OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

Advance Sheets
2d Series
Volume 62, No. 6

Opinions filed in October - December 2022

Cite as 62 Kan. App. 2d

JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER …… Overland Park

JUDGES:

HON. HENRY W. GREEN JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. KIM R. SCHROEDER ..... Hugoton
HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE……..……...Valley Center
HON. LESLEY ANN ISHERWOOD……..…….....Hutchinson
HON. JACY J. HURST..……..... Lawrence
HON. ANGELA D. COBLE ..... Salina
VACANT .....

OFFICERS:

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

PAGE

Bott v. State.....625
City of Wichita v. Peterjohn 750
Doan Familly Corp. v. Arnberger.....769
Garner v. Kansas Dept. of Revenue.....694
Kleypas v. State. 654
Leek v. Brown.....599
Quinn v. State.....640
State v. Allen.....802
State v. Hurst.....614
State v. Showalter 675
State v. Ward.....721
Wiedemann v. Pi Kappa Phi Fraternity 704

UNPUBLISHED OPINIONS
OF THE COURT OF APPEALS

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
Astorga v. Leavenworth County Sheriff	124,944	Leavenworth	11/10/2022	Appeal dismissed
Baskin v. State	124,284	Sedgwick	11/23/2022	Affirmed
Beauclair v. State	123,671	Shawnee	12/09/2022	Affirmed
Beck v. City of Blue Rapids	124,136	Marshall	11/18/2022	Affirmed
Bell v. State	124,447	Sedgwick	12/23/2022	Affirmed
Buehne v. Kansas Dept. for Children and Families	125,093	Ford	12/09/2022	Reversed; remanded
City of Leavenworth v. Melton	123,857	Leavenworth	10/28/2022	Affirmed
City of Wichita v. Griffie	124,412	Sedgwick	11/18/2022	Affirmed
Duling v. Mid-American Credit Union	124,971	Sedgwick	12/16/2022	Affirmed
Estate of Bell v. 617 West	124,418	Sedgwick	12/23/2022	Affirmed
Graycon Building Group, Inc. v. Med-Ridge West	124,361	Sedgwick	12/02/2022	Reversed; remanded with directions
In re A.J.	124,854	Sedgwick	10/28/2022	Reversed; remanded with directions
In re A.S.	124,719			
	124,720	Saline	11/23/2022	Affirmed
In re B.C.	125,199	Crawford	12/30/2022	Affirmed
In re Care and Treatment of Davis	125,179	Sedgwick	11/18/2022	Affirmed
In re Care and Treatment of Wilson	124,786	Wyandotte	11/23/2022	Affirmed
In re D.J.	125,125			
	125,126			
	125,127	Thomas	11/04/2022	Affirmed
In re E.E.B.	124,937	Riley	11/23/2022	Affirmed
In re Estate of James	124,044	Douglas	11/18/2022	Affirmed
In re G.P.	125,111	Leavenworth	12/23/2022	Affirmed
In re I.S.	124,945	Sedgwick	12/23/2022	Affirmed
In re J.M.	125,103	Sedgwick	12/09/2022	Affirmed
In re M.T.	125,230	Sedgwick	12/09/2022	Affirmed
In re Marriage of Holmes and Gagel	125,035	Johnson	11/18/2022	Affirmed
In re Marriage of Lucas	125,233	Johnson	12/16/2022	Affirmed
In re Parentage of M.F.	124,911	Butler	12/23/2022	Affirmed
In re S.M.	124,948	Sedgwick	11/23/2022	Affirmed
In re Trust of Zweygardt	124,760	Cheyenne	12/02/2022	Affirmed
Johnson v. Schnurr	124,396	Reno	11/10/2022	Affirmed
Johnson v. Zmuda	125,069	Reno	11/18/2022	Affirmed
Jones v. State	124,383	Sedgwick	12/02/2022	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
Kansas State Board of Healing Arts v. Parcells	123,490	Shawnee	10/28/2022	Affirmed
L.S. v. C.S.	124,942 124,943	Ford	11/10/2022	Reversed
Langvardt v. Petitjean	124,700	Reno	10/28/2022	Affirmed in part; reversed in part; remanded with directions
Lloyd v. State	124,324	Sedgwick	11/04/2022	Affirmed
Marks v. State	124,735	Wyandotte	12/09/2022	Affirmed
Miles v. State	125,153	Shawnee	11/10/2022	Affirmed
NVLCC v. NV Lenexa Land Holdings	124,605	Johnson	11/10/2022	Affirmed
Pugh v. State	124,930	Sedgwick	12/23/2022	Affirmed
Reed v. Butler	124,991	Butler	12/16/2022	Affirmed
Robert v. Kansas Employment Security Board of Review	124,769	Sedgwick	11/04/2022	Affirmed
Ross v. State	123,907	Sedgwick	12/09/2022	Affirmed
Scott v. City of Leawood	124,556	Johnson	12/02/2022	Affirmed
Sheridan Co. Health Complex v. Parsons	125,057	Sheridan	12/09/2022	Affirmed in part; reversed in part; remanded with directions
Simmons v. Anderson	124,929	Morris	11/04/2022	Appeal dismissed
State v. Aguilar	124,507	Finney	11/04/2022	Affirmed
State v. Altum	124,663	Reno	11/04/2022	Affirmed
State v. Bailey	125,065	Leavenworth	12/16/2022	Reversed; remanded with directions
State v. Baughman	124,388	Neosho	10/28/2022	Remanded with directions
State v. Bird	124,686	Shawnee	10/28/2022	Affirmed
State v. Bollinger	124,776	Saline	10/28/2022	Affirmed
State v. Buettgenbach	124,517	Atchison	10/28/2022	Affirmed
State v. Caldwell	124,476	Harvey	11/23/2022	Convictions affirmed; sentence affirmed in part; vacated in part; case remanded with directions
State v. Callahan	125,046	Leavenworth	12/23/2022	Affirmed
State v. Carrera	124,710	Seward	11/18/2022	Affirmed
State v. Carrillo	124,463	Reno	11/04/2022	Affirmed
State v. Craige	124,599	Lyon	11/04/2022	Affirmed
State v. Doll	124,147	Sumner	12/16/2022	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Eismann	124,664	Wyandotte	11/18/2022	Appeal dismissed
State v. Elias	124,387	Sedgwick	11/23/2022	Affirmed
State v. Guerra	124,890			
	124,891	Ford	12/02/2022	Affirmed
State v. Hammons	124,974	Wichita	10/28/2022	Appeal dismissed
State v. Harbacek	124,805	Reno	12/16/2022	Affirmed
State v. Hinostroza	124,469	Lyon	11/23/2022	Affirmed
State v. Housworth	122,136	Leavenworth	12/02/2022	Affirmed
State v. Jarmon	124,558	Sedgwick	11/18/2022	Affirmed
State v. Johnson	121,902			
	121,911	Jackson	11/18/2022	Affirmed
State v. Johnson	124,256	Sedgwick	12/02/2022	Affirmed
State v. Kendall	124,880	Leavenworth	11/23/2022	Affirmed
State v. Kent	123,843	Allen	11/04/2022	Reversed; remanded with directions
State v. Kerrigan	123,862	Riley	10/28/2022	Reversed; remanded
State v. Kidd	124,652	Reno	12/09/2022	Affirmed
State v. Lightfoot	124,608			
	124,609	Pottawatomie	10/28/2022	Affirmed
State v. Llamas	125,028	Sedgwick	11/04/2022	Affirmed
State v. Lowe	123,723	Sedgwick	11/23/2022	Affirmed
State v. McBride	124,645	Barton	12/30/2022	Affirmed
State v. McCain	123,044	Sedgwick	11/23/2022	Affirmed in part; vacated in part; remanded with directions
State v. Miller	124,839			
	124,840			
	124,841	Shawnee	11/18/2022	Affirmed
State v. Mixon	122,392	Saline	11/10/2022	Sentence vacated in part
State v. Morales	125,165	Riley	12/02/2022	Affirmed
State v. Murie	124,322	Sedgwick	12/23/2022	Affirmed
State v. Ocelot	124,865	Sedgwick	11/10/2022	Affirmed
State v. Parker	124,530	Sedgwick	11/18/2022	Appeal dismissed
State v. Randall	124,015	Reno	11/04/2022	Sentence vacated; case remanded with directions
State v. Robinson	122,251	Johnson	11/23/2022	Affirmed
State v. Rodriguez	125,036	Barton	10/28/2022	Affirmed
State v. Rodriguez	123,152	Seward	12/30/2022	Affirmed in part; reversed in part; sentence vacated; remanded with directions

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Rush	124,150			
State v. Sanchez	124,460	Geary ……..	11/10/2022	Affirmed
	124,659	Reno	12/23/2022	Affirmed
State v. Segura	125,074	Sedgwick	11/23/2022	Affirmed
State v. Steele	124,301	Sedgwick	11/10/2022	Vacated; remanded with directions
State v. Stilley	124,385	Douglas	12/02/2022	Sentences vacated; case remanded with directions
State v. Stoakley	124,484	Sedgwick	10/28/2022	Affirmed
State v. Sutton	124,390	Lyon	11/04/2022	Affirmed
State v. Taylor	124,593	Barton	11/23/2022	Affirmed
State v. Torres	124,520			
	124,521			
	124,522	Ford	12/23/2022	Affirmed
State v. Turner	123,097	Sedgwick	10/28/2022	Convictions affirmed; sentence vacated; case remanded with directions
State v. Veales	124,320	Sedgwick	12/09/2022	Reversed; remanded with directions
State v. Webb	124,275	Sedgwick	12/16/2022	Affirmed
State v. Woods	124,702	Sedgwick	12/16/2022	Affirmed
State v. Woods	124,543			
	125,021	Sedgwick	12/16/2022	Affirmed
Sweeney v. Kansas Dept. of Revenue	124,409	Saline	12/30/2022	Affirmed
Vasquez v. Cleveland Chiropratic College, Inc.	124,788	Johnson	11/04/2022	Affirmed
Wilmer v. State	124,838	Leavenworth	11/04/2022	Affirmed

SUBJECT INDEX
62 Kan. App. 2d No. 6
(Cumulative for Advance sheets 1, 2, 3, 4, 5 and 6)
Subjects in this Advance sheets are marked with *.

PAGE

ADMINISTRATIVE LAW:

Appeal to District Court Providing Trial De Novo—Determination Anew of Both Law and Factual Issues—Burden of Proof. An appeal to the district court providing a trial de novo—whether taken from an agency determination or from a different court—requires issues of both law and fact to be determined anew. The burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs ...391

Final Order Required to Identify Agency Officer Who Receives Service of Petition for Judicial Review—Thirty-Day Period for Filing Petition for Judicial Review. K.S.A. 77-613(e) requires an administrative agency's final order to identify the agency officer who will receive service of a petition for judicial review on behalf of the agency. The 30-day jurisdictional period for filing a petition for judicial review begins to run after service of an order that complies with K.S.A. 77-613(e).
Gilliam v. Kansas State Fair Bd. ……..……..…. 236

Interpretation of Written Documents by Court—Interpret Written Language in Reasonable Fashion. It is not the function of a court to read sections of a written document in isolation or highlight awkward phrasing. Instead, courts must endeavor to interpret written language in a reasonable fashion that does not vitiate the purpose of the writing or reach an absurd result. *Gilliam v. Kansas State Fair Bd.* ……..……..…. 236

APPEAL AND ERROR:

Appellate Review of Admission of Evidence—Multistep Analysis. Appellate review of the admission of evidence involves a multistep analysis. First, we consider whether the evidence is relevant. This inquiry contains two components, whether the evidence is material and whether it is probative. The next step requires us to analyze whether the district court erred when weighing the probative value of the evidence against the risk it posed for undue prejudice. *State v. Vazquez* …… 86

Interpretation of Supreme Court Order—Appellate Review. Interpretation of Kansas Supreme Court Administrative Order 2020-PR-58, effective May 27, 2020, presents a question of law subject to unlimited review.
Blue v. Board of Shawnee County Commr's ……..…. 495

Interpretation of Workers Compensation Statutes—Appellate Review. Because the interpretation of workers compensation statutes involves a question of law, appellate review is unlimited. In interpreting a statute, appellate courts are not to give deference to the Board's legal analysis or determination. *Turner v. Pleasant Acres* ……..…….. 122

PAGE

Structural Errors Not Subject to Harmless-Error Analysis. Structural errors are not amenable to a harmless-error analysis. *State v. Allen* 802*

APPELLATE PROCEDURE:

Cross-Appeal by Appellee to Adverse Decisions of District Court—Failure to Cross-Appeal Prevents Appellate Review. Kansas law requires an appellee to cross-appeal a district court's adverse decisions before those rulings may be challenged on appeal. The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review.
Pretty Prairie Wind v. Reno County 429

Cross-Appeal of Adverse Rulings—Not Required if Challenging Decision Subject to Appeal. While a cross-appeal is necessary to bring other adverse rulings before the appellate courts, it is not generally required when a party is merely challenging the district court's reasoning underlying a decision already subject to appeal.
Pretty Prairie Wind v. Reno County 429

Date of Mandate Does Not Change if Corrected Mandate Filed. The date of the mandate issued by the clerk of the appellate courts does not change if a corrected mandate is subsequently filed. *Quinn v. State* 640*

ATTORNEY AND CLIENT:

No Right to Hybrid Representation – Litigant with Counsel May Not Dictate Procedural Course of Representation. In Kansas, a party has the right to represent themselves or to be represented by counsel, but they have no right to hybrid representation. A litigant who is represented by counsel has no right to dictate the procedural course of their representation by counsel. *Kleypas v. State* 654*

ATTORNEY FEES:

Grandparent Visitation Appeal—Court's Authority to Award Fees under Rule 7.07(b). In the appeal of a decision involving grandparent visitation, an appellate court has authority to award attorney fees under Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 51) because the district court had authority under K.S.A. 2020 Supp. 23-3304 to award attorney fees in the proceedings below.
Schwarz v. Schwarz 103

Request of Attorney Fees on Appeal Requires Detail for Courts to Review—Courts May Independently Determine Fee or Deny Request. A party requesting attorney fees on appeal must provide enough detail to allow appellate courts to meaningfully evaluate the reasonableness of the representation provided. When a party fails to provide enough information to allow courts to conduct this assessment, courts have discretion to independently determine an appropriate fee or to deny the request for fees altogether. *Doan Family Corp. v. Arnberger* 769*

PAGE

CITIES AND MUNICIPALITIES:

Administrative Ordinances—Require Particularized Knowledge. Ordinances tend to be administrative in nature when they require particularized knowledge in matters of city operations, associated space requirements, public safety, and regulatory issues, as well as an intimate appreciation of the city's fiscal affairs. *City of Wichita v. Peterjohn* ……..…… 750*

Initiative Petition—Substantial Compliance with Statutory Safeguards. An initiative petition is effective when it substantially complies with all relevant statutory safeguards. This means that petitioners must comply with the essential matters necessary to assure every reasonable objective of the statutes has been met. *City of Wichita v. Peterjohn* ……..……...… 750*

— Used to Advance Legislative Policies. An initiative petition can only be used to advance policies that are legislative in nature, not for policies that are predominantly executive or administrative.
City of Wichita v. Peterjohn ……..…… 750*

CIVIL PROCEDURE:

Actions in Small Claims Court—Relief from Judgments or Orders under K.S.A. 60-260. Parties to actions brought in small claims court pursuant to the Small Claims Procedure Act and the Code of Civil Procedure for Limited Actions may seek relief from such small claims judgments or orders from the district court pursuant to K.S.A. 60-260.
Wiedemann v. Pi Kappa Phi Fraternity …… 704*

Application of K.S.A. 60-513—Commencement of Statute of Limitation. Under K.S.A. 60-513(b), in part, the causes of action listed in K.S.A. 60-513(a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until a time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. *Bott v. State* ……..…… 625*

Application of K.S.A. 60-512 --Three-year Statute of Limitations under 60-512(2). K.S.A. 60-512(2) applies when a statute creates a liability where liability would not exist except for the statute. For example, an action would not be based on a liability created by statute if the right would exist at common law without the benefit of the statute. If the statute merely provides a procedure for obtaining relief, it does not trigger the application of the three-year statute of limitations under K.S.A. 60-512(2). *Bott v. State* ……..... 625*

Collateral Order Doctrine—Factors. The collateral order doctrine provides that an order may be collaterally appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separated from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.
In re Parentage of E.A. …….. 507

PAGE

Comparative Fault Procedure in Kansas—Policy of Judicial Economy. Kansas law requires defendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or post-settlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc…. 204

Default Judgment—Statutory Definition—Terminates Action without District Court Considering Merits. A default judgment is entered when a "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ." K.S.A. 2021 Supp. 60-255(a). Like a dismissal under K.S.A. 2021 Supp. 60-241(b), a default judgment terminates an action without the district court's consideration of the merits.
Blue v. Board of Shawnee County Comm'rs ……..……..…….. 495

Dismissal of Actions—Terminates Action without Considering Merits of Parties' Claims. A dismissal under K.S.A. 2021 Supp. 60-241(b) terminates an action or claim without consideration of the merits of the parties' claims. Such a dismissal contemplates a lack of action from the party pursuing the claim.
Blue v. Board of Shawnee County Comm'rs …….. 495

Distinction Between Types of Dismissal under Statutes. Kansas law supports a distinction between dismissals due to lack of action or missed deadlines, such as dismissal under K.S.A. 2021 Supp. 60-241(b) and default under K.S.A. 2021 Supp. 60-255, and those which are entered on the merits after consideration of the pleadings, discovery, and other evidence presented by the parties, such as K.S.A. 2021 Supp. 60-256. *Blue v. Board of Shawnee County Comm'rs* ……..… 495

District Court's Review of Small Claims Judgment or Order—Uses Appellate Review. A district court reviewing the small claims judgment or order pursuant to K.S.A. 60-260 performs a predominantly appellate review, only deciding the issues preserved and raised by the party seeking review, and does not conduct a new trial.
Wiedemann v. Pi Kappa Phi Fraternity …… 704*

Doctrine of Collateral Estoppel—Bars Relitigating Issue Already Determined against Same Party—Elements. The common-law doctrine of collateral estoppel, like res judicata, also bars someone from relitigating an issue determined against that party. Under Kansas law, collateral estoppel may be invoked when there is a prior judgment on

PAGE

the merits which determined the rights and liabilities of the parties on the issue based on ultimate facts as disclosed by the pleadings and judgment; the parties must be the same or in privity; and the issue litigated must have been determined and necessary to support the judgment. *In re Parentage of E.A.* 507

Doctrine of Comparative Fault—Parties to Occurrence to Have Determination of Fault in One Action. The doctrine of comparative fault requires all the parties to the occurrence to have their fault determined in one action.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Doctrine of Res Judicata—Common-law Rule of Equity—Four Elements. The doctrine of res judicata is a common-law rule of equity hoping to promote justice and sound public policy. In other words, a party should not have to litigate the same action twice. Before the doctrine of res judicata will bar a successive suit, four elements must be met: (a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits.
In re Parentage of E.A. 507

Exception to One-Action Rule—Separate Actions by Plaintiffs against Tortfeasors if No Determination of Comparative Fault. An exception to the one-action rule allows plaintiffs to pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault, but this exception does not allow defendants to bring separate actions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Joinder of Additional Parties—Determination of Percentage of Negligence Attributable to Each Party. The requirement to join additional parties under K.S.A. 2020 Supp. 60-258a(c) does not distinguish between tort and contract claims, but instead focuses on the need for a fact-finder to determine the percentage of negligence attributable to each party.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

No Consent to Jurisdiction by Raising Defense of Lack of Personal Jurisdiction. A person or entity does not consent to personal jurisdiction by its actions when it timely files motions raising the defense of lack of personal jurisdiction. *Wiedemann v. Pi Kappa Phi Fraternity* 704*

One-Action Rule—In Negligence Claim All Parties Must Be Joined in Original Action. When an injured party asserts a claim for negligence, all parties whose causal negligence contributed to the injury must be joined to the original action, with no distinction between tort claims and contract claims. This is called the one-action rule.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

PAGE

Purpose of K.S.A. 60-258a—Impose Individual Liability for Damages on Proportionate Fault of All Parties to Occurrence. The intent and purpose of the Legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault. It was the intent of the Legislature to fully and finally litigate in a single action all causes of action and claims for damages arising out of any act of negligence.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Service of Process—Restricted Mail Different than Certified Mail Service. Service of process by restricted mail is different from service by certified mail.
In re A.P. 141

Small Claims Judgment Entered Without Personal Jurisdiction—May Set Aside as a Nullity. A small claims judgment entered against a person or entity over which the issuing court lacked personal jurisdiction is a nullity and may be set aside at any time.
Wiedemann v. Pi Kappa Phi Fraternity 704*

CONSTITUTIONAL LAW:

Defendant's Assertion of Constitutional Right to Speedy Trial. A defendant's writings, motions, statements to the court, and other communications can support an assertion of their constitutional right to a speedy trial, and no particular language or citation to a specific legal principle is required. *State v. Hurst* 614*

Determination Whether Delay in Appellate Proceedings Violated Defendant's Due Process Rights—Appellate Courts Use Four-*Part Barker v. Wingo* Balancing Test. This court uses the four-part *Barker* balancing test to determine whether a delay in appellate proceedings has violated a defendant's due process rights under the United States Constitution. The court must consider the (1) length of delay, (2) reason for the delay, (3) defendant's assertion of their right, and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *State v. Hurst* 614*

Due Process Protection--Parents Have Fundamental Right to Decisions Regarding Their Children. The Due Process Clause of the United States Constitution provides heightened protection against government interference with the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Schwarz v. Schwarz* 103

Failure of Hearing Officer to Comply with Prison's Procedural Regulation—Not Due Process Violation. A hearing officer's failure to comply with a prison's procedural regulation does not necessarily establish a due process violation. *Leek v. Brown*..... 599*

PAGE

Right of Self-Representation Implied through Sixth Amendment's Right to Counsel. Although neither the United States nor the Kansas Constitutions explicitly provide for a right of self-representation, the right has been implied from the right to counsel granted in the Sixth Amendment. *State v. Allen* 802*

Sixth Amendment Right to Assistance of Counsel for Criminal Defendants. The Sixth Amendment guarantees criminal defendants the right to the assistance of legal counsel during all critical stages of a criminal proceeding. *State v. Allen* 802*

Speedy Trial Assessment—Burden on Defendant to Show Actual Prejudice. To meet the burden to show actual prejudice, the defendant cannot rely on generalities or the passage of time but must show how the delay thwarts his or her ability to defend oneself. *State v. McDonald* 59

— Consideration of Totality of Circumstances—Factors. The speedy trial assessment considers the totality of the circumstances with special emphasis on four factors: length of the delay, reason for the delay, defendant's assertion of his or her right, and prejudice to the defendant. *State v. McDonald* 59

— Evaluation of Actual Prejudice—Three Factors. Courts consider three factors when evaluating actual prejudice: oppressive pretrial incarceration, the defendant's anxiety and concern, and most importantly, the impairment of one's defense. *State v. McDonald* 59

— First Factor—Length of Delay between Charge and Arrest—Presumptively Prejudicial under These Facts. Under the facts of this case, the State's delay of over six years and three months between charging the defendant with child rape and arresting the defendant is presumptively prejudicial. *State v. McDonald* 59

— Fourth Factor—Actual and Presumed Prejudice from Excessive Delay. When assessing the fourth factor—prejudice—for a constitutional speedy trial analysis, we consider both actual prejudice and, in a proper case, presumed prejudice flowing from excessive delay. *State v. McDonald* 59

— Presumed Prejudice if Excessive Delay. When the State has been negligent, prejudice can be presumed if the delay has been excessive. A delay of over six years attributable to the State is long enough to give rise to a presumption that the defendant's trial would be compromised, and the defendant would be prejudiced. *State v. McDonald* 59

— Second Factor—Reason for Delay. When considering the second factor—the reason for the delay—the court assesses responsibility for the delay as between the State and the defendant. The State's inability to arrest a defendant because of the defendant's own evasive tactics is a valid reason for delay. But in that event, the State bears the burden to show that it took reasonably diligent efforts to pursue an evasive defendant. *State v. McDonald* 59

PAGE

— State May Mitigate Presumption of Prejudice. When a defendant relies on a presumption of prejudice to establish the fourth factor and identifies a delay of sufficient duration to be considered presumptively prejudicial, this presumption of prejudice can be mitigated by a showing that the defendant acquiesced in the delay and can be rebutted if the State affirmatively proves that the delay did not impair the defendant's ability to defend oneself. *State v. McDonald* 59

Suit to Challenge Constitutionality of Law—Requirement of Standing to Be Satisfied for Justiciable Controversy to Exist. A plaintiff is not required to expose himself or herself to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced, but the requirement of standing still must be satisfied for a justiciable controversy to exist. *League of Women Voters of Kansas v. Schwab* 310

Whether Due Process Rights Violated by Delay in Appellate Proceedings—Application of Prejudice Factor of *Barker* Balancing Test. The prejudice factor of the *Barker* balancing test carries crucial weight in determining whether a defendant's due process rights were violated by a delay in the appellate proceedings. *State v. Hurst* 614*

CONTRACTS:

Claim for Partial Indemnity or Contribution against Third-Party Defendant—Settlor Must Show Paid Damages on Behalf of Third-Party. To prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show that it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefited the third-party defendant, and the value of its contribution claim is zero.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Indemnification Provision—Determination of Fault Required to Determine Contractual Liability. When a contract requires a promisor to indemnify another for the promisor's share of negligence, the underlying negligence tort controls the promisor's liability, and it becomes impossible to determine contractual liability without a determination of fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Indemnification Provision Permitting Indemnity to Maximum Extent Allowed by Applicable Law Is Valid with Limits. When an indemnification provision permits indemnity "to the maximum extent allowed by applicable law," the provision is valid, but it limits the promisor's indemnification liability so that the promisor is not responsible for the promisee's negligence.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Kansas Anti-Indemnity Statute—Indemnification Provision in Construction Contract Void and Unenforceable if Requires Promisor to Indemnify for Negligence or Intentional Acts. Under K.S.A. 2020 Supp. 16-121(b), the Kansas anti-indemnity statute, an indemnification provision

PAGE

in a construction contract is void and unenforceable if it requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. …. 204

COURTS:

Administrative Order of Supreme Court Addressing Timelines—Issuance of Show Cause Order Not Required before Summary Judgment Granted. A court need not issue a show cause order prior to granting summary judgment under Administrative Order 2020-PR-58.
Blue v. Board of Shawnee County Comm'rs ……. 495

No Constitutional Authority to Issue Advisory Opinions. Kansas courts lack the constitutional authority to issue advisory opinions.
League of Women Voters of Kansas v. Schwab ……..... 310

Suspension of Deadlines under Administrative Order of Supreme Court—Exemption of Case if Procedures Met. A case may be exempted from the suspension of deadlines under Administrative Order 2020-PR-58 if certain procedures are met by the district court judge, appellate judicial officer, or hearing officer. *Blue v. Board of Shawnee County Comm'rs* ……...……...……..495

CRIMINAL LAW:

Booking Photo of Defendant at Trial—Relevancy Determination—In This Case Found to Be Material for Identity Purposes. A booking photo from the current case that illustrated defendant's appearance had changed considerably between the time of his arrest and the time of his trial was material, as required for relevancy determination, for identity purposes, because it explained the confusion by the child witnesses who had difficulty or no longer recognized the defendant due to the changes in his physical appearance. *State v. Vazquez* ……..…… 86

Booking Photo of Defendant from Prior Case May Be Unduly Prejudicial. A booking photo for the current crime does not carry the same potential for an unduly prejudicial impact as a mugshot from a prior case where the latter may suggest the defendant has a history of criminality.
State v. Vazquez …… 86

Booking Photo of Defendant Is Relevant—Admissible as Evidence at Trial. A criminal defendant's booking photo, taken at the time of arrest for the offenses for which he or she is currently on trial is relevant and generally admissible as evidence if it has a reasonable tendency to prove a material fact. *State v. Vazquez* ……..…… 86

Critical Stages of Criminal Proceeding Include Competency Hearing and Motion to Dismiss—Possibility of Substantial Prejudice if No Representation by Counsel. A competency hearing and a hearing on a motion to dismiss are critical stages of a criminal proceeding because of the substantial prejudice that could result from such hearings without representation by counsel. *State v. Allen* 802*

PAGE

Defendant Must Knowingly Waive Right to Counsel to Exercise Right to Self-Representation. To exercise the right to self-representation, a defendant must make a knowing and intelligent waiver of the right to counsel. *State v. Allen* ……..….. 802*

Determination Whether Defendant Made Knowing Waiver of Right to Counsel—Court Must Inform Defendant of Rights. In determining whether a defendant has made a knowing and intelligent waiver of the right to counsel, a district court must inform the defendant of his or her rights as well as of the potential dangers of self-representation. *State v. Allen* ……..…….. 802*

— District Court's Inquiry for Determination. At a minimum, a district court's inquiry should be sufficient to determine whether the defendant comprehends the nature of the charges, the significance of the proceedings, the range of potential punishments, and any additional facts essential to understanding the case. *State v. Allen* ……..…….. 802*

— Three-Step Framework. Although district courts are not required to use any specific checklist, the Kansas Supreme Court articulated a three-step framework in *State v. Burden*, 311 Kan. 859, 863, 467 P.3d 495 (2020), for use in determining whether a defendant made a knowing and intelligent waiver of his right to counsel. *State v. Allen* ……..…….. 802*

Fifth Amendment Privilege against Self-Incrimination—Before Sentencing Privilege Preeminent Over Privilege after Sentencing. Defendants' Fifth Amendment privilege against self-incrimination which springs from moving to withdraw a guilty plea before sentencing is wholly preeminent over defendants' Fifth Amendment privilege against self-incrimination which springs from moving to withdraw their guilty plea after sentencing. *State v. Showalter* ……..……. 675*

Motion Must Present Substantial Issues of Fact or Law to Avoid Summary Denial. To merit an evidentiary hearing, and to avoid summary denial, a motion must present substantial issues of fact or law that go beyond conclusory allegations. *State v. Ward* ……..…….. 721*

Motion to Withdraw Guilty Plea—Motion with Vague or Conclusory Allegations Will Be Subject to Dismissal Without Hearing. A motion to withdraw a guilty plea containing only vague or conclusory allegations or accusations and no additional facts in support of the alleged wrongdoing is subject to dismissal without an evidentiary hearing. *State v. Ward* ….. 721*

No Requirement to Inform Defendant Entering Guilty or Nolo Contendere Plea of Collateral Consequences. Neither due process nor K.S.A. 2021 Supp. 22-3210(a) require the district court to inform defendants of the collateral consequences of entering a guilty or nolo contendere plea to a felony. *State v. Wallace* ……..…….. 420

PAGE

Plea of Guilty or Nolo Contendere to Felony—Loss of Ability to Possess Firearm Is Collateral Consequence. The potential loss of the ability to possess a firearm is a collateral consequence of entering a guilty or nolo contendere plea to a felony. *State v. Wallace* ……..…….. 420

— Loss of Right to Vote Is Collateral Consequence. The potential loss of the right to vote is a collateral consequence of entering a guilty or nolo contendere plea to a felony. *State v. Wallace* …….. 420

Privilege against Self-Incrimination under Fifth Amendment Waived by Defendant—Permanent Waiver. Once defendants waive their privilege against self-incrimination under the Fifth Amendment to the United States Constitution as to a crime, they permanently waive this privilege because no future testimony could expose them to additional criminal punishment. *State v. Showalter* ….. 675*

Reckless Stalking—Consideration of Child's Maturity and Age in Decision by Fact-finder. Children are less mature than responsible adults. When deciding whether a child targeted by someone accused of reckless stalking in violation of K.S.A. 2019 Supp. 21-5427(a)(1) objectively feared for his safety, her safety, or a family member's safety, a fact-finder must consider the child's maturity and age in its analysis. *State v. Loganbill* . ……...552

— Statutory Requirements to Prove Stalking. K.S.A. 2019 Supp. 21-5427(a)(1) requires a person targeted by someone accused of reckless stalking (1) to subjectively fear the accused's course of conduct proving stalking and (2) to have an objectively reasonable fear of the accused's course of conduct proving stalking. *State v. Loganbill* ……...…... 552

— Targeted Person May Fear for His or Her Safety or Family Member's Safety to Prove Stalking. Under K.S.A. 2019 Supp. 21-5427(a)(1), a person targeted by someone accused of reckless stalking may fear for his safety, her safety, or a family member's safety after the accused engaged in the course of conduct proving stalking. *State v. Loganbill* ……...…….. 552

Sentencing—Burden of Proof on State to Prove Criminal History of Defendant at Sentencing—Requirements. Under K.S.A. 2020 Supp. 21-6814, the State bears the burden to prove criminal history at sentencing. The State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence. *State v. Hasbrouck* ……..…….. 50

— **Calculation of Criminal History Score under Inclusive Rule**. Under the "inclusive rule" for calculating a criminal history score, "prior convictions" includes multiple convictions on the same date in different cases. Because the convictions

PAGE

in each case are scored against the other case for criminal history purposes, a defendant will face a stiffer sentence if sentenced in multiple cases on the same date than if the defendant were sentenced for the same cases on different dates.
State v. Shipley 272

— **Cases Consolidated for Trial Not Prior Convictions**. Convictions in cases consolidated for trial do not qualify as "prior convictions" for criminal history purposes. K.S.A. 2020 Supp. 21-6810(a). *State v. Shipley* 272

— Classification of Out-of-State Conviction as Nonperson Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(iii), if the elements of the offense do not require proof of any of the circumstances listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i) or (ii), then it must be classified as a nonperson crime.
State v. Hasbrouck 50

— Classification of Out-of-State Conviction as Person Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(ii), an out-of-state conviction is a person crime if the elements of that felony necessarily prove that a person was present during the commission of the crime. *State v. Hasbrouck* 50

— Classification of Person Crime under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)—Elements of Out-of-State Felony Offense—Eight Circumstances. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i), classification of a person crime is determined by looking at the elements of the out-of-state felony offense. The statute then lists eight "circumstances" that if any are found in the elements of the out-of-state crime, then the crime will be classified as a person crime in Kansas when a court establishes a criminal history score. The eight circumstances are found in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(a)-(h). All eight circumstances depict dangerous situations in which innocent people may be harmed. The statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance. *State v. Hasbrouck* 50

— **Multiple Complaints—Statutory Requirement of Formal Consolidation by Court**. A constructive consolidation argument is unsupported by the plain language of K.S.A. 2020 Supp. 21-6810(a). That statute requires formal consolidation by court order for multiple complaints to be "joined for trial."
State v. Shipley 272

Sentencing—Privilege against Self-Incrimination Terminates at Sentencing unless Motion to Withdraw Plea before Sentencing. Unless defendants move to withdraw their guilty plea before sentencing, their Fifth Amendment privilege against self-incrimination terminates at sentencing.
State v. Showalter 675*

Sentencing for Out-of-State Felony Convictions under K.S.A. 2019 Supp. 21-6811(e)(3)(B). With the enactment of K.S.A. 2019 Supp. 21-6811(e)(3)(B), the Legislature replaced all the prior rules concerning how out-of-state criminal felony convictions are to be treated as person or nonperson crimes when a sentencing court is setting the offender's criminal history score. *State v. Hasbrouck* 50

PAGE

Stalking—Course of Conduct May Include Secretly Photographing and Filming a Person. Secretly photographing and filming a person repeatedly may constitute a course of conduct proving stalking as meant under K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of "course of conduct." *State v. Loganbill* …….. 552

— Question Whether Accused's Behavior Constitutes "Course of Conduct" as Defined by Statute. The key question when deciding whether an accused stalker's disputed behavior constituted a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of "course of conduct" is whether the accused's behavior evidenced his or her continuity of purpose to target the person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. *State v. Loganbill* ……..…….. 552

Violation of Sixth Amendment Right to Counsel at Critical Stage—Application of Structural Error Analysis. A violation of a Sixth Amendment right to counsel at a critical stage of a criminal proceeding is subject to a structural error analysis. *State v. Allen* ……..…..……. 802*

Waiver of Right to Counsel Must Be Knowingly Made—Determination Based on Facts of Each Case—Burden on State. The determination of whether a waiver of the right to counsel is knowingly and intelligently made depends on the facts and circumstances of each case. On appeal, the State has the burden of showing that an accused was advised of his or her right to counsel and that the waiver of counsel was knowingly and intelligently made. *State v. Allen* ……..…… 802*

ELECTIONS:

First Amendment Protections—Voter Outreach, Education and Registration Efforts. Voter outreach, education, and registration efforts receive protection under the First Amendment.
League of Women Voters of Kansas v. Schwab ……...……..…….. 310

Statutory Requirement of Prosecution of Individuals Who Knowingly Engage in Prohibited Conduct under Statute. In adopting K.S.A. 2021 Supp. 25-2438, the Legislature sought to subject only those individuals to prosecution who "knowingly" engaged in the conduct prohibited by the provision. *League of Women Voters of Kansas v. Schwab* …….…….. 310

EMINENT DOMAIN:

No Private Right of Action for Relocation Benefits under Eminent Domain Procedure Act. K.S.A. 2020 Supp. 26-518 is part of the Eminent Domain Procedure Act (EDPA). The EDPA does not provide third-party displaced persons a private right of action for relocation benefits under K.S.A. 2020 Supp. 26-518. Third-party displaced persons can pursue relocation benefits under the Kansas Relocation Act, K.S.A. 58-3501 et seq., or through another cause of action outside the EDPA.
Kansas Fire and Safety Equipment v. City of Topeka ……..……..…. 341

PAGE

Eminent Domain Procedure Act Limits Amount of Compensation Owed under K.S.A. 26-513. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits judicial review to the amount of compensation owed under K.S.A. 26-513. It provides no mechanism for judicial review of a denial of relocation benefits under K.S.A. 2020 Supp. 26-518.
Kansas Fire and Safety Equipment v. City of Topeka ……..……..……. 341

EMPLOYER AND EMPLOYEE:

Noncompete Agreements in Employment Contracts—Valid and Enforceable if Reasonable. Noncompete agreements in employment contracts are valid and enforceable if the restraint on competition is reasonable under the circumstances and not adverse to the public interest.
Doan Family Corp. v. Arnberger ……..…….. 769*

Noncompete Clause in Employment Contract—Courts Review Whether Reasonable under Totality of Circumstances. Courts evaluating the time and geographic restraints in a noncompete clause in an employment contract must determine whether those limitations are objectively reasonable under the totality of the circumstances. *Doan Family Corp. v. Arnberger* ……...…….. 769*

Noncompete Clause in Employment Contract—Appellate and District Court Review. Kansas appellate courts exercise unlimited review when determining whether a noncompete clause in an employment contract is enforceable as written. The question whether a noncompete clause is legally appropriate—whether an employer has a legitimate business interest and whether the clause otherwise harms the public welfare—is a question of law subject to unlimited review. Likewise, the district court's determination whether the time and geographic restraints are objectively reasonable under the totality of the circumstances is subject to unlimited appellate review.
Doan Family Corp. v. Arnberger ……...…….. 769*

Noncompete Clause Found Unenforceable by District Court—Appellate Review. If a district court has properly found that the time and geographic restraints in a noncompete clause are unenforceable under the totality of the circumstances, the district court's equitable discretion to reform the contract and modify the restraints is reviewed for an abuse of discretion.
Doan Family Corp. v. Arnberger ……...…….. 769*

ESTATES:

Decedent's Will Required to Be Delivered to District Court in County Where Decedent Resided. After the decedent's death, the person having custody of the decedent's will shall deliver the will to the district court in the county where the decedent resided. *In re Estate of Lessley* ……..….. 75

Petition for Probate and Will Required to Be Filed within Six Months of Decedent's Death. A petition for probate of a will and the will itself must be filed with the district court within six months of the decedent's death.
In re Estate of Lessley ……...……..….. 75

PAGE

Probate Process Requires Timely Filing of Will. In order to probate a will, the district court must have the will. Timely filing of the will is a required step in the probate process. *In re Estate of Lessley* ……..…….. 75

Requirement of Filing of Petition for Probate of Will within Six Months of Death of Testator. No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as provided by statute. *In re Estate of Lessley* ……..….. 75

Will Ineffective and Not Admissible if Not Timely Filed. The untimely filing of a will causes the will to become ineffective and not subject to admission to probate. *In re Estate of Lessley* ……..…….. 75

EVIDENCE:

Admission of Probative Evidence—Appellate Review. Evidence is probative if it has any tendency to prove any material fact and its admission will be examined on appeal for an abuse of discretion by the district court judge. *State v. Vazquez* ……..… 86

Driving under Influence of Alcohol—State's Requirements Met Even if Foreign Matter in Suspect's Mouth During Test. The State may meet the minimal foundational requirements of K.S.A. 2020 Supp. 8-1002(a)(3) for admissibility of a breath test even though a suspect has foreign matter in his or her mouth during the test. *State v. Fudge* ……..…..… 587

KDHE's Testing Procedures for Breath Alcohol Tests—No Requirement to Check Subject's Mouth for Foreign Matter. The required testing procedures set out by the KDHE for evidentiary breath alcohol tests are in the written protocol published by the KDHE for the equipment used. KDHE's protocol for the Intoxilyzer 9000 does not require the test operator to check the subject's mouth for foreign matter. *State v. Fudge* ….…..… 587

Material Fact Has Bearing on Decision in Case—Appellate Review. A material fact is one that has some real bearing on the decision in the case and presents a question of law over which an appellate court exercises unlimited review. *State v. Vazquez* …… 86

HABEAS CORPUS:

Application of Doctrine of Res Judicata to 60-1507 Movant When Issues Previously Raised by Final Appellate Court Order. The doctrine of res judicata applies to a K.S.A. 60-1507 movant who seeks to raise issues which have previously been resolved by a final appellate court order in their criminal case. *Quinn v. State* ……. 640*

Court's Review of 60-1507 Proceedings—Employ Same Fairness as Applicable in Other Death-Penalty Review Areas. Because of the importance of access to habeas proceedings and the grave nature of capital

PAGE

cases, courts must employ the same elevated awareness for fairness in reviewing a K.S.A. 60-1507 proceeding as applies in other areas of death-penalty review. *Kleypas v. State* 654*

Date Mandate Issued in Case Not Tethered to Date Action Is Final for K.S.A. 60-1507 Motion. The date the clerk of the appellate court issues the mandate in a case, which the court can shorten or extend at the court's discretion, is not tethered to the date the action is final for purposes of filing a K.S.A. 60-1507 motion. *Quinn v. State* 640*

Deadline for Filing K.S.A. 60-1507 Motion Runs from Date of Decision Denying Review. The time frame for filing a K.S.A. 60-1507 motion runs from the date of the decision denying review, not the date the clerk of the appellate courts issues the mandate. *Quinn v. State* 640*

Indigent Capital Murder Defendant—Statutory Right to Counsel in District Court upon Filing a 60-1507. Under K.S.A. 22-4506(d), an indigent person convicted of capital murder has a statutory right to counsel in district court upon a filing of a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507. *Kleypas v.State* 654*

No Right to Appointed Counsel to Help Prisoner File K.S.A. 60-1507. A prisoner has no right to appointed counsel to help the prisoner file a K.S.A. 60-1507 motion. *Quinn v. State* 640*

Voluntary Dismissal under K.S.A. 60-241(a)(1)—Without Prejudice. A plaintiff's voluntary dismissal of an action under K.S.A. 2021 Supp. 60-241(a)(1) is without prejudice. *Kleypas v. State* 654*

Withdrawal of 60-1507 Motion by Capital Murder Defendant—Determination by District Court of Competency and Knowing Waiver. Before a district court permits a death-sentenced inmate to withdraw a K.S.A. 60-1507 motion and waive postconviction relief, the court must conduct a hearing to determine (1) whether the inmate is competent to waive postconviction relief and (2) whether the inmate's waiver of postconviction relief is being made knowingly and voluntarily with an understanding of the consequences. *Kleypas v. State* 654*

INSURANCE:

Liability of Insurer for Judgment in Excess of Policy Limit—Requirement of Causal Connection. Kansas law is clear that for an insurer to be liable for a judgment in excess of the policy limit, there must be a causal connection between the insurer's conduct and the excess judgment. *Granados v. Wilson* 10

No Affirmative Duty of Insurer to Initiate Settlement Negotiations before Third Party Makes Claim. Although an insurer must exercise diligence and good faith in its efforts to settle a claim within the policy limits, an insurer owes no affirmative duty to initiate settlement negotiations with a third party before the third party makes a claim for damages.
Granados v. Wilson 10

PAGE

JUDGES:

Abuse of Judicial Discretion—Determination. A district court judge commits an abuse of discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching an erroneous legal conclusion, or (3) reaching a factual finding not supported by substantial competent evidence. *State v. Vazquez* ……..…….. 86

JURISDICTION:

Establishment of Standing Requires Concrete Injury in Fact Element—Self-censorship May Satisfy Concrete Injury in Fact Element. Self-censorship in response to a law's passage may satisfy the concrete injury in fact element required to establish standing when (1) there is evidence that, in the past, the individual engaged in the type of conduct that is affected by the challenged government action; (2) affidavits or testimony are available that evidence a present desire, though no specific plans, to engage in such conduct; and (3) the individual can articulate a plausible claim that they presently have no intention to engage in such conduct because of a credible threat that to do so would subject them to adverse consequences. *League of Women Voters of Kansas v. Schwab* ……...…… 310

Standing—Pre-enforcement Inquiry—Requirement of Objectively Reasonable Perceived Threat of Prosecution. The perceived threat of prosecution must be one that is objectively reasonable. A subjective fear is not sufficient to satisfy the third prong of the pre-enforcement inquiry. *League of Women Voters of Kansas v. Schwab* ……..……..…… 310

— Requirement of Injury in Fact Cannot Be Merely Conjectural. The injury in fact requirement is not satisfied where the complained of injury is merely conjectural. *League of Women Voters of Kansas v. Schwab* …… 310

— Requirement of Justiciable Controversy or Case Dismissed. If a person does not have standing to challenge an action or request a particular type of relief, then a justiciable controversy does not exist and the case must be dismissed. *League of Women Voters of Kansas v. Schwab* ……..… 310

Standing Inquiry for Pre-enforcement Questions—Requirements to Satisfy the Injury in Fact Component. In pre-enforcement questions the injury in fact component of the standing inquiry is satisfied when a party establishes an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and the party faces a credible, substantial threat of prosecution under the challenged provision. *League of Women Voters of Kansas v. Schwab* ……..……...… 310

Standing Requirement—Demonstrate Injury and Causal Connection between Injury and Challenged Conduct. To demonstrate standing in Kansas, the traditional test is twofold: a person must demonstrate that he or she suffered a cognizable injury, also known as an injury in fact, and that there is a causal connection between the injury and the challenged conduct. *League of Women Voters of Kansas v. Schwab* ……..…… 310

PAGE

— Three-Prong for Association to Sue on Behalf of Its Members. An association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *League of Women Voters of Kansas v. Schwab* ……..… 310

JUVENILE JUSTICE CODE:

Review of Presumptive Sentence by Appellate Court if Lack of Specific Finding as Required by Statute. An appellate court has jurisdiction to review a presumptive sentence under K.S.A. 2019 Supp. 38-2380(b)(5), when a trial judge imposes a sentence under K.S.A. 2019 Supp. 38-2369(a)(1)(B), that lacks a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* ……..…… 1

Sentencing of Juvenile Offender—Requirement of Specific Finding in Written Order by Trial Judge. Before a trial judge under K.S.A. 2019 Supp. 38-2369(a)(1)(B) directly commits a juvenile offender to a juvenile correctional facility, the trial judge must make a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* ……...…… 1

KANSAS OPEN RECORDS ACT:

Enforcement of Kansas Open Records Act under Statute. The Kansas Open Records Act may be enforced by injunction, mandamus, declaratory judgment, or other appropriate order. K.S.A. 2020 Supp. 45-222(a). *Hammet v. Schwab* ……..…….……. 406

Public Policy That Public Records Are Open for Public Inspection—Exceptions under Act. The public policy of the State of Kansas expressed in the Kansas Open Records Act, K.S.A. 45-215 et seq., is that public records shall be open for public inspection by any person unless the records are within one of the exceptions created in the Act. The Act is to be liberally construed and applied in order to promote the policy of openness. K.S.A. 45-216(a). *Hammet v. Schwab* ……..…. 406

Reasonable Fees for Copies of Records Furnished by Public Agencies—Limitation. A public agency can ask for reasonable fees for providing access to or furnishing copies of public records. The fees for copies of records shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available. K.S.A. 2020 Supp. 45-219(c)(1). The fees for providing access to records maintained on computer facilities shall include only the cost of any computer services including staff time required. K.S.A. 2020 Supp. 45-219(c)(2). *Hammet v. Schwab* ……..……..……. 406

PAGE

Requirement of State Agencies to Maintain Register for Public Information. State agencies are required to maintain a register, open to the public, that describes the information that the agency maintains on computer facilities, and the form in which the information can be made available using existing computer programs. K.S.A. 2020 Supp. 45-221(a)(16). *Hammet v. Schwab* 406

Statutory Definition of Public Records. Public records include any recorded information, regardless of form, characteristics, or location, which is made, maintained, or kept by or is in the possession of any public agency. K.S.A. 2020 Supp. 45-217(g)(1)(A). *Hammet v. Schwab* 406

KANSAS TORT CLAIMS ACT:

Definition of Municipality under Kansas Tort Claims Act. The Kansas Tort Claims Act (KTCA) defines "municipality" to include "any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution, or other instrumentality thereof." K.S.A. 75-6102(b). The KTCA does not define the term "instrumentality."*R.P. v. First Student, Inc.* ... 371

Governmental Entity Definition under Act Includes Both State and Municipalities. The Kansas Tort Claims Act (KTCA) defines "governmental entity" as encompassing both the state and municipalities. K.S.A. 75-6102(c). "State" under the KTCA is defined as "the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof." K.S.A. 75-6102(a). *R.P. v. First Student, Inc*. 371

Requirement of Private Entity to Qualify as Instrumentality under Kansas Tort Claims Act. To qualify as an instrumentality under the Kansas Tort Claims Act, a private entity that contracts with a governmental entity must either be an integral part of or controlled by a governmental entity. *R.P. v. First Student, Inc*. 371

LEGISLATURE:

Amendment of Statute by Legislature—Presumption of Intent to Change Prior Law. When the Legislature amends a statute, Kansas courts presume that it intended to change the law that existed prior to the amendment. *State v. Hasbrouck* 50

MOTOR VEHICLES:

Determination by Court Whether Driver Violated K.S.A. 8-1547. To find that a driver violated K.S.A. 8-1547, the court must determine whether the driver started their vehicle from a stop without reasonable safety under the specific circumstances. *Garner v. Kansas Dept. of Revenue* 694*

Driving under Influence of Alcohol— Statutory Requirements for Admission of Breathalyzer Test. The State meets the minimal foundational requirements for admission of a breathalyzer test by showing that the operator and the testing equipment were certified, and the testing procedures met

PAGE

the requirements set out by the Kansas Department of Health and Environment. K.S.A. 2020 Supp. 8-1002(a)(3). *State v. Fudge* ……. 587

Revving Engine and Spinning and Squealing Tires Does Not Constitute Violation of K.S.A. 8-1547. A driver's acceleration of a car from a stop that causes the engine to rev and the tires to spin and squeal—without more—is insufficient to constitute a violation of K.S.A. 8-1547 when there are no other circumstances suggesting that the acceleration was not reasonably safe. *Garner v. Kansas Dept. of Revenue* ……..……. 694*

PARENT AND CHILD:

Competing Presumptions of Parentage—Determination by District Court of Best Interests of Child. When two competing presumptions of parentage arise and conflict with each other, a district court must determine which presumption is founded on the weightier considerations of policy and logic, including the best interests of the child. K.S.A. 2021 Supp. 23-2208(c). *In re Parentage of A.K.* ……...…… 536

Court's Jurisdiction Ends When Child Reaches Majority Age. A district court's jurisdiction over custody and parenting time ends once the child reaches the age of majority. *In re Marriage of Bush* …….. 284

Kansas Adoption and Relinquishment Act—Purpose—Adoption Granted with Consent of Parent or Both Parents or Those in Place of Parents. The Kansas Adoption and Relinquishment Act recognizes the primary importance natural parents have in a child's life, and adoptions will be granted with the consent of a parent, or both parents, or from those who are legally in the place of parents such as an adoption agency. The Adoption Act permits any adult to adopt a minor child, but only with the parents' consent. Consent to an adoption shall be given by the living parents of the child whose rights have not been terminated unless one of the parents' consent is found unnecessary under certain rules set out in the Adoption Act. K.S.A. 2021 Supp. 59-2113; K.S.A. 2021 Supp. 59-2129. *In re Parentage of E.A.* …..….. 507

Kansas Parentage Act—Legal Presumption—Any Person on Behalf of Child May Bring Action under Statute. The Kansas Parentage Act focuses on legal presumptions that arise from a child's circumstances. The Act provides that any person on behalf of a child may bring an action at any time to determine the existence of a parent and child relationship presumed under K.S.A. 2021 Supp. 23-2208. K.S.A. 2021 Supp. 23-2209.
In re Parentage of E.A. ……..…. 507

— Statutory Definition of Parent and Child Relationship. According to the Kansas Parentage Act, a parent and child relationship means the legal relationship existing between a child and the child's biological or adoptive parents. K.S.A. 2021 Supp. 23-2205. *In re Parentage of A.K.* …… 536

PAGE

Presumption of Parentage Must Be Claimed at Time of Child's Birth. Anyone trying to establish a presumption of parentage by openly and noto riously claiming parentage must do so at the time of the child's birth.
In re Parentage of E.A. 507

Presumption of Parentage under Statute—Clear and Convincing Evidence of Paternity by Another Person May Rebut Presumption of Parentage. A presumption of parentage may be rebutted "by clear and convincing evidence," "by a court decree establishing paternity of the child by another man," or by another presumption. When a presumption is rebutted, "the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence." K.S.A. 2021 Supp. 23-2208(b). If two or more presumptions arise and conflict with each other, "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." K.S.A. 2021 Supp. 23-2208(c). *In re Parentage of E.A.* 507

— Requirement of Consent of Birth Mother or Notoriously Recognize Maternity at Child's Birth. A presumption under K.S.A. 2021 Supp. 23-2208(a)(4) does not arise or is rebutted if either the birth mother did not consent to share parenting duties or the petitioner did not notoriously recognize maternity at the time of the child's birth.
In re Parentage of A.K. 536

Presumption of Paternity—Marriage and Child's Father Named on Birth Certificate—No Time Limit under Statute. A man is presumed to be the father of a child if after the child's birth, the man and the child's mother have married and, with the man's consent, the man is named as the child's father on the child's birth certificate. The statute does not say how long after the child's birth. There is no time limit set by K.S.A. 2021 Supp. 23-2208(a)(3). *In re Parentage of A.K.* 536

Presumptive Mother under Statute—Artificial Insemination Cases. A woman can be a presumptive mother under K.S.A. 2021 Supp. 23-2208(a)(4) without claiming to be a biological or adoptive mother. Such a presumption is a "legal fiction" of biological parentage in cases involving artificial insemination. Thus, a child can have two mothers rather than a mother and a father.
In re Parentage of A.K. 536

Request for Grandparent Visitation under Statute—Factors for Consideration by Court. When considering a request for grandparent visitation, in addition to considering under K.S.A. 2018 Supp. 23-3301(b), the best interests of the child and whether a substantial relationship exists between grandparent and child, the court must presume that a fit parent is acting in the child's best interests and must give special weight to a fit parent's proposed grandparent visitation plan. The court cannot adopt a grandparent's conflicting plan without first finding that the parent's proposed plan is unreasonable. The burden is on the grandparent to rebut the presumption that a fit parent's proposed visitation plan is reasonable. Reasonableness is assessed in light of the totality of the circumstances.
Schwarz v. Schwarz 103

PAGE

Statutory Authorization for Service of Notice of Hearing—Individual Not Required to Personally Sign for Delivery. K.S.A. 2020 Supp. 38-2267(b) authorizes service of the notice of a hearing concerning the termination of parental rights by return receipt delivery, which includes service by certified mail. The law does not restrict the delivery of the notice to the person served or otherwise require that individual to personally sign for its delivery. *In re A.P.* ……..……...……. 141

Statutory Grandparent Visitation Rights—Findings of Best Interests and Substantial Relationship. K.S.A. 2018 Supp. 23-3301(b) allows for grandparent visitation when "visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." *Schwarz v. Schwarz* ……..…….. 103

— No Statutory Exclusion of Visitation Rights Following Death of Parent. K.S.A. 2018 Supp. 23-3301(a), which permits a provision for grandparent visitation rights in a pending divorce action, does not preclude a separate and independent action for grandparent visitation rights following the death of a parent. *Schwarz v. Schwarz* ……..…….. 103

PENAL INSTITUTIONS:

Prison Disciplinary Hearing—Sworn Statements of Officer Given Same Deference as in Person Testimony. Sworn statements in an officer's report should be given the same deference as in-person testimony in a prison disciplinary hearing. *Leek v. Brown* ……..…… 599*

— Right to Confront and Cross-Examine Witness Not Required by Due Process Clause in Prison Hearing. The right to confront and cross-examine a witness is generally not required by the Due Process Clause of the United States Constitution in a prison disciplinary hearing.
Leek v. Brown ……..……..…… 599*

REAL PROPERTY:

Improvement to Real Property Is Valuable Addition to Property or Amelioration in Condition. An improvement is a valuable addition made to real property or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes. An improvement need not involve structural additions and need not necessarily be visible as long as it enhances the value of the property.
Claeys v. Claeys ……...……..……. 196

Partition Proceedings—Broad Discretion of District Courts for Determining Division of Interests. Partition proceedings, which seek to fairly divide ownership interests in real property, are equitable in origin. District courts have broad discretion to determine how best to fairly divide those interests. When a cotenant has made improvements to the property, the court may adjust the division to apply a

PAGE

credit to that cotenant for his or her efforts, measured by the extent the improvement enhances the value of the land. *Claeys v. Claeys* 196

SEARCH AND SEIZURE:

Exigent Circumstances—Allows Warrantless Search of Fifth-Wheel Camper. The exigent circumstances which allow warrantless searches of motor vehicles also allow warrantless searches of a fifth-wheel camper attached to a vehicle that is traveling on a public roadway and is so situated that an objective observer would conclude it was not being used as a residence at the time of the search. *State v. Crudo* 464

Probable Cause to Search Vehicle—Allows Warrantless Search of Fifth-Wheel Camper and Containers Inside and Outside Vehicle. If officers have probable cause to search a vehicle, they have probable cause to search containers inside and attached to the outside of the vehicle which they have probable cause to believe may contain contraband or evidence of a crime. This includes searching a fifth-wheel camper attached to a vehicle when both are traveling on a public roadway in the possession and control of the defendant. *State v. Crudo* 464

STATUTES:

Construction—Determination of Legislative Intent—Appellate Review. The fundamental rule of statutory construction is to determine the Kansas Legislature's intent. If a statute is plain and unambiguous, appellate courts are not to speculate about the legislative intent behind the language used and must refrain from reading something into the statute that is not readily found in its words.
Turner v. Pleasant Acres 122

SUMMARY JUDGMENT:

Process for Summary Judgment under Statute. The summary judgment process is initiated when any party seeks judgment on all or part of a claim by filing a motion, with or without supporting affidavits, under K.S.A. 2021 Supp. 60-256(a).
Blue v. Board of Shawnee County Comm'rs 495

TAXATION:

Ad Valorem Tax Valuation—Property Management Contract—Consideration in Real Estate Valuation. A property management contract is a personal contractual obligation which may but does not have to be considered in valuing real estate for ad valorem tax purposes. A property management contract is a personal contractual obligation which may but does not have to be considered in valuing real estate for ad valorem tax purposes.
In re Equalization Appeal of Kansas Star Casino 443

Challenge to Valuation of Real Property—Statutory Requirement of Proper Classification of Property by County or District Appraiser—Burden of Proof on County or District Appraiser. When a taxpayer challenges the valuation of real property for commercial and industrial purposes, K.S.A. 79-1606(c) and K.S.A. 79-1609 require the county or district appraiser to "initiate the production

PAGE

of evidence to demonstrate, by a preponderance of the evidence," that the property has been properly classified. These statutes establish a quantum of proof—"preponderance of the evidence"—and designate who bears the burden of proof during the proceedings—the county or district appraiser.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs ……. 391

Equipment Rental Expenses Necessary to Perform Taxable Services Are Not Tax Exempt. Equipment rental expenses which are necessary to perform taxable services are materially different from hotel and meal expenses incurred by employees who perform the taxable services. As such, equipment rental expenses are not tax exempt under *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012).
In re Tax Appeal of Capital Electric Line Builders, Inc. …..……..……. 251

Exemption of Commercial and Industrial Machinery and Equipment from Property and Ad Valorem Taxes—Real Property Not Exempt. Kansas law exempts commercial and industrial machinery and equipment from property and ad valorem taxes, but this exemption does not extend to real property. Real property includes land, buildings, and fixtures—personal property affixed to and considered part of the real estate.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs 391

Machinery and Equipment are Taxable Fixtures When Three Elements Met. Machinery and equipment are taxable fixtures if they (1) are annexed to real property; (2) are adapted to the use of and serve the real property; and (3) were intended by the party attaching the equipment to be permanently affixed to the property. All three elements must be met for equipment to be a fixture.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs .. 391

No Exemption under Retailers' Sales Tax Act for Equipment Rental Expenses. The Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., does not exempt equipment rental expenses incurred to perform taxable services from taxation.
In re Tax Appeal of Capital Electric Line Builders, Inc. ……..…. 251

Property Tax Exemptions Effective January 1 of Tax Year in Which Mineral Lease Produced at Exempt Levels. Since property tax exemptions are effective from the date of the first exempt use (K.S.A. 79-213[j]), and mineral leases are appraised as of January 1 each year (K.S.A. 79-301), a property tax exemption under K.S.A. 79-201t is effective January 1 of the tax year in which the mineral lease produced at exempt levels.
John O. Farmer, Inc. v. Board of Ellis County Comm'rs ……..… 262

Refund of Property Tax Paid on Mineral Lease When Lease Produced at Exempt Levels. A taxpayer is entitled to a refund of property taxes paid on a mineral lease for the tax year in which the mineral lease produced at exempt levels under K.S.A. 79-201t. K.S.A. 79-213(k).
John O. Farmer, Inc. v. Board of Ellis County Comm'rs ……...…...… 262

PAGE

TORTS:

Comparative Implied Indemnity—Cause of Action by Tortfeasor for Recovery of Damages Proportional to Joint Tortfeasor's Fault. Comparative implied indemnity, or as it is more accurately termed postsettlement contribution, describes the cause of action initiated by a tortfeasor in a negligence lawsuit to recover from a joint tortfeasor the share of the damages proportional to the joint tortfeasor's fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Comparative Implied Indemnity or Claim of Contribution against Joint Tortfeasor as Third Party—Must Assert Timely Claim. For a tortfeasor to pursue a claim of contribution or comparative implied indemnity against a joint tortfeasor who was not sued by the plaintiff, the tortfeasor must join the joint tortfeasor as a third party under K.S.A. 2020 Supp. 60-258a(c) and assert a timely claim against the joint tortfeasor.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Determination of Percentage of Fault in One Lawsuit—Submission to Jury of Causal Fault or Negligence of All Parties to Occurrence. The causal fault or negligence of all parties to the occurrence, including the negligence of the injured plaintiff and any third parties, should be submitted to the jury and the percentage of fault of each determined in one lawsuit.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

TRIAL:

Booking Photo of Defendant—Preventative Measures Required to Minimize Prejudicial Effect. The district court should take preventive measures to minimize any potentially prejudicial effect the photograph might have. *State v. Vazquez* 86

Consolidation of Criminal Cases for Trial—Applying Base Sentence Rules Separately to Convictions Violates Equal Protection Clause. When two or more criminal cases are consolidated for trial because all the charges could have been brought in one charging document, then applying the base sentence rules under K.S.A. 2020 Supp. 21-6819(b) separately to the defendant's convictions in each case violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *State v. Myers* 149

— Conviction of Multiple Charges—Compliance with Equal Protection Clause. For K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant shall be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint.
State v. Myers 149

PAGE

TRUSTS:

Beneficiary of Trust May Void Transaction if Conflict of Trustee's Fiduciary and Personal Interest—Exception. Generally, a trust beneficiary may void a transaction involving trust property which is affected by a conflict between the trustee's fiduciary and personal interest, without further proof. But an exception to that rule applies when the terms of the trust expressly or impliedly authorize the transaction. K.S.A. 2021 Supp. 58a-802(b)(1). *Culliss v. Culliss* ……. 293

Court Has Discretion to Award Reasonable Attorney Fees to Any Party. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, has broad discretion to award reasonable attorney fees to any party, to be paid by another party or from the trust that is the subject of the controversy. K.S.A. 58a-1004. *Culliss v. Culliss* ……..…. 293

WORKERS COMPENSATION:

Decisions of Workers Compensation Appeals Board—Appellate Review under KJRA. Appellate courts review decisions from the Kansas Workers Compensation Appeals Board under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. In doing so, appellate courts must review the record to determine whether the decision of the Board is supported by evidence that is substantial when viewed in light of the record as a whole. It is not the role of the appellate courts to reweigh the evidence or to make credibility determinations. *Turner v. Pleasant Acres* ……. 122

Dual Capacity Doctrine—Exception to Exclusive Remedy Provision of Workers Compensation Act. The dual capacity doctrine, first recognized in *Kimzey v. Interpace Corp.*, 10 Kan. App. 2d 165, 167, 694 P.2d 907 (1985), is a judicially recognized exception to the exclusive remedy provision of the Workers Compensation Act. Under this exception, an employer may be liable to its employee as a third-party tortfeasor if the employer has obligations to the employee independent of those imposed on it as an employer. *Jefferies v. United Rotary Brush Corp*. ……. 354

--- When Machine Manufactured by Employer Injures Employee—No Application of Doctrine. The dual capacity doctrine does not apply when a machine manufactured by the employer injures the employee since the employer has a duty to its employees to maintain a safe work environment. *Jefferies v. United Rotary Brush Corp*. ……..……. 354

Dual Purpose of K.S.A. 44-504. The Kansas Legislature enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages caused by third parties. Second, K.S.A. 44-504(b) prevents an injured worker from receiving a double recovery for the same injuries.
Turner v. Pleasant Acres ……. 122

PAGE

Employer's Subrogation Rights—Legislative Determination. The nature and extent of an employer's subrogation rights under the Kansas Workers Compensation Act are matters for legislative determination.
Turner v. Pleasant Acres 122

Injured Worker's Recovery under K.S.A. 44-504(b)—Subrogation Rights of Employer against Duplicative Recovery. Under K.S.A. 44-504(b), if an injured worker receives a judgment, settlement, or other recovery in a claim asserted against any person or entity—other than the employer or a co-employee—who caused the injury for which compensation is payable under the Kansas Workers Compensation Act, the employer is subrogated to the extent of the compensation and medical benefits provided and has a lien against any duplicative recovery. The subrogation lien does not include any amount paid by a third party for loss of consortium or loss of services to an injured worker's spouse.
Turner v. Pleasant Acres 122

No Distinction between Types of Recovery in K.S.A. 44-504(b). K.S.A. 44-504(b) does not distinguish between the types of recovery to which the workers compensation subrogation lien attaches.
Turner v. Pleasant Acres 12

ZONING:

Statutes Applicable to Election Petitions Not Applicable to Zoning Protest Petitions. The requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions. Those petitions are governed by K.S.A. 2021 Supp. 12-757(f)(1). *Pretty Prairie Wind v. Reno County* 429

(518 P.3d 1257)

No. 123,711[1]

KENNETH D. LEEK, *Appellant*, v. ANDY BROWN, et al., *Appellees*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Failure of Hearing Officer to Comply with Prison's Procedural Regulation—Not Due Process Violation.* A hearing officer's failure to comply with a prison's procedural regulation does not necessarily establish a due process violation.

2. PENAL INSTITUTIONS—*Prison Disciplinary Hearing—Sworn Statements of Officer Given Same Deference as in Person Testimony.* Sworn statements in an officer's report should be given the same deference as in-person testimony in a prison disciplinary hearing.

3. SAME—*Prison Disciplinary Hearing—Right to Confront and Cross-Examine Witness Not Required by Due Process Clause in Prison Hearing.* The right to confront and cross-examine a witness is generally not required by the Due Process Clause of the United States Constitution in a prison disciplinary hearing.

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Opinion filed July 22, 2022. Affirmed.

Shannon S. Crane, of Hutchinson, for appellant, and *Kenneth D. Leek*, appellant pro se.

Jon D. Graves, legal counsel, Kansas Department of Corrections, of Hutchinson, for appellee.

Before SCHROEDER, P.J., GREEN and GARDNER, JJ.

GARDNER, J.: Following proceedings in two prison disciplinary cases, Kenneth D. Leek filed a K.S.A. 60-1501 petition in the district court. The district court held a hearing on Leek's claims but eventually dismissed Leek's petition. Leek appeals that decision, challenging the process in the disciplinary proceedings and

[1]**REPORTER'S NOTE**: Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish by an order dated October 26, 2022, under Rule 7.04(e) (2022 Kan. S. Ct. R. at 47). The published opinion was filed with the Clerk of the Appellate Courts on November 4, 2022.

in the district court. Even assuming that the allegations in Leek's petition are true, we find no error in the district court's dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, Hutchinson Correctional Facility (HCF) officials charged and later found Leek guilty of violating the following prison regulations in case Nos. 19-07-350E and 19-07-443E:

- K.A.R. 44-12-305, a class II offense, for insubordination or disrespect to an officer;
- K.A.R. 44-12-306, a class I offense, for threatening or intimidating a person; and
- K.A.R. 44-12-503A, a class III offense, for being in an area of the prison without proper authorization.

Facts Surrounding 19-07-350E

On July 19, 2019, Officer J. Cain called Leek into the chaplain's office at HCF to talk about religious headgear Leek possessed without proper authorization. Cain told Leek the unauthorized headgear would have to be sent somewhere outside of the prison or destroyed. Another officer, D. Wilson, handed Leek mailing materials. Then, according to Cain, Leek responded with aggressive and threatening statements—Leek told Cain to stop laughing and said Cain would not "be laughing long." Leek also blamed Cain for starting the conflict, saying he "started this [s]hit." Cain, Wilson, and Chaplain Halfmoon witnessed this event.

Cain filed a written report, which became the basis of disciplinary charges against Leek under K.A.R. 44-12-305, for insubordination or disrespect, and K.A.R. 44-12-306, for threatening or intimidating. Leek moved to dismiss the complaint, alleging fraud and retaliation. Leek claimed the charge was fraudulent because although Cain had signed the report, he had not written it—the handwriting showed Wilson had written the report. He then argued that Wilson likely wrote the report in retaliation for a recent grievance Leek filed against him. The hearing officer rejected these claims and denied Leek's motion to dismiss.

The record on appeal does not include a transcript of the disciplinary hearing, but according to the hearing officer's written

summary of the hearing, Leek signed a form acknowledging that he had received proper notice of the charges and the hearing and pleaded not guilty to both offenses. Leek also waived his right to question the reporting officer, and he did not submit a witness request.

The hearing officer's summary also shows that Halfmoon appeared at the disciplinary hearing and gave sworn testimony. Halfmoon denied seeing Cain laugh at Leek during the incident but testified that Leek had said: "Cain you started all this. You[]'re laughing now, but you ain't going to be laughing for long."

Leek denied that he had made any "threats," but he did not deny having made the statements Halfmoon attributed to him. Leek would later claim that contrary to the hearing officer's written summary, Halfmoon did not appear at the disciplinary hearing and thus did not provide sworn testimony.

Relying on Halfmoon's testimony and Cain's disciplinary report, the hearing officer found Leek guilty and imposed a $5 fine.

Facts Surrounding 19-07-443E

Around a week after the incident in Halfmoon's office, Wilson filed another disciplinary report against Leek for being in two restricted areas of the prison without permission: the prison gym and near Dorm One. According to Wilson's report, Leek went to the prison gym without permission, and Leek was seen "talking thru the screen windows of Dorm One and this is not allowed and is also a restricted area."

HCF officials charged Leek with being in a restricted area under K.A.R. 44-12-503(a) and set the matter for a disciplinary hearing. After receiving proper notice, Leek submitted a request to have two witnesses testify on his behalf: inmate Lewis Anderson and HCF's activities' specialist William Perrone. Leek also moved to dismiss, claiming Perrone had given Leek ongoing permission to go to the gym anytime he was there.

The hearing officer denied Leek's motion to dismiss and partially denied his witness request, finding Anderson did not witness the incident reported.

Leek challenges how the hearing officer treated his witness request for Perrone. A copy of the witness request form shows the

hearing officer approved Leek's request for Perrone to appear. But Leek would later claim that his request for Perrone was impliedly denied because Perrone never appeared at the disciplinary hearing. And the signature lines for Perrone and the hearing officer's signature on the summons for Perrone to appear at the hearing were left blank.

The hearing officer's summary of the disciplinary hearing states: "Perrone was sworn in as a witness. The hearing officer ask[ed] Perrone if he called Leek out to the gym on 7/26/19 to work in the craft room. Perrone responded 'Negative.'"

Leek testified that Perrone gave him permission to "go to the gym anytime he was there."

Relying on Perrone's testimony and Wilson's report, the hearing officer found Leek violated K.A.R. 44-12-503(a) and ordered Leek to pay a $3 fine.

Leek appealed both disciplinary decisions to the Secretary of Corrections. The Secretary of Corrections affirmed Leek's three convictions, finding sufficient evidence supported them and the hearing officer substantially complied with the required administrative procedures.

Leek then petitioned for review in the district court. The State responded to Leek's claims and moved to dismiss Leek's petition as untimely.

The district court held a nonevidentiary hearing on Leek's petition. The State appeared through counsel. Leek did not ask for counsel but appeared at the district court and argued pro se.

At the hearing, the State argued that Leek's petition was untimely because it had not been filed within 30 days of the Secretary of Correction's disposition. The State also argued that the district court should dismiss Leek's claims because the record showed relief was not warranted.

Leek again raised claims regarding fraud, retaliation, bias, and due process. Leek argued that Cain did not write the disciplinary report in 19-07-350E and that Wilson's filing of the disciplinary report was retaliatory. Leek also claimed that the hearing officer violated his due process rights, showed bias in favor of the reporting officers, and fraudulently stated that various witnesses had appeared at the disciplinary hearings.

The district court found that Leek "substantially compli[ed]" with the filing requirements and found jurisdiction to consider his petition. The district court allowed Leek to argue, including his claims about the allegedly fraudulent report and retaliation.

In its written order, the district court found the handwriting in Cain's disciplinary report was different than Cain's signature, but that fact was immaterial. The district court found Leek's claims regarding bias, fraud, and retaliation unsupported and unpreserved. The district court also found that Leek had waived his right to develop the facts necessary to consider his retaliation defense. The district court likewise rejected Leek's due process claims, finding some evidence supported Leek's convictions. The district court thus dismissed Leek's K.S.A. 60-1501 petition.

Leek timely appeals.

DID THE DISTRICT COURT ERR IN DISMISSING LEEK'S PETITION?

Leek challenges the district court's summary dismissal of his K.S.A. 60-1501 petition. Leek's appointed appellate counsel submitted an appellate brief on Leek's behalf, arguing the hearing officer violated Leek's due process rights by ignoring his theories of defense. We granted Leek's request to file a supplemental brief pro se. In it, Leek claims the hearing officer violated his due process rights by denying his witness requests, failing to conduct the hearing in a fair and impartial manner, and failing to make an accurate and complete record of the disciplinary proceedings. Leek also asserts that the district court erred by not appointing him counsel when the State appeared through counsel.

Standard of Review and Basic Legal Principles

K.S.A. 2021 Supp. 60-1503 authorizes the summary dismissal of a habeas corpus petition "[i]f it plainly appears from the face of the petition and any exhibits attached thereto that the plaintiff is not entitled to relief in the district court." Relief is warranted only when the petition alleges "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009). "When determining if this standard is met, courts must accept the facts alleged by

the inmate as true." *Hogue v. Bruce*, 279 Kan. 848, 850, 113 P.3d 234 (2005).

When a district court summarily dismisses a petition without issuing a writ under K.S.A. 2021 Supp. 60-1503(a), appellate courts are in just as good a position as the district court to determine whether relief is warranted. "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)." *Denney v. Norwood*, 315 Kan. 163, 175, 505 P.3d 730 (2022). So, our review is unlimited. See *Johnson*, 289 Kan. at 649. We assume the facts alleged are true and if we find those facts support the petitioner's claims under any theory, we must reverse the decision to summarily dismiss. *Washington v. Roberts*, 37 Kan. App. 2d 237, 240, 152 P.3d 660 (2007). We also "broadly construe" pro se petitions. *Laubach v. Roberts*, 32 Kan. App. 2d 863, 868, 90 P.3d 961 (2004).

Due process requirements of a prison's disciplinary proceeding are satisfied if some evidence supports the hearing officer's decision. *Sammons v. Simmons*, 267 Kan. 155, 159, 976 P.2d 505 (1999). Whether an individual's due process rights were violated is a question of law, and this court's review is unlimited. It is the inmate's burden to prove a constitutional violation occurred. *Starr v. Bruce*, 35 Kan. App. 2d 11, 12, 129 P.3d 583 (2005).

Claims Raised in the District Court

In his petition, Leek alleged fraud and due process violations. Leek claimed that contrary to the hearing officer's factual findings, no witnesses appeared at his disciplinary hearings. Leek thus claimed that Halfmoon and Perrone provided unsworn statements to the hearing officer outside his presence. Leek also argued that the hearing officer wrongly denied his request to have Perrone and Anderson testify. He also contended that the hearing officer did not conduct a fair and impartial hearing or issue a complete and accurate record of the disciplinary hearing.

Rules Applicable to Due Process Analyses

Leek's due process arguments require a two-step analysis. First, we determine whether the State has deprived Leek of life,

liberty, or property. If so, we next determine the extent and the nature of the process due. *Hogue*, 279 Kan. at 850-51; *Washington*, 37 Kan. App. 2d at 240.

The hearing officer imposed a $5 fine in 19-07-350E and a $3 fine in 19-07-443E, so Leek was deprived of property. The imposition of a fine implicates an inmate's property interest. *Stano v. Pryor*, 52 Kan. App. 2d 679, 682, 372 P.3d 427 (2016). So Leek's claim raises a constitutionally protected property interest.

We must therefore consider the process provided in each case. As a general matter, inmates are not owed "the full panoply of rights due a defendant in [criminal] proceedings." *Hogue*, 279 Kan. at 851 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 [1974]). Instead, inmates in disciplinary proceedings have only limited rights, including "an impartial hearing, a written notice of the charges to enable [the inmate] to prepare a defense, a written statement of the findings by the fact-finders as to the evidence and the reasons for the decision, and the opportunity to call witnesses and present documentary evidence." *In re Habeas Corpus Application of Pierpoint*, 271 Kan. 620, Syl. ¶ 6, 24 P.3d 128 (2001). *In re Pierpoint* found that "*Wolff* did not require the right to confront and cross-examine witnesses or the right to counsel in all cases. 418 U.S. at 567-70." 271 Kan. at 627-28. If an inmate is denied a request to have a witness called to testify on his or her behalf, the hearing officer must make a record explaining the decision. See K.A.R. 44-13-101(c)(5); K.A.R. 44-13-405a(e).

But a hearing officer's violation of KDOC regulations does not, by itself, compel this court to interfere. See *Anderson v. McKune*, 23 Kan. App. 2d 803, 810, 937 P.2d 16 (1997) ("'Maintenance and administration of penal institutions are executive functions and it has been said that before courts will interfere the institutional treatment must be of such a nature as to clearly infringe upon constitutional rights, be of such character or consequence as to shock general conscience or be intolerable in fundamental fairness.'") (quoting *Levier v. State*, 209 Kan. 442, 450-51, 497 P.2d 265 [1972]). Our Supreme Court recognized this principle in *Hogue*:

"'The mere fact that a hearing officer in a prison discipline case has not followed [Department of Corrections] procedural regulations does not of itself violate fundamental fairness that rises to an unconstitutional level. Without much more, a petition for habeas corpus alleging procedural errors at a prison disciplinary hearing must fail.'" 279 Kan. at 855-56.

So a hearing officer's failure to comply with a regulation does not necessarily establish a due process violation, unless the failure violates fundamental fairness and rises to an unconstitutional level. See *Washington*, 37 Kan. App. 2d at 242.

Leek does not allege facts to support his due process claim in 19-07-350E and some evidence supports his convictions in that case.

Contrary to Leek's argument at the district court hearing, the record shows Leek did not request a witness in 19-07-350E. He also signed a waiver of his right to confront the reporting officer. So the district court properly dismissed those procedural claims.

Leek's due process claims also necessarily fail because even assuming neither Halfmoon nor Cain appeared at the hearing, the record still contains some evidence supporting his convictions. No more is required. When we review this type of claim, we determine whether some evidence supports the decision by the prison disciplinary board. *Miller v. McKune*, 38 Kan. App. 2d 810, 814, 174 P.3d 891 (2006). We do not reexamine the entire record, make an independent assessment of the credibility of witnesses, or reweigh the evidence, and we give broad deference to prison officials maintaining discipline in prison settings. *Sammons*, 267 Kan. 155, Syl. ¶ 3; *Anderson*, 23 Kan. App. 2d at 807-08. Due process does not require that the evidence preclude other possible outcomes, only that the evidence supports the conclusion reached by the disciplinary authority. *May v. Cline*, 304 Kan. 671, Syl. ¶ 1, 372 P.3d 1242 (2016).

K.A.R. 44-12-305 states that an inmate must be "attentive and respectful towards employees, visitors, and officials. The showing of disrespect, directly or indirectly, or being argumentative in any manner shall be considered insubordination." K.A.R. 44-12-306 prohibits an inmate from threatening or intimidating, "either directly or indirectly, any person or organization." This regulation also provides that the "subjective impression of the target of the

alleged threat or intimidation shall not be a factor in proving a violation of subsection (a)." K.A.R. 44-12-306(c).

At Leek's disciplinary hearing in 19-07-350E, the hearing officer presented Cain's disciplinary report and relied on it as Cain's sworn statement. In *Miller*, 38 Kan. App. 2d at 815, citing various regulations, a panel of this court considered a due process claim similar to Leek's. The *Miller* panel explained that sworn statements in an officer's report should be given the same deference as in-person testimony:

> "K.A.R. 44-13-201(c)(2) states: 'The investigation report may be adopted by the charging officer both as the charge itself and as the officer's sworn statement in lieu of testimony in any case, in accordance with the regulations.'
>
> "In this case when the sworn statement of the reporting officer was presented, it is valid and persuasive evidence just as if the officer had appeared and testified in person. The district court's finding that Warden McKune presented 'no evidence' is not correct and is directly contradicted by a full reading of all of the provisions of K.A.R. 44-13-201.
>
> "The record further reflects that Miller signed a waiver of rights dated November 18, 2004, in which it was stated: 'I waive reporting officer/reporting staff member testifying (Class I Cases).' This waiver was also acknowledged by Hearing Officer Cooper.
>
> "The fact that the disciplinary report is to be considered by the hearing officer is further clarified and confirmed by the provision of K.A.R. 44-13-403(p) which states: 'The hearing officer, in deciding whether or not the inmate is guilty, shall consider only the relevant testimony *and report.*' It is clear that there was evidence presented to the hearing officer . . . [that] Miller was involved in fighting under K.A.R. 44-12-301. There was clearly some evidence that he was. This evidence was properly considered." 38 Kan. App. 2d at 815.

Cain's report provided a first-person description of the reported incident. The report alleged that after telling Leek to send his religious headgear somewhere outside of HCF, Leek "became verbally aggressive towards [Cain] stating that [Cain] started this and that I better quit laughing." Cain also claimed that Leek "in a very hostile voice and threatening manner" stated that Cain was "not going to be laughing long. [Cain] started this [s]hit."

Leek questions the authenticity of the report based on an alleged difference between the handwriting in the report and Cain's signature on the report. But the hearing officer found that Cain signed the report. He thus took responsibility for it as though he had written it. And even though Leek denied making any threats, he did not deny making the statements Cain quoted in his report.

We thus find the hearing officer properly relied on the sworn statements in Cain's report. Those statements provide some evidence to support Leek's convictions under K.A.R. 44-12-305 and K.A.R. 44-12-306 and thus refute Leek's due process claim.

Leek also challenges the hearing officer's rejection of his retaliation defense. But the hearing officer properly rejected that argument as immaterial. Regardless of why Wilson may have drafted the body of Cain's report, the evidence supports Leek's convictions. As explained by the *Miller* panel, evidentiary decisions related to such defenses should be made by the hearing officer:

> "The finding which the hearing officer is allowed to make under prison regulations is based on K.A.R. 44-13-403(j), which states: 'The hearing officer shall rule on all matters of evidence. Strict rules of evidence, as used in a court of law, shall not be required, but the hearing officer shall exercise diligence to admit reliable and relevant evidence and to refuse to admit irrelevant or unreliable evidence.' Our duties in the consideration of a K.S.A. 60-1501 petition involving disciplinary proceedings in a prison is to give 'broad deference to prison officials in maintaining discipline in prison settings.' *Anderson*, 23 Kan. App. 2d at 809. The fact we may not have reached the same conclusion as the hearing officer is not material. The crucial fact to be determined is whether there is 'some evidence' upon which the decision was reached and that clearly existed under the undisputed facts shown by the record in this case.
>
> "The question of self-defense was an issue before the hearing officer. But, by the decision of guilty of fighting being reached, it is clear the existence of this defense was resolved against Miller. The prosecution was not obligated to disprove self-defense, and the hearing officer as the factfinder in a prison disciplinary proceeding resolved this issue." 38 Kan. App. 2d at 815-16.

We agree and find no error in this portion of the disciplinary proceedings.

Leek also failed to provide evidence at the disciplinary hearing to support his claim of retaliation, which requires proof of the following:

> "(1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury sufficient to chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse action was substantially based on the plaintiff's exercise of a constitutionally protected right." *Bloom v. Arnold*, 45 Kan. App. 2d 225, 233, 248 P.3d 752 (2011).

Leek failed to show that Wilson likely knew that Leek had recently filed a grievance against him and Leek provided no evidence showing a causal connection between his grievance against Wilson and the decision to file a disciplinary report. So the district court did not err by dismissing this argument. See *Requena v. Cline*, No. 108,395, 2013 WL 1876471, at *4 (Kan. App. 2013) (unpublished opinion) (similarly finding a lack of obvious connection when reviewing disciplinary proceeding).

The undisputed evidence thus supports Leek's convictions in 19-07-350E. We affirm the district court's summary dismissal of those claims.

Leek does not allege facts to support his due process claim in 19-07-443E and some evidence supports his conviction in that case.

In 19-07-443E, Leek submitted requests to call two witnesses in his defense, Anderson and Perrone. The hearing officer rejected Leek's request for Anderson, an inmate, because he was not alleged to have witnessed any of the events at issue. Leek does not allege that Anderson had personal knowledge of the events, but he claims he could help Leek's retaliation claim. Based on our reasoning about the retaliation claim above, we find no error in the hearing officer's decision not to call Anderson as a witness for Leek.

We focus, as Leek does, on his request to call Perrone. The parties agree that Leek requested Perrone as a witness. In his request and at the disciplinary hearing, Leek claimed that Perrone had given him continuing permission to go to the gym whenever Perrone was there.

The hearing officer's summary of the disciplinary hearing states that Perrone gave sworn testimony and he denied having given Leek permission to go to the gym on the reported date. But in his K.S.A. 60-1501 petition, Leek claimed that Perrone did not appear at the hearing. We must assume Leek's allegation is true, but the two statements are not necessarily inconsistent. HCF suggests that the hearing could have been held with the hearing officer just outside Leek's cell while Leek was in his cell, and the hearing officer left to call Perrone on the telephone to take his sworn testimony. Thus, Perrone could have given sworn testimony on the

telephone. See *In re Pierpoint*, 271 Kan. at 627-28 (noting *Wolff*, 418 U.S. at 567-68, the benchmark case defining process requirements for disciplinary proceedings, requires "the opportunity to call witnesses" but does "not require the right to confront and cross-examine witnesses").

To address that possibility, Leek counters that the hearing officer did not document a reason for denying his witness request and did not question Perrone in front of him. But Leek has not shown that the hearing officer had to do so. The relevant regulations give the hearing officer some discretion about these matters. K.A.R. 44-13-101(c) provides that an inmate's right to call witnesses, confront and cross-examine witnesses, and present documentary evidence is subject to certain limitations.

> "The hearing officer shall have broad discretion in permitting or denying the witness request. In exercising the discretion, the hearing officer shall balance the inmate's request and wishes against the needs of the facility. The goal of the hearing officer shall be to conduct the fact-finding process in a manner leading to the discovery of the truth." K.A.R. 44-13-405a(b).

And although K.A.R. 44-13-101(c)(6) generally provides that an inmate has a right to confront and cross-examine opposing witnesses, that right is "[s]ubject to the limitations and guidelines set out in these regulations and subject to the control of the hearing officer exercised within the parameters of the law and these regulations." A more specific regulation, K.A.R. 44-13-403(l)(1), generally states that each staff member the hearing officer calls as a witness shall be compelled to appear, and the hearing officer shall not receive testimony or evidence outside the presence of the accused inmate. But Leek, not the hearing officer, called Perrone as a witness. And that regulation has an exception that states: "(q) Confrontation and cross-examination may be denied by the hearing officer if deemed necessary in any case except class I cases." K.A.R. 44-13-403(q). Leek's restricted area violation was not a class I case but a class III case. Leek thus fails to show that the hearing officer's acts violated a relevant regulation.

Nor does Leek show that the hearing officer's acts violated his constitutional rights. Confrontation and cross-examination are generally not required in prison disciplinary hearings:

"Although some States do seem to allow cross-examination in disciplinary hearings, we are not apprised of the conditions under which the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination." *Wolff*, 418 U.S. at 567-68.

After weighing the potential problems that could arise from an inmate's cross-examination, the Supreme Court concluded that "[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." 418 U.S. at 569; see *In re J.D.C.*, 284 Kan. 155, 167, 159 P.3d 974 (2007) (citing *Wolff*, 418 U.S. at 567-68, for its findings that "rights of cross-examination and confrontation [are] not universally applicable to prison disciplinary hearings"); *Taylor v. Wallace*, 931 F.2d 698, 701 (10th Cir. 1991) (stating due process does not require the confrontation and cross-examination of witnesses in prison disciplinary proceedings); see also *Kucera v. Terrell*, 214 Fed. Appx. 729, 730 (10th Cir. 2006) (unpublished opinion) ("The Sixth Amendment right to confront one's accusers is available only in criminal trials.").

Kansas courts have generally held the same. See *Washington*, 37 Kan. App. 2d at 242 (acknowledging *Wolff* weighs against a constitutional due process right to confront and cross-examine witnesses); *Lowe v. Schnurr*, No. 122,094, 2020 WL 3885705, at *5 (Kan. App.) (unpublished opinion) (finding no constitutional right to confrontation or cross-examination in an inmate's disciplinary hearing), *rev. denied* 312 Kan. 892 (2020); *Rincon v. Schnurr*, No. 114,670, 2016 WL 3031284, at *3 (Kan. App. 2016) (unpublished opinion) (presuming Rincon had no due process right to confront and cross-examine an adverse witnesses, based on *Wolff*).

Harmless Error

But even if Leek had a constitutional right to have Perrone appear, and that right was violated, remand is necessary only if we do not find the error harmless. See *Sauls v. McKune*, 45 Kan. App. 2d 915, 921, 260 P.3d 95 (2011) (finding violation of inmate's due

process rights harmless error if no reasonable probability of changing outcome of disciplinary hearing).

True, Perrone's testimony fails to rebut Leek's testimony. Leek testified that Perrone had given him continuing permission to go to the gym whenever Perrone was there. Yet Perrone's denial was narrow—he was asked only whether he had "called Lee out to the gym on 7/26/19 to work in the craft room," and he responded negatively.

Still, any error is harmless. The record shows that although Perrone's testimony may have been crucial to Leek's defense of the restricted area violation based on Leek's going to the gym, it had no apparent relation to Leek's separate restricted area violation based on Leek's going to Dorm One.

K.A.R. 44-12-503(a) provides that "[n]o inmate shall enter a restricted area without a direct order by a correctional employee authorized to render this order or unless expressly permitted in writing by the warden." Wilson's report provides some evidence to sustain this conviction. It states that Leek was seen talking through a screen window at Dorm One, which is a restricted area that Leek was not allowed to be in.

Leek testified about going to the gym, claiming he had Perrone's permission to be there. Leek told the hearing officer:

"I was in the wood shop. Perrone told me I could go to the gym anytime he was there. He told me that I could be there. I was trying to ask him about that because Wilson told me that I couldn't talk to Perrone. I was asking him if he would be a witness for the other [disciplinary report]. He told me that he would be. Everybody goes out there whenever he is there."

But none of Leek's testimony refuted the Dorm One charge, which formed an independent basis for the disciplinary violation. The hearing officer did not limit its findings to the gym violation, but broadly found that "the inmate was in an area that he was not supposed to be in without permission, it is more likely than not, in the hearing officer[']s opinion, true the incident did happen . . . ." The disciplinary report contains some evidence supporting Leek's conviction under K.A.R. 14-12-503(a) for the Dorm One violation. And the Dorm One violation provides an independent and fully sufficient ground to affirm the district court.

Leek's failure to challenge the independent basis for the disciplinary report means he cannot show that he was actually harmed by the prison's decision not to question Perone in his presence. As such, he has not provided the "something more" that we require when a prisoner raises procedural violations in a habeas petition challenging inmate discipline. See *Anderson*, 23 Kan. App. 2d at 811.

Right to Representation

Leek's final claim on appeal is that the district court erred by allowing the State to appear through counsel at the district court proceedings without appointing him counsel. The State contends that Leek was not legally entitled to counsel, especially since he did not request counsel.

There is no general right to have an appointed attorney in a civil case. We have recognized a right to counsel for a person in Leek's situation seeking habeas relief under K.S.A. 2015 Supp. 60-1501 after the district court has determined that the petition cannot be summarily denied and requires an evidentiary hearing: *Griffin v. Bruffett*, 53 Kan. App. 2d 589, 606-07, 389 P.3d 992 (2017); *Merryfield v. State*, 44 Kan. App. 2d 817, 826, 241 P.3d 573 (2010). And courts routinely appoint counsel when a habeas petition is appealed from the district court to an appellate court. See, e.g., *White v. State*, No. 121,755, 2020 WL 2602031 (Kan. App. 2020) (unpublished opinion); *Wheeler v. State*, No. 120,981 2020 WL 1646810 (Kan. App. 2020) (unpublished opinion). The district court here dismissed Leek's petition without an evidentiary hearing and without Leek asking for counsel, and it appointed counsel for Leek on appeal. Accordingly, Leek fails to show error in the district court's not appointing him unrequested counsel during the preliminary hearing.

Affirmed.

(521 P.3d 1)

No. 124,199

STATE OF KANSAS, *Appellee*, v. ALLEN MICHAEL HURST, *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Determination Whether Delay in Appellate Proceedings Violated Defendant's Due Process Rights—Appellate Courts Use Four-Part* Barker v. Wingo *Balancing Test.* This court uses the four-part *Barker* balancing test to determine whether a delay in appellate proceedings has violated a defendant's due process rights under the United States Constitution. The court must consider the (1) length of delay, (2) reason for the delay, (3) defendant's assertion of their right, and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

2. SAME—*Defendant's Assertion of Constitutional Right to Speedy Trial.* A defendant's writings, motions, statements to the court, and other communications can support an assertion of their constitutional right to a speedy trial, and no particular language or citation to a specific legal principle is required.

3. SAME—*Whether Due Process Rights Violated by Delay in Appellate Proceedings—Application of Prejudice Factor of* Barker *Balancing Test.* The prejudice factor of the *Barker* balancing test carries crucial weight in determining whether a defendant's due process rights were violated by a delay in the appellate proceedings.

Appeal from Leavenworth District Court; MICHAEL D. GIBBENS, judge. Opinion filed November 4, 2022. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Todd Thompson, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before CLINE, P.J., ISHERWOOD and HURST, JJ.

HURST, J.: In a case that spans many years and multiple states, Allen Michael Hurst appeals his conviction asserting that his lengthy direct appeal process has deprived him of his due process rights. While this court does not dispute the inexplicable delay, Hurst presents no other errors, in either his underlying plea or the

resulting sentence, that were impacted or otherwise resulted from this delay. Although Hurst is correct that he experienced an inexcusable and inordinate delay, he has made no showing of constitutionally cognizable prejudice resulting from that delay.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts, which are reminiscent of a screenplay, are relevant to the procedural posture of this case. On May 10, 2013, Allen Michael Hurst escaped from Lansing Correctional Facility in Lansing, Kansas, with two fellow prisoners. During their escape, Hurst and one other prisoner stole a car in Kansas and eventually crossed the state line into Missouri where they engaged in a high-speed car chase. Hurst and his fellow escapee shot at officers in Missouri who attempted to stop the vehicle. Eventually, Hurst and his accomplice crashed the stolen vehicle and fled the scene on foot, where they broke into a nearby house and barricaded themselves inside. An armed standoff with a SWAT team ensued before the escapees were finally apprehended. Hurst received a 20-year sentence in Missouri for the crimes he committed in that state following his escape, and his codefendant received a 128-year sentence. See *State v. Gilbert*, No. 117,953, 2018 WL 4939094 (Kan. App. 2018) (unpublished opinion); *State v. Gilbert*, 531 S.W.3d 94, 97 (Mo. Ct. App. 2017).

Hurst was also charged in Kansas with aggravated escape from custody and, in a separate case, felony theft, and criminal possession of a firearm for his actions during the prison break in 2013—but he remained in custody in Missouri for about five years with no proceedings in Kansas. In April 2018, Hurst filed a Uniform Mandatory Disposition of Detainers Act request seeking disposition of his Kansas charges and he was transported across the border to face those charges. Shortly thereafter, on June 22, 2018, Hurst pled no contest to the aggravated escape from custody charge in exchange for the State's agreement to dismiss the other case. At sentencing, Hurst's criminal history score was determined to be A and the district court sentenced him to 130 months' imprisonment. The court further ordered that Hurst serve the Kansas sentence consecutive to the 20-year sentence he was already serv-

ing in Missouri and the 25 months remaining on the Kansas sentence he was serving when he had escaped prison. On August 3, 2018, Hurst's trial counsel timely filed a notice of appeal.

A week after Hurst's counsel filed his notice of appeal, the district court appointed the Kansas Appellate Defender's Office (ADO) to represent Hurst on appeal. Approximately 14 months later, on October 24, 2019, the ADO moved to withdraw from the case because that office had previously represented Hurst's codefendant and believed it was conflicted out of representing Hurst. The motion noted that the ADO had only learned about its appointment to represent Hurst the week prior—on October 17, 2019. The ADO's withdrawal was granted the next week, but—for reasons which remain unclear to this court—the district court did not appoint substitute counsel at that time. It appears the ADO may have been appointed to represent Hurst again after its first withdrawal, as the record contains a second motion to withdraw filed in October 2020 due to the same conflict issue.

On August 19, 2020, Hurst wrote to the Leavenworth County Court Clerk, requesting "help or advice in the matter of [his] appeal," noting that he had not been contacted about the matter for over two years. Then in September 2020, Hurst filed a "Motion To Dismiss" based on the delay in his appeal and requested that his conviction be "overturned and dismissed due to violation of Due Process and Constitution of Rights being violated." That same month, Hurst filed two additional motions for dismissal in which he contended that he had received ineffective assistance of counsel based on the delay in the appellate process. Hurst explained that "[b]ecause of said acts, the Defendant, me, has not been able to move forward with the above case, and places me, the Defendant, under duress." The State promptly opposed Hurst's request for dismissal, noting that dismissal of Hurst's sentence or conviction was not an appropriate remedy regardless of any delay. Hurst then filed a "Petition To Court," requesting the district court to review his motion and notify him of its decision.

On November 30, 2020, the district court appointed Hurst new, conflict-free counsel for his appeal. Three months later, the court held a hearing on Hurst's pro se motions to dismiss, during which Hurst argued that he had received deficient performance from the various attorneys appointed to represent him and had

been prejudiced because his "appeal could have been received" and he "could know what [his] future outcome would be." Ultimately, the district court denied Hurst's motions, explaining:

"The Court has reviewed this file and it appears that Mr. Lee had been counsel here in the district court, and that upon conclusion of it he had filed a notice of appeal. And then he had withdrawn so the Appellate Defender could be appointed and that the Appellate Defender was actually appointed. And all of that was done timely and properly except the Appellate Defender then determined that they had a conflict of interest 'cause they were representing a co-defendant and so they withdrew. When they withdrew it looks like the ball got dropped and replacement counsel didn't get appointed.

"And then when this motion was filed and it was brought to the Court's attention, that's when new counsel was appointed, Mr. [] was appointed. I think initially the Appellate Defender was reappointed and they continued to decline representation, then Mr. [] was appointed.

"But either event, the proper remedy, though, here, if there is one, is not a dismissal. . . . I'm not sure that there's any remedy for it. It was delayed and—and—and that's what happened."

Some months after the court denied Hurst's pro se motions to dismiss, on July 28, 2021, his new counsel moved to docket Hurst's appeal out of time—this court granted the motion on August 11. However, less than two months later, on September 20, 2021, Hurst's attorney withdrew because of a conflict of interest and breakdown of the attorney-client relationship, which is evinced by a testy exchange of letters. The next month, the district court appointed Hurst new appellate counsel who finally filed a brief on Hurst's behalf in January 2022—about three and a half years after his notice of appeal.

DISCUSSION

On appeal, Hurst argues only that the lengthy delay in getting his appeal before this court deprived him of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Hurst asserts no other claim of any deficiency in his plea or the sentence imposed in this case—he merely argues that he was denied due process because of the objectively lengthy time between the filing of his notice of appeal and the filing of his appellate brief.

The United States Constitution affords criminal defendants due process rights on appeal. "[I]f a State has created appellate

courts as an integral part of its system for finally adjudicating the guilt or innocence of a defendant, the procedures employed in the appeal process must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *State v. Bussart-Savaloja*, 40 Kan. App. 2d 916, 920, 198 P.3d 163 (2008), *abrogated on other grounds by City of Kingman v. Ary*, 312 Kan. 408, 475 P.3d 1240 (2020). The United States Supreme Court established a balancing test—known as the *Barker* balancing test—to determine whether a trial delay has violated a criminal defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

Although *Barker* addressed a criminal defendant's right to a speedy trial under the Sixth Amendment, the Tenth Circuit Court of Appeals has since adopted the *Barker* balancing test for determining whether a delay in the appellate process has violated a defendant's due process rights. *Harris v. Champion*, 15 F.3d 1538, 1558-65 (10th Cir. 1994). In the appellate context, the Tenth Circuit modified the fourth factor of the test—prejudice to the defendant—by expanding the prejudice element as fully explained below. A panel of this court has adopted the *Harris* formulation of the *Barker* balancing test when considering whether a delay in the appellate process has violated a defendant's constitutional due process rights, and this panel finds that to be the appropriate analysis. See *Bussart-Savaloja*, 40 Kan. App. 2d at 921.

In determining whether Hurst's appellate delay violated his constitutional due process rights, this court must balance the following factors: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of their rights; and (4) prejudice to the defendant. See *Barker*, 407 U.S. at 530.

The Length of Appellate Delay

Here, the first factor in the balancing test weighs heavily in favor of Hurst. Around three and a half years elapsed from when Hurst filed his notice of appeal in August 2018 to when his counsel filed his appellate brief in January 2022. This court has held that only the passing of an "inordinate amount of time" triggers due process concerns. *State v. Delacruz*, 52 Kan. App. 2d 153, 165, 364 P.3d 557 (2015), *rev'd on other grounds* 307 Kan. 523,

411 P.3d 1207 (2018); *Bussart-Savaloja*, 40 Kan. App. 2d at 921 ("If inordinate delay cannot be shown, we need not inquire into the other factors."); see also *Barker*, 407 U.S. at 530 ("The length of the delay is to some extent a triggering mechanism."). A two-year delay from the notice of appeal to final adjudication will be considered presumptively excessive, requiring examination of the remaining factors. *Bussart-Savaloja*, 40 Kan. App. 2d at 921-22; see *Harris*, 15 F.3d at 1559-60.

Although the filing of a notice of appeal starts to run the clock, Kansas courts have used different measures for when a delay officially ends, including the docketing of the appeal, the filing of an appellate brief, or the resolution of the case by this court. See *Delacruz*, 52 Kan. App. 2d at 164-65 (measuring delay from filing of defendant's notice of appeal to when appeal was docketed); *Bussart-Savaloja*, 40 Kan. App. 2d at 921-22 (measuring delay from filing of defendant's notice of appeal to actual adjudication); *State v. Ballou*, No. 107,155, 2013 WL 646485, at *3 (Kan. App. 2013) (unpublished opinion) (measuring delay from the filing of defendant's notice of appeal to the filing of his appellate brief). Here, the length of delay was presumptively unreasonable regardless of the measuring stick. Even by the shortest standard—stopping the clock when Hurst's appeal was docketed—Hurst suffered a 27-month delay. If measured from when Hurst's appellate brief was filed, it was about a 40-month delay and both delays weigh in favor of Hurst's contention that his due process rights were violated.

The Reason for the Inordinate Delay

Having found a presumptively inordinate delay, this court must determine the reason for the delay. If the delay was purposefully caused, this factor weighs heavily against the government. But if the delay resulted from a neutral reason, such as overcrowded courts, this factor carries less weight. No matter the reason for the delay, "[t]he ultimate responsibility rests with the government rather than with the defendant." *Bussart-Savaloja*, 40 Kan. App. 2d at 922 (citing *Barker*, 407 U.S. at 531). In fact, "reasons such as lack of funding, briefing delay by court-appointed attorneys, and mismanagement of resources by public defender

offices are not considered acceptable excuses for inordinate delay." 40 Kan. App. 2d at 922 (citing *Harris*, 15 F.3d at 1562).

Hurst does not allege the delay was purposeful, and this court finds no intentional delay or subterfuge by the State to orchestrate the delay. Hurst addresses the initial delay from the time he filed his notice of appeal to when the court appointed him replacement counsel after the ADO withdrew from his case—about 28 months. After its first appointment as Hurst's appellate counsel, the ADO waited 14 months to request to withdraw from the representation. However, the ADO explained that it was not made aware of its appointment until the week prior to moving to withdraw. At that point, after more than a year-long delay, the district court failed to appoint another attorney to represent Hurst for another 13 months. There is no explanation for this delay beyond the district court's comment that "the ball got dropped."

The State argues that the delays caused by the ADO's conflict of interest should not be assessed against it and that Hurst is somehow responsible for much of the total delay. The State apparently contends that Hurst should have taken some action to obtain counsel sooner or alert the court and State of the delay—yet could not identify the appropriate mechanism for Hurst to take such action. This court disagrees with the State and finds its position untenable. The State attempts to avoid accountability for the delay because it was not purposeful and by pointing responsibility onto the ADO and Hurst. This attempt contradicts the governing speedy trial caselaw as well as logic, particularly when a defendant is relying on the district court to appoint him counsel and has no other access to an attorney.

More than a decade ago, the *Bussart-Savaloja* panel explained that "[p]roblems in the prompt appointment of appellate counsel and notification of the appointment have been a persistent problem to our court." 40 Kan. App. 2d at 923. Based on Hurst's experience, this problem persists. After Hurst filed his notice of appeal in August 2018, his appeal was not docketed by appointed counsel for three years. Most of this delay was caused by failures in the timely appointment of conflict-free counsel—failures for which Hurst has no culpability. The State has identified no procedural rule or process that Hurst—as an indigent, incarcerated defendant—failed to follow in obtaining conflict-free counsel. Yet, this

court finds no intentional delay by the State and thus this factor only weighs slightly in favor of Hurst and the finding of a due process violation.

Hurst's Assertion of His Rights

Hurst first contacted the district court about the delay in the appellate process through a letter in August 2020—two years after his sentence and the filing of his notice of appeal. In the letter, Hurst explained that in October 2019 he tried to obtain information about the delay from his trial counsel but received no response. Hurst asked the court to grant him "help or assistance in the matter of [his] appeal" because he had "heard nothing in 2 years." He then filed several motions to dismiss based on the delay in the appellate process and requested that "this conviction be overturned and dismissed due to violation of Due Process and Constitution of Rights being violated."

The State contends that through his motions Hurst failed to request a prompt resolution of his appeal, but merely requested a dismissal of the underlying conviction and sentence. The Kansas Supreme Court has noted that "'an assertion that charges be dismissed for a speedy trial violation is not a value protected under *Barker*." *In re Care & Treatment of Ellison*, 305 Kan. 519, 538, 385 P.3d 15 (2016). Despite Hurst's pro se request for an inappropriate remedy, he did invoke his due process rights, albeit without citing the specific right to an expeditious appeal. Hurst's pro se motions and letter to the court make clear that he brought the unreasonable delay of his appeal to the attention of the district court and sought a remedy, which is an adequate assertion of his rights. This is particularly true when the defendant, as here, has requested appointment of counsel to pursue his rights and such appointment has not occurred, requiring him to assert his rights without counsel.

The Prejudicial Effect of the Inordinate Delay

Finally—and most importantly—this court considers whether Hurst suffered prejudice from the objectively unreasonable delay. In determining the prejudice to defendant, this court examines

whether the defendant suffered (i) oppressive incarceration pending appeal; (ii) constitutionally cognizable anxiety; or (iii) impairment of the ability to present a defense upon a retrial or reversal. *Bussart-Savaloja*, 40 Kan. App. 2d at 920 (citing *Harris*, 15 F.3d at 1559). Hurst focuses his argument on the second factor—constitutionally cognizable anxiety while awaiting appellate resolution.

Before analyzing Hurst's anxiety stemming from the delay, this court notes that Hurst has suffered no prejudice that falls within the other two categories. First, Hurst suffered no oppressive incarceration pending the resolution of this appeal because he has not even begun to serve the 130-month sentence resulting from his Kansas conviction. His Kansas sentence was ordered to run consecutive to his 20-year sentence in Missouri as well as the 25 months remaining on the Kansas sentence he was serving when he escaped prison in 2013. Thus, Hurst will not begin serving his present sentence for about 17 years. Accordingly, any remedy sought through his appeal to this court—including his impermissible request for "dismissal" of his conviction—would not affect Hurst until he completes his other sentences.

Similarly, the delay in Hurst's appeal has not prejudiced or impaired his grounds for relief or any defenses he could raise if this court were to reverse and remand any aspect of his conviction or sentence. While Hurst's decision to enter a plea agreement limits his grounds for appeal—he has asserted no grounds other than the deprivation of his due process rights due to the delay in the appellate process. He alleges no error and presents no other grounds for reversal or relief stemming from his plea or sentencing in this case. By asserting no other basis for appellate relief, Hurst essentially admits that he has suffered no prejudice or impairment of any grounds for direct appeal or potential defenses if his case were reversed and remanded. Additionally, by not challenging any aspect of his underlying plea or sentence, he has waived any potential argument of infirmity in the underlying proceedings from which this direct appeal derives. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) (issues not briefed are deemed waived and abandoned).

Hurst's only prejudice argument centers on the anxiety subfactor. Hurst contends that he has suffered anxiety about the outcome of his case and felt as if he were abandoned during the delay in the appellate process. However, to establish the requisite prejudice stemming from anxiety, Hurst must make a "particularized and substantial showing of anxiety distinguishable from anxiety suffered by other similarly situated defendants." *Bussart-Savaloja*, 40 Kan. App. 2d at 925. Therefore, the general anxiety which Hurst claims he suffered during the delay in his appeal is insufficient to demonstrate prejudice. In *Harris*, the Tenth Circuit explained:

> "A petitioner has no reason to be anxious or concerned about the time it takes to adjudicate an appeal that is without merit. Therefore, to establish prejudice resulting from anxiety, a petitioner must once again assert a colorable state or federal claim that would warrant reversal of the petitioner's conviction or reduction of sentence to an amount of time less than that taken to adjudicate the appeal." 15 F.3d at 1565.

Hurst asserts no potentially colorable claims under state or federal law that would warrant reversal of his conviction or reduction of his sentence. His only basis for relief is the inordinate delay in his appeal, meaning he cannot suffer legally prejudicial anxiety because he has no meritorious appellate claim. Moreover, even if he asserted a potentially meritorious claim, he would not recognize that benefit for about 17 years, making any increased anxiety from the delay in his appeal unreasonable. Hurst's frustration, anxiety, and feeling of abandonment based on the lack of information he received during the delay in his appeal is unfortunate. This court does not condone or excuse the delay in this case. But under the unique facts of Hurst's case, he could not have suffered the type of constitutionally cognizable anxiety that amounts to prejudice. In sum, Hurst has failed to show that he suffered any prejudice from the delay in his appeal.

Although three of the four *Barker* balancing test factors weigh in favor of finding that the delay in Hurst's appeal violated his due process rights—his inability to demonstrate prejudice outweighs all the other factors. Defendants cannot establish a constitutional due process violation from a delay in their direct appeal without

showing that they suffered some amount of prejudice from the delay.

CONCLUSION

While Hurst unquestionably experienced an inordinate delay during the appellate process, he suffered no additional incarceration, unique anxiety, or impairment of his ability to present a defense. In other words, he did not suffer any constitutionally cognizable prejudice as a result of the delay. Accordingly, this court finds that the delay in the appellate process did not deprive Hurst of his due process rights.

Affirmed.

(521 P.3d 740)

No. 124,511

JOSEPH A. BOTT, *Appellant*, v. STATE OF KANSAS and KANSAS HIGHWAY PATROL, *Appellees*.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Application of K.S.A.60-512 – Three-year Statute of Limitations under 60-512(2).* K.S.A. 60-512(2) applies when a statute creates a liability where liability would not exist except for the statute. For example, an action would not be based on a liability created by statute if the right would exist at common law without the benefit of the statute. If the statute merely provides a procedure for obtaining relief, it does not trigger the application of the three-year statute of limitations under K.S.A. 60-512(2).

2. SAME—*Application of K.S.A. 60-513—Commencement of Statute of Limitation*. Under K.S.A. 60-513(b), in part, the causes of action listed in K.S.A. 60-513(a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until a time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party.

Appeal from Shawnee District Court; MARY E. CHRISTOPHER, judge. Opinion filed November 10, 2022. Affirmed.

Kurt A. Harper, of Depew Gillen Rathbun & McInteer, LC, of Wichita, for appellant.

Arthur Chalmers, assistant attorney general, *Bryan A. Ross*, assistant attorney general, and *Derek Schmidt*, attorney general, for appellee State of Kansas.

Sarah E. Washburn, legal counsel, for appellee Kansas Highway Patrol.

Before WARNER, P.J., GREEN and HILL, JJ.

GREEN, J.: Joseph A. Bott appeals after the district court dismissed his lawsuit against the State and the Kansas Highway Patrol (KHP). The district court also denied a claim that Bott filed against the Kansas Public Employees Retirement System (KPERS), who is not a party to this appeal. Bott's claims concerned the Deferred Retirement Option Program (DROP). Bott claims the district court erred in granting the motion to dismiss

because it improperly applied the statute of limitations, improperly determined when his claim accrued, and improperly denied his claim against KPERS by misinterpreting statutes. We conclude that the district court did not err when it applied the statute of limitations to Bott's claim. We also conclude that the district court did not err in determining when Bott's claim accrued. Finally, we conclude that the district court did not err when it denied Bott's claim against KPERS because the district court properly interpreted the applicable statutes. As a result, we affirm the district court's dismissal of Bott's claims.

FACTS

Joseph A. Bott began working for KHP in July 1984 and had been enrolled as a member of the Kansas Police and Firemen's Retirement System (KP&F) throughout his employment with KHP. In June 2016, Bott contacted an employee with KPERS and requested a retirement benefit estimate if he entered DROP.

In essence, DROP is available to KP&F members with the KHP and Kansas Bureau of Investigation who are eligible for full retirement. But instead of retiring, a given employee can elect to participate in DROP and have his or her monthly retirement benefit accumulate in a DROP account for a period of three, four, or five years—known as a DROP period—while he or she continues to work. During the DROP period, an employee does not accrue additional service time credit but can receive interest on the money in his or her DROP account if KPERS's investment returns each year meet a certain threshold. Upon retirement, the employee begins receiving his or her monthly retirement benefits, as well as a lump-sum payment for the money accrued in the DROP account over the DROP period.

After filing a retirement benefit estimate request, Bott and a KPERS employee engaged in a series of e-mails in which Bott sought to clarify questions he had about how DROP worked and how it would affect his retirement benefits if he entered a DROP program on December 1, 2016. After settling on that date, Bott applied for DROP in September 2016. Later that same month, Bott sent a letter to Major Jason De Vore. In the letter, Bott told De Vore that he wanted to enter DROP for a five-year DROP period. At the end of the month, Colonel Mark Bruce responded to Bott's letter

and informed Bott that his request to participate in a five-year DROP period had been denied.

At some point afterwards, Bruce met with Bott and encouraged him to complete an application for DROP with a three-year DROP period. After Bott did so, Bruce sent another letter in October 2016 notifying Bott that his request to enter DROP with a three-year DROP period had been approved. Bruce then signed Bott's application on the Appointing Authority line in the Employer Acknowledgement section, and Lea Weishaar signed the Designated Agent line of the same section. Towards the end of that month, a KPERS employee sent Weishaar a letter confirming receipt of Bott's DROP application. The letter stated that Bott's DROP period began on December 1, 2016, and would end on November 30, 2019.

In June 2019, Bott contacted KPERS regarding his DROP period, indicating he wished to change his DROP period from three years to five years. Bott also included his previous correspondence with De Vore, Bruce, and an undated e-mail from Major Scott Harrington concerning who could participate in DROP. A few days later, KPERS responded to Bott's request and notified him that he could not change his DROP period election because the decision was irrevocable. KPERS's general counsel also sent Bott a letter explaining why he could not change his DROP period election.

In September 2019, Bott sued the State, KHP, and KPERS in district court. In brief, Bott alleged that his request to participate in a 5-year DROP period was wrongfully rejected and sought damages for an amount equal to the 24-month difference between the 3-year DROP period and the 5-year DROP period.

In November 2019, KPERS issued a final agency determination that Bott could not change his DROP period election. In December 2019, KPERS received Bott's application for DROP and monthly retirement benefits, which also indicated the DROP period had been completed. Later the same month, Bott timely appealed KPERS's final agency determination, and the district court entered an order of dismissal without prejudice regarding Bott's September 2019 petition, which allowed Bott to seek exhaustion of his administrative remedies. Shortly afterwards, KPERS notified Bott that it had received his application and confirmed his retirement date of January 1, 2020.

In November 2020, KPERS issued a final order affirming its determination that Bott could not change his DROP period election from three years to five years. The following month, Bott filed another action in district court against the State, KHP, and KPERS. In this petition, he sought judicial review of KPERS's final order under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., in count I, as well as damages from the State and KHP in count II.

The district court later granted the motion to stay discovery and proceedings regarding count II filed by the State and KHP, pending final resolution of Bott's KJRA appeal against KPERS in count I. In May 2021, the district court denied count I of Bott's petition, dismissed KPERS as a defendant, and rescinded its order staying count II of Bott's petition.

The State and KHP later moved jointly to dismiss Bott's petition regarding count II, citing the running of the statute of limitations. Initially, the district court denied the motion but later granted the motion to dismiss after the State and KHP moved jointly for reconsideration of their initial motion to dismiss.

Bott timely appeals.

ANALYSIS

As an initial matter, we note that the Legislature amended the language of K.S.A. 74-4986n(b), which now reads, in part: "A member who first elected a DROP period of less than five years may extend, with the employer's authorization, such DROP period upon making application to the system." The statutory change became effective July 1, 2021. See L. 2021, ch. 75, § 5. Bott did not raise any argument concerning the change issue in district court, which means he cannot raise it on appeal. See *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020).

Did the district court err in applying the statute of limitations?

Bott claims that the district court erred in determining the applicable statute of limitations in his action. Specifically, Bott contends that the district court erred when it concluded that K.S.A. 60-512(2) did not apply to his claim.

In its original order regarding this claim, the district court concluded:

"[T]he DROP Act is not a statute which creates liability. Although K.S.A. 74-4986k, *et seq*. creates a statutory retirement benefit for [Kansas Bureau of Investigation] agents and certain firemen and police officers, it does not create any liability separate from preexisting common law torts. Therefore, the Court finds the three-year statute of limitations under K.S.A. 60-512 does not apply to the DROP Act."

As stated earlier, the district court did not originally grant the joint motion to dismiss filed by the State and KHP. But after the State and KHP moved jointly for reconsideration, the district court concluded that no genuine issue of material fact existed and granted the joint motion to dismiss.

Our standard of review is this: "Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review." *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). When K.S.A. 2021 Supp. 60-212(b)(6) is used to challenge the legal sufficiency of a claim, the appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state *any* claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly demonstrate the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

To the extent that we must interpret statutes, we exercise unlimited review because statutory interpretation presents a question of law. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *Montgomery v. Saleh*, 311 Kan. 649, 654, 466 P.3d 902 (2020). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. 311 Kan. at 654-55.

At issue in this case is whether K.S.A. 60-512(2) or K.S.A. 60-513 applies to Bott's claim. The two statutes require different

causes of action to be brought within either two or three years. K.S.A. 60-512(2)—the statute that Bott maintains should have been applied to his claim—provides a three-year limitation period for "[a]n action upon a liability created by a statute other than a penalty or forfeiture." Bott argues that the State, by enacting the DROP Act, K.S.A. 74-4986k et seq., created a liability on behalf of the program participants that had otherwise not previously existed.

In contrast, K.S.A. 60-513(a) states that certain actions must be brought within two years. The State and KHP argue that Bott's claim was subject to a two-year statute of limitations under K.S.A. 60-513(a)(3) or (a)(4), which concerns actions for fraud and actions for injuries to the rights of another, respectively.

We are guided in this inquiry by a previous decision of our Supreme Court that has considered the issue when K.S.A. 60-512(2) or K.S.A. 60-513 should apply under a party's claim. Most significantly, in *Eastman v. Coffeyville Resources Refining & Marketing*, 295 Kan. 470, 471, 284 P.3d 1049 (2012), Benjamin and Marcita Eastman sued Coffeyville Resources Refining & Marketing, LLC after it "accidentally released about 90,000 gallons of crude oil into floodwaters of the Verdigris River in Coffeyville." The Eastmans originally asserted a nuisance claim but later sought to recover damages under K.S.A. 65-6203, which required compensation to be paid by the person responsible for an accidental release of materials harmful to the waters or soil to the property owner where the discharge occurred for actual damages incurred by the property owner as a result of the release or discharge.

In this case, our Supreme Court had to determine the nature of the liability imposed under K.S.A. 65-6203. After making that determination, our Supreme Court had to determine what statute of limitations, if any, applied to K.S.A. 65-6203. On this argument, the Eastmans maintained that they had timely filed their cause of action because the three-year statute of limitations embodied in K.S.A. 60-512(2) applied to their suit. In contrast, Coffeyville Resources argued that the two-year statute of limitations embodied in K.S.A. 60-513(a)(4) applied because K.S.A. 65-6203 did not create any new liability. En route to its holding, our Supreme Court stated:

"To determine whether K.S.A. 60-512(2)'s 3-year limitation period for '[a]n action upon a liability created by a statute other than a penalty or forfeiture' applies in this case, we apply an 'identical-elements' test. Under that test, we consider 'whether a plaintiff would have had the *same* cause of action at common law, not *any* cause of action. . . ."

"The identical-elements test requires that we ascertain the most analogous cause of action under Kansas law. If an analogous common-law cause of action exists, we compare the elements of that action with the elements of the statute in question. If the statutory elements are not identical to the elements of the most analogous common-law cause of action, K.S.A. 60-512(2) applies. [Citations omitted.]" 295 Kan. at 478-79.

After applying the identical elements test, our Supreme Court concluded that the three-year statute of limitations in K.S.A. 60-512(2) applied to the Eastmans' actions brought under K.S.A. 65-6203 "[b]ecause the elements necessary to establish liability imposed under K.S.A. 65-6203 are not identical to the elements necessary to impose liability under the common-law doctrine of strict liability." 295 Kan. at 480.

By contrast, Bott argues that the district court's error "in rejecting the applicability of the three-year statute of limitations prescribed in K.S.A. 60-512 stems from . . . a confusion concerning how to properly label [his] claims against the [State and KHP] under Count II of the Petition." Nevertheless, any confusion the district court had in labeling Bott's claim would seem to have occurred from Bott's failure to label the claim in his petition. Even so, Bott contends on appeal that he stated a claim for fraudulent inducement of a contractual agreement. We agree.

The elements of fraudulent inducement are as follows:

"(1) The defendant made false representations as a statement of existing and material fact; (2) the defendant knew the representations to be false or made them recklessly without knowledge concerning them; (3) the defendant made the representations intentionally for the purpose of inducing another party to act upon them; (4) the other party reasonably relied and acted upon the representations; (5) the other party sustained damages by relying upon the representations. A representation is material when it relates to some matter that is so substantial as to influence the party to whom it is made. [Citations omitted.]" *Stechschulte v. Jennings*, 297 Kan. 2, 19-20, 298 P.3d 1083 (2013).

Here, Bott's claim met the essential elements of a fraudulent inducement action. For example, Bott alleged in his suit the following: (1) Bruce falsely represented he had discretion to validly reject Bott's original application for a 5-year DROP election; (2) Bruce either knew he did not have the authority to reject Bott's original DROP period election or made the representation without knowing whether he had such discretion; (3) Bruce made such representation because he wanted Bruce to change his DROP election from a 5-year DROP period to a 3-year DROP period; (4) Bott relied on Bruce's representation; and (5) Bott suffered damages as a result of the money he lost because of the 24-month difference between a 3-year DROP period and a 5-year DROP period.

Nevertheless, when we contrast the identical elements test discussed in *Eastman* to the statute in question in Bott's claim, this Act (K.S.A. 74-4986k et seq.) does not provide a separate statutory right for Bott to recover damages. For example, in *Eastman*, the Eastmans' suit against Coffeyville Resources was based on a statutory right to recover damages under K.S.A. 65-6203. 295 Kan. at 471-72. Here, Bott's action is not based on any statutory right to recover damages.

Indeed, in its original order, the district court arrived at the same conclusion, stating:

> "The DROP Act does not resemble any of the statutory acts creating liability that were cited in *Gehring*[*v. State*, 20 Kan. App. 2d 246, 886 P.2d 370 (1994)], such as the [Kansas Tort Claims Act], the [Kansas Consumer Protection Act], the veterans' preference law, etc., as the Drop Act does not contain any provisions for violations of the act."

Moreover, we have previously stated that "[t]he appropriate inquiry to determine whether a liability is created by a statute (thus making K.S.A. 60-512[2] applicable) is whether liability for resultant damages would not arise but for the statute." *Haag v. Dry Basement, Inc.*, 11 Kan. App. 2d 649, 650, 732 P.2d 392 (1987). In *Gehring v. State*, 20 Kan. App. 2d 246, 250, 886 P.2d 370 (1994), this court stated:

> "In determining whether the three-year statute of limitations applies, our inquiry is whether the statute created the cause of action. An action is not based upon a liability created by statute if the right would exist at common law without the statute. A statute is merely remedial if it does not give any new rights."

Our Supreme Court also adopted this approach in *Burnett v. Southwestern Bell Telephone*, 283 Kan. 134, 145-46, 151 P.3d 837 (2007), when the court quoted this court's standard in *Pecenka v. Alquest*, 6 Kan. App. 2d 26, 28, 626 P.2d 802 (1981). The *Pecenka* court reasoned: "It is not enough to simply state that there is an injury to the rights of another to remove the cause of action from the operation of the three-year statute of limitations. Rather, the inquiry must be whether the statute created the cause of action." 6 Kan. App. 2d at 28.

The *Pecenka* court then cited 51 Am. Jur. 2d, Limitation of Actions § 82, p. 659 and stated:

"'A statute "creates" no liability, as regards the applicability of a statute of limitations with respect to an action to recover upon a liability created by statute, unless it discloses an intention, express or implied, that from disregard of the statutory command a liability for resultant damages shall arise which would not exist except for the statute. Clearly, an action is not based upon a liability created by statute if the right is one which would exist at common law in the absence of statute.'" 6 Kan. App. 2d at 28.

Given the absence of any statutory right to recover damages under K.S.A. 74-4986k et seq., paired with the fact that Bott's claim is identical to the elements of fraudulent inducement, we conclude that the district court properly rejected the application of K.S.A. 60-512(2) to Bott's claim.

Did the district court err in determining when Bott's claim accrued?

Next, we must determine whether the district court erred in determining when Bott's claim accrued. Bott argues "the earliest date on which [his] claim could have accrued was in November of 2020." The State and KHP argue Bott's claim accrued on September 30, 2016.

The standards of review set forth in the preceding issue regarding a motion to dismiss also apply to this issue. See *Jayhawk Racing Properties*, 313 Kan. at 154; *Kudlacik*, 309 Kan. at 790.

At this point, it would be helpful to recap the timeline of Bott's case. Bott completed his DROP application on September 1, 2016. On September 22, 2016, Bott sent a letter to De Vore stating he

wished to enter DROP for a five-year DROP period. On September 30, 2016, Bruce responded to Bott's letter and informed Bott that his request to participate in a five-year DROP period had been denied. At some point afterwards, Bruce met with Bott and encouraged him to complete an application for DROP with a three-year DROP period.

After Bott complied, Bruce sent another letter on October 12, 2016, notifying Bott his request to enter DROP with a three-year DROP period had been approved. On October 18, 2016, KPERS received Bott's DROP application. On October 20, 2016, Bruce signed Bott's application on the Appointing Authority line in the Employer Acknowledgement section. Weishaar signed Bott's DROP application on October 21, 2016, on the Designated Agent line in the Employer Acknowledgement section. On October 25, 2016, a KPERS employee sent Weishaar a letter confirming receipt of Bott's DROP application. The same day, a KPERS employee sent Bott a letter confirming his DROP start and end dates.

On June 5, 2019, KPERS's general counsel notified Bott he could not change his DROP period election. On November 15, 2019, KPERS issued a final agency determination that Bott could not change his DROP period election. On December 4, 2019, KPERS received Bott's application for DROP and monthly retirement benefits, which also indicated the DROP period had been completed. On December 9, 2019, Bott appealed KPERS's final agency determination. On December 11, 2019, KPERS notified Bott it had received his application and confirmed his retirement date of January 1, 2020. On November 20, 2020, KPERS issued a final order affirming its determination that Bott could not change his DROP period election from three years to five years.

Having concluded that Bott's claim is governed by K.S.A. 60-513(a), we must determine the date Bott's claim accrued. This statute states:

"[T]he causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. 60-513(b).

This leads us to two inquiries related to determining when the statute of limitations on Bott's claim began to run: (1) When did Bott "suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) When did the existence of that injury become reasonably ascertainable to [him]?" *LCL v. Falen*, 308 Kan. 573, 583, 422 P.3d 1166 (2018).

In its July 2021 order, the district court identified September 30, 2016, as the triggering date. The district court based this conclusion on the fact that Bott identified that date as the date of KHP's wrongful conduct. The district court also deemed Bott's "argument concerning his pursuit of administrative remedies with KPERS" was confusing because his claim concerned the alleged wrongful conduct of KHP. As a result, the district court concluded that if Bott "is asserting a claim of fraud, fraudulent inducement, or negligent misrepresentation, and he first filed his Petition in Shawnee County District Court," the State and KHP were correct that his claim was barred by K.S.A. 60-513. Nonetheless, the district court did not originally grant the State and KHP's motion for dismissal because "genuine issues of material fact remain based on [Bott's] assertion that he first filed a lawsuit in Sedgwick County on September 17, 2019." But after the State and KHP moved jointly for reconsideration, the district court granted the motion to dismiss because Bott's lawsuit filed on September 17, 2019, was a year later than the two-year statute of limitations, and Bott did not sustain his burden to provide information to support his assertion the statute of limitations had been tolled.

As stated earlier, Bott argues that "the earliest date on which [his] claim could have accrued was in November of 2020." Bott's brief does not specify a date on which he suffered an actionable injury. See *Falen*, 308 Kan. at 583. Instead, he essentially combines the two inquiries and argues his claim could not have accrued until he "had exhausted his efforts to obtain a 5-year benefit and that there was, in fact, no injury until the end of his three years and the refusal of KPERS and KHP to allow him a five-year election as he had originally attempted." He also argues that his claim could not have accrued until his injury had matured into being actionable, which he believes occurred after he completed his DROP period.

The State and KHP disagree and argue that Bott's action "could and should have been commenced within two years of [his] signature on his paperwork for enrollment into the DROP program on September 30, 2016. If not on the September 2016 date, then at the very latest, within two-years of [KPERS's] acceptance of the enrollment paperwork." The State and KHP contend that Bott suffered his alleged injury on September 30, 2016, when Bruce denied Bott's request to participate in a five-year DROP period. The State and KHP also contend that the extent of his injury was reasonably ascertainable on that date because he knew the decision was irrevocable, and he had already received an estimation of his retirement benefit payments. Lastly, the State and KHP assert that Bott was not required to exhaust administrative remedies against KPERS before filing his tort action against the State and KHP.

As an initial matter, the State and KHP are correct that KPERS is not a party to Bott's appeal. In Bott's December 2020 petition, he separated his claims against KPERS and his claims against the KHP in counts I and II, respectively. In count I Bott sought judicial review of KPERS's determination that he could not change his initial DROP election period, and he asked the district court to only reverse KPERS's final order. But in count II, he sought relief for KHP's alleged wrongful actions. Thus, it is unclear why Bott would have to wait until KPERS issued a final agency determination to pursue a tort claim against the State and KHP.

In *Roe v. Diefendorf*, 236 Kan. 218, 689 P.2d 855 (1984), our Supreme Court dealt with an analogous situation. There, Roe brought a negligence action against Diefendorf, seeking damages for injuries suffered in an automobile accident. The accident occurred in November 1979, and Roe filed suit against Diefendorf in June 1982. Diefendorf sought summary judgment against Roe, claiming the statute of limitations had run. The district court denied the motion, reasoning that the statute of limitations under K.S.A. 60-513(b) had not run because Roe did not realize he sustained a substantial injury until February 1981.

On appeal, our Supreme Court had to determine how K.S.A. 60-513(b)'s "substantial injury" provision should be interpreted. Our Supreme Court began by discussing previous decisions and noted what appeared to be a conflict in how cases involving

knowledge of an injury versus extent of an injury were decided. In resolving this issue, our Supreme Court stated:

> "Our decisions are reconcilable. The rule which has developed is: The statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the injured person. In *Hecht*[*v. First National Bank & Trust Co.*, 208 Kan. 84, 490 P.2d 649 (1971)], neither the negligent act nor the injury were ascertainable until a later date. The stated rule provides a constitutionally permissible interpretation of K.S.A. 60-513(b). We hold the use of the term 'substantial injury' in the statute does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitations. Rather, it means the victim must have sufficient ascertainable injury to justify an action for recovery of the damages, regardless of extent. An unsubstantial injury as contrasted to a substantial injury is only a difference in degree, *i.e.*, the amount of damages. That is not a legal distinction. Both are injuries from which the victim is entitled to recover damages if the injury is the fault of another." *Diefendorf*, 236 Kan. at 222.

In *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 87, 716 P.2d 575 (1986), a case concerning a legal malpractice claim, our Supreme Court explained that "a cause of action accrues, so as to start the running of the statute of limitations, as soon as the right to maintain a legal action arises. . . . [A]n action accrues [when] the plaintiff could first have filed and prosecuted his action to a successful conclusion." More recently, our Supreme Court again adhered to the rule pronounced in *Pancake House* in another legal malpractice claim and stated that "'[a] cause of action accrues when the right to institute and maintain a suit arises, or when there is a demand capable of present enforcement.'" *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, 633, 355 P.3d 667 (2015) (quoting *Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406, 410, 582 P.2d 244 [1978]).

Applying these principles, we determine that the district court correctly concluded that Bott—by bringing his tort claim against the State and KHP—suffered the alleged injury on September 30, 2016, because that is the date when Bruce denied his request to participate in a five-year DROP period. In the alternative, we conclude that Bott's alleged injury occurred on October 25, 2016, when KPERS sent Bott a letter confirming his DROP start and end dates.

We further conclude that Bott could have reasonably ascertained the extent of his injuries on either of those dates. See *Falen*,

308 Kan. at 583. Stated differently, Bott could have or should have known the existence of the injury he claimed to have suffered on either of those dates because that is when Bruce denied his application for a five-year DROP period and his participation in a three-year DROP period became official. His DROP application form supports this conclusion because, in the DROP Commitment section, Bott selected December 1, 2016, as his irrevocable start date. And above his signature, the application states: "I confirm my election to participate in the DROP, and I understand that this election is irrevocable."

This conclusion is also supported by the versions of the statutes in effect when Bott entered DROP in 2016. The version of K.S.A. 74-4986*l*(a)(5) in effect then defined the DROP period as "the period of time that a member irrevocably elects to participate in the DROP pursuant to K.S.A. 74-4986n, and amendments thereto." Similarly, the version of K.S.A. 74-4986n(b) in effect then stated, in relevant part: "A member may participate in the DROP only once. An election under this section is a one-time irrevocable election."

Additionally, as our Supreme Court stated in *Diefendorf*, Bott was not required "to have knowledge of the full extent of the injury to trigger the statute of limitations. Rather, [substantial injury] means the victim must have sufficient ascertainable injury to justify an action for recovery of the damages, regardless of extent." 236 Kan. at 222. The fact Bott might not have known the precise total of damages he would have been owed does not change this conclusion because that would be a "difference in degree," "not a legal distinction." 236 Kan. at 222.

Thus, under K.S.A. 60-513(b), Bott suffered an actionable injury on either September 30, 2016, or October 25, 2016, and the existence of the injury became reasonably ascertainable then. See *Falen*, 308 Kan. at 583. As a result, Bott's claim against the State and KHP needed to have been brought within two years from those dates. See K.S.A. 60-513(a). Because he failed to do so, we conclude that the district court correctly dismissed his claim.

Did the district court err by denying Bott's claim against the Kansas Public Employees Retirement System?

In Bott's final claim, he contends that the district court erred when it concluded that KPERS could not accept his application to participate in a five-year DROP period after he had already selected a three-year DROP period. The State and KHP, however,

argue that this issue is not properly before us because KPERS is not a party to this appeal. Neither Bott's original brief nor his reply brief challenges this contention. As stated earlier, the State and KHP are correct that KPERS is not a party to this appeal.

Even so, we conclude that the district court did not err in denying Bott's claim against KPERS. As previously stated, we exercise unlimited review when interpreting statutes. See *Nauheim*, 309 Kan. at 149.

When Bott filed his action against the State, KHP, and KPERS, he sought judicial review under the KJRA—based on K.S.A. 77-601 et seq. Bott challenged KPERS's determination that he could not change his DROP period election from three years to five years. He did not list a specific ground for relief; he simply asked the district court to deem KPERS's decision erroneous.

When resolving the claim on judicial review, the district court correctly noted that K.S.A. 77-621(c) sets forth the grounds on which a court can grant relief. Ultimately, the district court concluded that Bott's claim was brought under K.S.A. 77-621(c)(4), which allowed the district court to grant relief if it determined that KPERS "erroneously interpreted or applied the law." The district court then moved to statutory interpretation, assessing Bott's claim under the versions of the statutes in effect then.

As the district court pointed out, the version of K.S.A. 74-4986n(b) in effect when Bott began participating in DROP stated, in relevant part: "A member may participate in the DROP only once. An election under this section is a one-time irrevocable election." Similarly, the version of K.S.A. 74-4986*l*(a)(5) in effect then defined DROP period as "the period of time that a member irrevocably elects to participate in the DROP pursuant to K.S.A. 74-4986n, and amendments thereto."

Having concluded Bott failed to sustain his burden under K.S.A. 77-621(a), the district court denied Bott's claim. We conclude the same. The district court followed the correct procedure under the KJRA and properly interpreted the statutes. As a result, we conclude that the district court properly denied Bott's claim against KPERS.

Affirmed.

(522 P.3d 282)

No. 124,674

ROBERT QUINN, *Appellant*, v. STATE OF KANSAS, *Appellee*.

---

1. HABEAS CORPUS—*Date Mandate Issued in Case Not Tethered to Date Action Is Final for K.S.A. 60-1507 Motion.* The date the clerk of the appellate court issues the mandate in a case, which the court can shorten or extend at the court's discretion, is not tethered to the date the action is final for purposes of filing a K.S.A. 60-1507 motion.

2. SAME—*Deadline for Filing K.S.A. 60-1507 Motion Runs from Date of Decision Denying Review.* The time frame for filing a K.S.A. 60-1507 motion runs from the date of the decision denying review, not the date the clerk of the appellate courts issues the mandate.

3. APPELLATE PROCEDURE—*Date of Mandate Does Not Change if Corrected Mandate Filed.* The date of the mandate issued by the clerk of the appellate courts does not change if a corrected mandate is subsequently filed.

4. HABEAS CORPUS—*No Right to Appointed Counsel to Help Prisoner File K.S.A. 60-1507.* A prisoner has no right to appointed counsel to help the prisoner file a K.S.A. 60-1507 motion.

5. SAME—*Application of Doctrine of Res Judicata to 60-1507 Movant When Issues Previously Raised by Final Appellate Court Order.* The doctrine of res judicata applies to a K.S.A. 60-1507 movant who seeks to raise issues which have previously been resolved by a final appellate court order in their criminal case.

Appeal from Wyandotte District Court; AARON T. ROBERTS, judge. Opinion filed November 23, 2022. Affirmed.

Rosie M. Quinn, of Rosie M. Quinn Attorney LLC, of Kansas City, for appellant.

Kayla Roehler, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and HURST, JJ.

ARNOLD-BURGER, C.J.: Robert Quinn appeals the summary denial of his claim for relief under K.S.A. 60-1507 as well as the court's failure to appoint an attorney to represent him. Because we find that Quinn was not entitled to an attorney to help him file a

K.S.A. 60-1507 motion and because Quinn's motion is both untimely and barred by res judicata, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A jury convicted Quinn of rape in 2011. He appealed and this court affirmed his conviction. *State v. Quinn*, No. 109,321, 2015 WL 423653 (Kan. App. 2015) (unpublished opinion). In his direct appeal, he argued that the district court erred in denying him a new trial based on the ineffectiveness of his trial counsel, Charles Lamb. The district court held an evidentiary hearing on his claim of Lamb's ineffectiveness in which several witnesses including himself and Lamb testified. The court issued detailed findings in denying his motion. On appeal this court agreed that Quinn had failed to establish that Lamb's representation was ineffective and affirmed his conviction. 2015 WL 423653, at *11. The clerk of the appellate courts issued the mandate in August 2015 after his petition for review was denied by the Supreme Court.

Over five years later, in January 2021, Quinn filed his only motion under K.S.A. 60-1507 alleging ineffective assistance of counsel and the "victim lied." In detailing his claim against Lamb he wrote, "He didn't request lie detector test. He didn't question her on her supposed rape." As to the veracity of the victim, he claimed "[s]he lied about using drugs that night" and "[s]he lied when she said I ripped her clothes." He asked that the court appoint a lawyer for him. Quinn did not make these specific claims about Lamb in his direct appeal although he made many others. The court denied the request and summarily denied his motion as untimely in September 2021. Quinn filed a timely notice of appeal in November 2021.

In March 2022, Quinn's appellate counsel filed a motion with the clerk of the appellate courts to recall the mandate it had issued in August 2015. She argued that the mandate did not adhere to the usual and customary procedures of mandates because it did not recite the denial of the petition for review by the Supreme Court or the date of it, did not have the seal of the court affixed to it, and the copy of the decision was not certified. This court granted the motion and issued a corrected mandate on April 19, 2022.

ANALYSIS

I. QUINN'S 60-1507 MOTION WAS UNTIMELY

Prisoners must file motions under K.S.A. 2021 Supp. 60-1507(f) for postconviction relief within one year of "[t]he final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction." Here, the Kansas Supreme Court denied Quinn's petition for review in his direct appeal on August 20, 2015. The clerk of the appellate courts issued the mandate August 25, 2015. Nothing else was filed by Quinn, such as a motion of rehearing or modification or a notice of intent to file a petition for a writ of certiorari. Quinn was therefore required to file any motion under K.S.A. 60-1507 no later than August 2016. His motion was not filed until January 2021, over four years after the statutory deadline.

Quinn argues, for the first time on appeal, that his K.S.A. 60-1507 motion was not untimely because the one-year time limit did not start until the filing of the corrected mandate in April 2022.

Generally, parties cannot raise issues on appeal that they did not raise before the trial court. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). There are a few exceptions to this rule that may be invoked at the discretion of the appellate court. *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (holding that the decision to review an unpreserved claim under an exception is a prudential one—even if one of these exceptions would support a decision to review a new claim, the appellate court need not do so). Quinn invokes such an exception here. He argues that it is a question of law that should determine this case.

Since the answer is clear in our existing caselaw and does not require any fact-finding by the district court, we elect to address Quinn's new claim.

a. Our standard of review is de novo.

Interpretation of an appellate court mandate and its effect is a question of law subject to de novo review. *State v. Morningstar*, 299 Kan. 1236, 1240-41, 329 P.3d 1093 (2014). Likewise, to the extent that our analysis requires statutory interpretation, our review is de novo. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d

1015 (2019). And finally, the interpretation of a Supreme Court rule, like interpreting a statute, is a question of law. *Kansas Judicial Review v. Stout*, 287 Kan. 450, 459, 196 P.3d 1162 (2008).

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be established. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *State v. Ayers*, 309 Kan. 162, 164, 432 P.3d 663 (2019).

b. The final order of the last appellate court in the state to exercise jurisdiction is the date the Supreme Court denies the petition for review if such a petition is filed.

So we start with the language of the statute governing 60-1507 actions:

"(1) Any action under this section must be brought within one year of:

(A) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or

(B) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court's final order following granting such petition." K.S.A. 2021 Supp. 60-1507(f).

Procedures governing petitions for review "shall be prescribed by rules of the supreme court." K.S.A. 20-3018(b). Next, we turn to the rules of the Kansas Supreme Court to determine when a Court of Appeals decision is final. "The Court of Appeals decision is final as of the date of the decision denying review." Rule 8.03(h) (2022 Kan. S. Ct. R. at 59). This rule is repeated in subsection (k)(4) (2022 Kan. S. Ct. R. at 61): "If a petition for review is denied, the Court of Appeals decision is final as of the date of the denial." We believe the plain language of the statute and Rule 8.03 control the result here. The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal would be the denial of the petition for review by our Supreme

Court. The termination of such appellate jurisdiction would be the date of the Court of Appeals opinion when no petition for review is filed, or the date of dismissal of the appeal for any variety of reasons. Accordingly, the time frame for filing a 60-1507 motion runs from the date of the decision denying review, not the date the clerk of the appellate courts issues the mandate as Quinn suggests.

We recognize that both the Supreme Court and our court have filed cases measuring the time to file a 60-1507 motion from the date the mandate was issued—although the issue has never been squarely presented to it, nor was the date of the mandate versus the date the judgment was final determinative. See, e.g., *White v. State*, 308 Kan. 491, 421 P.3d 718 (2018); *Rowell v. State*, 60 Kan. App. 2d 235, 490 P.3d 78 (2021). Our court has often cited *Tolen v. State*, 285 Kan. 672, 176 P.3d 170 (2008), for the proposition that appellate jurisdiction ends upon the denial of a petition for review, not the date of the mandate. See *Sellers v. State*, No. 116,923, 2018 WL 2072656, at *2 (Kan. App. 2018) (unpublished opinion) (finding that appellate jurisdiction terminates when the Supreme Court denies a petition for review, not when the clerk of the appellate courts issues the mandate); *Burton v. State*, No. 100,555, 2009 WL 4639354, at *1 (Kan. App. 2009) (unpublished opinion) (same). Given the unique facts of *Tolen*, which revolved around whether Tolen could take advantage of a one-year grace period following the amendment to K.S.A. 60-1507 in 2003, its citation for a conclusion that the date of the mandate is irrelevant is a bit of a stretch. But it is clear that the court did not track the loss of jurisdiction to the date of the mandate.

We also concede that our holding here is contrary to Supreme Court Rule 183(c)(4) (2022 Kan. S. Ct. R. at 243) which does appear to tether a 60-1507 action to the date of the mandate:

> "[A] motion under K.S.A. 60-1507 must be filed no later than one year after the later of:
>
> (A) the date the mandate is issued by the last appellate court in this state which exercises jurisdiction on a movant's direct appeal or the termination of the appellate court's jurisdiction; or
>
> (B) the date the United States Supreme Court denies a petition for the writ of certiorari from the movant's direct appeal or issues its final order after granting the petition."

But our Supreme Court has made clear that a court rule cannot expand a statutory deadline. *Jones v. Continental Can Co.*, 260 Kan. 547, 557-58, 920 P.2d 939 (1996). And the Legislature clearly knows how to tether the filing of an action to the mandate, because it did so in K.S.A. 2021 Supp. 21-6702(d)(2) ("If an appeal is taken and determined adversely to the defendant, such sentence may be modified within 120 days after the receipt by the clerk of the district court of the mandate from the supreme court or court of appeals."). But K.S.A. 60-1507 does not contain language tethering the filing deadline to the date of the mandate. It tethers it only to the (1) final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or (2) the termination of such appellate jurisdiction. The mandate is issued by the clerk of the appellate courts. It is not signed by the court. The final order of the last appellate court would be, in this case, the order denying Quinn's petition for review. See Rule 8.03(h) (2022 Kan. S. Ct. R. at 59).

Even more telling is the fact that Rule 183(c)(4) does not equate the issuance of the mandate with the termination of appellate jurisdiction—the second clause in Supreme Court Rule 183(c)(4)(A). And that makes sense.

The purpose of the mandate is to advise the trial court that the appellate court has returned jurisdiction to it. The statute refers to the date "a decision of an appellate court becomes final" and requires the court to "promptly cause to be transmitted" the mandate to the district court containing directions. K.S.A. 60-2106(c). In other words, after the decision is final, the clerk of the appellate courts issues the mandate advising the district court that it has returned jurisdiction to it. Our rules require that the district court take specific actions in criminal cases upon receipt of the mandate. See Supreme Court Rule 4.02(f) (2022 Kan. S. Ct. R. at 30) (requiring that upon receipt of the mandate, the court order the defendant to appear or issue a warrant for the defendant). Likewise, Supreme Court Rule 7.03(b)(1)(A)(ii) (2022 Kan. S. Ct. R. at 46) requires that the mandate be filed seven days after denial of the petition for review. The mandate serves solely as notice to the district court that the decision of the court has become final and includes any instructions for further action that the district court

must take. See K.S.A. 60-2106(c). The mandate itself does not make the decision final, it is simply notice to the district court that the final decision in the case has been made and the date of that decision.

Moreover, if a motion for rehearing is filed in the Court of Appeals, although the filing stays the issuance of the mandate it does not extend the time for petitioning for review with the Supreme Court. Supreme Court Rule 7.05(b) (2022 Kan S. Ct. R. at 51). These are separate processes. The date the mandate is issued, which can be shortened or extended at the court's discretion, is not tethered to the date the action is final—although it cannot be issued until the decision is final. See Rule 7.03(b)(1)(B).

And finally, there is no statutory or court rule requirement that the defendant ever receive a copy of the mandate. Only the clerk of the district court has a right to receive the mandate along with a certified copy of the decision. Rule 7.03(b). The Supreme Court has long recognized its power to recall, correct, amplify, or modify its own mandate. See, e.g., *West v. Insurance Co.*, 105 Kan. 414, 415-16, 185 P. 12 (1919). It is not unusual for the court to even enter a supplemental mandate, rather than simply filing a "correct[ed]" mandate as here. *Union Central Life Ins. Co. v. Irrigation L. & T. Co*., 146 Kan. 545, 547, 73 P.2d 70 (1937).

It would be impractical for the date the mandate is issued to start the clock running for filing a motion under K.S.A. 60-1507, when the defendant is not required to receive a copy of the mandate. On the other hand, the court sends copies of the decision to the attorney of record, and if none, a copy is sent to the defendant on the date the decision is filed. Rule 7.03(a). So the defendant is aware of the only relevant date—the date the decision denying the petition for review is filed. Quinn does not contend that his attorney did not receive a copy of the opinion in his direct appeal or that he did not receive notice that his petition for review had been denied. To tether the finality of the judgment to the date of the mandate in a 60-1507 action would make the time to appeal a fluid concept based on when the clerk of the appellate courts happens to prepare and file the mandate even if the prisoner is not notified of it.

c. The date of the mandate does not change if it is subsequently amended or corrected.

Moreover, even if the date of the mandate were tethered to the filing of an action under K.S.A. 60-1507, the date does not change if a corrected mandate is subsequently filed. So Quinn's filing would still be untimely. This is similar to the process of filing a nunc pro tunc to correct an error in a journal entry. Our Supreme Court has made clear that the "judgment is one thing. The record of the judgment is a different thing." *Tafarella v. Hand*, 185 Kan. 613, 617, 347 P.2d 356 (1959). Like a mandate, the court can correct the journal entry at any time either on motion of a party or on its own motion. And as the court said in *Tafarella*, the correction does not make an order "now for then" but corrects an entry now that the court has already entered. 185 Kan. at 618 (citing *Bush v. Bush*, 158 Kan. 760, 763, 150 P.2d 168 [1944]). And a court's entry of a nunc pro tunc order does not affect the finality of the sentence. *State v. Hood*, No. 112,332, 2016 WL 463742, at *4 (Kan. App. 2016) (unpublished opinion) (citing *State v. Mason*, 294 Kan. 675, 677, 279 P.3d 707 [2012]). It has "the same effect as if filed in the first instance." *Ramsey v. Hand*, 185 Kan. 350, 361, 343 P.2d 225 (1959). To hold otherwise would allow parties to reopen cases for collateral challenge due solely to clerical or technical errors in the mandate—errors that did not affect the *finality* of the court's decision.

d. The date of the mandate can be significant in conjunction with the filing of a notice of intent to file a writ of certiorari with the United States Supreme Court.

We pause to note that there are some circumstances when our court has cited the date of the mandate as important to the outcome of an unrelated case. These unpublished cases appear to be limited to circumstances in which the court is trying to determine whether a change in the law has occurred during the pendency of a direct appeal, thus allowing a party to receive the benefit of the change without having argued its application at trial. And they rely on the procedure set out in K.S.A. 2021 Supp. 22-3605(b) (automatically staying a mandate when a notice of intent to file a petition for a writ of certiorari is filed). For example, in *State v. Kelly*, No.

123,118, 2022 WL 881700, at *6 (Kan. App. 2022) (unpublished opinion), *rev. denied* 316 Kan. ___ (September 30, 2022), the issue was the application of *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019) (finding a portion of the criminal threat statute to be unconstitutional), to a trial after our Kansas Supreme Court decided *Boettger* but while the mandate had been statutorily stayed due to the State's filing of notice of intent to petition for a writ of certiorari with the United States Supreme Court. See K.S.A. 22-3605(b)(1)(A). Our court found that although our Supreme Court had entered the decision it was not controlling while awaiting a decision from the United States Supreme Court. That decision came and the mandate was issued several months after Kelly was sentenced but before his direct appeal was final. We found that under these circumstances Kelly could argue the application of *Boettger* for the first time on appeal. 2022 WL 881700, at *6. But we also note that our Supreme Court reports the *Boettger* decision as final on October 25, 2019—not the date the mandate was issued in 2020. See *State v. Herrman*, No. 122,884, 2022 WL 569737, at *2 (Kan. App. 2022) (unpublished opinion) (same although it involves application of *Boettger* to Herrman's criminal history score), *rev. denied* 316 Kan. ___ (September 30, 2022). And, none of these cases suggest or even touch on an argument that the one-year time limit to file a motion under K.S.A. 60-1507 is controlled by the date the mandate is issued.

Treatment of the finality of a decision in the case when a petition for a writ of certiorari is filed matches the procedure followed when a petition for review is filed in a Court of Appeals decision. The decision of our court does not become final until the petition for review is denied by the Kansas Supreme Court. Likewise, for purposes of postconviction relief on a Kansas appellate case in which a party has requested a writ of certiorari, the case would not be final for purposes of postconviction relief until the United States Supreme Court denies the request. The statute seems to anticipate that in those situations the automatic stay on the mandate is automatically lifted with the filing of the denial of the petition for a writ of certiorari. K.S.A. 2021 Supp. 22-3605(b)(3). So the dates are the same.

In sum, Quinn's petition for review was denied on August 20, 2015. The mandate was issued just five days later. Quinn does not

claim any prejudice from the errors in the original mandate. They did not prevent him from filing a timely 60-1507 motion. In fact, he concedes he never received a copy of the mandate, so he could not have relied on it. And finally, the date of the mandate did not change based on a subsequent correction issued by the clerk of the appellate courts.

Quinn's time in which to file a motion under K.S.A. 60-1507 ended in August 2016. We agree with the district court that his motion was untimely.

II. THE DISTRICT COURT DID NOT ERR IN FAILING TO APPOINT COUNSEL FOR QUINN

Quinn argues that the district court erred in summarily denying his K.S.A. 60-1507 motion without first appointing an attorney for him.

When the district court denies a 60-1507 motion based only on the motion, files, and records appellate courts exercise de novo review. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014). And though we liberally construe pro se pleadings, a person filing such a motion still must allege facts that warrant a hearing. *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018). Conclusory allegations with no evidentiary basis in the record are not enough to carry the movant's burden. 307 Kan. at 304.

A prisoner has no right to appointed counsel to help file a 60-1507 motion. *Stewart v. State*, 310 Kan. 39, 44, 444 P.3d 955 (2019) (noting no state or federal constitutional right to pursue a postconviction collateral attack). The purely statutory right to counsel arises only after the petition is filed.

The court must appoint counsel for an indigent prisoner if the 60-1507 motion they have filed presents "substantial questions of law or triable issues of fact." 310 Kan. at 46. Or if the prisoner is not entitled to counsel but the court conducts a hearing at which the State is represented by counsel, the court must appoint counsel to even the playing field under concepts of due process. Otherwise, it is a purely discretionary call by the district court whether to appoint counsel. The court does have the authority to summarily deny a prisoner's 60-1507 motion without appointing counsel if the "files and records of the case, including any response to the

motion from the State, conclusively show that the [prisoner] is entitled to no relief under that motion." 310 Kan. 39, Syl. ¶ 4.

Here there was no hearing conducted in which the State was represented, and Quinn was not. The court decided the case based solely on its review of the files and records in the case and found it to be untimely. Accordingly, Quinn had no constitutional or statutory right to counsel to assist him at any stage, including the filing of the motion.

III. QUINN HAS FAILED TO ESTABLISH MANIFEST INJUSTICE TO EXCUSE THE UNTIMELINESS OF HIS MOTION UNDER K.S.A. 60-1507

a. A court may excuse an untimely K.S.A. 60-1507 motion on a showing of manifest injustice.

A defendant has one year from when a conviction becomes final to file a 60-1507 motion. K.S.A. 2021 Supp. 60-1507(f)(1). The district court may extend this limit only to prevent a manifest injustice. K.S.A. 2021 Supp. 60-1507(f)(2). A defendant who files a motion under K.S.A. 2021 Supp. 60-1507 outside the one-year time limitation and fails to affirmatively assert manifest injustice is procedurally barred from maintaining the action. *State v. Trotter*, 296 Kan. 898, 905, 295 P.3d 1039 (2013).

The Kansas Legislature has defined manifest injustice as limited to "determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence." K.S.A. 2021 Supp. 60-1507(f)(2)(A).

Quinn asserts that this exception applies to him. He does not claim actual innocence, but instead believes the reason he failed to file the action within one year justifies a finding of manifest injustice. He asserts that his filing was untimely because he detrimentally relied on the honest belief that the district court had appointed or was appointing counsel to help him file his motion. Under such circumstances, he claims it is manifestly unjust to hold him to the one-year limitation. A few more facts are necessary to provide context for Quinn's claim.

For reasons which are unclear from the record, in September 2016—over a year after the decision was final in this case—Judge

Michael Grosko appointed an attorney, Gerald Wells, to represent Quinn for "[a]ppeal." Wells had no contact with Quinn. In June 2017—almost two years after the decision was final in this case—Quinn wrote the court asking for assistance in completing a 60-1507 motion form. He asked for the day he was sentenced and the first name of his trial attorney, Lamb. He also noted "I have asked for an attorney from Judge Roberts and Judge Lampson. I haven't heard back from them." No other filings appear in the case, and in March 2018 Judge Aaron Roberts appointed Gerald Wells to represent Quinn for a "K.S.A. 60-1507" although no such motion had been filed. In November 2018, Wells moved to withdraw noting that all issues pending on appeal had been resolved and essentially there was nothing for him to represent Quinn on. The district court allowed him to withdraw.

In July 2020, Quinn again wrote to the court. He told the judge he had been trying to get an attorney for his 60-1507 hearing, but no one had contacted him. He said the court had appointed a lawyer, but the lawyer had "declined to take my case." He asked for the appointment of a lawyer. The same month, Judge Robert Burns responded that there was no pending 60-1507 motion filed on his behalf, so there was no reason to appoint an attorney for him. Six months later, Quinn filed the 60-1507 motion currently before us—the only one ever filed in this case. In September 2021, Judge Roberts denied Quinn's request for counsel and summarily denied his 60-1507 motion as untimely.

b. Quinn did not meet his burden to establish manifest injustice.

That brings us to the heart of Quinn's argument. The court dismissed his K.S.A. 60-1507 motion as untimely. He does not dispute that it was untimely when arguing manifest injustice. He also does not dispute that his motion was "on its face clearly deficient." He concedes that he did not mention manifest injustice, he did not state why he filed it more than a year after August 2016, and he did "not recite any logical facts to support actual innocence." But he claims applying the one-year time limit to him is manifestly unjust because the court did not appoint an attorney to assist him even though he had repeatedly requested one and the court led him

to believe the court had appointed him one. He contends that an attorney would have corrected the facially defective portions of his motion so that he would have succeeded, and that the absence of counsel excuses his failure to meet the one-year time limit.

We find this claim unpersuasive for at least three reasons.

First, as already explained, Quinn had no right to counsel either constitutionally or statutorily to help him file a 60-1507 motion. So failing to have one appointed cannot give rise to manifest injustice.

Second, Quinn's time to file a 60-1507 motion expired in August 2016. He did not even ask about filing a motion until June 2017. And there is no indication in the record that he was even aware the court had appointed an attorney for him—albeit erroneously—until the court allowed attorney Wells to withdraw in November 2018. Again, well past the August 2016 deadline. That the court may have erroneously appointed counsel in the past when no action was pending—years after the statutory deadline to file a 60-1507 motion had passed—does not establish detrimental reliance by Quinn.

And finally, and most importantly, Quinn admittedly did not claim either manifest injustice or actual innocence in his motion. This alone bars his current claim.

In sum, we find Quinn has not met his burden to establish manifest injustice to justify an untimely filing under K.S.A. 60-1507 under these facts.

IV. QUINN'S MOTION IS BARRED BY RES JUDICATA

Because we review the record de novo, we also note that—as the State argues in its brief and to which Quinn fails to respond—even if we were to assume his motion was timely or that it was untimely but excused on the basis of manifest injustice, Quinn's motion is barred on the basis of res judicata.

The doctrine of res judicata provides that "'where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived.'" *State v. Kingsley*, 299 Kan. 896, 901, 326 P.3d 1083 (2014). The doctrine of res judicata applies to a 60-1507 movant who seeks to raise issues which have

previously been resolved by a final appellate court order in their criminal case. *Drach v. Bruce*, 281 Kan. 1058, Syl. ¶ 14, 136 P.3d 390 (2006); *Woods v. State*, 52 Kan. App. 2d 958, Syl. ¶ 1, 379 P.3d 1134 (2016). A 60-1507 motion cannot substitute for a second appeal. But as with most rules, there is an exception. If a movant can establish exceptional circumstances that prevented raising the issue in the direct appeal, he may be able to avoid this prohibition. Exceptional circumstances can include ineffective assistance of counsel. *Woods*, 52 Kan. App. 2d at 964; Supreme Court Rule 183(c)(3) (2022 Kan. S. Ct. R. at 243). Exceptional circumstances are unusual events or intervening changes in the law that prevented the defendant from raising the issue in the preceding 60-1507 motion. *Beauclair v. State*, 308 Kan. 284, 304, 419 P.3d 1180 (2018).

This court determined in Quinn's direct appeal that "Quinn has failed to establish that Lamb's actions fell below an objective standard of reasonableness or that Lamb's alleged deficiencies prejudiced him." *Quinn*, 2015 WL 423653, at *12. Quinn does not argue any exceptional circumstances prevented him from alleging that his attorney was ineffective for not requesting a lie detector test and not questioning the victim "on her supposed rape" together with the many other points of ineffectiveness he alleged in his direct appeal. In addition, an unsupported and conclusory statement about the veracity of the victim absent new and compelling evidence is not an exceptional circumstance warranting collateral relief. See *Mundy*, 307 Kan. at 304 (finding that conclusory allegations with no evidentiary basis in the record are not enough to carry the movant's burden).

So Quinn's motion also fails based on res judicata.

For these reasons, we affirm the decision of the district court summarily denying Quinn's K.S.A. 60-1507 motion.

Affirmed.

* * *

HURST, J., concurring: I concur with my colleagues in the judgment based solely on the majority's opinion that res judicata bars Quinn's current K.S.A. 60-1507 motion.

(522 P.3d 304)

No. 124,152

GARY WAYNE KLEYPAS, *Appellant*, v. STATE OF KANSAS, *Appellee*.

SYLLABUS BY THE COURT

1. HABEAS CORPUS—*Court's Review of 60-1507 Proceedings—Employ Same Fairness as Applicable in Other Death-Penalty Review Areas.* Because of the importance of access to habeas proceedings and the grave nature of capital cases, courts must employ the same elevated awareness for fairness in reviewing a K.S.A. 60-1507 proceeding as applies in other areas of death-penalty review.

2. ATTORNEY AND CLIENT—*No Right to Hybrid Representation—Litigant with Counsel May Not Dictate Procedural Course of Representation.* In Kansas, a party has the right to represent themselves or to be represented by counsel, but they have no right to hybrid representation. A litigant who is represented by counsel has no right to dictate the procedural course of their representation by counsel.

3. HABEAS CORPUS—*Indigent Capital Murder Defendant—Statutory Right to Counsel in District Court upon Filing a 60-1507.* Under K.S.A. 22-4506(d), an indigent person convicted of capital murder has a statutory right to counsel in district court upon a filing of a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507.

4. SAME—*Withdrawal of 60-1507 Motion by Capital Murder Defendant—Determination by District Court of Competency and Knowing Waiver.* Before a district court permits a death-sentenced inmate to withdraw a K.S.A. 60-1507 motion and waive postconviction relief, the court must conduct a hearing to determine (1) whether the inmate is competent to waive postconviction relief and (2) whether the inmate's waiver of postconviction relief is being made knowingly and voluntarily with an understanding of the consequences.

5. SAME—*Voluntary Dismissal under K.S.A. 60-241(a)(1)—Without Prejudice.* A plaintiff's voluntary dismissal of an action under K.S.A. 2021 Supp. 60-241(a)(1) is without prejudice.

Appeal from Crawford District Court; KURTIS I. LOY, judge. Opinion filed December 16, 2022. Reversed and remanded with directions.

Julia S. Spainhour and *Jeffrey Gregory Dazey*, of Kansas Capital Habeas Defender Office, for appellant.

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., MALONE and BRUNS, JJ.

MALONE, J.: Gary Wayne Kleypas is a prisoner under sentence of death. This appeal involves purely procedural issues arising from the dismissal with prejudice of Kleypas' K.S.A. 60-1507 motion. The district court ordered the dismissal after receiving a handwritten, pro se letter from Kleypas asking that his case not proceed. The K.S.A. 60-1507 motion was drafted by attorneys who had been assigned to Kleypas' case by the State Board of Indigents' Defense Services (SBIDS) but were not yet officially appointed by the district court despite entering an appearance on his behalf, affixing their names to his motion, being noted as his counsel of record, and asking the court to appoint them as his attorneys. Even so, the district court dismissed Kleypas' case with prejudice based on his letter, without sending any notification to his attorneys or holding a hearing. The district court later denied Kleypas' motion to alter or amend judgment, which included an affidavit from Kleypas disclaiming any intent to dismiss his motion.

On appeal, Kleypas raises five interrelated issues: First, Kleypas argues that the district court erred by interpreting his pro se letter as an unambiguous request for voluntary dismissal. Second, he contends that if his letter was a request for dismissal, the district court erred by granting the dismissal with prejudice. Third, Kleypas asserts the district court erred when it failed to notify his counsel of its intent to dismiss the K.S.A. 60-1507 motion before entering the order of dismissal. Fourth, he claims the district court erred by failing to follow the procedure in K.S.A. 22-4506(d), which provided him a statutory right to counsel and other procedural safeguards. Finally, he contends the district court erred by granting a dismissal with prejudice—effectively a waiver of his right to pursue any postconviction relief—without first conducting a hearing to ensure that he was competent to do so and that his waiver was knowing and voluntary.

We need not decide whether the district court erred by interpreting Kleypas' letter as an unambiguous request to dismiss his

K.S.A. 60-1507 motion. Even if Kleypas' letter was an unambiguous request to dismiss his case, we hold the district court erred by dismissing the K.S.A. 60-1507 motion without notifying Kleypas' counsel of record and without setting the matter for a hearing to determine whether Kleypas was competent to dismiss his motion and whether he was knowingly and voluntarily waiving his right to postconviction relief. Finally, even if the district court had legal grounds to dismiss the K.S.A. 60-1507 motion, it erred by dismissing the motion with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, a jury convicted Kleypas of capital murder, attempted rape, and aggravated burglary—the facts of the case are not relevant to this appeal and are laid out in full in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) (*Kleypas I*), *cert. denied* 537 U.S. 834 (2002), *abrogated in part by Kansas v. Marsh*, 548 U.S. 163, 169, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). A jury sentenced Kleypas to death. On appeal, the Kansas Supreme Court affirmed Kleypas' convictions but reversed his death sentence and remanded for a new sentencing proceeding. *Kleypas*, 272 Kan. at 915, 1123-24.

The State later filed an interlocutory appeal on an evidentiary issue, which was decided in *State v. Kleypas*, 282 Kan. 560, 147 P.3d 1058 (2006) (*Kleypas II*). On remand, in December 2008, a jury once again sentenced Kleypas to death. Kleypas appealed, and the Kansas Supreme Court affirmed his death sentence but reversed his conviction for attempted rape and remanded his remaining noncapital conviction, aggravated burglary, for resentencing. *State v. Kleypas*, 305 Kan. 224, 258-64, 382 P.3d 373 (2016) (*Kleypas III*), *cert. denied* 137 S. Ct. 1381 (2017). After the United States Supreme Court denied Kleypas' petition for certiorari on March 27, 2017, the Kansas Supreme Court issued a mandate on April 11, 2017.

After Kleypas' direct appeals of his death sentence became final, SBIDS assigned Paul S. McCausland of Young Bogle McCausland Wells & Blanchard P.A. and Julia Spainhour of the Kansas Capital Habeas Defender Office to prepare a K.S.A. 60-1507 motion on Kleypas' behalf. We will refer to these attorneys as Kleypas' SBIDS attorneys. On January 23, 2018, the SBIDS

attorneys filed the K.S.A. 60-1507 motion—which alleged 47 grounds for relief—in Crawford County District Court. The motion's opening paragraph stated: "This motion is filed for Mr. Kleypas by and through attorneys assigned by the State Board of Indigents' Defense Services (SBIDS) to investigate his case and prepare a motion on his behalf." The motion was signed by the attorneys and does not include Kleypas' signature. On the same day, one of the SBIDS attorneys filed a separate entry of appearance on Kleypas' behalf.

The SBIDS attorneys also filed a motion for appointment of counsel on Kleypas' behalf, requesting the district court to find Kleypas indigent and to officially appoint them to represent Kleypas in district court. The SBIDS attorneys also filed a request for a status conference, asking the district court to docket the case under a civil case number and to set deadlines for discovery. The clerk of the district court docketed Kleypas' motion under 2018-CV-000005 and recorded the appearances of the SBIDS attorneys as his "retained" counsel. The deputy solicitor general entered an appearance for the State, but the record does not reflect that the State ever answered the K.S.A. 60-1507 motion.

On March 26, 2018, the district court received and filed a notarized, handwritten letter from Kleypas dated March 19, 2018. The letter stated:

"Dear Judge Bolton-Fleming:

"Since January 24, 2018, I've tried to find guidance/ assistance to help inform me of how to pursue the matter I'm presenting to you at this time. Being unsuccessful in my efforts I feel my only recourse is to contact you personally. Hoping not to violate any possible rules/regulations of the court regarding such contact I will be brief in providing a concise, direct statement of fact I strongly feel you should be made aware of.

"The matter before you—2018-CV-00005-P: Gary Wayne Kleypas vs. State of Kansas—was filed without my consent and/or approval and is a matter that should not proceed.

"Respectfully,

"Gary W. Kleypas"

Kleypas also sent the letter to counsel for the State, but he did not send a copy to the SBIDS attorneys who had filed the K.S.A. 60-1507 motion on his behalf. On April 10, 2018, Kleypas' habeas case was reassigned from Judge Lori Bolton Fleming to Judge

Kurtis I. Loy. The next day, without sending notice to the SBIDS attorneys or holding a hearing, Judge Loy entered an order of dismissal, dismissing the case "with prejudice, at the request of the movant, Gary W. Kleypas."

On May 3, 2018, the SBIDS attorneys who had drafted Kleypas' K.S.A. 60-1507 motion, moved to alter or amend judgment under K.S.A. 2017 Supp. 60-259 and K.S.A. 2017 Supp. 60-260, asking the district court to reconsider its order and to reinstate Kleypas' motion. Their motion appended many attachments, including an affidavit from Kleypas, dated April 16, 2018, in which he stated that his prior letter had not been "a complete statement of [his] intent at that time"; that he did not intend for his K.S.A. 60-1507 motion to be dismissed; and that he did not know that his "letter would result in such action by the Court." The State responded to the motion and argued that Kleypas had presented "no justification for the relief he [sought] other than suggesting he has changed his mind." Kleypas' SBIDS attorneys replied on June 21, 2018, contending that Kleypas' affidavit showed that the court had misinterpreted his pro se letter. The reply explained that the SBIDS attorneys had established an attorney-client relationship long before filing the motion and that "[s]ignificant communications between Mr. Kleypas and his counsel [had taken] place."

More than a year later, the State filed a motion asking the district court to finally rule on the matter. Kleypas then filed a renewed motion seeking to tack on another argument to his motion to alter or amend, challenging the Kansas death penalty statute under *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019). The State responded and opposed any such supplementation. The case then lay dormant for nearly two more years, until the district court held a status conference on March 15, 2021.

On April 16, 2021, the district court finally conducted a hearing on the parties' motions; all parties, including Kleypas, were present on Zoom. The district court heard arguments from both parties. Kleypas' attorneys stated that despite communication difficulties, they prepared the K.S.A. 60-1507 motion that was filed in January 2018 with Kleypas' agreement and participation. They argued that Kleypas' letter to the district court requested assistance

from the court and represented a complaint about his disagreements with their drafting decisions, not a request for the matter to be dismissed wholesale. They also asserted that Kleypas' affidavit refuted the district court's interpretation of his letter as a request for dismissal. For its part, the State contended that Kleypas' letter was an unambiguous request for a voluntary dismissal of the motion and that Kleypas had merely changed his mind, which it argued was an insufficient ground to grant relief.

After listening to the parties' arguments, the district court ruled from the bench. The district court noted that the SBIDS attorneys had "done an excellent job" but found that Kleypas' letter was unambiguous and manifested his intent for his K.S.A. 60-1507 motion to be dismissed. The district court found that Kleypas appeared to be abreast of what was going on with his motion because he knew the case number and where to address his letter. The district court found that Kleypas' decision not to send the letter to his attorneys showed that "he was making a deeply reasoned decision as to what he was doing." Finally, the district court found it had committed no errors of fact or law justifying relief under K.S.A. 2020 Supp. 60-259 or K.S.A. 60-260. On May 3, 2021, the district court entered a journal entry of the motion hearing, outlining the bases for denying any relief. Kleypas timely appealed the district court's judgment.

Heightened scrutiny involving death sentence

We will address each of Kleypas' issues on appeal, but not in the same order as he presents them in his brief. As a threshold matter, Kleypas argues that this court should apply heightened scrutiny to the issues he has raised in this appeal because he is a death-sentenced prisoner. The State argues that Kleypas' heightened scrutiny argument is a "red herring" because it does not substantively change this court's standard of review. Kleypas' case presents the first appeal of a K.S.A. 60-1507 proceeding in a capital case since Kansas reinstated the death penalty in 1994, and we have no Kansas caselaw addressing whether the heightened scrutiny that may apply in a direct appeal from a death sentence also applies in this appeal from a postconviction proceeding in a capital case.

The United States Supreme Court has oft noted that death is qualitatively different than any other punishment that the state can impose. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Similarly, in one of Kleypas' prior appeals, the Kansas Supreme Court echoed that "[a] sentence of death is different from any other punishment, and accordingly there is an increased need for reliability in the determination that death is the appropriate sentence." *Kleypas III*, 305 Kan. at 274. Still, the *Kleypas III* court noted that even with the need to apply heightened scrutiny, there is no substantive change to the standard of review applied to the issues raised in a death penalty case. 305 Kan. at 275. Rather, "the already applicable standard should be applied and heightened reliability in both the guilt-phase and penalty-phase proceedings must be ensured." 305 Kan. at 275. In other words, the heightened scrutiny requirement for capital cases does not change the standard of review, but it requires courts take a closer and more vigilant review of issues whenever a death sentence is involved.

"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969); see also *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("[F]undamental fairness is the central concern of the writ of habeas corpus."). Because of the importance of access to habeas proceedings and the grave nature of capital cases, we conclude that this court must employ the same elevated awareness for fairness in reviewing Kleypas' habeas appeal as applies in other areas of death-penalty review. See *Douglas v. Workman*, 560 F.3d 1156, 1194 (10th Cir. 2009) (noting reluctance "to create distinct rules applying differently to capital habeas proceedings," but still applying a "heightened concern for fairness . . . where the state is prepared to take a man's life").

DID THE DISTRICT COURT ERR BY INTERPRETING KLEYPAS' LETTER AS AN UNAMBIGUOUS REQUEST FOR VOLUNTARY DISMISSAL?

Kleypas first argues that the district court erred by interpreting his letter as an unambiguous request to dismiss his K.S.A. 60-1507

motion. He argues that the plain language of the letter was equivocal and therefore insufficient to show an explicit intent to dismiss without further inquiry from the district court. He also argues that this court should consider Kleypas' unique circumstances when construing the written language of his letter and whether he intended to dismiss his K.S.A. 60-1507 motion. The State counters there was no ambiguity in Kleypas' letter and that it was a simple and direct request to voluntarily dismiss the K.S.A. 60-1507 motion.

Before delving into the content of Kleypas' letter, a few observations are warranted about whether Kleypas had legal counsel or was unrepresented when he sent his letter to the district court. Although the parties agree that the lawyers assigned by SBIDS prepared (and signed and submitted) Kleypas' K.S.A. 60-1507 motion, the State emphasizes that Kleypas acted as a pro se, unrepresented party because the district court did not appoint him an attorney. This is partially true—at least to the extent that the district court did not formally appoint Kleypas' attorneys. Both parties appear to draw this distinction between counsel *assigned* by SBIDS to aid Kleypas and counsel *appointed* by the district court. In their own motion seeking appointment to Kleypas' case, the SBIDS attorneys stated that "Kleypas, *by and through counsel* assigned to assist him . . . has filed a *pro se* Motion Pursuant to K.S.A. 2016 Supp. 60-1507[.]" (Emphasis added.)

But just because counsel called the pleading a pro se habeas motion does not make it so. The record reflects that the SBIDS attorneys developed an attorney-client relationship with Kleypas, drafted the K.S.A. 60-1507 motion with his assistance, submitted the motion with their signatures (not Kleypas') affixed to the document, entered an appearance on his behalf, asked the court to find Kleypas indigent and appoint them as his attorneys, and requested a status conference. All these acts point toward the conclusion that Kleypas was being represented by counsel, even though the district court had not officially appointed counsel. We will discuss this issue more thoroughly in the next section of this opinion which addresses whether the district court erred in failing to notify the SBIDS attorneys before it entered the order of dismissal.

Although the parties dispute whether the K.S.A. 60-1507 motion was a pro se pleading, they agree that Kleypas' handwritten letter to the district court was filed pro se. And the parties agree that "[w]hether the district court correctly construed a pro se pleading is a question of law subject to unlimited review." *State v. Richardson*, 314 Kan. 132, Syl. ¶ 4, 494 P.3d 1280 (2021). Pro se pleadings must be liberally construed giving effect to content over form. *State v. Kelly*, 291 Kan. 563, 565, 244 P.3d 639 (2010).

The district court found that the substance of Kleypas' letter focused on two points: First, he was looking for a way to communicate with the district judge assigned to the case. Second, and more importantly, he was unambiguously requesting that the court dismiss his K.S.A. 60-1507 motion. With this interpretation of the letter, the district court entered an order dismissing the motion with prejudice, without holding a hearing or otherwise contacting the attorneys of record, who had executed and signed the motion.

At the hearing on Kleypas' motion to alter or amend, the district court recited the substantive portion of the letter and found that the "plain and ordinary language [of the letter] makes clear to this Court that [dismissal] is what he was seeking." The journal entry from that hearing similarly states: "The Court finds the pro se letter to be clear and concise in its intent and no further inquiry was necessary to determine what Kleypas was requesting." The district court did not credit Kleypas' affidavit, which explicitly stated that he did not intend for his letter "to be used to dismiss the Motion under K.S.A. 60-1507" and that he "did not want the Court to dismiss the Motion." The district court viewed the matter as Kleypas merely changing his mind about the dismissal, and stated, "[A] litigant changing his mind is not grounds for relief from judgment[.]"

Given the fact that dismissing Kleypas' K.S.A. 60-1507 motion with prejudice could have life-or-death consequences for him, maybe it is something he should have been allowed to change his mind about. The substantive content of Kleypas' letter is brief. It does not reference any statutes, and the body of the document requesting relief is one sentence long. Kleypas' entire request was: "The matter before you . . . was filed without my consent and/or approval and is a matter that should not proceed." On appeal, Kleypas argues that this key phrase is ambiguous and notes that

the letter does not even contain the word "dismiss." Kleypas contends that the phrase "a matter that should not proceed," could be interpreted as meaning that he merely wanted to "pause" or "interrupt" the proceedings. The State defends the district court's reading of Kleypas letter, asserting that the document is simply "not amenable to any other reasonable interpretation[.]"

To support his argument, Kleypas points to the difference between the definitions of "proceed" and "dismiss." Proceed is defined as "to advance or go on, esp. after stopping." Webster's New World College Dictionary 1160 (5th ed. 2016). Dismiss is defined as "[t]o send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved." Black's Law Dictionary 589 (11th ed. 2019). While there may be some distinction between the definitions of the two terms, that difference does not render the letter ambiguous. The simplest interpretation of the phrase "a matter that should not proceed" is, as the district court found, that Kleypas wanted to stop any more proceedings on the K.S.A. 60-1507 motion.

The parties contest whether evidence of other circumstances outside the letter should have been relied on in determining its meaning. Kleypas asserts the district court should have seen his affidavit as directly contradicting its interpretation of the letter. But, as noted above, the district court found that Kleypas' affidavit was merely evidence that he had changed his mind. Although the district court found that Kleypas' letter was "clear and concise in its intent[,]" the court still considered several external factors in making its ruling, including: (1) that Kleypas addressed the letter to the correct district judge; (2) that Kleypas had "prior extended experience with the legal system"; (3) that Kleypas had "sufficient time to carefully consider his decision"; and (4) that he wanted to proceed on his own because he did not send a copy of the letter to the SBIDS attorneys.

Kleypas asserts the district court's considerations were misguided and argues, as he did in his motion to alter or amend, that his history of mental illness should have factored into the court's interpretation of the intent of the letter. Kleypas' affidavit stated that he has been diagnosed with mental illness and is under the care and treatment of a physician who prescribes medication to

treat his illness. He offered many exhibits including affidavits and testimony of physicians describing his long history of mental disease. Kleypas contends that other "contextual clues"—including his request for "guidance/assistance" from the district court in the letter—suggest that he only wanted to pause or interrupt the habeas proceedings.

A more important contextual clue potentially rendering the intent of the letter ambiguous is located within the final sentence of the letter itself. Before stating that the motion "is a matter that should not proceed[,]" Kleypas asserts that the motion was "filed *without my consent and/or approval*[.]" (Emphasis added.) This portion of the sentence questions the attorney-client relationship and the scope of representation Kleypas was receiving. It would have been more prudent for the district court to interpret the letter as Kleypas alerting the court of a potential conflict with his attorneys, and then setting the matter for a hearing to investigate whether the conflict could be resolved.

In the end, we need not decide whether the district court erred by interpreting Kleypas' letter as an unambiguous request to dismiss his K.S.A. 60-1507 motion. As explained above, Kleypas was represented by the SBIDS attorneys. Thus, even if Kleypas' letter was an unambiguous request to dismiss his case, we find that the district court erred by dismissing the K.S.A. 60-1507 motion without notifying Kleypas' counsel of record and without setting the matter for a hearing to determine whether Kleypas was competent to dismiss his motion and whether he was knowingly and voluntarily waiving his right to postconviction relief. We will develop these findings and this analysis more thoroughly in the following sections of this opinion.

DID THE DISTRICT COURT ERR BY NOT NOTIFYING KLEYPAS' COUNSEL OF RECORD BEFORE DISMISSING HIS K.S.A. 60-1507 MOTION?

Kleypas argues that the district court erred when it failed to notify his counsel of its intent to dismiss the K.S.A. 60-1507 motion before entering the order of dismissal. Kleypas' claim stems from several different legal theories—a violation of his procedural due process rights to notice and an opportunity to be heard, an

improper ex parte communication, and improper hybrid representation. Most of the confusion on this issue flows back to whether Kleypas was being represented by the SBIDS counsel who drafted his motion and were noted as counsel of record in the district court's files. The State refuses to acknowledge that Kleypas was represented; it insists that Kleypas was acting pro se and characterizes the SBIDS attorneys' argument on appeal as asserting that their own due process rights were violated. The State also argues that Kleypas' letter was not an ex parte communication and there was no hybrid representation.

Kleypas couches his arguments in this issue mostly in terms of procedural due process. "Whether due process has been afforded is a question of law subject to unlimited review." *Sherwood v. State*, 310 Kan. 93, 96, 444 P.3d 966 (2019). "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Moody*, 282 Kan. 181, 188, 144 P.3d 612 (2006).

To begin, the error Kleypas complains of—the district court's decision to give effect to his letter without notifying or providing an opportunity for the attorneys representing him to respond—is perhaps not properly categorized as a violation of his due process rights to notice and opportunity to be heard. After all, Kleypas sent the letter to the court himself, so he had notice of his own action and a chance to be heard. We agree with the State that the SBIDS attorneys' argument on appeal is one asserting that their own due process rights were violated—not Kleypas' due process rights.

We also agree with the State that Kleypas' letter did not constitute an ex parte communication with the court. Kansas Code of Judicial Conduct, Canon 2, Rule 2.9 prohibits a judge from engaging in ex parte communications unless they are for scheduling, administrative, or emergency purposes and do not address substantive matters. Kansas Code of Judicial Conduct, Canon 2, Rule 2.9(A)(1) (2021 Kan. S. Ct. R. 491). An "ex parte communication" is defined as "[a] communication between counsel or a party and the court when opposing counsel or party is not present." Black's Law Dictionary 348 (11th ed. 2019). Kleypas' letter qualifies as a communication between a party and the court. But the letter was

also delivered to the State, the opposing party in this proceeding, so it did not constitute an ex parte communication.

Kleypas also argues that the district court improperly allowed him to engage in hybrid representation by dismissing his K.S.A. 60-1507 motion in response to his pro se letter, when he was being represented by legal counsel when the case was dismissed. He asserts that even if his letter could be interpreted as a request for voluntary dismissal, the district court should have rejected the pro se request to dismiss the K.S.A. 60-1507 motion when he was represented by counsel who had filed the motion on his behalf.

In Kansas, a party has the right to represent themselves or to be represented by counsel, but they have no right to hybrid representation. *State v. Holmes*, 278 Kan. 603, 620, 102 P.3d 406 (2004). Further, a litigant who is represented by counsel has no right to dictate the procedural course of their representation by counsel. *State v. McKessor*, 246 Kan. 1, 12, 785 P.2d 1332 (1990). Because Kansas does not provide a right to hybrid representation, "substantive documents submitted pro se by a person represented by counsel, with the exception of motions to relieve counsel, need not be considered by the court or filed by the clerk." *Wahl v. State*, No. 114,888, 2017 WL 3668917, at *5 (Kan. App. 2017) (unpublished opinion). Our Supreme Court has clarified that it is within the district court's discretion to allow defendant self-representation after counsel is appointed. *State v. Pollard*, 306 Kan. 823, 843, 397 P.3d 1167 (2017).

As we stated before in this opinion, Kleypas was represented by counsel. The K.S.A. 60-1507 motion filed with the court was prepared by counsel and signed only by counsel, not Kleypas. When the motion was filed, the SBIDS attorneys filed an entry of appearance and a separate motion for the court to find Kleypas indigent and to officially appoint them as counsel. The clerk's office accepted the K.S.A. 60-1507 motion and recorded the appearance of the SBIDS attorneys as Kleypas counsel. The SBIDS attorneys requested a status conference, a request that was pending when the district court dismissed the case. As Kleypas points out, at all points during these proceedings—except for the sending of his letter—he was represented by the SBIDS attorneys, even though they had not been officially appointed by the court. The district court even acknowledged that the SBIDS attorneys were Kleypas' counsel of record by sending them a copy of the dismissal with

prejudice order on April 11, 2018, although the court apparently saw no need to notify the same counsel about Kleypas' pro se letter.

The district court did not interpret Kleypas' letter as an indication that he had a conflict with or wanted to relieve his counsel. Instead, it treated the letter as a substantive motion seeking to dismiss his K.S.A. 60-1507 motion, without notifying his attorneys of record. In doing so, the district court allowed Kleypas to engage in hybrid representation. But because Kleypas was being represented by the SBIDS attorneys, he had no right to dictate the procedural course of the proceedings. *McKessor*, 246 Kan. at 12. And even if Kleypas' letter was not a request for dismissal but represented a request to relieve his counsel and proceed pro se, the district court should have first notified his attorneys of record and held a hearing on the matter. See *State v. Brown*, 300 Kan. 565, 575, 331 P.3d 797 (2014) (discussing district court's duty to inquire into a potential conflict of interest).

Although the district court had discretion to allow Kleypas to file pro se documents when he was represented by counsel, we find the district court abused that discretion by dismissing the K.S.A. 60-1507 motion with prejudice based on Kleypas' letter without giving prior notice to the SBIDS attorneys. Even if this case were a routine postconviction proceeding with counsel of record involved, the district court should not have addressed a pro se request for dismissal without first notifying counsel that the request for dismissal had been filed. Although we could end our analysis here, Kleypas also argues that because he is a prisoner under sentence of death, he has a statutory right to counsel in district court that other inmates do not have in K.S.A. 60-1507 proceedings. And he argues there are other procedural safeguards in place before an inmate subject to the death penalty can waive postconviction relief. We will turn to these additional claims.

DID THE DISTRICT COURT ERR BY FAILING TO FOLLOW THE PROCEDURE IN K.S.A. 22-4506(d) BEFORE DISMISSING KLEYPAS' MOTION?

Kleypas asserts that the district court erred by failing to follow the procedure in K.S.A. 22-4506(d), which provides a statutory right to counsel and certain procedural safeguards when a death-sentenced individual begins habeas proceedings under K.S.A. 60-1507. The State argues that the provisions of K.S.A. 22-4506(d)

are inapplicable because Kleypas did not file the K.S.A. 60-1507 motion himself and thus never triggered his right to counsel or the procedures outlined in the statute. This issue requires statutory interpretation of K.S.A. 22-4506(d), a question of law subject to unlimited review. See *Stewart v. State*, 310 Kan. 39, 43, 444 P.3d 955 (2019).

In a typical proceeding under K.S.A. 60-1507, a movant has no right to receive appointed counsel in district court unless they are found to be indigent and "the court finds that the petition or motion presents substantial questions of law or triable issues of fact." K.S.A. 22-4506(b). But under K.S.A. 22-4506(d), an indigent person convicted of capital murder has an absolute right to counsel in district court. K.S.A. 22-4506(d)(1) provides that SBIDS must provide for the assignment of attorneys who are qualified to represent death-sentenced individuals "*upon a filing of* a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507, and amendments thereto[.]" (Emphasis added.) In other words, the subsection provides a statutory right to appointed counsel for death-sentenced individuals after a K.S.A. 60-1507 motion is filed.

SBIDS assigned attorneys to help Kleypas draft his motion before his right to counsel under the statute attached—before the filing of his motion. This assignment appears to have been preemptive, especially considering K.S.A. 22-4506(d)(2) provides more steps a district court must take before appointing an attorney or accepting the defendant's rejection of such representation. The attorneys assigned by SBIDS consulted with Kleypas and drafted and then filed the K.S.A. 60-1507 motion on his behalf before being appointed by the district court. In fact, they moved for the district court to make such an appointment alongside the K.S.A. 60-1507 filing.

K.S.A. 22-4506(d)(2) lays out other procedural steps a district court must follow upon the filing of a K.S.A. 60-1507 motion by an individual sentenced to death:

> "If a petitioner or movant, who has been convicted of capital murder and is under a sentence of death, files a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507, and amendments thereto, the district court shall make a determination on the record whether the petitioner or movant is indigent. Upon a finding that the petitioner or movant is indigent and accepts the offer of representation or is unable competently to decide whether to accept or reject the offer, the court shall appoint one or more counsel, in accordance with subsection (d)(1), to represent the petitioner or movant. If the petitioner or movant rejects the offer of representation, the court shall find on the record, after a hearing if necessary, whether the petitioner or movant rejected the

offer of representation with the understanding of its legal consequences. The court shall deny the appointment of counsel upon a finding that the petitioner or movant is competent and not indigent." K.S.A. 22-4506(d)(2).

The disagreement between the parties lies in whether the statute makes a distinction based on who files the K.S.A. 60-1507 motion. The State argues that the statutory right to counsel and procedural protections of K.S.A. 22-4506(d)(2) are not triggered by the filing of a motion unless that motion is filed by the individual under a death sentence. The State's brief points out that "Kleypas himself did not file a K.S.A. 60-1507 motion" and that the SBIDS attorneys filed it "'on his behalf.'" But this is a distinction without a difference as a K.S.A. 60-1507 motion was unquestionably filed, no matter if Kleypas did so himself or attorneys did so on his behalf. There is nothing in the plain language of the statute that states that a death-sentenced prisoner must *personally* file a K.S.A. 60-1507 motion to be afforded the right to counsel provided by the statute.

Thus, Kleypas' statutory right to counsel under K.S.A. 22-4506(d) was triggered upon the filing of his K.S.A. 60-1507 motion. The provisions of K.S.A. 22-4506(d)(2) required the district court to (1) determine on the record whether Kleypas was indigent, (2) determine whether Kleypas desired to accept representation from attorneys assigned by SBIDS, if he was competent to make that decision, and (3) if he rejected such representation, make a finding on the record, after a hearing, if necessary, that he understood the legal consequences of doing so. The district court erred by making none of these inquiries, following none of these procedural safeguards, and instead ordering a dismissal with prejudice based on Kleypas' pro se letter. The district court's order dismissing Kleypas' K.S.A. 60-1507 motion with prejudice based on his pro se letter violated Kleypas' statutory right to counsel under K.S.A. 22-4506(d).

DID THE DISTRICT COURT ERR BY FAILING TO CONDUCT A HEARING BEFORE ALLOWING KLEYPAS TO WAIVE POSTCONVICTION RELIEF?

Kleypas also argues that the district court erred by granting a dismissal with prejudice—effectively a waiver of his right to pursue any postconviction relief—without first conducting a hearing to ensure that he was competent to do so and that his waiver was knowing and voluntary. He asserts that due process requires that

sufficient procedures be undertaken before a death-sentenced prisoner can waive postconviction relief, procedures that are not required in noncapital cases. The State dismisses Kleypas' claim and asserts that nothing in K.S.A. 60-1507 requires a formal waiver of the statute's provisions. The State succinctly argues that "a person serving a sentence for a criminal conviction can forego K.S.A. 60-1507 proceedings by simply doing nothing."

Kleypas again couches his arguments on this issue mostly in terms of procedural due process. As stated before, whether due process has been afforded is a question of law subject to unlimited review. *Sherwood*, 310 Kan. at 96. The State asserts that whether K.S.A. 60-1507 requires a person in custody under a sentence of death to formally waive the provisions of the statute involves statutory interpretation and is a question of law subject to unlimited review. *State v. Mitchell*, 297 Kan. 118, 121, 298 P.3d 349 (2013).

When a state has chosen to provide postconviction remedies—as Kansas has done by statute under K.S.A. 60-1507—due process principles apply to the terms on which those remedies may be furnished or lost. See *St. Pierre v. Cowan*, 217 F.3d 939, 949 (7th Cir. 2000) (citing *Gilmore v. Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L. Ed. 2d 632 [1976]). Although no Kansas court has ruled on the issue, federal courts have held that before a district court permits a death-sentenced individual to withdraw a habeas petition and forgo any further legal proceedings, sufficient procedures must be used to ensure that (1) the prisoner is competent to waive postconviction relief, and (2) the waiver is knowing and voluntary with an understanding of the consequences. See *Kirkpatrick v. Chappell*, 950 F.3d 1118, 1133 (9th Cir.) (citing *Rees v. Peyton*, 384 U.S. 312, 313-14, 86 S. Ct. 1505, 16 L. Ed. 2d 583 [1966]), *cert. denied* 141 S. Ct. 561 (2020); *Fahy v. Horn*, 516 F.3d 169, 176-88 (3d Cir. 2008); *Mata v. Johnson*, 210 F.3d 324, 329-30 (5th Cir. 2000); *St. Pierre*, 217 F.3d at 947-50.

Competence

In *Rees*, a death-sentenced petitioner instructed his counsel to withdraw his petition for certiorari and forgo any other attacks on his conviction and death sentence. On review, the United States Supreme Court remanded the case to the district court to determine his competence before permitting the withdrawal. The *Rees*

court explained that the district court had to ensure the defendant had "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity[.]" 384 U.S. at 314.

Applying *Rees*, other federal courts have developed a three-part test for determining whether a death-sentenced prisoner is competent to waive their postconviction rights: (1) whether that person suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that person from understanding their legal position and the options available to them; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among their options. *Mata*, 210 F.3d at 328 (citing *Rumbaugh v. Procunier*, 753 F.2d 395 [5th Cir. 1985]). Here, despite potential questions about Kleypas' competence brought before the district court, no inquiry was made into his capacity to appreciate his options and make a rational choice on whether to forgo judicial proceedings.

Knowing and voluntary waiver

Even if the district court had ensured that Kleypas was competent and had the ability to understand the proceedings, it should have also confirmed that the waiver was voluntary, knowing, and intelligent. Typically, whether a waiver is voluntary, knowing, and intelligent involves two distinct inquiries—neither of which occurred in this case. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." 475 U.S. at 421. And second, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." 475 U.S. at 421.

When a decision to dismiss a K.S.A. 60-1507 motion carries life-or-death consequences, due process demands a robust procedure to ensure that the movant fully understands those consequences. *St. Pierre*, 217 F.3d at 947-50. By abandoning his K.S.A.

60-1507 motion, Kleypas effectively waived future avenues for habeas proceedings in federal court. See 28 U.S.C. § 2254(b)(1) (requiring the exhaustion of remedies available in state court as a prerequisite to consideration of federal writ of habeas corpus). There is no indication in the record that Kleypas understood that by dismissing his K.S.A. 60-1507 motion, he might be forfeiting any future chance to challenge his conviction or death sentence. Because the district court did not make any inquiry into the matter, there is no way to know whether Kleypas appreciated the consequences of his decision, understood the possible grounds for relief but did not wish to pursue them, or had a reason for not delaying his execution any longer.

Federal courts require that before an inmate sentenced to death can waive postconviction relief, the court must conduct a hearing to determine (1) whether the inmate is competent to waive postconviction relief and (2) whether the inmate's waiver of postconviction relief is being made knowingly and voluntarily with an understanding of the consequences. There is no reason why Kansas should adopt a lesser standard. Thus, the district court erred by allowing Kleypas to voluntarily dismiss his K.S.A. 60-1507 motion without first conducting a hearing to ensure that he was competent to do so and that his waiver of postconviction relief was knowing and voluntary.

DID THE DISTRICT COURT ERR BY GRANTING THE DISMISSAL WITH PREJUDICE?

Finally, Kleypas argues that even if the district court did not err by dismissing his K.S.A. 60-1507 motion without first notifying his counsel of record and scheduling the matter for a hearing, the court erred by ordering the dismissal with prejudice. Kleypas contends that the rules of civil procedure apply to a K.S.A. 60-1507 proceeding, and K.S.A. 2021 Supp. 60-241(a)(1) permits a party to voluntarily dismiss an action *without* prejudice. The State asserts that a dismissal with prejudice was appropriate because (1) Kleypas' letter expressed a desire for his motion to be dismissed with prejudice; (2) the statute of limitations had passed when the district court entered the dismissal order; and (3) any future K.S.A. 60-1507 motion filed by Kleypas would be barred as successive.

The State asserts this court should review this issue under an abuse of discretion standard and cites an unpublished case from this court where a dismissal with prejudice was ordered as a sanction under

K.S.A. 60-216(f). Because sanctions did not affect the district court's dismissal of Kleypas' motion with prejudice, the abuse of discretion standard does not apply. Rather, whether the dismissal should have been ordered with or without prejudice depends on the application of K.S.A. 2021 Supp. 60-241(a)(1), which is a question of law subject to unlimited review. *Stewart*, 310 Kan. at 43.

A proceeding under K.S.A. 60-1507 is civil and is governed by the rules of civil procedure when they apply. Supreme Court Rule 183(a)(2) (2022 Kan. S. Ct. R. 242); see *Dawson v. State*, 310 Kan. 26, 33, 444 P.3d 974 (2019) (noting that the rules of civil procedure govern motions under K.S.A. 60-1507 "'to the extent the rules are applicable'" but that "'those rules will not always control'"). This court has explicitly found that K.S.A. 60-1507 motions "may be voluntarily dismissed under K.S.A. 60-241(a)(1)." *Smith v. State*, 22 Kan. App. 2d 922, Syl. ¶ 1, 924 P.2d 662 (1996).

K.S.A. 2021 Supp. 60-241(a)(1)(A)(i) provides a vehicle for a plaintiff to voluntarily dismiss a civil action without a court order by filing a notice of dismissal "before the opposing party serves either an answer or a motion for summary judgment[.]" But if an answer has been filed by an adverse party, "a party may only dismiss the action by filing a motion to dismiss and seeking an order of the court." *Smith*, 22 Kan. App. 2d at 924. K.S.A. 2021 Supp. 60-241(a)(1)(B) states a voluntary dismissal is "without prejudice" provided the plaintiff has not previously dismissed an action based on the same claim.

To the extent that Kleypas' letter could be construed as a request to dismiss his K.S.A. 60-1507 motion, it should be categorized as a notice of voluntary dismissal under K.S.A. 2021 Supp. 60-241(a)(1). There is no question that the State had filed no response to the K.S.A. 60-1507 motion when Kleypas sent his letter to the court; the State concedes that it "took no action whatsoever in this process." Nor is there any debate that Kleypas had never dismissed a K.S.A. 60-1507 motion. Thus, even if the district court did not err by dismissing Kleypas' K.S.A. 60-1507 motion without first notifying his counsel of record and scheduling the matter for a hearing, the dismissal order should have been without prejudice under K.S.A. 2021 Supp. 60-241(a)(1)(B).

The State's arguments in support of a dismissal with prejudice are unavailing. First, there is nothing in Kleypas' letter to suggest that he

intended for his motion to be dismissed with prejudice. Second, the State's time limitation argument is also meritless. The State contends that when the district court entered its order of dismissal with prejudice, the time limitation for Kleypas to file a K.S.A. 60-1507 motion had expired, barring him from refiling his motion. But under K.S.A. 2021 Supp. 60-241(a)(1), Kleypas' voluntary dismissal should have been given effect on the day the letter was filed—March 26, 2018—and on that date the statute of limitations for Kleypas' motion had not expired. Third, any future K.S.A. 60-1507 motion filed by Kleypas would not have been barred as successive under Supreme Court Rule 183(d) (2022 Kan. S. Ct. R. at 243). The district court stated its ruling was not a summary denial and that it had not considered the merits of Kleypas' motion. And K.S.A. 2021 Supp. 60-1507(c) merely provides that the district court "shall not be required" to entertain a successive motion for similar relief on behalf of the same prisoner, but it still has discretion to do so.

CONCLUSION AND REMAND ORDER

Even if Kleypas' letter was an unambiguous request to dismiss his K.S.A. 60-1507 motion, the district court abused its discretion by permitting Kleypas to engage in hybrid representation when he was represented by legal counsel, and the district court should not have dismissed the K.S.A. 60-1507 motion without giving prior notice to the SBIDS attorneys. The district court also erred by failing to follow the procedure in K.S.A. 22-4506(d) before dismissing Kleypas' motion. Furthermore, because Kleypas is a prisoner sentenced to death, the district court should not have dismissed his K.S.A. 60-1507 motion without first conducting a hearing to determine whether Kleypas was competent to dismiss his motion and whether he was knowingly and voluntarily waiving his right to postconviction relief. Finally, even if the district court had legal grounds to dismiss the K.S.A. 60-1507 motion, it erred by dismissing the motion with prejudice. We reverse the district court's order of dismissal with prejudice, direct that Kleypas' K.S.A. 60-1507 motion be reinstated, and remand for further proceedings.

Reversed and remanded with directions.

(522 P.3d 292)

No. 124,598

STATE OF KANSAS, *Appellee*, v. RICHARD DANIEL SHOWALTER, *Defendant*, (MATTHEW DOUGLAS HUTTO), *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Privilege against Self-Incrimination under Fifth Amendment Waived by Defendant—Permanent Waiver.* Once defendants waive their privilege against self-incrimination under the Fifth Amendment to the United States Constitution as to a crime, they permanently waive this privilege because no future testimony could expose them to additional criminal punishment.

2. SAME—*Sentencing—Privilege against Self-Incrimination Terminates at Sentencing unless Motion to Withdraw Plea before Sentencing.* Unless defendants move to withdraw their guilty plea before sentencing, their Fifth Amendment privilege against self-incrimination terminates at sentencing.

3. SAME—*Fifth Amendment Privilege against Self-Incrimination—Before Sentencing Privilege Preeminent Over Privilege after Sentencing.* Defendants' Fifth Amendment privilege against self-incrimination which springs from moving to withdraw a guilty plea before sentencing is wholly preeminent over defendants' Fifth Amendment privilege against self-incrimination which springs from moving to withdraw their guilty plea after sentencing.

Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Opinion filed December 16, 2022. Affirmed.

Shawna R. Miller, of Miller Law Office, LLC, of Holton, for appellant.

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and MALONE, JJ.

GREEN, J.: The trial court directed Matthew Douglas Hutto to testify after Hutto invoked his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The trial court told Hutto that he no longer had the privilege against self-incrimination because our Supreme Court had just announced its decision denying his postsentencing motion to withdraw his two felony murder guilty pleas. *State v. Hutto*, 313 Kan. 741, 743-44, 751, 490 P.3d 43 (2021). It also told him that he no longer had

the privilege because the State had granted him use immunity. Ultimately, because Hutto would not comply with its direction to testify, the trial court found Hutto in direct contempt of court.

Hutto appeals his direct contempt conviction, arguing that our Supreme Court's precedent does not support the trial court's reasons for ruling that he no longer had the privilege against self-incrimination. He contends that a person continues to have the privilege against self-incrimination until he or she has exhausted all methods of attacking his or her underlying criminal convictions and sentences. He also asserts that the trial court's ruling about the State's grant of use immunity contradicts our Supreme Court's holding in *State v. Delacruz*, 307 Kan. 523, 535, 411 P.3d 1207 (2018).

In response, although the State concedes that its grant of use immunity to Hutto did not terminate Hutto's privilege against self-incrimination under the *Delacruz* holding, it, however, argues that our Supreme Court's other precedent supports the trial court's ruling. It contends that most of our Supreme Court's caselaw supports that a person who pleaded guilty to a crime loses the privilege against self-incrimination when sentenced for that crime. Relying on this interpretation of our Supreme Court caselaw, the State argues that when Hutto refused to testify, Hutto no longer had the privilege against self-incrimination. Then, it argues that we should affirm Hutto's direct contempt conviction for violating the trial court's legitimate direction to testify.

In *Delacruz*, our Supreme Court held that "[a] court cannot lawfully compel a witness to testify based upon the State's grant of mere use immunity." 307 Kan. 523, Syl. ¶ 5, 534-35. Indeed, the court explained the significant hurdle that must be cleared before a court can compel a witness to testify: "[I]f the government wants to compel testimony from a witness claiming the Fifth Amendment privilege against compulsory self-incrimination, it must grant the witness at least use and *derivative use immunity*, otherwise a citation in contempt must be reversed." (Emphasis added.) 307 Kan. at 535. So, as Hutto argues and the State concedes, the trial court erred when it ruled that Hutto no longer had the privilege against self-incrimination because of the State's grant of use immunity. Hence, under the *Delacruz* precedent, we hold that the trial court erred when it determined that Hutto no longer

had the privilege against self-incrimination because of the State's grant of use immunity. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017) (holding that this court is duty-bound to follow our Supreme Court precedent absent some indication that our Supreme Court is moving away from that precedent). And because the trial court plainly erred in this respect, it is not necessary for us to further address this issue.

As for Hutto's argument that a person retains the Fifth Amendment privilege against self-incrimination until he or she has exhausted all methods of attacking his or her underlying criminal convictions and sentences, the State correctly argues that our Supreme Court's precedent does not support his position. A critical fact that the parties largely ignore is that *Hutto pleaded guilty to two counts of felony murder and did not move to withdraw his felony murder guilty pleas until after he was sentenced*. In short, our Supreme Court precedent establishes that defendants lose their privilege against self-incrimination at sentencing when they have pleaded guilty and have failed to move to withdraw their guilty plea before sentencing. Here, because Hutto was sentenced before he attempted to withdraw his felony murder guilty pleas, Hutto lost his privilege against self-incrimination when sentenced for those crimes. The privilege did not extend until he exhausted all postsentencing methods of attacking his convictions and sentences. So, when Hutto refused to testify—citing the privilege against self-incrimination—the trial court correctly directed Hutto to testify because he no longer had a valid Fifth Amendment privilege. As a result, we affirm Hutto's direct contempt conviction for violating the trial court's direction.

FACTS

On July 26, 2018, the State charged Hutto with two counts of first-degree murder, one count of conspiracy to commit first-degree murder, and one count of aggravated burglary. *Hutto*, 313 Kan. at 743-44. Later, the State amended its complaint to also charge Hutto with two alternative counts of felony murder, one count of attempted first-degree murder, and one count of opiate possession. Evidence indicated that Hutto was involved in the

murder of Lisa Sportsman and Jesse Polinskey. During an interview with law enforcement, Hutto admitted to traveling from Greenleaf, Kansas, to Topeka, Kansas, to murder Lisa with Brad Sportsman (Lisa's husband), Richard Showalter, and Cole Pingel. 313 Kan. at 743. Although he denied physically participating in the murders, he told law enforcement that he had helped Showalter enter Lisa's house so Showalter could murder Lisa.

Once the State filed its charges, Hutto began plea negotiations. Initially, Hutto considered cooperating with the State to get a better plea deal. Under his ultimate plea agreement, though, Hutto did not have to give the State evidence against his accused murder accomplices. Rather, under this agreement, Hutto agreed to plead guilty to two counts of felony murder in exchange for the State's dismissal of his remaining charges. Also, under this agreement, Hutto could ask the trial court to impose concurrent sentences, rather than consecutive sentences, for his two felony murder convictions.

On January 18, 2019, Hutto pleaded guilty to the felony murder of Lisa and Polinskey in accordance with his plea agreement with the State. On May 10, 2019, the trial court sentenced Hutto to two consecutive hard 25 life sentences.

After his sentencing, Hutto did not directly appeal to our Supreme Court. But on May 22, 2019, he did file a pro se motion to withdraw his felony murder guilty pleas. Hutto argued that he received ineffective assistance of plea counsel for a variety of reasons, which meant that he should be allowed to withdraw his guilty pleas. *Hutto*, 313 Kan. at 744. The trial court disagreed, denying Hutto's motion on February 11, 2020.

On February 17, 2020, Hutto appealed the trial court's decision to deny his postsentencing motion to withdraw his felony murder guilty pleas to our Supreme Court. In the end, our Supreme Court rejected the only argument Hutto raised on appeal. Hutto asserted that his plea counsel "was ineffective to the extent of misleading him and preventing him from entering into the plea in a voluntary fashion" because plea counsel failed to tell him about his "viable compulsion defense." *Hutto*, 313 Kan. at 745-46. But our Supreme Court rejected this argument for the following reasons: (1) because he had not adequately briefed it before the trial court, (2) because he had no viable compulsion defense under the

evidence of his case, and (3) because plea counsel was not ineffective under the facts of his case. 313 Kan. at 746-51.

On July 9, 2021, our Supreme Court announced its decision affirming the trial court's denial of Hutto's postsentencing motion to withdraw his felony murder guilty pleas. On August 13, 2021, our Supreme Court issued its mandate.

Between these two events, however, the State started its jury trial against Hutto's accused felony murder accomplice—Showalter. The State had charged Showalter with two counts of first-degree murder as well as a single count each of conspiracy to commit first-degree murder, attempted first-degree murder, solicitation to commit first-degree murder, aggravated burglary, aggravated witness intimidation, and opiate possession. Because Showalter was Hutto's accused felony murder accomplice, the State subpoenaed Hutto to testify against Showalter at Showalter's jury trial. Nevertheless, when the State called Hutto to testify at the trial on July 13, 2021, Hutto refused to testify against Showalter.

The State questioned Hutto outside the presence of the jury with his attorney present. After the prosecutor asked Hutto why he was convicted of two felony murders, Hutto responded that he was "plead[ing] the Fifth." The prosecutor then asserted that Hutto no longer had the privilege against self-incrimination. According to the prosecutor, Hutto "no longer ha[d] an evidentiary privilege to refuse to testify" for three reasons: (1) because the trial court had already sentenced him for his crimes, (2) because our Supreme Court had already affirmed the denial of his postsentencing motion to withdraw guilty pleas, and (3) because the State had given him use immunity.

Relying on the prosecutor's arguments, the trial court ruled that Hutto no longer had the Fifth Amendment privilege against self-incrimination. And as a result, it directed Hutto to testify against Showalter. In doing so, it told Hutto that it could find him in contempt of court for refusing its direction to testify. It also explained that it could immediately impose up to a six-month jail sentence on him for a direct contempt conviction.

But Hutto still refused to testify. He told the trial court that he understood its direction to testify. Yet, he explained that he would

not testify because any contempt sentence that it could impose was negligible compared to the two consecutive hard 25 life sentences that he was serving for his felony murder convictions. "There [was] no reason to testify" based on these sentencing disparities. As a result, the trial court found Hutto in direct contempt of court. See K.S.A. 20-1203 (explaining the punishment procedures for direct contempt convictions).

Although the trial court found Hutto in direct contempt for refusing to testify, it gave Hutto the opportunity to purge himself of his contempt. Thus, on July 16, 2021, at the end of the State's case against Showalter, the State recalled Hutto to see if he would testify. Again, the State questioned Hutto outside the presence of the jury with his attorney present. But Hutto still refused to testify. Then, the trial court imposed a six-month jail sentence on Hutto for his direct contempt conviction. It ordered Hutto to serve this jail sentence after serving his consecutive felony murder sentences.

Hutto timely appeals his direct contempt conviction to this court.

ANALYSIS

Did Hutto have a valid Fifth Amendment privilege against self-incrimination when he refused to testify?

Under the Fifth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The privilege applies to the States through the Fourteenth Amendment to the Unites States Constitution. See *State v. George*, 311 Kan. 693, 707, 466 P.3d 469 (2020). Also, Section 10 of the Kansas Constitution Bill of Rights provides the same protection as it prohibits compelling a person to "be a witness against himself." 311 Kan. at 708.

Whether a person has a valid Fifth Amendment privilege against self-incrimination to invoke constitutes a question of law over which this court exercises de novo review. *State v. Contreras*, 313 Kan. 996, 999, 492 P.3d 1180 (2021). When a witness invokes the privilege against self-incrimination, the party seeking to admit evidence over the witness' invocation carries the burden

of proving to the trial court that no privilege exists. 313 Kan. at 1000.

The purpose of the privilege is to "protect[] both a defendant and any other witness whose answers may expose him [or her] to future criminal liability," from being forced to testify against himself or herself. *State v. Longobardi*, 243 Kan. 404, 407, 756 P.2d 1098 (1988). "The most straightforward application of this right is refusing to testify at one's own criminal trial." *George*, 311 Kan. at 708. Yet, a person may invoke the Fifth Amendment privilege against self-incrimination in other situations. 311 Kan. at 708. Indeed, the United States Supreme Court has explained that a person may have a valid Fifth Amendment privilege against self-incrimination whenever asked to "answer official questions" that may result in future criminal prosecution:

"[T]he Fifth Amendment 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Baxter v. Palmigiano*, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810 (1976) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 [1973]).

Although a person may invoke the Fifth Amendment privilege against self-incrimination in a variety of official proceedings, our Supreme Court has explained that a person's "Fifth Amendment privilege is not without limits" because it ends at some point. *State v. Bailey*, 292 Kan. 449, 460, 255 P.3d 19 (2011). Here, Hutto's appeal hinges on when his Fifth Amendment privilege against self-incrimination terminated. If Hutto's privilege terminated before he refused the trial court's direction to testify, then Hutto's refusal to testify supports his direct contempt conviction. On the other hand, if Hutto still had the privilege against self-incrimination when he refused the trial court's direction to testify, then Hutto's refusal to testify does not support his direct contempt conviction.

On appeal, Hutto never suggests that he had a valid Fifth Amendment privilege against self-incrimination because his trial testimony could have exposed him to punishment additional to his felony murder convictions and sentences. Rather, he argues that

he still had the privilege against self-incrimination when the trial court found him in direct contempt for refusing to testify for the following reasons: (1) because he still had time to move under the Kansas Supreme Court Rule 7.06 (2022 Kan. S. Ct. R. at 51) for our Supreme Court to rehear his appeal and (2) because he still had time to move for relief under K.S.A. 60-1507. To support his argument, Hutto relies on language from our Supreme Court's decision in *State v. Smith*, 268 Kan. 222, 235, 993 P.2d 1213 (1999). There, our Supreme Court held that "[t]he Fifth Amendment privilege against self-incrimination extends until there is a final judgment in a case and *a right to appeal has expired*." (Emphasis added.) 268 Kan. at 235. Based on this holding, Hutto concludes that although our Supreme Court had already announced its decision affirming the trial court's denial of his motion to withdraw guilty pleas, he still had the privilege against self-incrimination until he exhausted all methods of attacking his convictions and sentences.

The State's response recognizes the *Smith* court's holding that a person's Fifth Amendment privilege against self-incrimination "'extends until there is a final judgment in a case and a right to appeal has expired.'" It also recognizes that in *George*, our Supreme Court acknowledged that it had "framed the extent" of the privilege differently in different cases. 311 Kan. at 708. Even so, the State argues that, overall, our Supreme Court precedent supports that a person's privilege against self-incrimination ends when the trial court sentences that person. It argues that at that point, the person cannot face anymore adverse consequences for his or her crimes. Alternatively, the State argues that Hutto had no privilege against self-incrimination when he refused to testify because our Supreme Court's decision "was effective upon its publication." Essentially, the State argues that Hutto's privilege ended when our Supreme Court announced its decision rather than when our Supreme Court issued its mandate. But see Kansas Supreme Court Rule 7.03(b)(1)(A)(iii), (C) (2022 Kan. S. Ct. R. at 46) (providing that a mandate issues after an event finally disposing of the appeal and that a "mandate is effective when issued").

Here, although the trial court's analysis why Hutto no longer had the Fifth Amendment privilege against self-incrimination did not explicitly point it out, when it found Hutto in direct contempt,

it recognized two important facts: (1) that Hutto had pleaded guilty to two counts of felony murder and (2) that our Supreme Court had affirmed Hutto's appeal from *his postsentencing motion to withdraw guilty pleas*. Similarly, although neither party's analysis before the trial court or on appeal emphasizes these facts, both parties implicitly recognize that *Hutto moved to withdraw his guilty pleas after sentencing*. In any case, the trial court ruled, and the State argues that Hutto's privilege against self-incrimination terminated once the trial court sentenced Hutto.

A. *Reviewing our Supreme Court on the Fifth Amendment Privilege Against Self-Incrimination*

In *Mitchell v. United States*, 526 U.S. 314, 326, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999), the majority of the United States Supreme Court suggested that a person's Fifth Amendment privilege against self-incrimination ends after sentencing as long as that person's judgment of conviction is final. It explained:

> "It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude that principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final. See, e.g., *Reina v. United States*, 364 U.S. 507, 513, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960). If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared." 526 U.S. at 326.

The *Reina* decision that the *Mitchell* Court cited provides that there is "weighty authority" that a person's privilege against self-incrimination ends "once a person is convicted of a crime." *Reina*, 364 U.S. at 513. So, taken together, the *Mitchell* and *Reina* decisions support that if a person is not directly challenging his or her underlying conviction, that person's Fifth Amendment privilege against self-incrimination ends upon sentencing.

Over the years, our Supreme Court has considered several appeals involving the Fifth Amendment privilege against self-incrimination. In *State v. Anderson*, 240 Kan. 695, 698, 732 P.2d 732 (1987), our Supreme Court considered Anderson's argument that the trial court erred when it directed a witness—a person who had already pleaded guilty to committing a robbery with Anderson—to testify against Anderson at his jury trial for related crimes.

Anderson argued that the witness still had the Fifth Amendment privilege against self-incrimination (1) because he had not been sentenced and (2) because he still had time to appeal the denial of his motion to withdraw his guilty plea. 240 Kan. at 700. Our Supreme Court agreed that the trial court erred because "although a guilty plea generally waives a witness' Fifth Amendment privilege, where the witness may be subject to prosecution for other offenses, the witness' refusal to testify in the trial of a joint defendant was justified." 240 Kan. at 700. In its second syllabus, it further held that a "witness cannot be compelled to testify against an accomplice where the witness has already pled guilty but has not yet been sentenced *nor has his time for appeal expired*." (Emphasis added.) 240 Kan. 695, Syl. ¶ 2.

Although the *Anderson* court never explicitly acknowledged it, the fact that the witness filed a presentencing motion to withdraw a guilty plea clearly played a role in its decision. The *Anderson* court's second syllabus supports this fact as it states that a witness who "already pled guilty but has not yet been sentenced" still has a privilege against self-incrimination. 240 Kan. 695, Syl. ¶ 2.

Even so, shortly after our Supreme Court published *Anderson*, our Supreme Court modified *Anderson*'s second syllabus to delete the language indicating that a witness who pleaded guilty keeps the privilege against self-incrimination through appeal. In *Longobardi*, 243 Kan. at 408, the specific question before our Supreme Court was "[a]t what point does a defendant's Fifth Amendment privilege against self-incrimination end after his plea of guilty has been accepted?" 243 Kan. at 408-09. Longobardi argued that the trial court wrongly ruled that a person he intended to call as a hostile witness—a person who had already pleaded guilty to being his murder and aggravated robbery accomplice—still had the privilege against self-incrimination at his jury trial for related crimes because he still had time to appeal. 243 Kan. at 407. Longobardi asserted that for self-incrimination purposes, it was irrelevant that the witness still had "time for appeal, rehearing, [and] sentence modification," since the witness had already pleaded guilty and had been sentenced for second-degree murder and aggravated burglary. 243 Kan. at 407-08.

In the end, our Supreme Court agreed that the witness had no Fifth Amendment privilege against self-incrimination. It distinguished Longobardi's case from Anderson's case. It explained that unlike his case, in *Anderson*, (1) the witness had not been sentenced and (2) the witness still had time to appeal his presentencing motion to withdraw guilty pleas. 243 Kan. at 409. Then, it ruled: "[O]nce a plea of guilty has been regularly accepted by the court, *and no motion is made to withdraw it*, the privilege against self-incrimination ends after sentence is imposed." (Emphasis added.) 243 Kan. at 409. In doing so, it explicitly modified the second syllabus in *Anderson* to be limited to this holding. 243 Kan. at 409. It is worth mentioning that the *Longobardi* court's corresponding syllabus for this holding is worded somewhat differently: "The privilege against self-incrimination ends after sentence is imposed where a plea of guilty has been regularly accepted by the court, and no motion is made to withdraw it." 243 Kan. 404, Syl. ¶ 1. All the same, the *Longobardi* court determined that the witness no longer had the privilege against self-incrimination (1) because the witness never moved to withdraw his guilty pleas and (2) because the witness had been sentenced for his crimes. 243 Kan. at 409.

Clearly, the *Longobardi* court concluded that unless a person moves to withdraw a guilty plea before sentencing, that person's Fifth Amendment privilege ends when sentenced. The plain language of its holding modifying *Anderson*'s second syllabus supports this conclusion. Also, the specific language that it rejected in *Anderson*'s second syllabus supports this. The *Longobardi* court's modification specifically removed the language in *Anderson*'s second syllabus indicating that a person who pleads guilty continues to have the privilege against self-incrimination until his or her "time for appeal expired." *Anderson*, 240 Kan. 695, Syl. ¶ 2; see *Longobardi*, 243 Kan. at 410. Simply put, our Supreme Court would not have modified *Anderson*'s second syllabus unless it deemed that this modification was important. Thus, our Supreme Court's decision to remove the language indicating that the privilege extends through appeal for people who have pleaded guilty to crimes is very significant.

The way the *Longobardi* court worded the modification also supports that unless a person moves to withdraw his or her guilty plea before sentencing, that person's privilege against self-incrimination terminates at sentencing. Again, the *Longobardi* court held that "once a plea of guilty has been regularly accepted by the court, *and no motion is made to withdraw it*, the privilege against self-incrimination ends after sentence is imposed." (Emphasis added.) 243 Kan. at 409. As a result, the *Longobardi* court placed the clause "and no motion is made to withdraw it" before discussing sentencing. By doing this, it clarified that when a person does not move to withdraw a guilty plea before sentencing, that person's privilege against self-incrimination ends upon sentencing.

Also, this would seem the only sound way to interpret the *Longobardi* court's holding. To interpret the *Longobardi* court's holding otherwise and to allow a person to validly invoke the privilege against self-incrimination after moving to withdraw a guilty plea after sentencing would result in the following: a person losing and then regaining this privilege again. Under such an interpretation, individuals who plead guilty to a crime, who are then sentenced, and who later move to withdraw their guilty plea after sentencing would technically lose their Fifth Amendment privilege against self-incrimination under *Longobardi*. But then they could regain their Fifth Amendment privilege against self-incrimination upon moving to withdraw their guilty plea after sentencing under *Smith*.

So, we pause to ask this question: Can the *Longobardi* and *Smith* decisions coexist in harmony with each other? About a decade after deciding *Longobardi*, in *Smith*, our Supreme Court discussed the privilege against self-incrimination in the context of Smith's argument that the trial court wrongly failed to sever his theft and conspiracy to commit theft jury trial from his codefendant's jury trials for the same crimes. Although Smith argued that his codefendants could have testified on his behalf at his hypothetical severed jury trial, our Supreme Court rejected Smith's argument because his codefendants could have invoked the privilege against self-incrimination at his hypothetical severed jury trial. In doing so, the court held that "[t]he Fifth Amendment privilege against self-incrimination extends until there is a final judgment in a case *and a right to appeal has expired*. See *State v. Aldape*, 14 Kan. App. 2d 521, 526, 794 P.2d 672, *rev. denied* 247 Kan.

705 (1990)." (Emphasis added.) *Smith*, 268 Kan. at 235. Thus, the *Smith* court's holding supports that the privilege against self-incrimination extends until the "right to appeal has expired." 268 Kan. at 235.

But the preceding holding in *Smith* has been called into question. First, unlike the *Anderson* and *Longobardi* courts, which had to resolve the extent of actual witnesses' privileges against self-incrimination, the *Smith* court discussed the privilege in passing to undermine Smith's argument about severing his hypothetical trial from his codefendants. Second, the *Smith* court's holding is very broad. It never clarified what "right to appeal" must expire before a person's privilege against self-incrimination ends. Third, the *Smith* court relied on language from this court's *Aldape* decision to support its holding. Yet, the *Aldape* court never held that a person keeps the privilege against self-incrimination after sentencing. Rather, it concluded that "the risk of incrimination continues until there is a final judgment in a case *and a right to appeal*." (Emphasis added.) 14 Kan. App. 2d at 526. In other words, the *Aldape* court held that the risk of incrimination continues until a person *attains* the right to appeal following final judgment. Fourth, the *Smith* court never acknowledged the *Longobardi* decision even though the *Longobardi* court's conflicting holding modified *Anderson*'s second syllabus by explicitly stating that unless a person moves to withdraw a guilty plea before sentencing, that person loses the privilege against self-incrimination upon sentencing. So, the *Smith* court's holding lacks a sound basis for saying that "[t]he Fifth Amendment privilege against self-incrimination extends until there is a final judgment in a case and a right to appeal has expired." 268 Kan. at 235.

Next, although the *Smith* court never discussed the *Longobardi* decision, our Supreme Court's more recent decisions involving the extent of the Fifth Amendment privilege against self-incrimination have relied on its *Longobardi* holding. Our Supreme Court's 2011 *Bailey* decision, 2015 *Soto* decision—*State v. Soto*, 301 Kan. 969, 349 P.3d 1256 (2015)—and 2020 *George* decision all cite *Longobardi* for the proposition that "'[t]he privilege against self-incrimination ends after sentence is imposed where a plea of guilty has been regularly accepted by the court, and no motion is

made to withdraw it.'" *George*, 311 Kan. at 707; *Soto*, 301 Kan. at 980; *Bailey*, 292 Kan. at 460.

In *Bailey*, Bailey argued that the trial court erred by telling the State's witness—a person who had already been sentenced for murder after pleading guilty to being Bailey's murder accomplice—that he had a valid Fifth Amendment privilege against self-incrimination when he invoked it at his jury trial. Bailey argued that the witness still had the privilege because he still had an appeal pending. But our Supreme Court rejected Bailey's argument. It held that "[b]ecause [the witness] had *entered a guilty plea and had been sentenced*, the trial court was correct in finding that [the witness] had no Fifth Amendment privilege protecting the events in this case." (Emphasis added.) 292 Kan. at 463. Immediately before it reached this holding, the *Bailey* court quoted the *Longobardi* court's holding that "'once a plea of guilty has been regularly accepted by the court, and no motion is made to withdraw it, the privilege against self-incrimination ends after sentence is imposed.'" 292 Kan. at 462. Meanwhile, in *Soto*, while considering a *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), violation claim, our Supreme Court relied on the same *Longobardi* holding to conclude that a person—who had pleaded guilty to committing a murder with Soto—had the privilege against self-incrimination past the end of Soto's jury trial. This was because although the person had pleaded guilty to murder and had not withdrawn his guilty plea, he was sentenced after Soto's jury trial ended. 301 Kan. at 977, 980.

As a result, our Supreme Court's holdings in *Bailey* and *Soto* undermine our Supreme Court's holding in *Smith* that the Fifth Amendment privilege against self-incrimination extends until the "right to appeal has expired." 268 Kan. at 235. Indeed, our Supreme Court's rejection of Bailey's argument that the witness kept the privilege through appeal because the witness had entered a guilty plea and the witness had been sentenced plainly contradicts the *Smith* court's holding that a person who pleads guilty to a crime retains the privilege through appeal. At the same time, the *Bailey* and *Soto* decisions reaffirm the validity of the *Longobardi* court's contradictory holding because both relied on *Longobardi* in determining whether the people at issue had a valid Fifth Amendment

privilege against self-incrimination after pleading guilty to murder.

George is the most recent decision discussing *Longobardi*. There, George argued that the trial court wrongly ruled that his intended witness—a person who had already pleaded *no contest* to second-degree murder, had been sentenced, but had a pending appeal—still had a valid Fifth Amendment privilege against self-incrimination when he invoked the privilege at his first-degree murder jury trial. 311 Kan. at 704-06. The trial court determined that the witness' privilege extended through his appeal. 311 Kan. at 705. Ultimately, the *George* court "decline[d] to decide whether *a plea of nolo contendere* waives the privilege against self-incrimination after sentencing but before the conclusion of the direct appeals" because any error by the trial court was harmless under the specific facts of George's case. (Emphasis added.) 311 Kan. at 709.

In reaching its decision, though, our Supreme Court provided the following summary of its caselaw discussing the extent of the privilege against self-incrimination:

> "There is no doubt that the privilege against self-incrimination extends at least through sentencing. *State v. Gary*, 282 Kan. 232, 249, 144 P.3d 634 (2006); *State v. Valdez*, 266 Kan. 774, 794, 977 P.2d 242 (1999) ('There is no doubt that an individual's right against self-incrimination extends through sentencing.'); *State v. Aldape*, 14 Kan. App. 2d 521, 526, 794 P.2d 672 (1990) ('[T]he right against self-incrimination extends through sentencing.'); see also *Mitchell v. United States*, 526 U.S. 314, 327, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) ('[A] defendant who awaits sentencing after having pleaded guilty may assert the privilege against self-incrimination if called as a witness in the trial of a codefendant, in part because of the danger of responding "to questions that might have an adverse impact on his sentence or on his prosecution for other crimes.'").
>
> "Elsewhere, we framed the extent of the right more broadly as extending through the completion of all appeals. *Smith*, 268 Kan. at 235 (The right 'extends until there is a final judgment in a case and a right to appeal has expired.'). But in other cases, we have suggested that a guilty plea may result in a waiver of the privilege against self-incrimination during the pendency of any appeal. For example, in *State v. Soto*, 301 Kan. 969, 980, 349 P.3d 1256 (2015), we stated that the '"privilege against self-incrimination *ends after sentence is imposed where a plea of guilty has been regularly accepted* by the court, and no motion is made to withdraw it."' (Emphasis added.) (Quoting *Bailey*, 292 Kan. at 460, and *Longobardi*, 243 Kan. 404, Syl. ¶ 1.)" 311 Kan. at 708-09.

So, the *George* court recognized that the court's past holdings discussing when a person's Fifth Amendment privilege against self-incrimination ends differed in different cases. It recognized that its holding in *Smith* about the privilege extending through appeal conflicted with its other cases, which held that unless a person moves to withdraw guilty plea before sentencing a person who pleads guilty to a crime loses the privilege upon sentencing. Yet, the *George* court neither modified nor overruled its interpretation or application of the privilege against self-incrimination in the *Longobardi*, *Smith*, *Bailey*, or *Soto* decisions. As indicated in the preceding excerpt from *George*, the *George* court never engaged in an in-depth review of the *Longobardi*, *Smith*, *Bailey*, or *Soto* decisions. Of course, the *George* court did not need to engage in an in-depth review because it rejected George's argument based on harmless error.

B. *Applying our Supreme Court Precedent on the Fifth Amendment Privilege Against Self-Incrimination*

Having reviewed our Supreme Court's precedent addressing when a person's Fifth Amendment privilege against self-incrimination ends, it is readily apparent that Hutto did not have a valid Fifth Amendment privilege when he invoked the privilege at Showalter's trial.

Hutto's entire argument about having the privilege against self-incrimination hinges on the *Smith* and *Aldape* decisions. In his appellant's brief, these are the only cases Hutto cites to support his argument. But Hutto merely cites to the *Smith* and *Aldape* decisions without any further analysis regarding the correctness of the *Smith* court's holding that the privilege against self-incrimination extends through appeal. Additionally, he does not address our Supreme Court precedent in *Anderson*, *Longobardi*, *Bailey*, or *Soto* supporting that unless a person moves to withdraw a guilty plea before sentencing, that person loses the privilege against self-incrimination upon sentencing.

Regardless, as previously explained, the *Smith* court's holding that a person retains the privilege "until the right to appeal has expired" is thrown into question for the following reasons: (1) the holding stems from a hypothetical privilege issue; (2) the holding contains broad language; (3) the holding hinges on misinterpreting

language from *Aldape*; and (4) the holding ignores the *Longobardi* court's conflicting precedent. Once more, the *Longobardi* court explicitly modified the second syllabus of *Anderson* to provide that "once a plea of guilty has been regularly accepted by the court, and no motion is made to withdraw it, the privilege against self-incrimination ends after sentence is imposed." The *Bailey* and *Soto* decisions, which our Supreme Court decided more than a decade after the *Smith* decision, reaffirmed the *Longobardi* holding. And in *Bailey*, our Supreme Court applied *Longobardi*'s holding to conclude that a witness lacked the privilege through his pending appeal. 292 Kan. at 463.

Although Hutto points out that he still had time to file certain motions when he invoked the privilege against self-incrimination, he ignores that those motions were *postsentencing motions*. Again, Hutto specifically points out that when he invoked the privilege, (1) he still had time to move under Rule 7.06 for our Supreme Court to rehear his appeal on his postsentencing motion to withdraw his guilty pleas and (2) he still had time to attack his sentence under K.S.A. 60-1507. Yet, under the *Anderson*, *Longobardi*, *Bailey*, and *Soto* precedents, the fact that Hutto could still file those postsentencing motions is irrelevant. Because Hutto had entered his felony murder guilty pleas and had been sentenced for those crimes without first moving to withdraw his guilty pleas, his privilege against self-incrimination ended upon sentencing.

Also, Hutto's argument ignores that the *Smith* court's holding does not and cannot logically be harmonized with the *Anderson*, *Longobardi*, *Bailey*, and *Soto* precedents. That is to say, the *Smith* court's holding directly conflicts with the results reached by the *Anderson*, *Longobardi*, *Bailey*, and *Soto* courts. In a nutshell, our Supreme Court would not have decided *Anderson*, *Longobardi*, *Bailey*, and *Soto* cases the way it did if it agreed with the *Smith* court's holding that "[t]he Fifth Amendment privilege against self-incrimination extends until there is a final judgment in a case and a right to appeal has expired." 268 Kan. at 235. Even more, Hutto never considers the impracticality of his argument. He contends that his privilege should have extended until he had exhausted all methods of attacking his convictions and sentences after sentencing, which includes moving for relief under K.S.A. 60-1507. Yet,

if we were to echo Hutto's suggested application of the privilege, a person could retain the privilege indefinitely as he or she filed successive K.S.A. 60-1507 motions. Then, under Hutto's suggested application of the *Smith* court's holding, it is unclear when, if ever, a person's Fifth Amendment privilege against self-incrimination would terminate.

In *Rogers v. United States*, 340 U.S. 367, 373, 71 S. Ct. 438, 95 L. Ed. 344 (1951), the United States Supreme Court explained that a "[d]isclosure of a fact waives the privilege as to details." This means that once a person waives the privilege against self-incrimination as to a crime, that person permanently waives this privilege because no future testimony could expose the person to additional criminal punishment. 340 U.S. at 373.

As previously noted, we are duty-bound to follow our Supreme Court precedent unless there is some indication that our Supreme Court is moving away from that precedent. *Rodriguez*, 305 Kan. at 1144. Here, there is no evidence that our Supreme Court is moving away from its precedent. A close review of our Supreme Court's decisions establishes that unless a person moves to withdraw a guilty plea before sentencing, that person loses the privilege against self-incrimination to avoid testifying about related criminal conduct upon sentencing. As a result, we must follow this precedent and reject Hutto's argument that he retained the Fifth Amendment privilege against self-incrimination until he had exhausted all methods of attacking his convictions and sentences after sentencing. We conclude that Hutto's privilege against self-incrimination ended upon his sentencing for his two felony murder guilty pleas.

So, defendants' Fifth Amendment privilege against self-incrimination which springs from moving to withdraw a guilty plea before sentencing—under the *Longobardi* and *Bailey* precedents—is wholly preeminent over defendants' Fifth Amendment privilege against self-incrimination which springs from moving to withdraw their guilty plea after sentencing under the *Smith* precedent. Both privileges against self-incrimination have real existence—once more, all persons have a Fifth Amendment privilege against self-incrimination. Yet, each stated version of the above privilege excludes the other when defendants move to withdraw their guilty plea after sentencing under the *Smith* precedent. The

former privilege against self-incrimination under the *Longobardi* and *Bailey* precedents is incongruous with the latter privilege against self-incrimination under the *Smith* precedent because the *Longobardi* and *Bailey* precedents established that for defendants who pleaded guilty to their crimes, their Fifth Amendment privilege against self-incrimination terminates at sentencing.

In summary, the trial court correctly ruled that Hutto did not have a valid Fifth Amendment privilege against self-incrimination when he invoked the privilege at Showalter's trial. Because Hutto lacked a valid reason for refusing the trial court's direction to testify, the trial court properly found Hutto in contempt for violating its direction. Thus, we affirm Hutto's direct contempt conviction.

Affirmed.

(522 P.3d 319)

No. 124,127

JACK GARNER, *Appellant,* v. KANSAS DEPARTMENT OF REVENUE, *Appellee.*

SYLLABUS BY THE COURT

1. MOTOR VEHICLES—*Determination by Court Whether Driver Violated K.S.A. 8-1547.* To find that a driver violated K.S.A. 8-1547, the court must determine whether the driver started their vehicle from a stop without reasonable safety under the specific circumstances.

2 SAME—*Revving Engine and Spinning and Squealing Tires Does Not Constitute Violation of K.S.A. 8-1547.* A driver's acceleration of a car from a stop that causes the engine to rev and the tires to spin and squeal—without more—is insufficient to constitute a violation of K.S.A. 8-1547 when there are no other circumstances suggesting that the acceleration was not reasonably safe.

Appeal from Trego District Court; THOMAS J. DREES, judge. Opinion filed December 23, 2022. Reversed and remanded with directions.

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

Charles P. Bradley, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before WARNER, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

HURST, J.: The Kansas Department of Revenue suspended Jack Garner's driver's license for driving under the influence, and after judicial review the district court upheld that suspension. Garner now appeals, challenging the arresting officer's reasonable suspicion for performing the stop on his vehicle that led to his driver's license suspension. Finding that the officer lacked reasonable suspicion to believe Garner had violated the law, this court reverses the district court's decision to uphold the suspension of Garner's driver's license and remands with instructions.

FACTUAL AND PROCEDURAL HISTORY

The relevant facts are straightforward. On July 27, 2020, at about 9:20 p.m., the arresting officer was on patrol in WaKeeney

when he observed Garner's truck stopped at a stop sign. The officer had the window of his patrol car down and was around 200 or 300 feet away from Garner's truck when he heard a car engine "roar" and tires screech. He described the sound as "not just a little screech like you would accidentally hit it, but it was, you know, someone laying into the gas." The officer looked back toward Garner and observed him "spinning [the truck's] tires all the way around until it got . . . directly onto 13th Street and straightened up." He testified that he observed Garner spinning his tires for "several feet."

While the arresting officer heard Garner's tires screech and witnessed the tires spinning, he did not see any typical driving infractions. The officer did not observe Garner leave his lane of travel, fishtail, or commit a speeding violation, but he decided to stop Garner's truck exclusively based on "[excessive] acceleration of the tires." The officer claimed Garner's acceleration violated K.S.A. 8-1547, which provides: "No person shall start a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety." This traffic stop eventually led to Garner's arrest for driving under the influence. The facts supporting Garner's arrest for driving under the influence are not relevant to this appeal.

Under the statutory requirements, Garner was served with the officer's certification and notice of driver's license suspension, and the Kansas Department of Revenue (KDOR) affirmed the suspension of Garner's driver's license. Garner petitioned for review of KDOR's administrative suspension order in Trego County District Court, arguing, among other things, that the traffic stop based on his screeching tires was unconstitutional because the officer lacked the requisite reasonable suspicion to initiate the stop. The district court conducted a de novo bench trial and upheld KDOR's administrative suspension order, finding the officer had reasonable suspicion to initiate a traffic stop based on Garner's violation of K.S.A. 8-1547. Garner appeals.

DISCUSSION

The sole issue presented here is whether the district court erred in holding that the arresting officer had reasonable suspicion

to initiate the traffic stop of Garner. Helpfully, the parties agree on the relevant facts but disagree on whether those facts provided the officer with a particularized and objective basis for suspecting that Garner violated K.S.A. 8-1547.

Standard of Review

Appeals from the administrative suspension of driver's licenses are subject to review under the Kansas Judicial Review Act. K.S.A. 2021 Supp. 8-259(a); K.S.A. 77-601 et seq.; *Rosendahl v. Kansas Dept. of Revenue*, 310 Kan. 474, 480, 447 P.3d 347 (2019). On appeal, Garner, as the party asserting the error, carries the burden of proving the invalidity of KDOR's suspension of his driver's license. See K.S.A. 77-621(a)(1); see also K.S.A. 2021 Supp. 8-1020(q) ("Upon review, the licensee shall have the burden to show that the decision of the agency should be set aside.").

This court reviews the district court's factual findings in upholding KDOR's suspension of Garner's license for "substantial competent evidence" but reviews de novo its legal conclusions. *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 469, 447 P.3d 959 (2019); *Casper v. Kansas Dept. of Revenue*, 309 Kan. 1211, 1213, 442 P.3d 1038 (2019). Substantial competent evidence is both relevant and substantive, and provides a substantial basis of fact from which the issues can reasonably be resolved. In reviewing the district court's factual findings, this court will not reweigh the evidence, redetermine the credibility of witnesses, or redetermine questions of fact. *Creecy*, 310 Kan. at 469. However, this court conducts its legal analysis of those facts anew, without reliance on or deference to the district court's legal analysis.

Governing Legal Principles

The Fourth Amendment to the United States Constitution protects persons from unreasonable government seizure and provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Kansas Constitution Bill of Rights likewise prohibits unreasonable searches and seizures. Kan. Const. Bill of Rights, § 15. "[A] traffic

stop, even one leading to administrative rather than criminal proceedings, is a seizure" under the Fourth Amendment and section 15. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 171, 473 P.3d 869 (2020); see *State v. Jimenez*, 308 Kan. 315, 322, 420 P.3d 464 (2018) ("A routine traffic stop is a seizure under the Fourth Amendment."); *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 636, 176 P.3d 938 (2008) ("A traffic stop is not magically converted to a 'nonseizure' when it leads to a civil or administrative rather than a criminal proceeding.").

An officer's decision to seize someone by pulling them over constitutes a valid seizure under the Fourth Amendment if the officer has "specific and articulable facts that create a reasonable suspicion the seized individual is committing, has committed, or is about to commit a crime or traffic infraction." *State v. Cash*, 313 Kan. 121, Syl. ¶ 2, 483 P.3d 1047 (2021); see K.S.A. 22-2402; *Strickert v. Kansas Dept. of Revenue*, 58 Kan. App. 2d 1, Syl. ¶ 3, 462 P.3d 649 (2020). When an officer lacks those specific, articulable facts, the seizure may violate the Fourth Amendment, assuming no exception applies. In such cases if the traffic stop is unconstitutional, the court may set aside KDOR's administrative suspension of a person's driver's license. See K.S.A. 2021 Supp. 8-1020(o)-(p); *Jarvis*, 312 Kan. at 167-69; *Whigham v. Dept. of Revenue*, 312 Kan. 147, 152, 473 P.3d 881 (2020).

The parties' entire dispute revolves around this court's interpretation of K.S.A. 8-1547, the statute the officer alleged supported Garner's traffic stop. When interpreting a statute, if the Legislature's intent in enacting the statute is ascertainable, this court must defer to that intent. *Montgomery v. Saleh*, 311 Kan. 649, 654-55, 466 P.3d 902 (2020). The Kansas Supreme Court has explained that:

> "When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. [An appellate court] will only review legislative history or use canons of construction if the statute's language or text is ambiguous. [Citations omitted.]" *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

Contrary to Garner's assertion, the question of what conduct violates K.S.A. 8-1547 appears to be an issue of first impression

in Kansas. Garner mistakenly asserts that the Kansas Supreme Court has previously determined this issue in his favor. See *City of Altamont v. Finkle*, 224 Kan. 221, 579 P.2d 712 (1978). While the defendant's conduct in *Finkle* was much like Garner's conduct here, the legal issue in that case was distinguishable from the issue here. In *Finkle*, the court held that the complaint charging Finkle with "exhibition of speed" was defective because it failed to charge an offense "with enough clarity and detail to inform the defendant of the criminal act with which he is charged." 224 Kan. 221, Syl. ¶ 1. The court in *Finkle* did not address whether the conduct at issue could be prosecuted if properly charged, but determined the charging document was defective. Moreover, the *Finkle* court examined an ordinance similar to K.S.A. 8-1565, a statute prohibiting racing on highways—not the statute at issue in this case. 224 Kan. at 222. Cases like *Finkle*—analyzing or interpreting K.S.A. 8-1565—do not help the analysis in this case.

Garner also wrongly relies on the district court's decision in his DUI criminal case that arose from the same traffic stop. Not only is the district court's full decision not in the record on appeal, it is immaterial to this current analysis because Garner relies on the district court's discussion of whether he committed an "exhibition of speed or acceleration" as prohibited by K.S.A. 8-1565—which is not the issue currently on appeal—and it involves a different legal standard and burden of proof. Garner's present appeal claims only that the officer lacked reasonable suspicion to stop Garner for violating K.S.A. 8-1547. The district court's analysis of Garner's violation of a different statute (K.S.A. 8-1565) is not relevant to this court's current analysis.

K.S.A. 8-1547 provides: "No person shall start a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety." Neither this court nor the Kansas Supreme Court have defined the conduct that violates this statute, and the parties provide little guidance on how this court should interpret the statutory language. But the plain statutory language is clear, and other state courts' interpretations of similar statutory language provide this court with some persuasive authority in determining the meaning and scope of K.S.A. 8-1547. The language in K.S.A. 8-1547 is identical to that contained in §

11-603 of the Uniform Vehicle Code (UVC), and the same or similar language has been adopted by multiple states. See, e.g., Ind. Code § 9-21-8-23; N.Y. Vehicle and Traffic Law § 1162; Iowa Code § 321.313; Fla. Stat. § 316.154. And the Kansas Legislature's intent in enacting portions of the UVC was "to make uniform the law of those states which enact it." See K.S.A. 8-2203 ("This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."). This statute specifically prohibits starting a vehicle from a stopped, standing, or parked position in an unsafe manner and is often called the unsafe-start statute.

Indiana has an unsafe-start statute that is almost identical to the Kansas statute at issue here—and the UVC—which provides that "[a] person may not start a vehicle that is stopped, standing, or parked until the movement can be made with reasonable safety." Ind. Code § 9-21-8-23. The Indiana Court of Appeals has interpreted and applied its equivalent statute to a case with a substantially similar fact pattern to this case. *Dora v. State*, 736 N.E.2d 1254 (Ind. Ct. App. 2000). In *Dora*, a police officer observed John Dora stopped in his vehicle at an intersection. As Dora turned right, the officer observed him "'over-accelerate' the vehicle he was driving, causing the tires on his car to spin and squeal for approximately three to four seconds" and with enough force to cause smoke to roll out from the car's tires. 736 N.E.2d at 1255. The officer then stopped Dora and cited him for a violation of the state's unsafe-start statute, and the Indiana trial court found Dora guilty of violating the statute.

The Indiana Court of Appeals reversed Dora's conviction and reasoned:

> "The statute makes clear that a driver may not start a vehicle that is stopped, standing, or parked, until such movement can be made with reasonable safety. While we consider it to be unwise, in most circumstances, to over-accelerate one's car thereby causing the tires to spin and squeal, there is nothing in the statute specifically prohibiting such conduct at all times. Had the Legislature intended for the provisions of this traffic regulation to prohibit the spinning and squealing of one[']s tires in all circumstances, it could have easily provided for such regulation.
>
> . . . .

"[A]fter carefully reviewing the evidence most favorable to the trial court's judgment, we find that there simply was no evidence adduced at trial that Dora's commencement of the right-hand turn constituted a threat to himself or anyone else. While it certainly is conceivable that spinning one's tires to the point that they begin to squeal and smoke might, under a different set of facts, be unreasonably safe, here, there was no evidence offered of any danger created by this conduct, either to Dora or anyone else. Nor did the State provide any evidence that Dora started his vehicle before said movement could be made with reasonable safety. The fact that Dora spun and squealed his tires does not ipso facto mean said conduct violated the 'reasonable safety' mandate, which is the essence of the statutory prohibition." 736 N.E.2d at 1256-57.

Contrarily, the Indiana Court of Appeals again confronted this issue with a different set of facts in which it found the stop appropriate. See *Beasey v. State*, 823 N.E.2d 759 (Ind. Ct. App. 2005). In *Beasey*, a police officer observed Glenn Beasey "pulling out of a liquor store parking lot with its wheels spinning and backend fishtailing." 823 N.E.2d at 760. Beasey did not correct the action, but continued to accelerate and fishtailed through the turn on a wet roadway. The officer initiated a traffic stop of Beasey based on his violation of the state's unsafe-start statute. The Indiana appellate court upheld the validity of the stop, finding that Beasey's conduct violated the statute and was distinguishable from the conduct evaluated in its prior decision in *Dora*. 823 N.E.2d at 762. The court explained that "unlike *Dora*, additional evidence was presented that Beasey's start was unsafe thus creating a danger to himself or others, viz., Beasey's car fishtailed as he overaccelerated on wet pavement and he was not in control of the vehicle." 823 N.E.2d at 762.

New York's unsafe-start statute similarly provides that "[n]o person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety." N.Y. Vehicle and Traffic Law § 1162. Like the Indiana Court of Appeals, New York state courts have held that merely accelerating a vehicle from a stop in a manner that causes the tires to squeal does not violate the statute. See *People v. Riggs*, 60 Misc. 3d 817, 80 N.Y.S.3d 649 (N.Y. City Ct. 2018) (finding no violation of the statute, even when accelerating to the point of causing tires to squeal, when there was no evidence that defendant was driving in excess of the legal speed limit, no evidence of any hazardous driving conditions, and no evidence that the car was out of control); *People v. Rebecca P.*, No. CR12-0577, 2012 WL 6582613 (Canandaigua City Ct. 2012) (unpublished opinion) (finding that squealing tires and speeding away from intersection was not sufficient to establish a violation of the statute when there was no evidence that indicated the car's movement was not reasonably safe). But see *People v. Petri*, 152 A.D.3d 1089, 59

N.Y.S.3d 584 (2017) (finding that an officer had probable cause to stop a vehicle under the unsafe-start statute because "defendant made an immediate turn to the right and rapidly accelerated on a city street past numerous pedestrians, some within 5 to 10 feet of his vehicle, while causing his tires to loudly squeal and spin for a protracted period of time").

Other appellate courts examining statutes nearly identical to K.S.A. 8-1547 have stated in dicta that squealing tires alone do not violate their respective unsafe-start statutes. See *State v. Howard*, No. 16-0137, 2017 WL 108466, at *2 n.4 (Iowa Ct. App. 2017) (unpublished opinion) ("The State does not explain how squealing tires fits the elements of an unsafe start under section 321.313. That section prohibits motorists from moving their cars until they can do so 'with reasonable safety.'"); *Donaldson v. State*, 803 So. 2d 856, 859 (Fla. Dist. Ct. App. 4th 2002) ("There is no indication that squealing tires alone constitutes a traffic infraction. We are at a loss to understand how squealing tires without more constitutes a danger to public safety.").

However, at least one state court agrees with the district court here that a driver squealing their tires is sufficient to permit an officer to initiate a traffic stop under a statute with a reasonable-safety provision similar to K.S.A. 8-1547. See *Singleton v. State*, 91 S.W.3d 342 (Tex. App. 2002). In *Singleton*, a police officer stopped Wayne Singleton after observing him "making a right turn fast enough and sharp enough to squeal the tires and make the tires spin out." 91 S.W.3d at 345. A Texas appellate court agreed, finding that squealing tires was enough to provide the officer with probable cause to stop Singleton. But, the Texas statute was slightly broader than the statute at issue here in that it related to turning or sideways movement and provided: "An operator may not turn the vehicle to enter a private road or driveway, otherwise turn the vehicle from a direct course, or move right or left on a roadway unless movement can be made safely." Tex. Transp. Code Ann. § 545.103 (Vernon 1999). The court explained:

"In the present case, although [the officer] testified he did not stop Singleton for driving unsafely, he also testified, '[Singleton] made the turn in an unsafe manner and caused his tires to spin out.' He further testified, 'any time you make a turn where your tires are squealing, it's unsafe.' Based on the totality of the circum-

stances, the specific objective, articulable facts of the officer, in light of the officer's experience and personal knowledge, together with inferences from those facts, were sufficient to support the trial court's finding of reasonable suspicion that a traffic violation had occurred. This point of error is overruled." 91 S.W.3d at 347-48.

The majority of states have determined that finding a violation of statutes similar to K.S.A. 8-1547 requires a determination of whether the driver's conduct in starting their vehicle was not reasonably safe under the specific circumstances. As the Kansas Supreme Court has recognized, courts should look for guidance from surrounding states to interpret these statutes patterned after the UVCA and seek uniformity in those interpretations. See *State v. Marx*, 289 Kan. 657, 670, 215 P.3d 601 (2009). This court joins most of state courts that have addressed this statutory language in holding that a driver's acceleration from a stop that causes the car's engine to rev and tires to squeal and spin is insufficient to constitute a violation of K.S.A. 8-1547 when there are no other circumstances showing that the acceleration was not reasonably safe. The plain text of the statute unambiguously requires that stopped vehicles must begin moving "with reasonable safety," and nothing more. K.S.A. 8-1547. Clearly, the facts presented here—an acceleration causing the engine to rev and the tires to squeal and spin—could contribute to a violation of the statute. However, the revving engine and squealing and spinning tires alone do not demonstrate that Garner accelerated without "reasonable safety" as required by K.S.A. 8-1547. The essence of the unsafe-start statute is that it prohibits unsafe conduct, and the officer here did not identify any conditions or circumstances—such as wet road conditions, construction, the presence of other vehicles or pedestrians, or obstructions—that made Garner's acceleration unsafe.

While the officer testified that "there's no way that a driver is going to have any control of that vehicle" when its tires are spinning, his description of Garner's driving demonstrated that Garner did have control and moved his vehicle with reasonable safety. Garner maintained control of his vehicle, stayed in his lane, and did not swerve or fishtail. Nor was there any evidence of poor road conditions that might have required extra caution, nor did the officer testify that other cars or pedestrians were nearby. This court

cannot say that every acceleration that causes the car's engine to rev and tires to spin and squeal is not reasonably safe.

The officer provided no specific, articulable facts that created a reasonable suspicion Garner violated K.S.A. 8-1547 because the only facts upon which the officer relied—the revving engine coupled with squealing and spinning tires—do not violate the statute. Because the officer did not identify any specific facts or circumstances that demonstrated Garner accelerated without reasonable safety, he lacked reasonable suspicion that Garner violated K.S.A. 8-1547. Although the responding officer may have genuinely believed that Garner had violated K.S.A. 8-1547 when he heard the engine rev and tires squeal, "[t]he 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." *Cash*, 313 Kan. 121, Syl. ¶ 7. This court does not doubt the good-faith intention and belief of the arresting officer, but that is not enough to support the constitutionality of Garner's seizure in these circumstances.

CONCLUSION

Garner's acceleration in a manner that caused his engine to rev and his tires to squeal and spin did not violate K.S.A. 8-1547, and thus the officer who witnessed this conduct could not have possessed the reasonable suspicion necessary to support a traffic stop. The officer violated Garner's Fourth Amendment right against unreasonable seizures by conducting the stop based on a violation of K.S.A. 8-1547, and the judgment of the district court is therefore reversed and remanded with instructions to set aside KDOR's administrative order suspending Garner's driver's license because the stop was unlawful.

Reversed and remanded with directions.

(522 P.3d 325)

No. 124,251

FREDERICK TODD WIEDEMANN, *Appellant*, v. PI KAPPA PHI FRATERNITY, et al., *Appellees*.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Actions in Small Claims Court—Relief from Judgments or Orders under K.S.A. 60-260.* Parties to actions brought in small claims court pursuant to the Small Claims Procedure Act and the Code of Civil Procedure for Limited Actions may seek relief from such small claims judgments or orders from the district court pursuant to K.S.A. 60-260.

2. SAME—*District Court's Review of Small Claims Judgment or Order—Uses Appellate Review*. A district court reviewing the small claims judgment or order pursuant to K.S.A. 60-260 performs a predominantly appellate review, only deciding the issues preserved and raised by the party seeking review, and does not conduct a new trial.

3. SAME—*No Consent to Jurisdiction by Raising Defense of Lack of Personal Jurisdiction*. A person or entity does not consent to personal jurisdiction by its actions when it timely files motions raising the defense of lack of personal jurisdiction.

4. SAME—*Small Claims Judgment Entered Without Personal Jurisdiction—May Set Aside as a Nullity.* A small claims judgment entered against a person or entity over which the issuing court lacked personal jurisdiction is a nullity and may be set aside at any time.

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Opinion filed December 23, 2022. Affirmed.

Kevin M. McMaster, of McMaster & McMaster LLC, of Wichita, for appellant.

No appearance by appellees.

Before CLINE, P.J., ISHERWOOD and HURST, JJ.

HURST, J.: This appeal stems from Frederick Todd Wiedemann's small claims action against multiple defendants seeking repayment of prepaid expenses for his son's room and board during the COVID-19 disrupted spring semester of 2020. What seems like a simple claim became more complicated when Wiedemann amended his small

claims petition and, among other changes, added three new parties—but omitted the only party to the original small claims petition. The small claims court ultimately entered judgment against two entities, one of whom was not included as a party to the amended petition. In order to resolve the apparent civil procedure conundrum, Pi Kappa Phi Fraternity (Fraternity) appealed to the district court which agreed that the small claims court lacked personal jurisdiction to enter judgment against the Fraternity. Wiedemann now appeals the district court's dismissal of the Fraternity from the small claims judgment, although he still has a valid judgment against the second entity—Greek Housing USA.

Finding no error, this court affirms the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Wiedemann prepaid $5,250 for his child's room and board for the spring semester of 2020 at the Pi Kappa Phi Fraternity house at the University of Kansas. Unfortunately, due to the COVID-19 pandemic, Fraternity was forced to close for a portion of that semester. Wiedemann requested a refund for the months his child was unable to occupy the fraternity house due to its closure, but was denied. On May 27, 2020, Wiedemann filed a small claims petition in Sedgwick County District Court against Fraternity, seeking repayment of the prepaid room and board for the months that the fraternity house was closed—in total, he sought $3,100. Wiedemann also requested the return of several of his child's personal items that had been left in the house. Wiedemann then caused the summons to be served on Fraternity's CEO, who was also its attorney and lived in North Carolina.

On the morning of the scheduled trial date—July 1, 2020—Fraternity's attorney requested a continuance citing the ongoing COVID-19 pandemic for his inability to make it to the trial in Kansas. The court granted the requested continuance and postponed the trial just three weeks to July 22. The next week, and prior to the continued trial date, Wiedemann filed an amended petition in which he listed Pi Kappa Phi Properties (Properties), Greek Housing USA (Greek Housing), and Pi Kappa Phi Theta Epsilon Alumni Chapter, Inc. (Alumni Chapter) as the defendants.

Notably, Wiedemann did not include Fraternity—the only defendant in the original petition—as a party defendant in the amended petition. Wiedemann also increased his total requested relief to $3,375 and he claimed that he had made the prepayment to Properties, rather than Fraternity. Wiedemann only served Greek Housing and Properties with the amended petition and summons, and he did not serve either Alumni Chapter or Fraternity with the amended petition.

The amended petition and summons both listed July 22—the same date of the rescheduled trial from the original petition—as the trial date. The returns on service from both the petition and amended petition show that Properties and Fraternity are located at the same address. Wiedemann later claimed that he amended the original petition without adding Fraternity because he "believed that it was not necessary to include in the Amended Petition the name of the party, [Fraternity], who had already been named, served, appeared, and obtained the continuance of the trial."

On July 22, 2020, the small claims court granted Wiedemann judgment against both Fraternity and Greek Housing in the amount of $3,375 along with costs of $129.50. There is no transcript from the trial, but the journal entry of judgment notes that the parties—Wiedemann and Fraternity—appeared. Later pleadings suggest that Fraternity was present via a nonattorney representative. The small claims court found Greek Housing in default for its failure to appear. Notably, Properties did not appear in the case caption, was not included in the judgment, and appears to have been crossed out by hand in one of the copies of the journal entry in the appellate record. Wiedemann did not object to the small claims court's failure to include Properties in the judgment.

About one week after the small claims trial, two attorneys entered their appearances on behalf of Fraternity and Fraternity appealed the small claims judgment to the district court pursuant to K.S.A. 2021 Supp. 61-2709(a). In its district court appeal, Fraternity used the same case caption and parties from the small claims court journal entry of judgment, which did not include Properties as a party. Wiedemann did not object to Fraternity's omission of Properties—which was not included in the small claims court judgment—from the case caption in its notice of appeal to the district court.

Wiedemann submitted a proposed pretrial order to the district court that included claims against Fraternity, who was included in the small claims judgment, and he also tried to add claims against Properties. But Properties was neither included in the small claims judgment, nor as a party in the district court appeal. On December 16, 2020, an attorney representing Properties, and claiming to be unable to enter an appearance, filed a motion for continuance of the pretrial conference. Properties opposed Wiedemann's attempt to add claims against it through the district court pretrial order and noted that "No judgment was entered against Properties" and that "Properties is not a party to the appeal." Properties further asserted that it had "a number of defenses to [Wiedemann's] action should [he] wish to make or revive a claim against Properties—but at this juncture, no such claim against Properties exists."

At the pretrial conference, Wiedemann acknowledged that the small claims court had not entered any judgment against Properties, and Properties was not included in the district court appeal. Wiedemann explained, "[i]t's new claims against an entity that there was no judgment entered against," but still requested permission to serve the district court appeal pretrial order on Properties pursuant to K.S.A. 2021 Supp. 60-205(a)(2). The district court denied Wiedemann's request, explaining, "[T]his is a small claims appeal, and the only judgment appealed is the judgment against [Fraternity] . . . there needs to be a proper motion before the Court to cross-appeal against [Properties] in order for them to be a proper party in this action." The court then asked Wiedemann if he intended to file a cross-appeal against Properties, but Wiedemann's attorney responded, "Likely not, but I'm not saying definitively no."

Several months later, on March 5, 2021, Fraternity filed a combined motion to dismiss and for relief from small claims judgment. Fraternity argued that Wiedemann had failed to state a claim upon which relief could be granted because he lacked standing as merely the guarantor of the lease and Fraternity was not a party to the lease agreement. Fraternity also sought relief from the small claims judgment due to the excusable neglect of its nonattorney representative at the small claims trial. Finally, Fraternity argued that the small claims judgment against it was void pursuant to

K.S.A. 2021 Supp. 60-260(b)(4) and that the small claims court lacked personal jurisdiction over Fraternity because Wiedemann had failed to serve it a copy of the amended petition and, therefore, it did not have notice of Wiedemann's new claims. Additionally, Fraternity was not included as a party in the amended petition. Fraternity claimed that its nonattorney representative only appeared at the July 22 trial because of the continuance of the prior trial date—in which it was included as a party—and it would not have appeared had it known Wiedemann had removed it as a party from the amended petition.

At the district court hearing on Fraternity's motion to dismiss, Fraternity explained that it was only seeking relief for itself on appeal but clarified that since Wiedemann had not cross-appealed to add Properties to the small claims judgment—Properties could not be a party to the district court appeal. Wiedemann reasserted that he should have been permitted to raise claims against Properties in the pretrial order. The district court ruled that

- (1) Wiedemann had standing to pursue reimbursement as the guarantor of his son's lease;
- (2) Fraternity was, as a matter of law, permitted to raise procedural defenses, such as lack of personal jurisdiction, that were not raised in the small claims proceeding; and
- (3) Fraternity was not properly served the amended petition and summons, did not consent to the court's jurisdiction, and did not waive its right to raise personal jurisdiction as a defense on appeal.

The court filed a handwritten motion minutes order explaining its decision and that Fraternity's motion to dismiss was "granted on jurisdiction issue."

Wiedemann filed a motion for relief from judgment and argued the district court made inadequate findings of fact and conclusions of law in granting Fraternity's motion to dismiss. Wiedemann also requested the district court correct the small claims judgment to show that Properties was in default and to enter judgment against it. Although the district court had previously found Properties was not a party to the appeal, Properties nevertheless responded to Wiedemann's motions, again asserting: "No judgment was entered against Properties nor was any action taken

as to Properties at that hearing," and further noted that Wiedemann "did not file a cross-appeal" and that "[n]either party raised the issue of Properties' involvement, and neither party raised the lack of judgment entered against Properties."

The district court held a hearing on Wiedemann's motions and affirmed its prior rulings, and explained its jurisdictional rulings as follows:

"[W]hile it may be technical, you still somehow have to indicate to everybody that I'm amending this, but I still want [Fraternity] involved. And that's not what was—that's not what happened, based upon what you all are arguing and the record that you've given me. So the second time around Fraternity was not part of the petition, and nobody's disputing that Fraternity was named in the second or the amended petition.

"Now, its problematic that Fraternity may or may not have appeared at the first one. Normally if you appear you've waived personal jurisdiction. Everybody knows that. But it's also at some point you have to be able to say I haven't been properly served, . . . it's both substantively and procedurally I shouldn't be involved in this. And the Fraternity has properly raised that, and I'm still holding as a matter of law that the Fraternity can properly raise that in the small claims appeal reviewed by the district court."

The district court also addressed Wiedemann's attempt to bring Properties into the appeal via the pretrial order—rather than filing a cross-appeal to correct the small claims judgment to add Properties as a party—and the court concluded:

"But Judge Smith already made rulings with regard to whether or not Properties was a proper party in this appeal. The appeal was taken by Fraternity, and if for some reason crossing out Properties was a mistake there were remedies for that. And Judge Smith told everybody that there was a problem because of having Properties be part of the appeal, and nothing's been done since then, whether it was going back and trying to have the small claims judge cure the mistake, which arguably at this point the small claims judge wouldn't have jurisdiction, or trying to add Properties by cross claiming against Properties. So with that in mind the motion for relief from judgment is denied[.]"

Wiedemann appeals and seeks appellate costs and attorney fees in the amount of $16,159.50 from both Fraternity and Properties. Although no other party has filed a brief with this court, Properties filed a motion in opposition to Wiedemann's request for attorney fees as well as a motion for involuntary dismissal of Wiedemann's appeal. After Wiedemann filed his brief, this court

granted Fraternity's attorney's motion to withdraw and subsequently removed Fraternity as a party to the appeal.

DISCUSSION

On appeal, Wiedemann argues that: (1) the district court erred in denying his request to add claims against Properties into the pretrial order; (2) the district court was not permitted "to review the judgment entered by the small claims court" and that K.S.A. 2021 Supp. 61-2709 required the small claims appeal "to be determined as if it were a new case and not based on any prior record"; (3) the district court erred by permitting Fraternity to file for relief from judgment under K.S.A. 2021 Supp. 60-260 and a motion to dismiss under K.S.A. 2021 Supp. 60-212(b)(6); and (4) the district court erred by sua sponte determining that the small claims court lacked personal jurisdiction over Fraternity.

I. *The district court properly denied Wiedemann's request to add claims against Properties, a nonparty in the underlying judgment, through the pretrial order in Fraternity's appeal.*

Wiedemann contends that because a district court must review a small claims judgment de novo, the "entire case"—which here would include claims against Properties that were not included in the small claims judgment—should have been included in the district court appeal. Wiedemann's claim requires this court to interpret the relevant statutes, which involves a question of law subject to unlimited review. See *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Wiedemann relies on K.S.A. 2021 Supp. 61-2709(a) for the proposition that the district court should have essentially conducted a new trial. The relevant portion of the statute provides:

> "An appeal may be taken from any judgment under the small claims procedure act. All appeals shall be by notice of appeal specifying the party or parties taking the appeal and the *order, ruling, decision or judgment complained of* and shall be filed with the clerk of the district court within 14 days after entry of judgment. All appeals shall be tried and determined de novo before a district judge . . . . The appealing party shall cause notice of the appeal to be served upon all other parties to the action in accordance with the provisions of K.S.A. 60-205, and amendments thereto." (Emphasis added.)

Panels of this court have determined that "appeal," as used in K.S.A. 2021 Supp. 61-2709(a), "refer[s] to *a review of the judgment* of the small claims court, not to a new, original action in the district court." (Emphasis added.) *Armstrong v. Lowell H. Listrom & Co.*, 11 Kan. App. 2d 448, 451, 725 P.2d 540 (1986); *Brown v. Zimmerman*, 61 Kan. App. 2d 537, 541, 506 P.3d 300 (2022) ("[T]he statutory language is plain, clear, and all-encompassing . . . *all* SCPA appeals—without exception—shall be tried de novo to the district judge."). Similarly, "a district court hearing an appeal from a small claims action *may only decide those issues properly preserved for appeal by an appellant or cross-appellant*." (Emphasis added.) Wurtz v. Cedar Ridge Apts., 28 Kan. App. 2d 609, 615, 18 P.3d 299 (2001). The district court's de novo review of the small claims appeal pursuant to K.S.A. 2021 Supp. 61-2709(a) applies to those actions that can properly be appealed, such as a judgment or order, and "the proceeding is still predominantly appellate in nature." 28 Kan. App. 2d at 615.

While Wiedemann's small claims court amended petition named Properties, Greek Housing, and Alumni Chapter as defendants, the small claims court only found Fraternity and Greek Housing liable and entered judgment only against those two entities. Although Wiedemann failed to serve Alumni Chapter, there is no explanation in the record as to why Properties, which was served the amended petition and summons, was not included in either the case caption or in the judgment for Wiedemann. While the small claims court may have been able to enter a default judgment against Properties based on its failure to appear—Wiedemann did not request a default judgment against Properties, object to the judgment's omission of Properties, or file an appeal or cross-appeal to the district court against Properties.

Fraternity—as the only party to appeal the small claims court proceedings to the district court—appealed from the small claims *judgment* and nothing else. Fraternity's notice of appeal to the district court only included Wiedemann, Greek Housing, and Alumni Chapter as parties. Wiedemann still has an uncontested default judgment from the small claims court against Greek Housing that is unaffected by these proceedings.

Properties was not included in the small claims court judgment or as a party to the district court appeal, but Wiedemann still tried to include claims against Properties in his pretrial orders in the district court appeal. Despite not being a party to the action, Properties felt compelled to protect its interest and file a motion opposing Wiedemann's attempt to assert these claims through a pretrial order. At the pretrial conference, Wiedemann conceded that the small claims judgment was only against Fraternity and Greek Housing, and that he was not "trying to resurrect old claims against Properties," but was asserting new claims against an entity that was not a party to the judgment.

Wiedemann's attorney would later claim that he was unaware of the omission of Properties from the small claims judgment: "To tell you the truth, the first time I saw that was this morning, and I didn't follow up on it." But because no judgment was entered against Properties, the district court concluded that Wiedemann could not simply add additional claims against Properties through the pretrial order. The district court explained that Wiedemann was required to file "a proper motion before the Court to cross-appeal against Pi Kappa Phi Properties in order for them to be a proper party in this action." When the court then asked Wiedemann if he intended to file such a cross-appeal, his attorney replied: "Likely not, but I'm not saying definitively no."

The only small claims judgment appealed to the district court was the judgment against Fraternity. Therefore, the district court's de novo review was limited to determining whether the small claims court erred in granting that judgment against Fraternity. Wiedemann never raised the question of whether the small claims court erroneously or mistakenly omitted Properties from the small claims judgment, even though he could have done so by filing a cross-appeal or objecting to the judgment to the small claims court. Because the issue of Properties' omission from the small claims judgment was not properly raised before the district court, the issue may not be raised now in this appeal. See *Wurtz*, 28 Kan. App. 2d at 615 ("If an appellee were allowed to raise an issue in the district court without filing a cross-appeal, the proceeding would not be truly appellate.").

Despite the district court's explicit ruling—and even with the suggestion of the proper procedure—Wiedemann did not file a

cross-appeal. This court cannot bring a new party into an action on appeal that was not a party to the underlying action, and Wiedemann's argument on appeal fails.

II. *The district court properly reached Fraternity's motion for relief from judgment and motion to dismiss.*

Wiedemann's final claims all stem from his argument that the district court was essentially required to retry the small claims court action rather than merely review the judgment or order as appealed. As part of this claim, Wiedemann also contends that the district court should not have permitted Fraternity to seek relief from judgment or dismissal.

Although Wiedemann's arguments are not entirely clear, they do appear to require statutory interpretation, making this court's review unlimited. *Nauheim*, 309 Kan. at 149. Panels of this court have consistently recognized that appeals from small claims actions to the district court are similar to an appeal, and require the district court to review a final judgment of the small claims court. See, e.g., *Armstrong*, 11 Kan. App. 2d at 452. In *Armstrong*, the panel explained:

"[W]e interpret 'appeal' in K.S.A. 61-2709(a) to refer to *a review of the judgment of the small claims court, not to a new, original action in the district court*. The provision for de novo review does not alter the appellate nature of the district court's authority, but rather specifies the procedure to be employed on appeal of a small claims judgment, directing the district court to make an independent determination of the facts. The direction to hear a small claims appeal de novo does not expand the appellate jurisdiction of the district court, which extends no further than the subject matter jurisdiction of the small claims court. [Citations omitted.]" (Emphasis added.) 11 Kan. App. 2d at 451-52.

This court has consistently recognized the above interpretation of the scope of K.S.A. 2021 Supp. 61-2709(a). See *Frost v. Cook*, 30 Kan. App. 2d 1270, 1274, 58 P.3d 112 (2002); *Wurtz*, 28 Kan. App. 2d at 614.

A district court reviewing a small claims judgment performs a predominantly appellate review and may only decide issues that are preserved by an appellant or cross-appellant. Here, Fraternity appealed the small claims judgment against it, and thus the district court was permitted to review that judgment—including any procedural defects such as lack of personal jurisdiction.

Wiedemann also claims, in an apparent contradiction, that the district court lacked authority to decide Fraternity's motions challenging personal jurisdiction. The Small Claims Procedure Act (the Act) provides an all-inclusive, comprehensive procedure for litigating small claims actions in Kansas, and where the Act is silent, the courts apply the Code of Civil Procedure for Limited Actions. See K.S.A. 61-2701; K.S.A. 61-2702 ("This act shall apply to and be an alternative procedure for the processing of small claims pursuant to the code of civil procedure for limited actions . . . . Except as otherwise specifically provided or where a different or contrary provision is included in this act, the code of civil procedure for limited actions shall be applicable to the processing of small claims and judgments under this act.").

Contrary to Wiedemann's assertion, panels of this court have recognized that petitioners in small claims cases may generally seek relief from judgments or orders pursuant to K.S.A. 2021 Supp. 60-260—as Fraternity did in this case. See *Morton County Hospital v. Howell*, 51 Kan. App. 2d 1103, 1106, 361 P.3d 515 (2015); *Southwestern Bell Yellow Pages, Inc. v. Beadle*, 40 Kan. App. 2d 989, Syl. ¶ 4, 197 P.3d 896 (2008) ("K.S.A. 60-260 . . . is incorporated into the Kansas Code of Civil Procedure for Limited Actions and applies to Chapter 61 judgments so long as it does not conflict with other provisions of Chapter 61."). Additionally, the Act incorporated several provisions of the Code of Civil Procedure, including motions "concerning relief from judgment or order" under K.S.A. 2021 Supp. 60-260. See K.S.A. 2021 Supp. 61-2912(k); K.S.A. 2021 Supp. 61-3304 (providing that the provision of K.S.A. 2021 Supp. 60-260 "shall apply to judgments entered under the code of civil procedure for limited actions where such provisions are not inconsistent with other provisions of the code"). In its district court appeal pursuant to K.S.A. 2021 Supp. 61-2709(a), Fraternity was permitted to seek relief from the small claims judgment pursuant to K.S.A. 2021 Supp. 60-260.

III. *The district court did not err in finding it lacked personal jurisdiction over Fraternity.*

Wiedemann attacks the district court's finding that it lacked personal jurisdiction over Fraternity on two grounds: First, that the district court acted improperly and lacked impartiality because

it acted sua sponte to find it lacked personal jurisdiction over Fraternity; and second, that the district court erred in finding that it did not have personal jurisdiction over Fraternity. Wiedemann's first contention is simply not supported by the facts. Fraternity raised the personal jurisdiction issue to the district court, arguing that the small claims judgment was void due to insufficient service of process. Fraternity claimed in its motion, "A void judgment is one rendered by a court which lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process. [Citation omitted.]" Thus, the district court did not act on its own or in a biased manner in deciding the issue of personal jurisdiction.

As to Wiedemann's second argument, he contends that the district court had personal jurisdiction either because Fraternity was properly served the original petition—even though Wiedemann later removed Fraternity as a party and it was not served the amended petition—or because Fraternity consented to the jurisdiction of the court. Wiedemann contends Fraternity acceded to personal jurisdiction by filing an appeal, appearing at the small claims trial on the amended petition, and by participating in the pretrial conference on appeal.

Whether the district court has personal jurisdiction is a question of law over which this court exercises de novo review, looking at the issue anew. *Merriman v. Crompton Corp.*, 282 Kan. 433, 439, 146 P.3d 162 (2006); *Kluin v. American Suzuki Motor Corp.*, 274 Kan. 888, 893, 56 P.3d 829 (2002). Where, as here, the court decides the issue of personal jurisdiction on the basis of the pleadings, affidavits, and other written materials, any factual disputes must be resolved in the plaintiff's favor and the plaintiff need only make a prima facie showing of jurisdiction. *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 270, 275 P.3d 869 (2012). The district court found that Wiedemann failed to properly serve Fraternity with the amended petition and thus it lacked personal jurisdiction.

Courts must have personal jurisdiction over a party, which is "the court's power over the defendant's person and is required before the court can enter an in personam judgment." *In re Marriage of Salas*, 28 Kan. App. 2d 553, 555, 19 P.3d 184 (2001). And, "[j]urisdiction over the person of the defendant may be acquired only by issuance and service of process in the method prescribed

by statute or by voluntary appearance." *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, 812, 987 P.2d 1096 (1999). Service of process is a formal method used to start an action, and is required to give the defendant notice of the action against them. It is well-settled that "[t]he person named as defendant normally does not become a party to the action until served with the summons." *In re Marriage of Welliver*, 254 Kan. 801, 803, 869 P.2d 653 (1994).

Generally, this court uses a two-step analysis to determine if a Kansas court has personal jurisdiction. First, it determines if Kansas statutes or caselaw provide a basis for the exercise of jurisdiction over a particular defendant. Second, if statutory and other requirements are satisfied, "the court inquires if the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment to the United States Constitution." *Kluin*, 274 Kan. at 894.

Here, there is no question that Wiedemann served Fraternity with the *initial* petition in which Fraternity was named as the sole defendant. It is also undisputed that Wiedemann did not serve the *amended* petition or summons on Fraternity, and that Fraternity was not included as a defendant. Wiedemann asserts that despite his failure to serve the amended petition, he nonetheless substantially complied with the statutory requirements of service because Fraternity was aware of his claim through the service of the initial petition. He further contends that because Fraternity's headquarters is at the same address as Properties, which was included as a defendant and served the amended petition, Fraternity was put on notice of his amended claim.

Substantial compliance with service of process means "'compliance with respect to the essential matters necessary to assure every reasonable objective of the statute.'" *Kuhn v. Schmidt*, 47 Kan. App. 2d 241, 244, 277 P.3d 1141 (2012). However, "'Kansas case law is clear that mere knowledge of pending litigation is not a substitute for valid service of process.'" 47 Kan. App. 2d at 244; see *Skinner*, 267 Kan. at 812 ("The fact that a party has actual knowledge of the pendency and the nature of an action against him or her is not a substitute for service. Notice or knowledge must come from process of service, or there must be a valid waiver."); *Le v. Joslin*, 41 Kan. App. 2d 280, 293, 202 P.3d 677 (2009)

("[A]ctual knowledge of the pendency of an action is not a substitute for service."). Even though Fraternity was aware of Wiedemann's original claim, the service of the initial petition—which contained a different prayer for relief, different statement of the claims, and different defendants than the amended petition—does not cure Wiedemann's failure to serve Fraternity with the amended petition when Fraternity was not included as a defendant in the amended petition. Because Fraternity was not served with the amended petition—and was not identified as a party to the amended petition—Wiedemann did not substantially comply with the statutory requirements, and the district court did not acquire personal jurisdiction over Fraternity.

Despite insufficient service of process, a Kansas court may still exercise personal jurisdiction over a party who expressly or impliedly consents to the personal jurisdiction of a court. This is because "personal jurisdiction is an individual right that can, like other such rights, be waived." *In re Marriage of Williams*, 307 Kan. 960, 967, 417 P.3d 1033 (2018). Thus, the remaining question is whether Fraternity voluntarily appeared or otherwise acceded to the jurisdiction of the district court. See K.S.A. 2021 Supp. 61-3003(f) ("The voluntary appearance *by a defendant* is equivalent to service as of the date of appearance." [Emphasis added.]).

Wiedemann argues that Fraternity voluntarily appeared and consented to the court's jurisdiction because its representative called the district court to request a continuance of the original trial setting on the original petition, and then filed a notice of appeal from the small claims judgment to the district court and subsequent motions for relief from judgment and to dismiss. While the record of the small claims proceedings is sparse, the journal entry of judgment from the initial petition specifically notes that Fraternity did not appear but that it "called from NC." This request for a continuance does not constitute a voluntary appearance. See *Fisher v. DeCarvalho*, 298 Kan. 482, Syl. ¶ 5, 314 P.3d 214 (2013) (holding "an appearance to request an extension of time in which to answer or respond to the petition is not a voluntary appearance that will equate to service of process"). Additionally, Fraternity's subsequent entry of appearance and appeal of the small claims

judgment did not waive its right to assert that the court lacked personal jurisdiction because Fraternity also timely asserted the defense of lack of personal jurisdiction. See *Skinner*, 267 Kan. at 815 (party did not acquiesce to personal jurisdiction when she properly challenged the court's lack of personal jurisdiction in her answer, by a motion for summary judgment, and in jury instructions); *In re Marriage of Yockers*, No. 94,065, 2006 WL 1379601, at *4-7 (Kan. App. 2006) (unpublished opinion) (noting that a party may appear in order to seek relief from judgment while also challenging personal jurisdiction). Fraternity timely raised the defense of lack of personal jurisdiction in its pretrial and combined motion to dismiss and for relief from small claims judgment. Fraternity did not waive its personal jurisdiction defenses or consent to jurisdiction when it entered its appearance for the purpose of challenging the court's jurisdiction to enter the small claims judgment.

In addition to the reasons identified above, the district court also properly dismissed Fraternity because it was not a party to the small claims action for which the judgment was entered. See *Ryder v. Farmland Mut. Ins. Co.*, 248 Kan. 352, 367, 807 P.2d 109 (1991) ("[A] judgment may not be rendered for or against one who is not a party to the action or who did not intervene therein."). Wiedemann did not identify Fraternity as a party in the amended petition, and thus the small claims court was without authority to issue a judgment against it stemming from that amended petition. A judgment entered by a court that lacks personal jurisdiction over the defendant is a legal nullity and may be set aside at any time. See *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997).

Fraternity raised this issue before the district court when it explained that "had notice of the amended petition been received [it] would not have appeared, there would be no need for [it] to appear, because [it] was not named or otherwise referenced in the amended petition." Although the district court's ruling did not rest on these grounds, the district court recognized Fraternity's argument on this point:

"[W]hy would they need to appear at the second trial date when the amended petition basically, he's arguing, didn't name Fraternity and was only naming Properties and other defendants. And so why would you need to appear, even if they had been served, when you were not named as a defendant; and then why

should [Fraternity] be held liable if for some reason a judgment was entered against [it] when [it was not] named as a defendant at the second one."

While the district court's disposition of the matter on personal jurisdiction grounds was sound, its decision is further justified because Fraternity was not a party to the amended petition. Thus, the district court was also correct in its judgment, even if this court agreed with Wiedemann's claims. See *Gannon v. State*, 305 Kan. 850, 889, 390 P.3d 461 (2017); *Hall v. Kansas Farm Bureau*, 274 Kan. 263, 273, 50 P.3d 495 (2002) ("A trial court decision which reaches the right result will be upheld, even though the trial court may have relied upon the wrong ground or assigned erroneous reasons for its decision.").

IV. *Wiedemann is not entitled to attorney fees.*

After docketing this appeal, Wiedemann moved this court to award him $16,159.50 in costs and attorney fees incurred in the appellate process. He cites Supreme Court Rules 7.07 (2022 Kan. S. Ct. R. at 51) and 5.01 (2022 Kan. S. Ct. R. at 31). Properties opposed Wiedemann's request.

Rule 7.07(b)(1) controls this court's authority to grant the party's motion for attorney fees and provides that "[a]n appellate court may award attorney fees for services on appeal in a case in which the district court had authority to award attorney fees." (2022 Kan. S. Ct. R. at 52). Here, the district court had authority to award attorney fees under K.S.A. 2021 Supp. 61-2709(a), which provides that "[i]f the appellee is successful on an appeal pursuant to this subsection, the court shall award to the appellee, as part of the costs, reasonable attorney fees incurred by the appellee on appeal." Because Wiedemann was the appellee before the district court, he would have been entitled to attorney fees if he had prevailed. But he did not. Likewise, Wiedemann has not prevailed on any of his claims before this court and is not entitled to relief on any of the claims he brings before this court. Accordingly, Wiedemann's request for appellate costs and attorney fees is denied.

CONCLUSION

Wiedemann seeks repayment of room and board costs from Properties, an entity against whom no court has entered a judgment, and Fraternity, an entity he failed to sue. Wiedemann cannot, through an appeal to the district court, assert new claims or

claims against entities he neglected to properly pursue in small claims court or add through a cross-appeal. To this court's knowledge, Wiedemann still has a judgment against Greek Housing for the entire amount of his actual loss, and his attempt to pursue that amount from nonparties to the judgment or suit is misplaced.

Affirmed.

(522 P.3d 337)

No. 124,458

STATE OF KANSAS, *Appellee*, v. ROBERT LOWELL-LAWRENCE WARD, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Motion Must Present Substantial Issues of Fact or Law to Avoid Summary Denial*. To merit an evidentiary hearing, and to avoid summary denial, a motion must present substantial issues of fact or law that go beyond conclusory allegations.

2. SAME—*Motion to Withdraw Guilty Plea—Motion with Vague or Conclusory Allegations Will Be Subject to Dismissal Without Hearing.* A motion to withdraw a guilty plea containing only vague or conclusory allegations or accusations and no additional facts in support of the alleged wrongdoing is subject to dismissal without an evidentiary hearing.

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Opinion filed December 23, 2022. Affirmed.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Brandon L. Jones, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and MALONE, JJ.

GREEN, J.: Robert Lowell-Lawrence Ward appeals the trial court's denial of his pro se motion to withdraw plea without holding an evidentiary hearing. Ward also claims that he was denied the right to effective assistance of counsel at the motion to withdraw plea hearing. In the motion, Ward asked the court to withdraw his plea of no contest in his criminal threat case because he was coerced into making the plea by his counsel's advice that false testimony could support a guilty verdict at trial. Ward requested that an evidentiary hearing be held on the matter. The trial court denied the motion on the merits because Ward's motion did not sufficiently address his plea arrangement and found that no evidentiary hearing was needed because there were no substantial questions of law or fact presented by the motion.

On appeal, Ward argues that the trial court erred in summarily denying the motion because his motion sufficiently alleged facts to warrant an evidentiary hearing. Ward also alleges that his motion counsel failed to function as Ward's advocate and argued against Ward's motion. A review of the record, however, shows that the trial court properly summarily denied Ward's motion without an evidentiary hearing because his pleadings made only conclusory ad hominem, abusive allegations and addressed issues irrelevant to Ward's plea agreement. Ward was also not denied the right to effective assistance of counsel because his motion counsel's representation did not fall below an objective standard of reasonableness and his assistance did not prejudice Ward. As a result, the majority affirms.

FACTS

For acts that occurred on October 11, 2012, the State charged Ward in Franklin County District Court with criminal threat, violation of a protective order, domestic battery, and battery. Under a plea agreement, Ward entered a no-contest plea on the record to one count of criminal threat and two counts of assault.

In the written plea agreement, Ward acknowledged that he understood the offenses for which he was charged and that if the case were to go to trial, the State could establish sufficient facts to enable a reasonably instructed jury to find him guilty beyond a reasonable doubt. By accepting the plea agreement, Ward admitted that he was waiving his right to a jury trial, to call and confront witnesses, to require the State to prove the charges beyond a reasonable doubt, and to have the judge and jury presume his innocence until proven guilty. Ward expressed that he made the decision to accept the plea completely voluntarily, without the influence of threat, leniency, duress, or coercion of any kind. And Ward recognized that he was satisfied with the representation that his attorney provided and that he did not dispute that advice.

The trial court reiterated these rights with Ward at the plea hearing on June 10, 2013. Ward acknowledged to the court that he was entering his plea freely and voluntarily, without the influence of drugs, alcohol, or prescription medicine affecting his judgment. Once again, Ward expressed that he was satisfied with his counsel's advice on the entry of plea. Ward pleaded no contest to the

three counts contained in the second amended complaint and was found guilty of each of those offenses. At sentencing in August 2013, the trial court imposed an underlying 14-month jail sentence but suspended that sentence and granted probation for 12 months.

Five months later, on January 31, 2014, the State moved to revoke Ward's probation alleging that he violated the terms of his probation by having violent contact with the victim from the previous incident and for engaging in physical violence. Following this incident, the State brought a separate case against Ward in Franklin County District Court. At the August 2014 revocation hearing, the trial court revoked Ward's probation to serve a 60-day jail sanction and reinstated probation to extend another 12 months after completing the sanction. Then in February 2015, the State moved to revoke Ward's probation for the second time alleging that Franklin County authorities arrested Ward again and charged him in a third criminal case.

Under a plea agreement in Ward's 2014 and 2015 cases, Ward stipulated to violating his probation in his original case. The trial court accepted the stipulation and found that Ward had violated his probation. Ward pleaded guilty to the charges in the 2015 case, and the State recommended that the trial court dismiss the 2014 case. At sentencing, the trial court revoked Ward's probation in his 2012 case and ordered him to serve his original 14-month prison sentence. The trial court ordered this sentence to run consecutive with his 17-month sentence imposed in the 2015 case, and the trial court dismissed the 2014 case with prejudice.

In the months that followed, Ward filed 10 pro se postsentencing motions and sent 4 letters to the trial court seeking to overturn his sentence in the 2012 case. The trial court denied all of Ward's motions, and Ward appealed. In September 2017, this court dismissed Ward's appeal as moot because Ward had served the entire prison portion of his sentence. Our Supreme Court granted Ward's petition for review. On review, our Supreme Court reversed this court's decision and remanded the case to this court to reconsider the mootness issues. See *State v. Ward*, 311 Kan. 619, 624, 465 P.3d 1143 (2020). On remand, a panel from this court again dismissed Ward's appeal as moot because the alleged future harm was too speculative to refute a finding of mootness, and the claim

did not present a vital or substantial right requiring judgment. Ward petitioned for review, and our Supreme Court denied the petition. See *State v. Ward*, No. 116,545, 2021 WL 219233, at *4 (Kan. App. 2021) (unpublished opinion), *rev. denied* 315 Kan. 971 (2022).

Before our Supreme Court ruled on the second petition for review, Ward filed a motion in the trial court to withdraw his plea in his 2012 case to correct manifest injustice. In the motion, Ward alleged that the trial court "abused its discretion by relying on factual determinations not properly established by an evidentiary record." Ward also alleged that he was coerced into entering a plea, and that his defense counsel failed to advise him of his right to appeal the probation violations, scared him into not testifying, and stated: "'[H]ow scary prison is, and how [the trial] court would allow false testimony to gain a conviction at trial.'" Most of the motion, however, challenges the trial court's decision to revoke his probation in 2014.

In March 2021, the trial court appointed defense attorney John Boyd to represent Ward on his motion to withdraw a plea. After the trial court granted two continuances, Ward requested an evidentiary hearing on the motion to withdraw a plea. The trial court denied the motion, however, noting at the July 2021 motion hearing that the basis on which Ward argued that his plea should be withdrawn had "nothing to do with the plea and whether he committed that crime or not." And the trial judge stated that Ward was "upset still and alleging that there was misrepresentations on the motion to revoke his probation in '14 or '15, which he essentially made the same argument in a 1507, which I denied on the merits." Ward maintained that he wanted the opportunity to tell the court he was innocent of the probation violation and that his previous defense counsel did not allow him to testify at the probation violation hearing. The trial court suggested it did not believe that it had jurisdiction over Ward's other cases and that this court had determined Ward's previous motions were moot. Still, the trial court continued the hearing to allow additional time to consider whether to hold an evidentiary hearing.

At the final hearing in August 2021, the trial court ruled that there were no substantial questions of law or fact presented by

Ward's motion to withdraw his plea and that no evidentiary hearing was necessary. The trial court denied the motion on the merits finding that there was no manifest injustice. The trial court explained that Ward's motion did not appreciate the different burdens of proof between a jury trial and probation revocation hearing, and the dismissal of one of the cases under the plea agreement had no legal effect on the trial court's decision to revoke Ward's probation and impose his jail sentence. The trial court also denied the motion because the same issues were already litigated in the previous appeal, and this court dismissed that appeal as moot because Ward had served his entire sentence.

Ward timely appealed the trial court's summary denial of his motion to withdraw a plea without providing an evidentiary hearing.

ANALYSIS

Did the trial court err in summarily denying Ward's motion to withdraw his plea without granting an evidentiary hearing?

Ward argues the trial court erred in summarily denying his motion to withdraw his plea. After the trial court pronounces the sentence, it may allow the defendant to withdraw a plea and set aside the judgment in order "[t]o correct manifest injustice." K.S.A. 2021 Supp. 22-3210(d)(2). An appellate court generally reviews the denial of a motion to withdraw a plea for an abuse of discretion. The defendant has the burden of proving abuse of discretion. When a motion to withdraw a plea is summarily denied without an evidentiary hearing, however, the appellate court applies the same procedures and standards of review as in cases arising out of K.S.A. 60-1507. The appellate court exercises de novo review because it has the same access to the motions, records, and files as the trial court, and it determines whether the motion, records, and files conclusively show that the defendant is entitled to no relief. To merit an evidentiary hearing, and to avoid summary denial, a motion must present "substantial issues of fact or law" that go beyond conclusory allegations. *State v. Fritz*, 299 Kan. 153, 154-56, 321 P.3d 763 (2014).

Before the majority addresses the merits of the trial court's decision to deny Ward's motion, the State contends that Ward's appeal should be barred under the law-of-the-case doctrine and res judicata. The law-of-the-case doctrine prevents a party from relitigating an issue already decided on appeal in successive stages of the same proceeding. *State v. Parry*, 305 Kan. 1189, 1189, 390 P.3d 879 (2017). Similarly, res judicata will bar a successive suit when it meets four conditions: (1) it raises the same claim, (2) it involves the same parties, (3) the claims were or could have been raised in the previous case, and (4) there was a final judgment on the merits. *State v. Kingsley*, 299 Kan. 896, 901, 326 P.3d 1083 (2014). The State argues that Ward's motion to withdraw his plea is another attack on his probation revocation, and the parties already litigated that issue when this court dismissed the appeal from his previous K.S.A. 60-1507 motion as moot.

Ward clarifies in his reply brief, however, that the motion was different because he sought to withdraw his plea and set aside his convictions because his counsel's advice coerced him into entering a plea in the 2012 case. Ward filed the motion pro se in the trial court. Pro se pleadings are liberally construed, giving effect to the pleading's contents rather than the labels and forms used to articulate the defendant's arguments. *State v. Kelly*, 291 Kan. 563, 565, 244 P.3d 639 (2010). In his pro se motion, Ward alleged that the trial court "blocked the testimony from Mr. Ward, he wanted to advise the court of being coherced [*sic*] into a plea. Of his lawyer scaring him to not testify." And his "'[a]ttorney stating how scary prison is, and how this court would allow false testimony to gain a conviction at trial.'" Although, admittedly, much of Ward's motion attacks the integrity of his 2014 probation revocation, when this court liberally construes his motion to withdraw his plea, it is sufficient to establish that he is seeking relief on a separate issue distinct from his previous K.S.A. 60-1507 motion. For example, before he filed this motion, the trial court had not previously decided whether Ward should be allowed to withdraw his plea. Thus, Ward's motion to withdraw his plea is not barred by the law-of-the-case doctrine and res judicata as argued by the State.

Turning to the merits of the denial of the motion, the court previously noted that after a trial court pronounces a sentence, a

court may allow the defendant to withdraw a plea and set aside the judgment in order "[t]o correct manifest injustice." K.S.A. 2021 Supp. 22-3210(d)(2). The defendant bears the burden of establishing manifest injustice. *State v. Huynh*, 278 Kan. 99, 101, 92 P.3d 571 (2004). To establish manifest injustice, the defendant must demonstrate facts showing that it would be obviously unfair or shocking to the conscience not to permit withdrawal of the plea. *State v. Oliver*, 39 Kan. App. 2d 1045, 1048, 186 P.3d 1220 (2008). Three factors, also known as the *Edgar* factors, guide the trial court's analysis on a motion to withdraw a plea: (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. *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). These factors, however, are not exhaustive. See *Fritz*, 299 Kan. at 154.

Ward first argues that his motion to withdraw his plea sufficiently alleges that the ineffective assistance of counsel caused him to enter into a plea agreement, and the trial court erred in summarily denying his motion without an evidentiary hearing to determine whether any of the *Edgar* factors applied. When a postsentencing motion to withdraw a plea alleges ineffective assistance of counsel, the constitutional test for ineffective assistance must be met to establish manifest injustice. *State v. Kelly*, 298 Kan. 965, 969, 318 P.3d 987 (2014). This two-prong analysis considers: (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. See 298 Kan. at 969-70 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). In the context of a motion to withdraw a plea, the defendant must show that, but for counsel's deficient performance, he or she would have insisted on going to trial rather than entering the plea. *Kelly*, 298 Kan. at 970.

Under the *Strickland* analysis, Ward argues that he has met his burden of alleging facts adequate to warrant an evidentiary hearing. See *Kelly*, 298 Kan. at 969. Ward maintains that his coun-

sel gave him inaccurate legal advice that constituted deficient performance when the trial court "blocked the testimony from Mr. Ward, he wanted to advise the court of being coherced [*sic*] into a plea. Of his lawyer scaring him to not testify." And his "'[a]ttorney stating how scary prison is, and how this court would allow false testimony to gain a conviction at trial.'"

The majority has two quarrels with Ward's contentions—one based on the record and one based on logic.

The majority cannot agree with Ward's contentions about the trial court and his attorney. The majority will repeat Ward's broad-brush factual allegations to test their soundness. For example, he maintains that the trial court "blocked the testimony from Mr. Ward, he wanted to advise the court of being coherced [*sic*] into a plea. Of his lawyer scaring him to not testify." And his "'[a]ttorney stating how scary prison is, and how this court would allow false testimony to gain a conviction at trial.'" Ward's factual allegations in this regard are reduced to little more than innuendoes. With no support in the record, Ward insinuates that the trial court blocked his testimony about his being coerced into entering the plea and how his attorney told him that the trial court would accept false testimony against him to gain a conviction.

How did the trial court block Ward's testimony? First, there is nothing in the record that shows the trial court discouraged Ward from testifying during his plea hearing. Second, Ward acknowledged in writing that he was accepting this plea without any coercion of any kind. For example, in the written plea agreement, Ward acknowledged that he understood the offenses for which he was charged and that if the case were to go to trial, the State could establish sufficient facts to enable a reasonably instructed jury to find him guilty beyond a reasonable doubt. In accepting the plea agreement, Ward admitted that he was waiving his right to a jury trial, to call and confront witnesses, to require the State to prove the charges beyond a reasonable doubt, and to have the judge and the jury to presume his innocence until proven guilty. Ward expressed that he made the decision to accept the plea completely voluntarily, without the influence of threat, leniency, duress, or coercion of any kind. Finally, Ward told the trial court, in open court, that he was entering his plea without any coercion or undue influence.

As to his attorney, Ward acknowledged that he was satisfied with the representation that his attorney provided and that he did not dispute that advice. Under the *Strickland* analysis and the *Edgar* factors, Ward has not shown that his plea counsel's performance fell below the objective reasonableness standard. Indeed, even though Ward's sentence was presumptive prison, Ward's counsel negotiated a plea bargain that allowed him to remain free on probation. In his written plea agreement, Ward acknowledged that he was satisfied with the advice that his counsel provided, that he believed his attorney did all that anyone could do to assist him, and that he had no dispute or question about that advice. Then, at the plea hearing, Ward reiterated to the court that he was satisfied with the advice of his counsel on the entry of his plea. A review of the record shows that Ward's counsel provided competent assistance and advice to Ward in entering his plea.

Next, the majority notes that Ward's bald factual assertions against the trial court and his attorney are mere ad hominem, abusive allegations. This fallacy is designed to impugn the integrity and character of both the court and his attorney. And this common ad hominem technique is used to raise questions about a person's moral fitness and trustworthiness.

Turning our attention again to the record of Ward's motion to withdraw his plea, the majority notes that he made two compelling assertions against lying in his motion. First, he expressed a strong aversion to lying. So much so, in one point in his motion he specifically stated: "'A lie is a lie, no matter what [its] subject.'" Second, in another point in his motion, he stated: "No matter how many times a lie is sent forward, it is still a lie." Ward's condemnation against lying is admirable. So, the majority was perplexed when it noted that Ward had abruptly discarded his aversion about lying that he had earlier outlined in his motion and blatantly lied to the trial judge during his plea hearing on June 10, 2013, when the trial judge asked Ward and his counsel the following questions:

"THE COURT: All right. Does the defendant contest the factual basis for purposes of the pleas today?

"[DEFENSE COUNSEL]: No, your Honor. I would add that my client had recently had his mental health medication adjusted at that time and was having some difficulty with the resulting adjustment of his mental health medication,

and then there was also some alcohol involved, so it was just kind of a bad week or two there where he was making an adjustment transition from one drug to another.

"THE COURT: Okay, but he's not challenging the factual basis? He's not asserting his problems with his medication as a defense in this case?

"[DEFENSE COUNSEL]: No, he is not.

"THE DEFENDANT: No."

In his motion to withdraw plea, Ward maintained that he has no memory of the events underlying his criminal threat charges. Indeed, in challenging the factual basis of his plea and in alleging that he has no memory of the alleged criminal offenses, Ward states in his motion the following: "He [his plea attorney] never told his client [Ward] there was no factual basis for the alleged criminal threat. (Defendant Ward was under medication on alleged [incident] night. He had no knowledge of threatening [the victim].)."

Thus, Ward contends that in addition to his allegations of coercion, there are two other reasons why he should be allowed to withdraw his plea: (1) because there was no factual basis for his alleged criminal threat charges and (2) because of the effects of medication he was taking, he has no memory of committing the offenses in this case. But if Ward's two previously mentioned contentions are treated as true, then Ward plainly lied to the trial judge when he and his attorney told the judge that Ward was "not challenging the factual basis" of his plea and when he and his attorney told the trial judge that Ward was not asserting "his problems with his medication as a defense in this case."

Obviously, if Ward had answered the trial judge's questions based on his two current contentions, the trial judge would not have accepted his plea. So, if Ward's two contentions are treated as true, it is unassailable that Ward lied twice to the trial judge during his plea hearing.

Furthermore, if Ward's contention that he has no memory of committing the offenses in this case because of medication he was taking is treated as true, then he also lied in his written plea agreement that he signed on the same day as his plea hearing. Also, the State and the trial court would not have accepted his written plea agreement. During his plea hearing, the trial judge directed Ward's

attention to his written plea agreement that he had previously signed:

"THE COURT: . . . . Mr. Ward, if you'll direct your attention up to the bench. Is that your signature on page 10 of the plea agreement?

"THE DEFENDANT: Yes, your Honor."

The trial judge accepted and signed Ward's written plea agreement.

Under paragraph 13 of Ward's written plea agreement, Ward acknowledged, under the penalty of perjury, the following:

"My mind is clear and I am not presently under the influence of alcohol or drugs or under a doctor's care for mental, emotional, or psychological conditions which would in any way affect my ability to make a reasoned and well-informed judgment or decision, and I know of no reason, why my mental competence at the time of the commission of the offense(s) or at the present time should be questioned. I am satisfied that I am in full possession of my faculties and well able to make sound and reasoned decisions as to what is in my best interest."

Here, Ward acknowledged under his written plea agreement that he was in full possession of his "mental competence" when he committed his crimes in this case. He further acknowledged that his "mental competence" should not be questioned. So, if Ward's contention that he has no memory of committing the offenses in this case because of medication he was taking is treated as true, then he lied in his written plea agreement.

Obviously, Ward's lack of memory about the events underlying his criminal threat charges places his credibility and memory in issue concerning his truthfulness about his ad hominem, abusive allegations made against his attorney and the court. Indeed, a faulty memory creates a presumption against the credibility of any of Ward's allegations. Moreover, his lack of memory about the events underlying his criminal threat charges shows a possible motive to fabricate his bald contentions against his attorney and the court contained in his motion to withdraw his plea.

Generally, it is improbable that someone should remember what he or she professes to remember and, yet, forget or have no memory about the other things connected to those things remembered.

For example, why is Ward clearly able to recall the specific details surrounding how the trial court and his attorney allegedly coerced him into entering a plea of no contest to his criminal threat charges? Is the majority to assume that he can vividly remember those concrete facts about the coercion he endured because he was not taking his medication then, but now he is unable to remember anything about his criminal threat charges? Surely not: Ward acknowledged in his written plea agreement that he was in full possession of his "mental competence" when he committed his crimes in this case. Is the majority to further assume that at all other times during these criminal proceedings that Ward was taking his medication, and thus, except for the alleged coercion, he has absolutely no memory of the events underlying his criminal threat charges? Assuredly, not; the majority cannot endorse such an implausible assumption. Nevertheless, based on Ward's factual allegations and pleadings, this is exactly what he is asking the majority to do. Because Ward's assumption is fatally flawed, it is baseless as a matter of fact and wrong as a matter of law.

Ward's conclusory argument is unpersuasive because he has failed to show why the majority should accept his ad hominem, abusive allegations and pleadings as true. Also, he has failed to establish that there is a substantial question of law or fact that warrants an evidentiary hearing. Ward offered no further argument to contradict his original position that he was satisfied with his counsel's advice. In his written plea agreement and at the plea hearing, Ward explained that he was satisfied with his counsel's advice, and he was entering a plea without any coercion or undue influence. Ward had the opportunity to express his concerns with his plea arrangement at the hearing, but he only raised the issue after his probation was revoked.

Now the majority turns to the dissent's argument in this issue. The crux of the dissent's argument rests on its conclusion that Ward's factual allegations are not conclusory. The dissent maintains that "Ward gave two reasons to support his claim that his counsel coerced his plea." 62 Kan. App. 2d at 746. Thus, the dissent contends that the factual allegations are not conclusory. What is a conclusory argument? A conclusory argument "is one whose propounder attempts to persuade by mere assertion and repetition.

Because it offers no reasons in support of its conclusion, a conclusory argument is incapable of persuading anyone who does not already agree." Gardner, Legal Argument: The Structure and Language of Effective Advocacy, p. 114 (2d ed. 2007).

What, then, do we know? We know that the dissent first points out that Ward alleged that his counsel scared him to not testify by "'stating how scary prison is.'" 62 Kan. App. 2d at 746. Second, the dissent notes that Ward alleged that his counsel gave him inaccurate advice that the "'court would allow false testimony to gain a conviction at trial.'" 62 Kan. App. 2d at 747. What makes these two factual allegations of Ward conclusory? They are conclusory because Ward has failed to back up his factual assertions that his attorney and the court coerced him into entering the plea. Thus, he has failed to ground his factual contentions contained in his minor premise. Indeed, there are no facts in this record which substantiate any of Ward's factual allegations. To illustrate, Ward's factual allegations do not even allege when or where his attorney was supposed to have made these allegations of coercion. He completely fails to allege any facts surrounding the circumstances of these factual allegations. So, Ward attempts to persuade by mere assertion and repetition.

Moreover, the dissent acknowledges that to merit an evidentiary hearing and to avoid summary denial, a motion must present "substantial issues of fact or law" that go beyond conclusory allegations. *Fritz*, 299 Kan. at 156. Here, Ward's factual allegations are conclusory, and they do not satisfy the substantial issues of fact requirement under *Fritz*. Ward's factual allegations are not sufficient to allow a reasonable inference that he was coerced into entering his plea.

Indeed, Ward's unsupported factual allegations simply state a conclusion of coercion, but he fails to back up this factual conclusion adequately. Simply put, Ward's minor premise (his attorney and the court coerced him into entering the plea) is inadequately grounded. When the minor premise of an argument is inadequately grounded, any effort spent grounding the premise is well invested so the court may accept it. Here, Ward has spent no effort in trying to ground his minor premise. Based on Ward's two bald factual allegations, he has failed to adequately ground his factual

allegations of coercion. So, he has failed to show why the majority should accept his minor premise as true. As a result, his factual allegations are merely conclusory.

Even so, there is alternative reason—independent of Ward's invalid conclusory factual allegations argument—why his allegations should not be accepted as true. Here, the record shows that Ward blatantly lied twice to the trial judge when he and his attorney told the judge that Ward was not challenging the factual basis of his plea and that Ward was not asserting that the problems with his medication was a defense in this case. Also, Ward lied in his written plea agreement when he acknowledged the following: "I know of no reason, why my mental competence at the time of the commission of the offense(s) or at the present time should be questioned." Because Ward lied twice in open court during his plea hearing and because he lied in his written plea agreement, involving an issue connected with his motion to withdraw plea, his factual allegations ought not be accepted as true.

Moreover, the omission of important or striking matters does, in general, tend to discredit the testimony or allegation of a party. Here, Ward maintains that the trial court "blocked the testimony from Mr. Ward, he wanted to advise the court of being coherced [*sic*] into a plea. Of his lawyer scaring him to not testify." And his "'[a]ttorney stating how scary prison is, and how this court would allow false testimony to gain a conviction at trial.'" But in these allegations of coercions, Ward specifically fails to mention or allege that his attorney ever told him to lie—when the judge would ask him if he was entering his plea free of any prescription medication that could cloud his judgment—in support of his previously mentioned allegations of coercion. Here, the circumstances are such as to make it probable that if Ward's attorney had told him to lie—when the judge would ask him if he was entering his plea free of any prescription medication that could cloud his judgment—Ward assuredly would have mentioned this additional accusation of coercion by his attorney if it existed. Ward's failure to mention this additional accusation of coercion by his attorney does, in absence of an explanation, lead to one conclusion: that this additional accusation of coercion by his attorney does not exist; thus, Ward's other allegations of coercion are not trustworthy either.

The dissent has cited several cases of our Supreme Court which have considered when a party has made a conclusory argument. In this inquiry, the dissent has cited the following cases that have addressed this issue: *Mundy v. State*, 307 Kan. 280, 408 P.3d 965 (2018); *Bellamy v. State*, 285 Kan. 346, 172 P.3d 10 (2007); and *State v. Jackson*, 255 Kan. 455, 874 P.2d 1138 (1994). Most significantly, the dissent argues that of these three cases, the *Bellamy* case is more similar to Ward's case than the *Jackson* and the *Mundy* decisions. The majority disagrees. The majority believes that Ward's case is more like the *Jackson* decision than the *Bellamy* decision.

For example, in *Jackson*, the defendant, Jackson, sought to withdraw his guilty pleas based on his allegations that his attorney had coerced him into pleading guilty to one count of aggravated kidnapping, three counts of aggravated robbery, one count of aggravated battery, and one count of kidnapping. Jackson contended that he was compelled to plead guilty to those offenses because his attorney coerced him to do so. Our Supreme Court, however, concluded that Jackson's meager contentions were mere conclusions, which did not require an evidentiary hearing to deny any relief. In reaching this decision, the *Jackson* court grounded its conclusion on the fact that Jackson had failed to designate "additional facts in support of his contentions of coercion and ineffective assistance of counsel." 255 Kan. at 463. The majority notes that Jackson's previously mentioned allegations of coercion are very similar to Ward's scant allegations of coercion.

Also, Ward's and Jackson's allegations of coercion are dissimilar to the contentions made in *Bellamy*. For one thing, Bellamy made a specific accusation that his attorney failed to properly tell him about the law of consent involving his rape charge. Here, Jackson and Ward simply allege that their attorneys coerced them into entering their plea. This points to a material factual likeness between the *Jackson* holding and Ward's case, which outweighs any negative resemblances in the compared factual scenarios.

Under *Jackson*, a motion to withdraw a guilty plea containing only vague or conclusory allegations or accusations and no additional facts in support of the alleged wrongdoing is subject to dismissal without an evidentiary hearing. Thus, Ward's allegations of

coercion were not of a sufficient evidentiary basis to warrant an evidentiary hearing.

Based on the record before us, Ward's motion contains mere conclusory factual allegations that do not provide a substantial question of law or fact that warrant an evidentiary hearing on whether his plea should be withdrawn. Thus, the majority concludes that the trial court properly summarily denied Ward's motion to withdraw a plea without providing an evidentiary hearing. Because Ward offers no reasons in support of his conclusory argument, the majority further concludes that it is not warranted by the law.

Was Ward denied the right to effective assistance of counsel at the motion to withdraw his plea hearing?

In the alternative, Ward argues that his counsel—Boyd—provided ineffective assistance of counsel by failing to advocate at the plea withdrawal hearing and arguing against his client. Thus, Ward urges us to reverse the trial court's denial of his motion to withdraw his plea and remand for a new hearing with new counsel. The State argues that the court cannot review this issue because Ward failed to preserve it, and it cannot be addressed for the first time on appeal. The State also argues that Ward's argument should be denied on the merits because Boyd's performance did not fall below an objective standard of reasonableness given the motion's likelihood of success.

Ineffective assistance of counsel claims based on deficient performance involve mixed questions of fact and law. *State v. Cheatham*, 296 Kan. 417, 430, 292 P.3d 318 (2013). For ineffective assistance of counsel claims on which there is no evidentiary hearing in the trial court, the appellate court reviews de novo the trial court's determination that relief should be denied on the motion, files, and records of the case. The burden of proof in establishing ineffective assistance of counsel is on the defendant. *Fuller v. State*, 303 Kan. 478, 485-86, 363 P.3d 373 (2015).

Ward did not argue before the trial court that his counsel at the motion to withdraw his plea hearing was ineffective. He raises this issue for the first time on appeal. "Claims of ineffective assistance of counsel, as a general rule, cannot be raised for the first time on appeal. Rather, in most cases a trial court must consider

the evidence to determine the two-prong test for establishing ineffective assistance of counsel." *Trotter v. State*, 288 Kan. 112, Syl. ¶ 10, 200 P.3d 1236 (2009). An appellate court may consider a claim of ineffective assistance for the first time on appeal if: (1) there are no factual issues in dispute, and (2) the test for ineffective assistance of counsel can be resolved as a matter of law based on the record. *State v. Salary*, 309 Kan. 479, 483-84, 437 P.3d 953 (2019). Ward's argument that Boyd's representation failed to meet constitutional requirements relies only on the factual allegations he made at the motion to withdraw his plea hearing. Ward argues that Boyd failed to advocate on his behalf at the plea withdrawal hearings by disparaging Ward's motion and agreeing that Ward wanted to relitigate his previous K.S.A. 60-1507 motion. The court can decide this argument as a matter of law upon reviewing the withdraw plea transcripts, which are not subject to factual dispute. Thus, Ward's claim of ineffective assistance of counsel is properly before the court for the first time on appeal.

Again, ineffective assistance of counsel claims based on deficient performance are controlled by the two-prong *Strickland* analysis. To establish ineffective assistance of counsel, the defendant must show (1) his attorney's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense. *Balbirnie v. State*, 311 Kan. 893, 894, 468 P.3d 334 (2020) (citing *Strickland*, 466 U.S. at 687-88). When the defendant is completely denied the assistance of counsel or denied counsel at a critical stage of the proceedings, however, there is a presumption of prejudice to the defendant. *State v. Galaviz*, 296 Kan. 168, 181, 291 P.3d 62 (2012) (citing *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 [1984]). *Cronic* provides that counsel is ineffective when the record "demonstrate[s] that counsel failed to function in any meaningful sense as the Government's adversary." 466 U.S. at 666. In reviewing counsel's representation, there is a """strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."" *Fuller*, 303 Kan. at 488 (quoting *State v. Betancourt*, 301 Kan. 282, 306, 342 P.3d 916 [2015]).

Ward argues that the *Cronic* exception should apply because Boyd denied him counsel at the plea withdrawal hearing by failing

to advocate on his behalf for the court to grant his motion. And Boyd's failure to act as an advocate is deficient performance that establishes a successful ineffective assistance of counsel claim. In support, Ward offers *Robertson v. State*, 288 Kan. 217, 201 P.3d 691 (2009). Under *Robertson*, appointed counsel "is simply not free to act merely as an objective assistant to the court or to argue against his or her client's position." 288 Kan at 229. Rather, counsel must pursue relief for their client "within the stricture of required candor to the court or other ethical rules." 288 Kan. at 229.

First, Ward argues that Boyd was deficient because counsel made several comments disparaging his motion to withdraw his plea and agreed with the trial court that Ward was attempting to relitigate his previous K.S.A. 60-1507 motion. At the May hearing, Boyd stated:

"MR. BOYD: Judge, I have trouble trying to get ahold of Mr. Ward on the telephone to clarify his legal issues. I was able to with letters get a—find a way to do that, and I've gotten a phone conference set for him later this week, I'll be actually able to talk to him, and I think I really need to do that to make heads or tails out of the correspondence I received."

After Ward and Boyd were able to discuss his motion further, Ward claims that Boyd then argued against his motion at the August hearing. After the trial court denied his motion and expressed its concerns that Ward's motion was mainly arguing against his probation revocation, Boyd stated in response:

"MR. BOYD: Your Honor, I was able to glean more or less the same arguments from my client as the court did from the pleadings, that my client does not seem to appreciate the difference between the different standard of proof necessary at a motion to revoke versus the trial, and he does not seem to understand how there could be different results in those things, whereas we believe it's entirely possible, given it's a lower standard of evidence there. So I intend to explain that to him."

Next, Ward argues that Boyd's performance was deficient because Boyd did not supplement his motion. The trial court informed Boyd at the July hearing that Ward's pro se motion did not sufficiently allege that he was innocent of the underlying matter justifying withdrawal of his plea. But Boyd did not file a motion on Ward's behalf to supplement the pro se motion's deficiencies. Ward also claims that Boyd was aware of additional factual allegations that would have supported the motion to withdraw his

plea. Based on later filings, Ward insists that he had no memory of the events underlying his criminal threat charges because of the effects of medication he was taking when he allegedly committed the offenses. Also, his plea counsel "never told his client there was no factual basis for the alleged criminal threat." By not supplementing Ward's pro se motion, Ward argues that Boyd failed to advocate on Ward's behalf.

Finally, Ward argues that Boyd did not effectively advocate for an evidentiary hearing. At the May hearing, Boyd told the court that he would discuss the need for an evidentiary hearing with Ward, and "if I believe that the motion has no merit, I don't believe I would be asking the court to schedule an evidentiary hearing on the matter." Counsel later requested an evidentiary hearing at the July hearing. But the trial court said that Ward's reason to withdraw his plea "has nothing to do with the plea and whether he committed that crime or not" and Ward was "upset still and alleging that there was misrepresentations on the motion to revoke his probation." Boyd responded that the trial court's exposition was accurate but maintained that Ward wanted an evidentiary hearing. When the trial court ultimately informed Boyd that it would not hold an evidentiary hearing, Boyd replied, "That's fine, Judge."

The State argues that Boyd's representation did not fall below an objective standard of reasonableness given the low likelihood of success in pursuing the motion to withdraw his plea and Boyd's ethical obligations. Like Ward, the State offers *Robertson* in support of its argument. In *Robertson*, our Supreme Court found no prejudice to the defendant when there existed no substantial legal issues or triable facts when motion counsel was appointed. The court criticized the trial court's decision to appoint counsel when the motion, files, and records demonstrated as a matter of law that the defendant was not entitled to relief. 288 Kan. at 232. Here, the State argues that Boyd should have never been appointed as counsel in the first place because the motion was fatally flawed and sought to relitigate an issue already decided. Again, Ward agreed that he was satisfied with his plea counsel's assistance and entered a plea without undue influence or coercion. The State claims that the trial court could have determined based on the motions, files,

and records that Ward's motion failed as a matter of law without the need to appoint counsel. As a result, Boyd's representation did not fall below an objective standard when the motion's validity failed from the start.

Additionally, the State maintains that Boyd followed his ethical obligations to be truthful with the trial court and to refrain from presenting erroneous claims. Under the Kansas Rules of Professional Conduct, a lawyer shall not knowingly make a false statement of fact or law to a tribunal or offer evidence that the lawyer knows is false. KRPC 3.3(a)(1) (2022 Kan. S. Ct. R. at 391). When the trial court suggested that Ward's motion addressed issues with his probation revocation already decided adversely against Ward, the State believes that Boyd exercised the requisite candor with the trial court by agreeing with the court's assessment. And Boyd was obligated to tell the court that Ward's motion presented the same arguments as his previous K.S.A. 60-1507 motion and that his complaint did not concern his written plea agreement.

Applying all these arguments to the *Strickland* analysis, the court concludes that Boyd's representation did not fall below an objective standard of reasonableness. Boyd adequately discussed the content of the motion to withdraw a plea with Ward and even received a continuance twice from the trial court so that he could clarify the relief that Ward sought in his motion. After telling the trial court that he would not ask for an evidentiary hearing if he believed that the claim was fatally flawed, Boyd later requested an evidentiary hearing on Ward's behalf. Boyd conveyed to the trial court that Ward wanted an evidentiary hearing to express that he was innocent of the underlying charges and that his previous counsel prevented him from testifying at the revocation hearing. In response to the trial court's skepticism Ward wanted to relitigate his previous motions, Boyd accurately acknowledged that the motion to withdraw a plea did not sufficiently address the written plea agreement and focused primarily on his issues with the probation revocation.

Ward's argument that Boyd could have supplemented his pro se motion is erroneous. Ward alleges that Boyd knew of additional factual allegations—namely, that Ward did not remember the events of the criminal threat charges because of medication. But these allegations were first presented to the trial court in a separate

motion one month after the court denied Ward's motion to withdraw his plea. The evidence does not support Ward's contentions that Boyd could have supplemented the motion to withdraw the plea with these additional factual allegations. Ward fails to overcome the strong presumption that Boyd provided reasonable professional assistance. Boyd's agreement with the trial court that Ward's motion to withdraw primarily disputed his probation revocation and his decision not to supplement Ward's pro se motion do not show that Boyd's representation fell below an objective standard of reasonableness.

Ward also does not show that Boyd's representation prejudiced him. The *Cronic* exception does not apply here because Boyd did not completely deny Ward his right to effective assistance of counsel. See 466 U.S. at 666. Boyd requested an evidentiary hearing on Ward's behalf but exercised candor with the trial court by explaining that Ward's factual allegations concerned his probation revocation, not his written plea agreement. Thus, Boyd pursued relief within the stricture of required candor to the court or other ethical rules. Rather, this case is most like *Robertson*. Like *Robertson*, the trial court could have determined by the motions, files, and records that Ward's motion failed as a matter of law. Ward's motion did not sufficiently address the circumstances of his plea to warrant an evidentiary hearing. Instead, the motion brought up issues with his revocation hearing, which did not affect his previous decision to enter a plea. Thus, there existed no substantial legal issues or triable issues of fact when the trial court appointed Boyd. Because Ward has not successfully established his ineffective assistance of counsel claim, his argument fails.

Affirmed.

* * *

MALONE, J., dissenting in part: I respectfully dissent from the majority's conclusion that the district court did not err in denying Robert Lowell-Lawrence Ward's motion to withdraw plea without holding an evidentiary hearing. I would find the district court erred in summarily denying the motion because the motion, records, and files in the case do not conclusively show that Ward is entitled to no relief.

Ward's case has a long history including a prior appeal to this court. In 2013, Ward pled no contest to one count of criminal threat and two counts of assault in 12CR367. The district court sentenced Ward to 14 months' imprisonment but granted probation for 12 months to be supervised by community corrections. One condition of Ward's probation was for him to have no violent contact with the victim, J.D., his girlfriend. See *State v. Ward*, No. 116,545, 2021 WL 219233, at *1 (Kan. App. 2021) (unpublished opinion), *rev. denied* 315 Kan. 971 (2022).

In 2014, Ward was arrested for committing domestic battery against J.D., so the State moved to revoke his probation. J.D. testified at the probation revocation hearing, but she recanted her allegations that Ward had physically assaulted her. Even so, the district court found by a preponderance of the evidence that Ward had violated his probation by attacking J.D. The district court ordered Ward to serve a 60-day jail sanction and extended his probation for 12 months. In 2015, the State again moved to revoke Ward's probation, alleging he had committed domestic battery and other crimes against J.D. This time, Ward admitted the allegations, and the district court revoked his probation and ordered him to serve the original sentence. 2021 WL 219233, at *1-2.

Ward later filed several motions with the district court including a K.S.A. 60-1507 motion. These motions asserted that the district court had violated his constitutional rights when it found that he had violated his probation in 2014 based on the domestic battery allegations that J.D. recanted. The K.S.A. 60-1507 motion also alleged that Ward's counsel was ineffective at the 2014 probation revocation hearing. Ward did not dispute his 2015 probation violation, but he asserted that he would not have been on probation in 2015 had the district court not improperly extended the probation in 2014. For his ultimate relief in the K.S.A. 60-1507 motion, Ward asked the district court "to vacate, set aside, or correct [his] sentence" in 12CR367. 2021 WL 219233, at *2.

The district court denied Ward's motions. After an appeal to this court, the Kansas Supreme Court, and a remand to this court, we dismissed the appeal as moot because Ward had completed his sentence. 2021 WL 219233, at *4. Ward petitioned for review, and the Supreme Court denied the petition.

This brings us to Ward's current motion. On February 23, 2021, Ward filed a pleading in 12CR367 entitled "Motion to Withdraw the Plea to Correct a Manifest Injustice." The State did not file a written response and raised no affirmative defenses to the motion. Most of the motion challenged the district court's decision to revoke Ward's probation in 2014—allegations addressed in his prior K.S.A. 60-1507 motion. But the motion also included these allegations:

"This court blocked the testimony from Mr. Ward, he wanted to advise the court of being coherced [*sic*] into a plea. Of his lawyer scaring him to not testify. 'Attorney stating how scary prison is, and how this court would allow false testimony to gain a conviction at trial.'

. . . .

"As such, Defendant pleas with this court to withdraw his plea, to fix these manifest injustices, the direct perjury, and prejudice shown to defendant, denial of due process, use of false evidence, ineffective assistance, and cohercment [*sic*] in to the original plea, and set this matter for trial, or dismissal."

The district court appointed counsel to represent Ward on his motion, and Ward's counsel requested an evidentiary hearing. But at a hearing in August 2021, after hearing arguments of counsel, the district court found there were no substantial questions of law or fact presented by Ward's motion and no evidentiary hearing was needed. The district court denied the motion on the merits finding there was no manifest injustice permitting Ward to withdraw his plea. The district court found the issues Ward raised in his motion to withdraw plea were the same issues he had raised and had been addressed in his prior K.S.A. 60-1507 motion. Finally, the district court found that Ward's motion to withdraw plea was moot because he had served his sentence and no further remedy was available.

Ward claims the district court erred in summarily denying his motion to withdraw his plea because it sufficiently alleged facts to warrant an evidentiary hearing. More specifically, Ward alleges that he received inaccurate legal advice from his attorney who coerced him into entering a no contest plea. He asserts that without the inaccurate legal advice he would have taken his case to trial. Ward also argues that the district court's reasons for summarily denying his motion are legally unsound for two reasons. First, Ward contends the district court incorrectly found that the issues

he raised in his motion to withdraw plea were the same issues he had raised and had been addressed in his prior K.S.A. 60-1507 motion. Second, Ward asserts the district court incorrectly found that his motion to withdraw plea was moot because he had served his sentence.

When a motion to withdraw a plea is summarily denied without an evidentiary hearing, the appellate court applies the same procedures and standards of review as in cases arising out of K.S.A. 60-1507. The appellate court exercises de novo review because it has the same access to the motions, records, and files as the district court, and it decides whether the motion, records, and files conclusively show the defendant is entitled to no relief. *State v. Fritz*, 299 Kan. 153, 154-55, 321 P.3d 763 (2014).

Turning to the merits of the denial of the motion, after a district court pronounces the sentence, it may allow the defendant to withdraw a plea and set aside the judgment in order "[t]o correct manifest injustice." K.S.A. 2021 Supp. 22-3210(d)(2). The defendant bears the burden of establishing manifest injustice. *State v. Huynh*, 278 Kan. 99, 101, 92 P.3d 571 (2004). Three factors, also known as the *Edgar* factors, guide the district court's analysis on a motion to withdraw a plea: (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. *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). These factors, however, are not exhaustive. See *Fritz*, 299 Kan. at 154.

To begin, I agree with Ward that the district court made two incorrect findings when it summarily denied the motion to withdraw plea. First, the district court incorrectly found that the issues Ward raised in his motion to withdraw plea were the same issues he had raised and had been addressed in his prior K.S.A. 60-1507 motion. Granted, much of Ward's motion to withdraw plea rehashed his complaints about the 2014 probation revocation. But Ward raised new claims in his current motion that focused on the voluntariness of his original plea, not the later probation revocation.

Second, the district court incorrectly found that Ward's motion to withdraw plea was moot because he had served his sentence. Ward can still try to withdraw his plea and set aside his conviction

even though he has served his sentence. Perhaps the district court was confused because our court ruled in Ward's last appeal that his postconviction motions in that case were moot because he had served his sentence. But Ward's postconviction motions that we addressed in his last appeal attacked only his sentence and not his conviction. Because Ward's motion to withdraw plea ultimately seeks to set aside his conviction, the motion is not moot even though Ward has served his sentence.

Ward argues that his motion to withdraw plea sufficiently alleges that ineffective assistance of counsel caused him to enter into a plea agreement, and the district court erred in summarily denying his motion without an evidentiary hearing to determine whether any of the *Edgar* factors applied. When a postsentence motion to withdraw plea alleges ineffective assistance of counsel, the constitutional test for ineffective assistance must be met to establish manifest injustice. *State v. Kelly*, 298 Kan. 965, 969, 318 P.3d 987 (2014). This two-prong analysis considers: (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. See 298 Kan. at 969-70 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). In the context of a motion to withdraw a plea, the defendant must show that, but for counsel's deficient performance, he or she would have insisted on going to trial rather than entering the plea. *Kelly*, 298 Kan. at 970.

Under the *Strickland* analysis, Ward argues that he has met his burden of alleging facts sufficient to warrant an evidentiary hearing. Ward maintains that his counsel gave him inaccurate legal advice that constituted deficient performance when his counsel advised him that the district court would allow a conviction based on testimony known to be false. By explaining *how* counsel coerced him into a plea, Ward asserts he has pled the basis for an ineffective assistance of counsel claim. Ward argues that he only pled no contest because he was advised by his counsel that the court would allow false testimony to gain a conviction at trial. Otherwise, he argues he would have insisted on going to trial.

I agree that Ward's motion sufficiently raises new claims about the voluntariness of his plea that the court has not addressed before and should not have been summarily dismissed without an evidentiary hearing. Ward claims that his original plea was coerced and specifies that his counsel gave inaccurate advice that the court would allow false testimony to gain a conviction at trial. He also claims that his counsel coerced him into a plea by scaring him about a potential prison sentence when the plea negotiations called for probation. These claims go directly to the first and second *Edgar* factors courts should consider in analyzing a defendant's motion to withdraw plea. See *Edgar*, 281 Kan. at 36. The State points out that Ward expressed satisfaction with his trial counsel when he originally pled no contest to the charges. But this statement does not serve as an absolute bar preventing Ward from later claiming ineffective assistance of counsel.

The majority opinion correctly finds that Ward's motion to withdraw his plea is not barred by the law-of-the-case doctrine and res judicata, as the State argues, because Ward's motion raises new factual claims about the voluntariness of his plea that have not been addressed in court. Still, the majority finds the district court correctly denied Ward an evidentiary hearing because his claims are "mere ad hominem, abusive allegations" that are conclusory in nature. 62 Kan. App. 2d at 729. For good measure, the majority finds from the record that Ward "blatantly lied to the trial judge during his plea hearing" when he told the judge that he was not challenging the factual basis for his plea and was not asserting his problems with his medication as a defense.62 Kan. App. 2d at 729.

To merit an evidentiary hearing, and to avoid summary denial, a motion must present "substantial issues of fact or law" that go beyond conclusory allegations. *Fritz*, 299 Kan. at 156. "Mere conclusions of the defendant are insufficient to raise a substantial issue of fact when no factual basis is alleged or appears in the record." 299 Kan. at 156.

Ward's allegations are not conclusory. A defendant makes a conclusory allegation when, for instance, the defendant states that a plea was coerced but does not give any explanation or reasons to support the claim. Ward gave two reasons to support his claim that his counsel coerced his plea. First, he alleged that his counsel scared him to not testify by "'stating how scary prison is.'" Second,

Ward alleged that his counsel gave him inaccurate advice that the "'court would allow false testimony to gain a conviction at trial.'" Perhaps Ward's claims are bold. But it is not up to the district court or this court to find that Ward's claims are not credible without affording him an evidentiary hearing and weighing his testimony against other evidence presented at the hearing.

A good example of conclusory allegations offered to support a plea withdrawal request is found in *State v. Jackson*, 255 Kan. 455, 874 P.2d 1138 (1994). In that case, the defendant's asserted basis for withdrawing his plea was "that my attorney corced [*sic*] me into pleaing [*sic*] guilty." 255 Kan. at 456. The defendant also stated that he was "[c]ompeled [*sic*] to plea" and "new evidence [was] found in the case." 255 Kan. at 456. Our Supreme Court found that these allegations were mere conclusions, and they did not require an evidentiary hearing to deny the defendant any relief. 255 Kan. at 463.

Likewise, in *Mundy v. State*, 307 Kan. 280, 304-05, 408 P.3d 965 (2018), the defendant claimed her trial counsel failed to subpoena witnesses, failed to interview certain witnesses, and declined to use some of the defendant's requested witnesses. But the record showed that trial counsel called several witnesses and thoroughly cross-examined many of the State's witnesses. As to witnesses the trial counsel did not call or interview, the defendant's motion for relief did not list any facts or indicate how the witnesses would have supported her claim. Under these circumstances, the court found that the defendant offered only conclusory statements without an evidentiary basis to support her claims, and no such basis appeared in the record. 307 Kan. at 304.

In contrast, in *Bellamy v. State*, 285 Kan. 346, 172 P.3d 10 (2007), our Supreme Court reversed the summary denial of a K.S.A. 60-1507 motion alleging ineffective assistance of counsel. In that case, the movant asserted that his trial counsel gave him specific advice about whether the victim could not consent to rape—advice that would have been legally incorrect if the movant's assertion was true. 285 Kan. at 349. The movant offered no corroborating evidence or witnesses to support his allegation. The district court denied the claim without an evidentiary hearing, and the Court of Appeals affirmed. In remanding for an evidentiary

hearing, our Supreme Court reasoned that the movant had alleged he received inaccurate advice from his trial counsel that caused him to plead guilty to the rape charge, and the Supreme Court found that the district court improperly denied the K.S.A. 60-1507 motion without specifically addressing the movant's claim that his trial counsel improperly advised him on the consent issue. 285 Kan. at 357. The court emphasized that under K.S.A. 60-1507, the district court must conduct an evidentiary hearing unless the motion, files, and records of the case conclusively show that the movant is not entitled to relief. 285 Kan. at 357.

Ward's case is more like *Bellamy* and different from *Jackson* and *Mundy*. Ward does not simply make a generic assertion that his counsel coerced him into pleading no contest. Instead, Ward specifies that his counsel gave inaccurate advice that the court would allow false testimony to gain a conviction at trial. He also claims that his counsel coerced him into a plea by scaring him about a potential prison sentence when the plea negotiations called for probation. Ward lists no corroborating witnesses to support his claim, but corroborating witnesses are not required. *Sullivan v. State*, 222 Kan. 222, 223, 564 P.2d 455 (1977). In fact, the only witness who could corroborate or dispute Ward's claim would be his trial counsel. This is precisely the reason that Ward's claim should not be rejected by the court without knowing that the claim is denied by counsel. There is nothing in the record at this stage that conclusively shows that Ward's claim is false.

Finally, the district court's decision to summarily deny Ward's claims was no doubt influenced by the two incorrect findings it made from the bench when it denied Ward's motion. First, the district court incorrectly found that the issues Ward raised in his motion to withdraw plea were the same issues he had raised and had been addressed in his prior K.S.A. 60-1507 motion. Second, the district court incorrectly found that Ward's motion to withdraw plea was moot because he had served his sentence. The district court identified all these reasons in finding that Ward's motion raised no substantial issues of law or fact, and thus, no evidentiary hearing was needed. Had the district court not been mistaken about whether Ward's issues had been previously addressed in his prior K.S.A. 60-1507 motion and its belief that Ward's motion to

withdraw his plea was moot, the court may not have been so quick to reject Ward's motion without an evidentiary hearing.

The only thing at stake in this appeal is whether Ward should have received an evidentiary hearing before the district court denied his postsentence motion to withdraw plea. Ward's motion asserts a claim that if found to be true could amount to manifest injustice permitting him to withdraw his no contest plea. The motion, records, and files do not conclusively show that Ward is entitled to no relief. Thus, I would reverse the district court's decision, which depended on erroneous findings, and remand for an evidentiary hearing on Ward's motion to withdraw plea.

(522 P.3d 385)

No. 123,485

CITY OF WICHITA, *Appellee/Cross-appellant*, v. KARL PETERJOHN and CELESTE RACETTE, INDIVIDUALLY AND AS REPRESENTATIVES OF "SAVE CENTURY II COMMITTEE," *Appellants/Cross-appellees*.

SYLLABUS BY THE COURT

1. CITIES AND MUNICIPALITIES—*Initiative Petition—Substantial Compliance with Statutory Safeguards*. An initiative petition is effective when it substantially complies with all relevant statutory safeguards. This means that petitioners must comply with the essential matters necessary to assure every reasonable objective of the statutes has been met.

2. SAME—*Initiative Petition—Used to Advance Legislative Policies.* An initiative petition can only be used to advance policies that are legislative in nature, not for policies that are predominantly executive or administrative.

3. SAME—*Administrative Ordinances—Require Particularized Knowledge*. Ordinances tend to be administrative in nature when they require particularized knowledge in matters of city operations, associated space requirements, public safety, and regulatory issues, as well as an intimate appreciation of the city's fiscal affairs.

Appeal from Sedgwick District Court; ERIC A. COMMER, judge. Opinion filed December 30, 2022. Affirmed.

Austin Keith Parker, of Parker & Parker, LLC, of Wichita, for appellants/cross-appellees.

Sharon L. Dickgrafe, chief deputy city attorney, for appellee/cross-appellant.

Before MALONE, P.J., ATCHESON and WARNER, JJ.

WARNER, J.: Kansas law allows city residents of Kansas cities to directly impact city policy through the initiative-and-referendum process. When a certain percentage of the voters in a city sign a petition to adopt a proposed ordinance under this procedure, the city council must either pass the proposed law or submit it for the voters' consideration in an election.

Initiative petitions thus provide a powerful tool for city residents to alter a city's *legislative* policies. But the initiative process cannot be used to address *administrative* matters, which require

specialized knowledge of the city's financial constraints and expertise as to how day-to-day operations are carried out. And initiatives must comply with various procedural safeguards to ensure that the petitioners, city government, and electorate understand the specific policy advanced.

This case involves an ordinance proposed by a group of Wichita residents through the initiative process to prevent the sale, demolition, or redevelopment of the Century II performing arts center and former Wichita public library. The proposed ordinance would require the City of Wichita to hold an election whenever it sought to destroy, replace, or adversely affect prominent buildings owned by the City that are historically important or architecturally significant. After the residents filed their petition and proposed ordinance, the City sued, seeking a declaration that the ordinance concerned administrative matters that could not be raised via the initiative process. The district court agreed and entered judgment in the City's favor. After carefully considering the parties' arguments in light of the governing law, we affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

The facts relevant to our discussion are generally undisputed. In the 1960s, the City of Wichita built a new performing arts center and a public library near the banks of the Arkansas River. The arts center, named Century II to honor the 100th anniversary of Wichita's incorporation, has served as a performance venue for organizations such as the Wichita Symphony Orchestra, the Wichita Youth Symphony, and Music Theatre Wichita. Though the library has since moved to a new location, Century II continues to host concerts, theatrical performances, and other events.

In late 2019, defendant Celeste Racette learned of five proposals by the Riverfront Legacy Master Plan Coalition—a partnership between various public and private groups—to redevelop the land where Century II and the former library sit. Four of these proposals involved demolition of Century II and the former library. This information led Racette to join the Save Century II Committee with the goal of preserving these two buildings.

Racette and defendant Karl Peterjohn subsequently helped the Committee organize the "Save Century II" campaign with the same aim.

Part of the "Save Century II" campaign involved the advancement of the initiative petition that is the subject of this lawsuit. Peterjohn submitted the campaign's petition to the Sedgwick County Counselor in January 2020. The petition included the following language and proposed ordinance:

"Shall the following ordinance become effective:

"BE IT ORDAINED THAT THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

"No prominent city owned buildings of historical importance or architectural significance (regardless of historic register status), including Century II and the adjoining former Public Library, shall be demolished, replaced or otherwise adversely affected without a public vote of approval by the qualified voters in the City of Wichita, and further, no interest in such city owned buildings, including Century II and the adjoining former Public Library, shall be leased, sold, bartered, traded, conveyed or assigned and thereafter demolished, replaced or otherwise adversely affected without a public vote of approval by the qualified voters in the City of Wichita."

The County Counselor approved the form of this proposed ordinance, and Save Century II organizers went on to obtain over 17,000 voter signatures supporting the petition—more than 34% of the number of electors who voted in the 2019 municipal election. The organizers filed the petition, signatures, and proposed ordinance with the Wichita city clerk in July 2020. The Sedgwick County Election Commissioner reviewed and verified the signatures, and the proposed ordinance was presented to the city council.

Later that month, the City sought a declaratory judgment against Racette and Peterjohn (as organizers of Save Century II) to determine whether the City was required to present the proposed ordinance to Wichita voters in a special election. The City argued that the initiative petition failed to comply with various statutory requirements and that the proposed ordinance was administrative in nature and thus not appropriate for a citizen initiative. The City also asserted that the proposed ordinance was void because it exceeded the City's constitutional authority by requir-

ing the City to call future binding elections not otherwise permitted by Kansas law. And the City asserted that the language of the ordinance was unconstitutionally vague because it did not give sufficient direction as to what actions the City must take to carry out the proposed law.

As the City's lawsuit proceeded, the Wichita City Council adopted a new policy in response to Save Century II's efforts. The City's policy acknowledged the thousands of signatures on the initiative petition but stated that the City lacked the statutory authority to call binding elections on its own initiative. Nevertheless, the policy announced that the City would hold an advisory election before tearing down either Century II or the former public library.

The district court held an evidentiary hearing a few days after the City's policy announcement. There, Wichita's Interim Assistant Director for Public Works and Utilities testified about how the City makes its decisions regarding building maintenance, renovation, and demolition. He also explained that the City owns about 540 buildings, about 60% of which are at least 40 years old. Racette also testified about Save Century II's motivations for proposing the ordinance and the group's intention that the ordinance's scope should not be limited to buildings on the historical registry.

The district court later announced its ruling in a 38-page decision. The court found the initiative petition substantially complied with the governing statutory procedures. But the court concluded that the proposed ordinance was predominantly administrative in nature and thus could not be adopted by initiative. The court also found that the ordinance would exceed the City's constitutional authority by requiring it to hold future binding elections. Finally, the court found that the terms "historically important or architecturally significant" and "adversely affected" rendered the ordinance unconstitutionally vague. The district court thus entered a declaratory judgment for the City, finding the proposed ordinance did not need to be adopted by the city council or set for an election.

The Save Century II organizers now appeal the district court's judgment. The City has cross-appealed the district court's procedural ruling that the initiative petition substantially complied with Kansas law.

DISCUSSION

In general, a city's power to adopt and amend its legislative policies rests with its city council. Council members consider and vote on "various ordinances, resolutions, and motions that the issues of the day" present. *City of Topeka v. Imming*, 51 Kan. App. 2d 247, 252, 344 P.3d 957, *rev. denied* 302 Kan. 1008 (2015). While members of the public may participate in public debate and open meetings, their role in the development and advancement of policy is indirect—they ultimately rely on the judgment of the city's elected representatives.

The Kansas Initiative and Referendum statute, K.S.A. 12-3013, establishes a powerful procedure by which residents may more directly influence legislative decisions by petitioning the city government to adopt new policies or repeal existing ones. Under the initiative process relevant to this appeal:

- Citizens seeking to initiate a new policy must present voters with the language of a proposed ordinance and gather a minimum number of signatures, determined by the size of the municipality and the number of voters who participated in the last city election. K.S.A. 12-3013(a).

- Once these signatures have been collected, the proposed ordinance and petition are filed with the city clerk so the signatures on the petition may be verified. K.S.A. 12-3013(a).

- If enough voters have signed the petition, the proposed ordinance must be either adopted outright by the city council or presented to the voters in a special election. K.S.A. 12-3013(a).

- Once an ordinance has been formally adopted through the initiative procedure, it can only be altered by a public vote or, if at least 10 years have passed since its adoption, by the city council. K.S.A. 12-3013(c).

Given the power and lasting effect of an initiative petition—compelling the adoption of a policy by some percentage of previous voters, but potentially less than the voting majority who

elected the city council members—Kansas law imposes various procedural safeguards to ensure "the validity of the proponents' support." *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 664, 367 P.3d 282 (2016). For example, the initiative petition must be accompanied by the specific language of the proposed ordinance so those signing the petition "have the opportunity to become fully aware of the exact, unalterable ordinance being proposed to become the law of their city." 303 Kan. at 663. And like other petitions seeking elections, an initiative petition must "pertain[] to a single issue or proposition." K.S.A. 25-3602(a). Petitions that fail to comply with these requirements are "null and void" and do not trigger any further action by the city council. 303 Kan. at 668.

Kansas law also restricts the types of issues that may be pursued through the initiative process. Initiative petitions may not be used to adopt "[a]dministrative ordinances," K.S.A. 12-3013(e)(1), which require "particularized knowledge" in matters of city "operations, associated space requirements, public safety, [and] regulatory issues, as well as an intimate appreciation of the [c]ity's fiscal affairs." *McAlister v. City of Fairway*, 289 Kan. 391, 408, 212 P.3d 184 (2009).

The parties' arguments in this appeal concern both these procedural and subject-matter limitations. Save Century II argues that the district court erred when it found that their proposed ordinance was administrative in nature, and thus inappropriate for the initiative process; it also challenges the court's constitutional rulings that the proposed ordinance was vague and exceeded the City's authority to conduct elections. In its cross-appeal, the City argues that the district court never should have reached the substance of the proposed ordinance, as the initiative petition did not strictly comply with the procedural safeguards in K.S.A. 12-3013, K.S.A. 25-3601, and K.S.A. 25-3602.

Because the City's cross-appeal presents a threshold challenge to the validity of the initiative petition, we consider those procedural claims first. We then turn to the parties' arguments regarding the language and scope of the proposed ordinance.

1. *The form of the initiative petition substantially complied with Kansas law.*

As we have indicated, K.S.A. 12-3013 allows city residents to initiate the adoption of a proposed city ordinance by collecting the required minimum number of signatures on a petition. See K.S.A. 12-3013(a); *McAlister*, 289 Kan. 391, Syl. ¶ 3. Initiative petitions must comply with the procedural safeguards in K.S.A. 12-3013(a), as well as other requirements in K.S.A. 25-3601 and K.S.A. 25-3602, which establish standards for all petitions requesting elections.

Under these statutes, an initiative petition "shall contain a request that the governing body pass the ordinance or submit the same to a vote of the electors." K.S.A. 12-3013(a). A petition may only concern a single issue. K.S.A. 25-3602(a). And if a petition requests an election on or protests an adopted ordinance or resolution, it is presumptively valid if it includes "the title, number and exact language of the ordinance, or resolution." K.S.A. 25-3601(c).

The City argues that an initiative petition is void if it does not strictly comply with each of these requirements. The district court concluded—and we agree—that Kansas law only required the organizers to substantially comply with these provisions.

As a starting point, we have previously observed that courts should exercise "'extreme caution'" when rejecting citizens' initiative or referendum petitions on mere technicalities. *City of Prairie Village v. Morrison*, No. 104,918, 2011 WL 6310196, at *7 (Kan. App. 2011) (unpublished opinion) (quoting 5 McQuillin, Municipal Corporations § 16.67, p. 481 [3d ed. rev. 2004]), *rev. denied* 296 Kan. 1129 (2013). In keeping with this principle, Kansas courts have long found that an initiative petition is effective when it substantially complies with all relevant statutory safeguards. See *State v. Jacobs*, 135 Kan. 513, 516-17, 11 P.2d 739 (1932) (finding substantial compliance when referendum petition was left with city clerk instead of board of commissioners); see also *Morrison*, 2011 WL 6310196, at *8 (statement asking whether ordinance should "'become effective'" instead of "'take effect'" substantially complied with Home Rule Amendment). This means that organizers presenting an initiative petition must comply with

"the essential matters necessary to assure every reasonable objective of the statute[s]" has been met. *Stueckemann v. City of Basehor*, 301 Kan. 718, Syl. ¶ 1, 348 P.3d 526 (2015).

The City correctly points out that the Kansas Supreme Court has previously rejected an initiative petition because it did not comply with the requirements of K.S.A. 12-3013(a). See *State ex rel. Schmidt*, 303 Kan. at 667-68. The court in that case assumed that substantial compliance was the correct standard—and the City of Wichita agreed. See 303 Kan. at 667. The petitioners in that case, however, failed to attach a copy of the proposed ordinance with the initiative petition when it was filed with the city. The Supreme Court found that, without including the ordinance, the initiative petition there did not even substantially "comply with the statutory provision that the proposed ordinance be filed with the city clerk." 303 Kan. at 668.

The technical variations the City points to here are a far cry from the defect discussed in *State ex rel. Schmidt*. The City argues that Save Century II's initiative petition fell short of the statutory requirements in four ways:

- The petition did not include the "title" and "number" of the proposed ordinance. See K.S.A. 25-3601(c).
- The petition preceded the language of the proposed ordinance with, "Shall the following ordinance become effective" rather than, "'Shall the following be adopted?'" See K.S.A. 12-3013(b).
- The petition did not specifically request the Wichita City Council to pass the proposed ordinance or submit the ordinance in an election. See K.S.A. 12-3013(a).
- The petition contemplated a new election each time the City sought to change the character of a historically significant building and thus did not, according to the City, involve a single issue as required by K.S.A. 25-3602(a).

As the district court noted, these discrepancies—to the extent they vary at all from the statutory requirements—do not invalidate Save Century II's initiative petition.

To begin, the district court correctly observed that petitions only need to include the title and number references when the petitioners are "requesting an election on or protesting an ordinance, or resolution, adopted by the . . . city." K.S.A. 25-3601(c). In other words, this information must be included when a petition seeks to amend or rescind *existing* ordinances, but not when it seeks to adopt a *new* ordinance. Indeed, a proposed ordinance has not been adopted or codified; it does not have an official title or number to reference.

The City's attempt to distinguish requests that a proposed ordinance should "become effective" or "be adopted" is similarly unavailing. These phrases are found in K.S.A. 25-3601(c) and K.S.A. 12-3013(b), but neither provision applies here. K.S.A. 25-3601(c) requires a petition protesting an existing ordinance to ask: "'Shall the following ordinance, or resolution, become effective?'" As we have indicated, this provision does not apply for initiative petitions proposing a new ordinance. K.S.A. 12-3013(b) provides language that must be included on a ballot when a proposed ordinance is submitted to the voters in an election, requiring the proposed ordinance to be preceded on the ballot by the question, "'Shall the following be adopted?'" K.S.A. 12-3013(b). In contrast, K.S.A. 12-3013 does not require this specific language in an initiative petition.

In fact, K.S.A. 12-3013(a) does not direct that any specific wording must be used when circulating an initiative petition and the accompanying proposed ordinance. Instead, that statute merely requires the petition to "contain a request that the governing body pass the ordinance or submit the same to a vote of the electors." K.S.A. 12-3013(a). The City asserts that Save Century II's initiative petition did not include such a request. But we disagree.

The heading on Save Century II's initiative petition stated: "PETITION TO THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS." Directly before the text of the proposed ordinance, the petition said: "BE IT ORDAINED THAT THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS." While this language could have more clearly articulated the specific actions the organizers were asking the City to take, there is

no question that the City understood what the organizers were requesting. The district court correctly found that this language substantially complied with K.S.A. 12-3013.

Finally, the initiative petition substantially complied with K.S.A. 25-3602(a)'s requirement that petitions "pertain[] to a single issue or proposition." The City correctly points out that Save Century II's proposed ordinance would require an election whenever the City sought to renovate, demolish, or take other actions concerning a historically important or architecturally significant building. But the focus of K.S.A. 25-3602(a) is the *petition*, not the ordinance. Here, the initiative petition proposed a single new ordinance for adoption and complied with K.S.A. 25-3602(a).

In sum, the initiative petition here complied with "the essential matters necessary to assure every reasonable objective of" K.S.A. 12-3013, K.S.A. 25-3601, and K.S.A. 25-3602. *Stueckemann*, 301 Kan. 718, Syl. ¶ 1. The district court did not err when it found that Save Century II's initiative petition substantially complied with these statutes.

2. *The proposed ordinance's aims may not be pursued through the initiative process.*

Because Save Century II's petition substantially complied with the statutes governing the initiative process, we turn to the ordinance proposed for adoption:

"No prominent city owned buildings of historical importance or architectural significance (regardless of historic register status), including Century II and the adjoining former Public Library, shall be demolished, replaced or otherwise adversely affected without a public vote of approval by the qualified voters in the City of Wichita, and further, no interest in such city owned buildings, including Century II and the adjoining former Public Library, shall be leased, sold, bartered, traded, conveyed or assigned and thereafter demolished, replaced or otherwise adversely affected without a public vote of approval by the qualified voters in the City of Wichita."

The district court found that this proposed ordinance could not be adopted through initiative process for three reasons. *First*, the ordinance was administrative and thus could not be proposed for adoption under K.S.A. 12-3013(e). *Second*, adopting the ordinance would exceed the City's constitutional authority, as the legislature had not authorized the City to call future binding elections

on its own initiative. And *third*, the language of the ordinance was unconstitutionally vague because it did not define "buildings of historical importance or architectural significance" or what actions would "adversely affect" those buildings. The organizers challenge each of these rulings on appeal.

After carefully reviewing the language of the proposed ordinance and the governing Kansas law, we agree with the district court that the ordinance is administrative and thus may not be adopted via an initiative petition under K.S.A. 12-3013. In light of this conclusion, we need not reach the district court's alternative constitutional rulings. See *State ex rel. Schmidt*, 303 Kan. at 658 (instructing that appellate courts should generally avoid making unnecessary constitutional decisions when the judgment can be assessed on other grounds). We therefore affirm the district court's judgment in favor of the City.

2.1. *The proposed ordinance is administrative and thus cannot be adopted via a citizen initiative under K.S.A. 12-3013.*

As we have indicated, K.S.A. 12-3013(e)(1) excludes administrative ordinances from the initiative-and-referendum process. Kansas courts have interpreted this provision to signify that an initiative petition can only be used to advance policies that are "legislative" in nature, not for policies that are "principally executive or administrative." *City of Lawrence v. McArdle*, 214 Kan. 862, Syl. ¶ 1, 522 P.2d 420 (1974). This does not mean, however, that an ordinance can only be adopted through the initiative process if it involves purely legislative acts. Indeed, "no single act of a governing body is ever likely to be solely legislative or solely administrative." *McAlister*, 289 Kan. at 402. Instead, the question is whether an ordinance is *principally*—or *predominantly*—legislative.

The *McAlister* court articulated four often-overlapping considerations Kansas courts have historically employed to determine whether an ordinance is predominantly legislative or administrative:

1. "An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance." 289 Kan. at 403.

2. "Acts declaring a public purpose and providing ways to accomplish that purpose may be generally classified as legislative. Acts dealing only with a small segment of an overall policy question are generally administrative in character." 289 Kan. 391, Syl. ¶ 8.

3. "Decisions requiring specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative in character, even though they may also be said to involve the establishment of policy." 289 Kan. 391, Syl. ¶ 9.

4. "When the matter at issue in a proposed ordinance under the initiative and referendum statute is one of statewide concern and the legislature delegates decision-making power to local councils or boards rather than local electors, the city's action is administrative in character." 289 Kan. 391, Syl. ¶ 10.

The weight afforded to each of these considerations differs from case to case. In some instances, one consideration will sufficiently elucidate whether a proposed ordinance is predominantly administrative or legislative. 289 Kan. 391, Syl. ¶ 11. Because, where the facts are not in dispute, the characterization of an ordinance as administrative or legislative is a legal question, we conduct our analysis of these considerations de novo. See 289 Kan. at 399.

The district court analyzed the ordinance proposed by Save Century II's petition under each of the *McAlister* considerations and found it was predominantly administrative. The court noted that the ordinance would create a new law, requiring an election whenever certain city-owned buildings will be demolished, replaced, or adversely affected, and that this new policy tended to indicate a legislative purpose. But the court also noted that this policy change would only affect a small segment of the approximately 540 city-owned buildings, which was more consistent with an administrative policy. Turning to the third consideration, the court found—based on the testimony provided regarding building

maintenance and the City's financial considerations—that the decision to demolish a building requires specialized training and knowledge beyond what is available to the general public. And the court lastly found that the manner in which cities hold elections is a question of statewide concern; requiring an election whenever the City sought to take action on one of the covered buildings would, at the very least, distinguish Wichita from all other municipalities in Kansas in the manner in which they held elections.

Our analysis of these considerations differs from the district court's assessment. But we ultimately arrive at the same end—that the proposed ordinance is principally administrative and thus not a proper subject for an initiative petition. While it is not necessary in every case, we explain our analysis of the *McAlister* considerations in some detail to provide guidance as to how we reach this conclusion.

The first *McAlister* consideration—whether the proposed ordinance would establish a "new law"—provides little guidance as to the character of the proposed ordinance in this case. 289 Kan. at 403. As the district court observed, if the proposed ordinance were adopted, it would technically result in a new law. But that is true of any ordinance proposed through the initiative process and thus provides little guidance as to whether the substance of the ordinance is administrative or legislative. The controlling question is not whether the ordinance would create a new law in the technical sense, but whether the ordinance would create a new legislative *policy*.

The Kansas Supreme Court's decision in *Lewis v. City of South Hutchinson*, 162 Kan. 104, 174 P.2d 51 (1946), illustrates this distinction. In that case, the voters in South Hutchinson had approved a municipal water system in a previous election. Some residents later circulated an initiative petition that sought to limit the city's authority to proceed until the water system's plans were made available for public inspection and the construction could proceed without interruption. The *Lewis* court found that the proposed ordinance was administrative because it would merely alter an existing policy—that is, it would "'execut[e] a law already in existence.'" 162 Kan. at 128.

Applying these principles here yields mixed results. The City correctly points out that Wichita, like other cities, has already

adopted a policy of historic preservation. The City argues that the proposed ordinance merely seeks to alter these existing policies. This is true to a point. But the proposed ordinance seeks to permanently expand these preservation principles and develop protections for other public buildings deemed historically important or architecturally significant. It also adds a voter-approval requirement before the City may demolish or otherwise adversely affect one of these properties. On the whole, we do not find that this consideration provides any significant insight as to whether the proposed ordinance is predominantly legislative or administrative.

The second *McAlister* consideration—the ordinance's scope and purpose—is similarly ambivalent. The proposed ordinance suggests a public purpose: that voters should have a say when historically important or architecturally significant buildings owned by the City are to be destroyed or otherwise adversely affected. And it contains a means to accomplish that goal by a public vote. These broad public policy considerations sometimes demonstrate a legislative character. But the ordinance's reach is limited—it affects buildings that are prominent, city-owned, and either historically important or architecturally significant. It is unclear how many of the city's approximately 540 buildings meet those criteria. But the district court found that the number of buildings affected would be small, and the organizers themselves freely admitted that their focus was on the Century II performing arts center and the former public library. Because the ordinance would affect only a limited number of buildings, the ordinance also bears administrative characteristics. Again, this consideration does not lead us to conclude the proposed ordinance is either predominantly administrative or legislative.

Our analysis of the third *McAlister* consideration—whether the ordinance requires particularized knowledge or financial acumen—is more fruitful. The district court found that decisions regarding the acquisition, maintenance, and demolition of city-owned buildings required municipal experience and appreciation for the City's various financial obligations. Because the proposed ordinance intruded on this realm, the district court found that it was predominantly administrative. Our review of the record leads us to the same conclusion.

At the hearing before the district court, Benjamin Nelson, the City's Interim Assistant Public Works Director, testified about the various factors the City must consider when making decisions about the maintenance, renovation, and demolition of city-owned buildings. Nelson explained that a decision to demolish or renovate a building is based primarily on the building's condition and utility—weighing the building's maintenance needs and its ability to accommodate future city programming. These assessments require an understanding of, among other things, a building's electrical, mechanical, and plumbing systems. Because components of these systems age and deteriorate at different rates, the City can estimate future maintenance needs by comparing the condition of components and systems with their expected useful lives. These estimates allow the City to determine how to best maintain buildings and help it to project future maintenance costs, which inform the City's maintenance budget.

In *McAlister*, the Kansas Supreme Court found a proposed ordinance that barred construction of a city hall from 90% of the area within a city implicated special knowledge and training in municipal governance. 289 Kan. at 407-09. The court noted decisions regarding where to construct municipal facilities necessarily require specialized knowledge and training. 289 Kan. at 408. And this was particularly true where the proposed ordinance effectively dictated where the City Hall could be built.

Similarly, in *City of Wichita v. Kansas Taxpayers Network, Inc.*, 255 Kan. 534, 541, 874 P.2d 667 (1994), the Supreme Court determined an attempt to repeal an ordinance establishing a city-wide stormwater management system required specialized knowledge, particularly regarding the system's physical structure, maintenance, and collection of fees. Because the city owned and operated the system, the system also implicated the city's expertise in fiscal management.

The City argues that a similar conclusion is warranted here because the decision whether to maintain, renovate, demolish, or otherwise dispose of city property requires specialized knowledge about the buildings and the City's budget. The City asserts that, as in *McAlister*, the proposed ordinance would limit the City's ability to operate. Save Century II counters the ordinance is legislative

because it involves a value judgment—whether a building's historical importance or architectural significance outweighs the City's judgment regarding the building's condition and utility—that can be made by average citizens. But the organizers' argument fails to appreciate the specialized knowledge that this judgment requires.

The proposed ordinance would trigger an election whenever the City decided that certain city-owned buildings should be demolished, replaced, or adversely affected. As in *Kansas Taxpayers Network*, that decision requires expertise in fiscal management, as well as an understanding of the buildings' existing system needs. The ordinance would invade and permeate the City's administrative assessments of these structures. And the ordinance would prevent the City from acting on its particular knowledge of these buildings, or creating financial plans to cover the buildings' future upkeep, without an election. These traits all demonstrate the ordinance's administrative nature.

Our analysis of the fourth *McAlister* consideration—whether the ordinance implicates a statewide policy administered by city officials—further strengthens this conclusion. Save Century II asserts the proposed ordinance only concerns local affairs and does not impose on statewide policy. The district court disagreed, ruling that the proposed ordinance would conflict with the City's constitutional authority to conduct elections. We find that this analysis misconstrued how this fourth point should be analyzed and applied. But we agree with the City that this consideration again tends to demonstrate that the ordinance is administrative.

This fourth consideration was first discussed at length by the Kansas Supreme Court in *Rauh v. City of Hutchinson*, 223 Kan. 514, 575 P.2d 517 (1978). The plaintiff in *Rauh* was circulating initiative petitions to challenge the city's issuance of industrial revenue bonds to finance the improvement and expansion of a Cargill plant and sought a declaratory judgment that the bond ordinances were legislative (and thus within the purview of the initiative statute). The Kansas Supreme Court found that the bond ordinances were administrative and thus could not be altered through the initiative process. 223 Kan. at 522.

To reach this conclusion, the *Rauh* court observed that when the subject of an ordinance is a matter of statewide concern or policy—like the issuance of revenue bonds—courts may be able to glean whether the policy is legislative or administrative from the Kansas Legislature's delegation of authority. 223 Kan. at 519-20. When the legislature has delegated decision-making power to a "'local council or board as the state's designated agent for local implementation of state policy,'" it tends to show that the actions are administrative. 223 Kan. at 519-20. Because the industrial-revenue-bond statutes delegated the authority to city governments to adopt procedures as to how the bonds should be implemented, the cities were merely administering the existing statutory policy (not adopting new policies of their own). See 223 Kan. at 520-21.

The City's constitutional authority to conduct elections—on which the district court based its ruling—does not involve these same questions. Whether the City had the constitutional authority to engage in the actions demanded by proposed ordinance, if adopted, presents a different issue from whether the ordinance intruded on the City's administration of a statewide policy.

But the district court's mistaken analysis does not render the fourth *McAlister* consideration inapplicable. As the City argued before the district court and continues to argue on appeal, the Historic Preservation Act and various statutes, such as K.S.A. 12-1739—authorizing a city to sell city-owned buildings—suggest that historical preservation is an issue of statewide concern and that the legislature has delegated the administration of this statewide policy to local governments. K.S.A. 75-2724(e)(1); Wichita Municipal Code of Ordinances (W.M.O.) §§ 2.12.1015-1025 (2022).

The Historic Preservation Act enables a "comprehensive program of historic preservation," noting that preservation "should be among the highest priorities of government." K.S.A. 75-2715. The Act permits delegation of local projects to cities that have enacted their own "comprehensive local historic preservation ordinance," as Wichita has adopted in W.M.O. §§ 2.12.1015-1025. K.S.A. 75-2724(e)(1). In other words, the legislature has entrusted city governments—not individual citizens—with the administration of Kansas' historic-preservation policies. This consideration, while

not conclusive, again suggests that the proposed ordinance is administrative, not legislative, in nature.

After analyzing each of these considerations, we conclude that Save Century II's initiative petition proposed an ordinance that was predominantly administrative. While the proposed ordinance's policy and reach could be interpreted as either legislative or administrative, the specialized experience and financial acumen necessary to determine how and whether a historic building should be maintained reveal the ordinance's administrative nature. Indeed, these specialized considerations might have contributed to the Kansas Legislature's decision to delegate and entrust the administration of the Historic Preservation Act to the city government.

Because the ordinance proposed by Save Century II's petition is predominantly administrative, it cannot be adopted through the initiative process. K.S.A. 12-3013(e)(1). The district court correctly found that the City is not required to take any further action on the proposed ordinance under K.S.A. 12-3013.

2.2. *We decline to reach the district court's alternative constitutional analyses as to whether the proposed ordinance would be enforceable if adopted.*

The district court provided two alternative bases for its conclusion that the City was not required to submit Save Century II's proposed ordinance to the electorate: The court found that the future elections contemplated by ordinance exceeded the City's authority to call elections, as defined by the Kansas Constitution and Kansas statutes. But see Kan. Const. art. 12, § 5 (defining a city's home-rule powers). And the court concluded that several undefined terms in the ordinance violated the constitutional guarantee of due process because they did not inform the City what buildings and actions were subject to the ordinance. But see *Banks v. Spirit Aerosystems Inc.*, Case No. 120,335, 2020 WL 741567, at *3 (Kan. App.) (unpublished opinion) (unclear policy language that does not impose criminal liability or other penalties should not give rise to "a judicial finding of unconstitutional vagueness," but

rather requires "an interpretation of the statutory language consistent with the discernible legislative intent and, if necessary, recognized canons of construction"), *rev. denied* 312 Kan 890 (2020).

The Kansas Supreme Court has repeatedly emphasized that appellate courts should refrain from deciding constitutional questions if a case can be resolved in some other fashion. See, e.g., *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 554, 502 P.3d 89 (2022); *State ex rel. Schmidt*, 303 Kan. at 658. Based on this principle, we decline to further consider the district court's constitutional analyses.

In closing, we—like the district court—are mindful of the effect of our decision. Thousands of Wichita residents supported Save Century II's efforts to preserve Wichita's performing arts center and former public library. Those efforts had an impact—in response to these signatures, the City has adopted a policy that it will not tear down the Century II performing arts center or the former public library without first holding an advisory election to allow the residents' voices to be heard.

But the extent of this support does not mean that Save Century II's proposed ordinance is appropriate for an initiative petition. Kansas law has long recognized that residents may not use the initiative process to advance ordinances that are predominantly administrative in nature, and the ordinance proposed here falls into this category. The district court correctly applied this principle and ruled in favor of the City. We affirm the court's judgment.

Affirmed.

* * *

ATCHESON, J., concurring: I concur in the result affirming the Sedgwick County District Court's judgment for the City of Wichita.

(522 P.3d 364)

No. 123,628

DOAN FAMILY CORPORATION d/b/a/ H&R BLOCK, *Appellant*, v. SHELLY ARNBERGER, *Appellee*.

SYLLABUS BY THE COURT

1. EMPLOYER AND EMPLOYEE—*Noncompete Agreements in Employment Contracts—Valid and Enforceable if Reasonable.* Noncompete agreements in employment contracts are valid and enforceable if the restraint on competition is reasonable under the circumstances and not adverse to the public interest.

2. SAME—*Noncompete Clause in Employment Contract—Courts Review Whether Reasonable under Totality of Circumstances*. Courts evaluating the time and geographic restraints in a noncompete clause in an employment contract must determine whether those limitations are objectively reasonable under the totality of the circumstances.

3. SAME—*Noncompete Clause in Employment Contract—Appellate and District Court Review*. Kansas appellate courts exercise unlimited review when determining whether a noncompete clause in an employment contract is enforceable as written. The question whether a noncompete clause is legally appropriate—whether an employer has a legitimate business interest and whether the clause otherwise harms the public welfare—is a question of law subject to unlimited review. Likewise, the district court's determination whether the time and geographic restraints are objectively reasonable under the totality of the circumstances is subject to unlimited appellate review.

4. SAME—*Noncompete Clause Found Unenforceable by District Court—Appellate Review.* If a district court has properly found that the time and geographic restraints in a noncompete clause are unenforceable under the totality of the circumstances, the district court's equitable discretion to reform the contract and modify the restraints is reviewed for an abuse of discretion.

5. ATTORNEY FEES—*Request of Attorney Fees on Appeal Requires Detail for Courts to Review—Courts May Independently Determine Fee or Deny Request.* A party requesting attorney fees on appeal must provide enough detail to allow appellate courts to meaningfully evaluate the reasonableness of the representation provided. When a party fails to provide enough information to allow courts to conduct this assessment, courts have discretion to independently determine an appropriate fee or to deny the request for fees altogether.

Appeal from Barton District Court; MIKE KEELEY, judge. Opinion filed December 30, 2022. Reversed and remanded with directions.

John D. Beverlin II, of Stull, Beverlin, Nicolay & Haas, LLC, of Pratt, for appellant.

Thomas J. Berscheidt, of Berscheidt Law Office, of Great Bend, for appellee.

Before MALONE, P.J., ATCHESON and WARNER, JJ.

WARNER, J.: The Doan Family Corporation appeals the district court's judgment against Shelly Arnberger, Doan's former employee, after Arnberger violated the restrictive covenants in her employment contract. Doan argues that the district court improperly reduced the duration of the contract's noncompete clause from two years to one year, resulting in a significantly reduced damages award. Doan also challenges various other aspects of the district court's decision relating to its measure of damages, costs, and attorney fees. After carefully reviewing the record and the parties' arguments, we agree that the district court erred when it reduced the duration of the noncompete clause. We therefore reverse the district court's decision and remand the case so the court may calculate Doan's damages using the two-year term in the employment contract.

FACTUAL AND PROCEDURAL BACKGROUND

Doan owns H&R Block franchises in Great Bend and Pratt. Under Doan's business model, employees conduct in-person client interviews to prepare and file tax returns and offer other products. Clients generally work with a specific employee, and employees call their clients at the beginning of each tax season to solicit their business. These practices help foster client relationships, resulting in clients returning to the franchise in future tax years.

Arnberger and Juanita Reimer were employed as tax preparers at Doan's Great Bend location. Arnberger had worked at Doan for 16 years—preparing taxes at the company every tax year from 2001 until 2016. At the beginning of each tax season, Arnberger would enter into an annual employment agreement with Doan. The issues in this case concern two provisions in the 2016 employment contract: the post-employment noncompetition clause (which we refer to as "the noncompete clause") and the remedies clause:

- The noncompete clause prohibits former employees from providing tax-return preparation or filing services for or soliciting company clients—persons for whom the former employee provided these services during their employment—for two years after their employment with Doan ends. The clause states that this two-year term will be tolled when the former employee is in violation of the noncompete clause and during litigation necessary to enforce the clause.

- Under the remedies clause, Doan is entitled to damages for a violation of the noncompete clause, and former employees must pay "all court costs, reasonable attorneys' fees, and expenses incurred" in enforcing the clause.

Arnberger and Reimer left Doan in 2016. Beginning in the 2017 tax season, they began preparing and filing tax returns at their own business. A significant portion of the returns they filed that year—at least 70% of the returns filed by Arnberger—were for Doan's former company clients.

In March 2017, Doan sought to enforce the noncompete clause against Arnberger and Reimer to prevent the continued violation of the agreement and seek damages for their breach. The district court granted a temporary injunction after the 2017 tax season but lifted it at the beginning of the 2018 season, allowing Arnberger and Reimer to prepare and file returns, as any breaches of the agreement could be addressed through a damages award. Doan later resolved its claim against Reimer outside of court, so we limit our discussion here to Arnberger.

In June 2018, Doan filed a motion for summary judgment, arguing that Arnberger violated the noncompete clause. The district court granted the motion in part:

- The court accepted as uncontroverted all the facts listed in Doan's motion and found that Arnberger had violated the agreement.
- The court found that the noncompete clause was the result of a freely negotiated contract.

- The court concluded that the clause protected a legitimate business interest, was not harmful to the public welfare, and was not unduly burdensome for the employees.
- The court found that any geographical limitations imposed by the clause were "minimal, if any."

Despite these conclusions, the court found that the duration of the noncompete clause—two years—was unreasonable. In reaching this conclusion, the court did not specifically analyze the two-year restriction. Instead, it discussed restrictive covenants generally, noting that some people go to a certain tax preparer, regardless of the employer, because they are the preparer's family or friends. The court observed that Great Bend is "a rural community where people have contact with others because of who they are and not necessarily who they work for."

The court thus ruled that the noncompete clause was enforceable in a general sense. But the court modified the duration of that clause from two years to one year "to begin immediately . . . for one year from the date [of] this decision" (which was filed October 19, 2018). The court did not otherwise discuss the noncompete clause's tolling provision.

In August 2020, the court held a bench trial on the damages caused by Arnberger's violation of the noncompete clause. Jennifer and Eric Doan—who own and operate the company—both testified at trial and explained it generally takes two years to secure a long-term client; employees build client relationships the first year and encourage clients to return during the second year. The Doans also noted that for each prepared tax return, Doan earns 40% of the income, the employee earns a 30% commission, and the remaining 30% goes to H&R Block as a franchise fee. That franchise fee would apply to Doan's recovery. Basing its damages calculation on a three-year average, Doan sought past and future damages equal to the 70% of the income it would have earned had Arnberger not violated the noncompete clause. Following trial, Doan filed a motion requesting nearly $69,000 in attorney fees and approximately $3,500 in litigation expenses.

The district court found that Doan had suffered approximately $12,000 in actual damages. It reached this figure by limiting Do-

an's damages to the 2017 tax season—as it had modified the noncompete clause's duration to one year. In doing so, the court implicitly revised its previous summary-judgment ruling that the one-year time frame started from the date of that ruling and rejected Doan's arguments regarding the agreement's tolling provision. The court also limited Doan's recovery to 40% of the gross income, finding that it was not entitled to recover either the 30% franchise fee or the 30% commission. And the court awarded Doan $7,500 in attorney fees and about $1,400 in additional costs.

Doan appeals, challenging several aspects of the district court's judgment. Arnberger has not filed a cross-appeal.

DISCUSSION

The freedom to contract "is not to be interfered with lightly." *Foltz v. Struxness*, 168 Kan. 714, 721-22, 215 P.2d 133 (1950). People have "wide discretion" to determine the terms of their agreements, including in employment contracts. *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016, 1019, 677 P.2d 1004 (1984). Courts have a corresponding duty to honor and enforce employment contracts as they are written, as long as they are "not contrary to the law or unreasonable in [their] terms." 234 Kan. at 1019; *Wichita Clinic, P.A. v. Louis*, 39 Kan. App. 2d 848, 852, 185 P.3d 946 (2008). Accord *Liggatt v. Employers Mut. Cas. Co.*, 273 Kan. 915, 923, 46 P.3d 1120 (2002) (When contract terms are unambiguous, "'the court may not make another contract for the parties'" but rather must "'enforce the contract as made.'").

More than 70 years ago, the Kansas Supreme Court clarified that this same "paramount public policy" extends to restrictive covenants in employment contracts. *Foltz*, 168 Kan. at 721-22. Recognizing the discrepancy of bargaining power between employers and employees, courts strictly construe ambiguous contract terms limiting the scope of an employee's postemployment conduct against the employer. See *Idbeis v. Wichita Surgical Specialists, P.A.*, 279 Kan. 755, 762, 112 P.3d 81 (2005). But like other contracts, unambiguous restrictive covenants must be enforced as written if they are legal and reasonable. See *Wichita Clinic*, 39 Kan. App. 2d at 852. Put another way, noncompete

agreements are "valid and enforceable if the restraint on competition is reasonable under the circumstances and not adverse to the public welfare." *Weber v. Tillman*, 259 Kan. 457, Syl. ¶ 2, 913 P.2d 84 (1996).

Doan's primary argument on appeal is that the district court erred when it reduced the term of the noncompete clause in Arnberger's employment contract to one year because the clause as written was reasonable and enforceable under Kansas law. We partially agree and find that the two-year term of the original agreement was reasonable. But we find no error in the district court's decision not to enforce the clause's tolling provision. We remand the case to the district court to reconsider its damages award and corresponding attorney-fees and expenses rulings in light of these principles.

1. *The district court erred by reducing the duration of the noncompete clause to one year.*

As we have indicated, Kansas courts have a duty to enforce noncompetition covenants when those agreements are reasonable and do not harm the public. Kansas courts evaluate these principles by considering four overlapping questions:

- "Does the covenant protect a legitimate business interest of the employer?"
- "Does the covenant create an undue burden on the employee?"
- "Is the covenant injurious to the public welfare?"
- "Are the time and territorial limitations contained in the covenant reasonable?" *Weber*, 259 Kan. 755, Syl. ¶ 5.

The district court correctly identified these questions as the starting point for its analysis. The court found that the first three considerations weighed in favor of enforcing the noncompete clause in Arnberger's employment contract. It concluded that Doan's motivations—preserving customer contacts and its referral sources—were legitimate business interests under Kansas law. The court further found that though the noncompete clause did place restrictions on Arnberger, those restrictions were not unduly burdensome. And the court concluded that the noncompete clause

did not contravene the public interest by preventing previous customers from seeking help from Arnberger instead of Doan or some other tax professional in the community. Neither Arnberger nor Doan contests these conclusions on appeal.

The court then turned to the noncompete clause's reasonableness. The court observed that the contract's geographical restrictions were "minimal, if any." The contract did not prevent Arnberger from offering tax preparation services around Great Bend; she could offer those services "for anybody, anywhere," as long as they were not for Doan's customers. The court found, however, that certain parts of the restrictions—a two-year prohibition on assisting and soliciting Doan's customers and the restriction as to all of Doan's clients—were unreasonable. It explained:

"The Court has concerns this should be for a period of two years and as to all of the clientele the plaintiff is trying to prevent from going to the defendants. It is clear some people go to a tax preparer or an accountant because they are family or friends. In other words, the plaintiff received a benefit when the two defendants started working for the plaintiff in that they brought clients with them, such as family members or family businesses, because those people were comfortable with the defendants and not because they were going to the plaintiff.

"The Court has concerns with the fact it should not interfere with an agreed-upon contract but is also punishing people who want to go to a particular tax preparer or accountant rather than an accounting firm. In this case, someone may want to go to one of the defendants rather than to the plaintiff."

The court found the noncompete clause's two-year restriction was "excessive under these facts and circumstances." The court thus invoked its equitable powers and modified the agreement to restrict Arnberger's actions for one year, instead of two. The court also indicated that the clause did not apply to any of Arnberger's family members or family businesses. In its initial summary-judgment ruling, the court indicated that the one-year time limitation would begin from the date of its October 2018 ruling. The court revisited this decision after the damages trial, however, and limited Doan's damages to those suffered in the 2017 tax season.

Doan argues that the district court erred when it reformed the term of the noncompete clause from two years to one year and when it declined to enforce the clause's tolling provision that extended these restrictions for as long as a person breached the

agreement. We agree with the first of these claims, but not the second.

We begin our analysis by considering what deference—if any—we give to the district court's evaluation of whether the noncompete clause was reasonable. Appellate courts have long recognized that the "ultimate question whether a restrictive covenant is contrary to public policy" is a legal question subject to unlimited appellate review, while the district court's underlying factual findings (which are not materially disputed here) are reviewed for substantial competent evidence. *Weber*, 259 Kan. at 462. Under this framework, broader questions as to whether a clause is contrary to the public interest—such as whether it seeks to protect legitimate business pursuits—are reviewed de novo. *Idbeis*, 279 Kan. at 766. In the event a clause harms the public interest, courts have broad discretion to determine the appropriate course of action, by either modifying the agreement or declining to enforce the restriction. See *Foltz*, 168 Kan. at 719-21 (affirming district court's discretion to modify territorial restriction in a noncompetition covenant).

What is less clear, however, is the proper standard to govern our review of the district court's reasonableness determination. While Kansas courts have on several occasions engaged in such a review, we have not clearly articulated the nature of our appellate inquiry and the deference we afford to the district court's reasonableness assessment—that is, whether there is a reasonable fit between the temporal and geographic limitations imposed and the employer's protectable interests.

While this standard has not been specifically articulated in our caselaw, a review of Kansas decisions reveals that the reasonableness inquiry in this context is an objective one, reviewed without deference to the district court's assessment. See *Graham v. Cirocco*, 31 Kan. App. 2d 563, 570-71, 69 P.3d 194 (considering reasonableness of temporal and geographic restrictions without deference to the district court), *rev. denied* 276 Kan. 968 (2003). Kansas appellate decisions reviewing the reasonableness of noncompetition covenants' temporal and geographic restrictions make little, if any, reference to the district courts' assessments of those provisions. See, e.g., *Weber*, 259 Kan. at 468-69 (assessing the time and geographical restrictions in a noncompetition clause without reference to the district court's analysis); *Wichita Clinic*,

39 Kan. App. 2d at 859-60 (independently determining that a three-year restriction was reasonable without deference to the district court's contrary finding); *Caring Hearts Personal Home Services, Inc. v. Hobley*, 35 Kan. App. 2d 345, 355, 130 P.3d 1215 (2006) (determining two-year timeframe was "clearly within the accepted range for the duration of post-employment restraints" without reference to the district court's decision). Instead, we have independently reviewed the facts and the parties' arguments to determine whether the restraints imposed are reasonable.

This unlimited review makes practical sense. When appellate courts assess the enforceability of a restrictive covenant, our analyses of the *Weber* questions often overlap. The reasonableness of a time or territory restriction can depend on the employer's legitimate business interest, which is subject to de novo review. See *Idbeis*, 279 Kan. at 766; *Weber*, 259 Kan. at 466. Likewise, we have recognized that an overly expansive geographic restriction can harm the public interest by restricting access to important services. See *Graham*, 31 Kan. App. 2d at 571. Because courts' reasonableness inquiry is intertwined with these legal questions, it follows that an analysis of each consideration should be conducted without deference to the district court's assessment.

This objective reasonableness standard also tracks with the decisions of many other jurisdictions that have considered the question. See *Hassler v. Circle C Resources*, 505 P.3d 169, 173 (Wyo. 2022) ("'The reasonableness, in a given fact situation, of the limitations placed on a former employee by a covenant not to compete are determinations made by the court as a matter of law.'"); *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 729 (Ind. 2008) ("Unlike reasonableness in many other contexts, the reasonableness of a noncompetition agreement is a question of law."); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 78, 866 N.E.2d 85 (2006) ("Courts, when assessing the reasonableness of restrictive covenants, are to apply an objective standard."); *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983) ("The question of whether a covenant not to compete is reasonable is a legal question for the court.").

In sum, Kansas appellate courts exercise unlimited review when determining whether a noncompete clause in an employment contract is enforceable as written. The question whether a noncompete clause is legally appropriate—whether an employer has a legitimate business interest and whether the clause otherwise harms the public welfare—is a question of law subject to unlimited review. *Idbeis*, 279 Kan. at 766. Likewise, the district court's determination whether the time and geographic restraints are objectively reasonable under the totality of the circumstances is subject to unlimited appellate review. *Weber*, 259 Kan. at 468-69 (assessing time and geographic restraints in a noncompete agreement without reference to the district court's analysis). If the district court has properly found that the time and geographic restraints in a noncompete clause are unenforceable under the totality of the circumstances, however, the district court's equitable discretion to reform the contract and modify the restraints is reviewed for an abuse of discretion. *Eastern Distributing Co. v. Flynn*, 222 Kan. 666, 676, 567 P.2d 1371 (1977); *Foltz*, 168 Kan. 714, Syl. ¶ 8.

Having concluded that our review over the district court's determination whether the time and geographic restraints are reasonable is unlimited, we must determine whether temporal limitations on Arnberger's actions—the two-year restriction and the tolling provision—were reasonable under the facts of this case.

Turning first to the two-year restraint, Kansas courts have upheld such restrictions on several occasions. See, e.g., *Graham*, 31 Kan. App. 2d 563, Syl. ¶ 7 ("A 2-year time period is common in Kansas noncompetition clause cases."). While a two-year limitation might not always pass muster, the facts illustrate the reasonableness of that limitation here.

Doan's owners testified that maintaining relationships with the company's clients is the most important part of its business. The two-year time restriction directly serves that interest because it takes time to build a client relationship; the first year initiates the relationship with the company, and the second year solidifies the relationship. When an employee leaves, Doan hopes to allow the employee's clients to develop a relationship with another employee. To do so, the client must work with a new tax preparer the first year, get to know them, and, if satisfied, return the following year to work with that same preparer. The facts emphasized by the

dissent—that the tax-preparation season is focused on the timeframe from January through April and that tax preparers signed new employment contracts each year—do not, in our view, diminish Doan's reasons for the two-year restraint. Indeed, the noncompete clause did not prevent Arnberger from offering tax preparation services during that two-year period; she just could not provide those services to or otherwise solicit Doan's clients. The two-year period merely allowed Doan to continue to foster those existing client relationships by connecting their customers with a new tax preparer at the company.

Given these facts, the two-year time restriction in Arnberger's noncompete clause was objectively reasonable, and the district court erred in holding otherwise. The district court's explanation that Great Bend is "a rural community where people have contact with each other because of who they are and not necessarily who they work for" is not supported by evidence in the record. We question the evidentiary basis for the court's finding, as it was made based only on reviewing the parties' summary-judgment filings before conducting any evidentiary hearing. But more importantly for purposes of our review, this finding does not reasonably support the district court's decision to reduce the duration of the noncompete clause from two years to one year.

The district court did not err, however, when it declined to enforce the noncompete clause's tolling provision. That provision extends the clause's time restrictions whenever a person breaches the agreement. Practically speaking, the tolling provision could result in an unlimited restriction on a person's postemployment activities, making them liable to their former employer for lost profits in perpetuity. Doan did not offer any explanation for this provision at trial, except by arguing that it should both receive damages for Arnberger's breach and the ability to prevent her from preparing others' taxes for some extended two-year period. We do not find this punitive explanation persuasive. While a two-year period is a reasonable restriction under these facts, an indefinite extension of that period is not a reasonable restraint on Arnberger.

After reviewing the facts of this case, we find that the district court erred when it reformed the duration of the parties' noncompete clause from two years to one year. Because the two-year term

was reasonable, the court did not have the discretion to rewrite that term of the agreement. See *Wichita Clinic*, 39 Kan. App. 2d at 859-60 (district court erred in reducing duration of restrictive covenant from three years to two years when three-year term was reasonable); see also *Liggatt*, 273 Kan. at 923 (When a contract is unambiguous, "'the court may not make another contract for the parties. Its function is to enforce the contract as made.'"). The district court did not err when it declined to enforce the contract's tolling provisions.

As we have indicated, the district court based its damages calculation at trial on its erroneous decision to modify the duration of the noncompete clause to one year. This calculation, like the modification on which it relied, was rooted in an error of law. We therefore reverse the district court's damages award and remand with directions that the court determine the damages that Doan suffered as a result of Arnberger's actions during the 2017 and 2018 tax seasons and enter judgment for that amount. Neither party has pointed to any evidentiary matter or factual dispute that would require a new trial in this case. Thus, we presume that this determination can be made, with the assistance of briefing by the parties, on the existing trial record.

2. *We address additional questions that will arise on remand.*

Doan's brief raises a few other questions regarding the district court's rulings. Because we are remanding the case for a new damages assessment, we need not address each allegation. But there are three matters that require further discussion and direction: (1) the responsibility for the 30% franchise fee and the application of the solicitation clause, (2) Doan's request for attorney fees, and (3) Doan's contractual claim for expenses.

Doan's first argument challenges two of the district court's findings—that the 30% franchise fee was not a recoverable damages element and that Arnberger did not solicit Doan's customers. Doan asserts that the district court erred when it calculated its damages award based only on the net amount it would have received as income after paying its 30% franchise fee to H&R Block. Doan points out that its owners testified that the company

must pay a franchise fee on all income the company receives, including the damages award collected from Arnberger. The district court apparently did not find this testimony, which was not supported by any franchise documentation, credible—an assessment we cannot second-guess on appeal. See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 407, 266 P.3d 516 (2011). And excluding the franchise fee from the damage award aligns with the basic principle that damages are designed to restore an injured person to the position that they would be in without the breach, not to grant the party a windfall profit. *Evenson v. Lilley*, 295 Kan. 43, Syl. ¶ 5, 282 P.3d 610 (2012); *Rose v. Via Christi Health System, Inc.*, 279 Kan. 523, 527, 113 P.3d 241 (2005). Given this evidentiary record, Doan has not shown any error in the district court's decision to exclude the franchise fee and merely repay Doan for its lost income.

The parties similarly presented conflicting evidence as to whether Arnberger had been soliciting Doan's former customers. The district court apparently found the evidence weighing against solicitation to be more persuasive. It is not the role of this court to reweigh disputed trial evidence. *Wolfe Electric*, 293 Kan. at 407.

Turning to Doan's contractual claims regarding the district court's award of attorney fees and expenses, we agree with Doan—and with the district court—that both were available under Arnberger's employment contract. At the hearing on attorney fees in September 2020, Doan's attorney, John Beverlin, testified that his hourly rate in this case was $175 per hour, which was consistent with the other attorneys in Pratt, where his firm was located. He testified that he had been working on the case since Doan contacted his firm in March 2017. Since August 2020, Beverlin had spent 358.85 hours on the case. Based on these numbers, as well as various other considerations, Doan sought $69,000 in attorney fees. Beverlin also testified that Doan had about $3,400 in expenses for litigation, filing fees, service fees, witness fees, postage, mileage, mediation fees, deposition fees, transcript fees, and copying.

The district court found the amounts of these requests were excessive and unreasonable. It ultimately awarded Doan $7,500 in attorney fees and about $1,400 in various expenses—$405.60 for

court costs, $90 for costs associated with process service, $173.28 for shipping and postage, $153.93 for witness fees, and $609 in copy charges. The court denied Doan's request for additional costs and expenses.

In deciding the reasonableness of attorney fees, courts consider the eight factors set forth in Rule 1.5(a) (2022 Kan. S. Ct. R. at 333) of the Kansas Rules of Professional Conduct (KRPC). See *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 169, 298 P.3d 1120 (2013). The district court is an expert in the area of attorney fees and can draw on its own knowledge and expertise in determining the value of services rendered. Although an appellate court is also an expert on the reasonableness of attorney fees, we do not substitute our judgment for that of the district court on the amount of the attorney fees awarded unless the facts of the case warrant revisiting the district court's ruling. *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006); *State ex rel. Schmidt v. Nye*, 56 Kan. App. 2d 883, 896, 440 P.3d 585 (2019).

Here, the district court reviewed the factors under Rule 1.5(a):

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent." KRPC 1.5(a) (2022 Kan. S. Ct. R. at 333).

The court then discussed several of these factors in explaining its original attorney-fees decision. The court noted that Doan aggressively pursued its case against Arnberger, though it maintained both Arnberger and Reimer were at fault for soliciting clients and agreed to settle Reimer's case for a relatively small amount. The court noted that Doan spent considerable time pursuing future damages, which it ruled were not permitted under the terms of the employment contract. And the court found Arnberger had presented legitimate defenses in litigating the case and awarded the

amount of attorney fees it deemed reasonable given the circumstances of the case. Because much of the district court's analysis focused on the extent of Doan's recovery and success, we agree with Doan that we should vacate the court's award and remand the case for reconsideration in light of our conclusion that the noncompete clause should have been enforced—and damages awarded—for two years, not one year.

As a final claim of error, Doan argues the district court misinterpreted the agreement when it denied reimbursement of litigation expenses because the agreement intended the expenses, like deposition and transcript fees, to be assessed as costs. Doan also argues that the agreement included the mileage for counsel's travel time and expenses for mediation. Insofar as this issue requires interpretation of the remedies clause of the agreement, our review is unlimited. See *Born v. Born*, 304 Kan. 542, 554, 374 P.3d 624 (2016).

The remedies clause states that a former employee who breaches the agreement will be responsible to pay damages associated with the breach, as well as attorney fees and expenses incurred during the enforcement of the contract. That clause states in relevant part:

"In addition to injunctive relief, Associate acknowledges that the Company is entitled to damages for any breach of [the noncompete clause]. Further, in the event of such breach or violation, Associate shall pay the Company all court costs, reasonable attorneys' fees, and expenses incurred by the Company in enforcing this Agreement."

As this language indicates, the parties' employment contract contemplated payment by the breaching employee of court costs, reasonable attorney fees, *and* expenses. The district court declined to grant Doan's requests for deposition expenses, mileage, and mediation expenses, observing that these items were not typically allowable as court costs. But contracting parties are not limited in their agreements to allocating expenses to what the court could award as costs. And Kansas courts have routinely differentiated between court costs, which are available to all prevailing parties under K.S.A. 60-2003, and attorney fees and expenses, which parties may contractually agree to provide. See *Condemnation of Land by City of Mission, Kan. v. Bennett*, 7 Kan. App. 2d 621,

622-24, 649 P.2d 406 (1982). Here, the governing question was not whether the expenses requested were allowable as court costs, but whether the expenses were "reasonable" and "incurred by [Doan] in enforcing" Arnberger's employment contract. Like the measure of damages and reevaluation of Doan's attorney fees, the district court on remand must evaluate and award reasonable expenses Doan incurred in enforcing its rights under the employment contract's noncompete clause.

3. *We deny Doan's request for appellate attorney fees.*

Following oral argument in this case, Doan asked this court to order Arnberger to pay $17,447.50 in appellate attorney fees and $329.89 in appellate costs. We deny the motion for fees because Doan's request fails to include the level of detail necessary to determine the reasonableness of that request. We partially grant Doan's request for costs in accordance with Supreme Court Rule 7.07(a)(5) (2022 Kan. S. Ct. R. at 52).

An appellate court may apportion appellate fees and expenses as justice requires and award attorney fees if the district court could do so. Supreme Court Rule 7.07(a)(4), (b)(1) (2022 Kan. S. Ct. R. at 51). The parties do not dispute that this court has the contractual authority to award Doan's appellate attorney fees and expenses under Arnberger's employment agreement. But the fact that this court *may* award fees in some instances does not mean that Doan's fee request is reasonable or meets the requirements of Kansas law.

When a party requests attorney fees on appeal, courts are charged with determining whether the fees sought are "reasonable." See *Johnson*, 281 Kan. at 940-41. A party requesting attorney fees must file a motion and attach an affidavit explaining the nature and extent of the services, as well as the time spent on the appeal, and applying the eight factors contained in KRPC 1.5. Supreme Court Rule 7.07(b)(2) (2022 Kan. S. Ct. R. at 51). Appellate courts are considered experts in the realm of appellate attorney fees and have broad discretion to assess the reasonableness of the fees requested. See *Johnson*, 281 Kan. at 940.

The reasonableness of hourly attorney fees generally starts with a two-part inquiry—assessing both the reasonableness of the

attorney's hourly rate and the reasonableness of the time spent representing the client's interests. See *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 199, 786 P.3d 618 (1990) (calculating attorney fees in a workers compensation case by multiplying reasonable hours spent by reasonable hourly rate); see also KRPC 1.5(a)(1), (a)(3) (2022 Kan. S. Ct. R. at 333) (reasonable fees include consideration of the "fee customarily charged in the locality for similar legal services" and "the time and labor required" by the representation). Courts have traditionally described this inquiry as a "lodestar calculation." See *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n*, 47 Kan. App. 2d 1112, 1125-27, 284 P.3d 348 (2012) (discussing and applying the lodestar method). Once a court has calculated the lodestar, the fee may be adjusted based on the other considerations in KRPC 1.5(a) to determine a reasonable attorney-fee award.

In an effort to satisfy this lodestar inquiry, Doan's motion for attorney fees attached an affidavit from its counsel. The attorney indicated that he charged Doan $175 per hour for his representation in this case, and no one disputes the reasonableness of this hourly rate. Instead, the shortcoming in Doan's request lies in the affidavit's lack of specificity about the time spent on the attorney's representation.

In his affidavit, Doan's counsel explains he spent nearly 100 hours preparing the appeal. The affidavit then provides broad categories of actions and provides a total number of hours spent performing that general type of work. For example, the affidavit states that Doan's attorney spent 11 hours "preparing and filing the documents required for the appeal and to docket the appeal." The affidavit also states the attorney spent 9.4 hours "reviewing the record on appeal" and 42 hours drafting Doan's brief. Though the affidavit sometimes provides more detail in its summaries of the categories, it does not provide any further breakdown of the hours spent for each discrete task.

Thus, instead of including a description of "the specific amount of time allocated to each individual task," the affidavit simply provides blocks of time for each general category of work. *Robinson v. City of Edmond*, 160 F.3d 1275, 1285 (10th Cir. 1998). Kansas courts have found that this type of block billing

does not provide the level of specificity required in determining attorney-fee awards.

Courts discourage block billing for several reasons. The imprecision of block billing can "camouflage[] the nature of a lawyer's work and raise[] suspicions about whether all the work claimed was actually accomplished or was necessary." *Citizens' Utility Ratepayer Bd.*, 47 Kan. App. 2d at 1133. There is no reason for us to ascribe these motivations to Doan's counsel here. But on a more benign level, grouped or block billing makes it difficult—if not impossible—for a court to assess the reasonableness of the time an attorney spent representing his or her client

Here lies the deficiency of Doan's motion and supporting affidavit. These documents do not provide the information necessary to meaningfully evaluate the reasonableness of the time spent throughout the appellate representation. In some instances, courts have attempted to fashion a reasonable fee without such documentation. See, e.g., 47 Kan. App. 2d at 1132 (discussing *Case v. Unified School Dist. No. 233, Johnson County*, 157 F.3d 1243, 1250 [10th Cir. 1998]). In this case, however, Doan provides no other documentation—no invoices, timesheets, or detailed summaries—on which we may base our assessment. The absence of this information is particularly glaring, as the affidavit indicates that Doan's attorney spent 5.7 hours preparing the motion for attorney fees, including "reviewing invoices from" the attorney's law firm.

As the party requesting attorney fees and expenses, Doan has the burden of providing a record on which this court may meaningfully assess its request. It has not done so in this case. We therefore deny Doan's request for appellate attorney fees and expenses.

Doan's request for costs incurred during the course of the appeal is governed by Supreme Court Rule 7.07(a)(5) (2022 Kan. S. Ct. R. at 52). Permissible costs, including recovery of the fee to docket the appeal, will be directed by the appellate mandate.

Reversed and remanded with directions.

* * *

ATCHESON, J., dissenting: What this case ought to be about is the legal justification for a two-year noncompete provision in a

contract of adhesion between the franchisee of a corporate juggernaut and an employee hired for about three months to provide the mostly rote preparation and filing of personal income tax forms for members of the public. That sort of overreach should be branded contrary to public policy as an impermissible weight on the right of everyday workers to earn a living in their trade or field of endeavor and, therefore, should be unenforceable.

But given the issues presented to us, I can't reach that result. So I would settle for affirming the principal conclusion of the Barton County District Court in shortening the noncompete term to one year and awarding money damages for that period (rather than injunctive relief) to the Doan Family Corporation and against Shelly Arnberger, its former employee. The Doan Family Corporation claims to have been shortchanged in the district court and has appealed. Arnberger has not cross-appealed and, thus, is apparently legally content to live with that outcome. We couldn't give Arnberger more than she has asked for on appeal even if we were disposed to do so. As a result, the legal field on which we play is, in a word, confined.

To be sure, the district court didn't get it right, but it got closer than the majority does. Hence my dissent from the majority's central ruling remanding the case to the district court with directions to inflict further financial punishment on Arnberger.

I. DOAN FAMILY CORPORATION'S EFFORT TO STYMIE FAIR COMPETITION

A. The Contract. The Doan Family Corporation is a franchisee of H&R Block, a multinational corporation headquartered in Kansas City, Missouri. As a franchisee, the Doan Family Corporation owns and runs a tax preparation service under the H&R Block banner with offices in Great Bend and Pratt. Arnberger signed an employment contract with the Doan Family Corporation dated January 1, 2016, that had a term through April 15—basically for three-and-half months—to work as a tax preparer in Great Bend. In that job, Arnberger met with people in the Great Bend office and prepared their personal income tax forms and filed the forms with the appropriate government agencies. While Arnberger had some training in that sort of comparatively simple tax preparation,

she was not a certified public accountant. Nor did she provide any sort of ongoing accounting or tax service to the customers over the course of the year. As compensation, Arnberger received 30 percent of the fees the customers paid for the tax service she provided. The contract contained a noncompete provision that for two years barred Arnberger from preparing or filing income taxes for anyone she helped as a customer at the Great Bend office after January 1, 2015—a peculiar reach-back clause predating the term of the contract and expanding the scope of its prohibition. The provision also precluded Arnberger from inviting any of those customers to have her prepare their taxes were she to go to work elsewhere. If Arnberger violated the provision, the Doan Family Corporation could sue her for injunctive relief and money damages. The contract allowed the Doan Family Corporation to recover attorney fees and other litigation expenses if it successfully enforced the noncompete restriction; Arnberger had no comparable contractual right were she to prevail in a legal battle.

The contract was one of adhesion presented to Arnberger and her coworkers as a take-it-or-leave-it proposition. There was no negotiation. An adhesion contract is not inherently unenforceable for want of any true bargaining. See *Bank of America v. Narula*, 46 Kan. App. 2d 142, 163, 261 P.3d 898 (2011). But it should be suspect when it contains one-sided exchanges and distinctly unequal burdens and benefits. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 613-14, 879 S.E.2d 746 (2022); 17 C.J.S. Contracts § 25 (courts examine adhesion contracts "with special scrutiny").

The contract here largely appears to be the instrument of H&R Block—especially the noncompete provision and other restrictive conditions imposed on former employees. H & R Block is identified as an intended third-party beneficiary of those clauses with independent legal authority to enforce them. Moreover, the noncompete provision obviously has not been tailored by the Doan Family Corporation to meet its perceived needs as an enterprise with two outlets in small Kansas communities. Rather, the provision recites alternative restrictions that become effective when the contract has been formed in other states. For example, the noncompete period is set at one year for contracts in Arizona and Puerto Rico, and there is no prohibition in contracts in North Dakota. The provision, then, stands out as a tool of H&R Block to

stifle competition, mostly on a small scale by impeding individuals like Arnberger from going to work for competitors or setting up their own mom-and-pop operations during tax season. Apart from an ironic drowning of the entrepreneurial spirit that motivated Henry Bloch and Richard Bloch, the founders of H&R Block, the provision likely imposes a legally impermissible anticompetitive burden on ordinary workers.

The legal inquiry necessarily focuses on the terms of the contract itself. The noncompete provision imposes a two-year restriction based on barely three months of employment—a fairly gross temporal disproportionality. The prohibition covers the customers of Doan Family Corporation that the employee would have worked with on a single occasion in a single tax season. Any given customer may have come in the door because of the H&R Block name or advertising. But that would hardly seem to be a sufficiently compelling reason to preclude the tax preparer from doing the same limited work for the customer at some other place the next tax season or the tax season after that. The service is a notably limited one—the preparation and filing of personal income taxes for a given year. That's all the Doan Family Corporation hired Arnberger to do. As I have said, the service required neither highly specialized or developed skills to perform nor entailed a continuing professional relationship like a certified public accountant would have with business clients or individuals with sophisticated and recurrent tax considerations.

The Doan Family Corporation has tried to make a great deal out of Arnberger's employment at the Great Bend office for 16 tax seasons, and the majority mentions the tenure of her service several times. Arnberger did work for many customers, often year after year, as a result. But her past contact with some customers is irrelevant to the enforceability of the noncompete provision in the 2016 contract. The contract would apply equally to a first-time employee of the Doan Family Corporation, and any protectable contractual interest it or H&R Block asserts should be so measured. That Arnberger may have cultivated personal relationships with some customers while she worked for the Doan Family Cor-

poration under contracts for successive tax seasons doesn't translate into a protectable interest under the most recent three-month contract.

B. The Public Interests at Stake. In assessing the public interest to be weighed against the employer's need for a noncompete clause, the district court and the majority incorrectly diminish the scope of the public interest. They focus exclusively on how the noncompete prohibition here might limit the number of tax preparers in the Great Bend area or inhibit a close friend or relative of Arnberger from having her do their taxes. But that's only part of the public good sacrificed to noncompete agreements. The other—and likely the much more important aspect—is the broad public good in permitting individuals to freely work in their chosen trades or fields of endeavor.

There is no substantial public benefit in enforcing adhesion contracts inhibiting a worker like Arnberger from gainful employment in her chosen field. Those contractual restrictions should be viewed as contrary to the public interest precisely because they restrict employment choices of individuals in rank-and-file type jobs by chaining them to an employer through a noncompete clause. Other employers would be reticent to hire such a person for fear of being drawn into litigation. And workers, such as Arnberger, trying to go it alone would be beaten down by their former employers' litigation. The coercive threat is often redoubled, as it was here, through one-sided fee-shifting clauses requiring the former employee to pay his or her former employer's attorney fees with no reciprocal right to recover their own attorney fees.

Noncompete agreements may, nonetheless, be appropriate in certain narrow circumstances. For example, high-level corporate officers with knowledge of a company's proprietary business model and similar strategic information about product development and marketing legitimately might be benched for some interval when they depart. Those sorts of executives regularly negotiate golden parachute provisions that amply cushion the financial impact of a noncompete obligation. Noncompete restrictions also may have a place in coordination with nondisclosure agreements for scientific, technological, and other expert employees directly involved in research and design.

Similarly, temporally and geographically limited noncompete agreements may be appropriate when a professional, such as a physician or an accountant, joins a comparatively small practice and immediately begins treating or working with existing patients or clients who have been cultivated and retained by the established members of the business. In those circumstances, the new professional provides sophisticated services, often imbued with a fiduciary character, to the existing clientele on a regular basis over an extended period. The business has a recognized and protectable interest in that patient or client base, especially given the highly skilled and distinctly personal nature of the services provided. See, e.g., *Weber v. Tillman*, 259 Kan. 457, 468-69, 913 P.2d 84 (1996).

The Kansas Supreme Court has extended noncompete protections to wholesalers employing sales representatives who develop close relationships with a cadre of retail buyers through repetitive business contacts over an extended time. The court recognized a wholesaler had a protectable interest in those retail customers and properly could limit one of its representatives from exploiting those lucrative relationships by jumping to a comparable and better paying position with a competing wholesaler. *Eastern Distributing Co. v. Flynn*, 222 Kan. 666, 674, 567 P.2d 1371 (1977). The court's detailed discussion of protectable interests in *Eastern Distributing* is both instructive and a counterpoint to why the Doan Family Corporation had no protectable interest based on the 2016 contract with Arnberger.

Drawing from a variety of sources, the court recognized that although "customer contacts" may support noncompete provisions in limited circumstances, the prohibitions cannot be deployed to stifle "ordinary competition." *Eastern Distributing*, 222 Kan. at 671-73. The hallmarks of protectable customer contacts include: (1) frequent, regular contacts between the company's employee and the client with little other interaction between the company and the client; (2) contacts at the client's home or place of business; and (3) a service of the kind that tends to forge a close relationship between the employee and the client, so that the client effectively becomes "a personal asset" of the employee. 222 Kan. at 672. As I have outlined, the work Arnberger performed under the 2016 contract—the only extant agreement the Doan Family

Corporation had with her—falls short. Arnberger performed a single, comparatively limited service for customers at the Doan Family Corporation office in Great Bend. The three-month contract entailed Arnberger doing tax preparation for individual customers sequentially with little or no continuing contact with any given customer. The court in *Eastern Distributing* highlighted an often-cited article from the Harvard Law Review for the proposition that "if contacts are infrequent and irregular there may be no sufficient risk to the employer to support any degree of restraint." 222 Kan. at 672 (citing Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 659 [1960]).

The facts in *Eastern Distributing* reinforce Doan Family Corporation's lack of a protectable interest. There, Terry A. Flynn worked for Eastern Distributing, a liquor wholesaler in northeast Kansas, about five years, regularly calling on and selling to retailers at their stores. As Eastern Distributing's near exclusive contact with the retailers, Flynn became the face and, indeed, the embodiment of his employer. When Flynn took a comparable job with a competing wholesaler, Eastern Distributing sued to enforce a noncompete provision in its employment contract with Flynn. The court affirmed the district court's conclusion Eastern Distributing had a legally protectable interest supporting the noncompete provision. The court also upheld the district court's decision to enforce the contractual one-year prohibition on Flynn working for a competing wholesaler as reasonable and to equitably reduce the geographical area in which the prohibition would apply. The close personal relationship Flynn developed with Eastern Distributing's retail buyers through frequent contacts over five years involving repetitive business transactions stands in marked contrast to the limited contact and work Arnberger did for the Doan Family Corporation's customers.

C. The Result on Appeal. In making its case on appeal, the Doan Family Corporation has discussed what it purports to be the valid protectable interest justifying the noncompete provision in the 2016 employment contract with Arnberger. As I have explained, I find the company's arguments unpersuasive. But in the absence of a cross-appeal from Arnberger, the issue is not in front of us. So I would affirm the district court's decision reducing the

prohibition to one year and awarding the Doan Family Corporation limited money damages in place of injunctive relief. That's the closest I can come to what I view as the correct result in this case. I, therefore, dissent from the majority's decision to remand to the district court to enforce the contractual two-year noncompete period, to reevaluate the damage award accordingly, and to reconsider the attorney fee award to the Doan Family Corporation for litigating in the district court in light of what will be its expanded (and wholly unjustified) success.

II. OTHER CONSIDERATIONS AT PLAY IN THIS APPEAL

A. Doan Family Corporation's Request for Attorney Fees on Appeal. In buttoning up the case, I turn to several other matters. First, I agree with the decision to deny attorney fees to the Doan Family Corporation for this appeal for the reasons the majority has outlined. Whether we should enforce a one-sided clause permitting an award of attorney fees to a corporate party drafting an adhesion contract presented to an individual seeking a rank-and-file job is not before us. I offer no opinion on the question in the absence of a challenge from Arnberger.

B. Analytical Framework for Evaluating Noncompete Provisions. The majority concludes (with some hesitancy) that the Kansas appellate courts have adopted a three-step analytical method for evaluating noncompete agreements, looking at: (1) whether there is a protected interest; (2) if so, whether the contractual restrictions are reasonable; and (3) if the restrictions are unreasonable, whether the district court has appropriately exercised its equitable authority in revising them. My colleagues correctly say that across the run of cases, the appellate courts have been fuzzy, at best, in outlining their legal analyses. In the absence of historical clarity, the majority interpolates the three steps and finds the first two are questions of law subject to unlimited review on appeal. The third, as an exercise of the district court's equitable authority, should be reviewed for an abuse of discretion.

The courts have consistently viewed the first step—the determination of some protectable interest—as a question of law. *Idbeis v. Wichita Surgical Specialists*, 279 Kan. 755, 766, 112 P.3d 81 (2005) (noting the parties agree on this point and citing case

authority); *Weber*, 259 Kan. at 462; *Eastern Distributing*, 222 Kan. at 673-74. Because I would find no protectable interest, my take on whether the analytical model has two or three steps makes no difference in my resolution of this case. We, of course, review questions of law without deference to the district court's determination. *In re Estate of Oroke*, 310 Kan. 305, 310, 445 P.3d 742 (2019).

There is a fair argument the Kansas Supreme Court actually has deployed a bifurcated analysis that treats what the majority identifies as the second and third steps as a single consideration entrusted to the district court's discretion and reviewed for abuse. See *Eastern Distributing*, 222 Kan. at 676; *Foltz v. Struxness*, 168 Kan. 714, Syl. ¶ 8, 718-19, 215 P.2 133 (1950). In both *Eastern Distributing* and *Foltz*, the district court equitably reformed (and reduced) the contractual restrictions in the disputed noncompete provisions—decisions predicated on determinations those restrictions were inequitable or unreasonable. In each case, the Supreme Court affirmed the district court's ruling by applying an abuse of discretion standard and without cleaving the predicate, though implicit, finding of unreasonableness from the reformation for some independent analysis or review. That looks like a two-step approach, although it may not have been explicitly delineated as such. So neither decision expressly sets out an analytical model establishing a two-step test. Both *Eastern Distributing* and *Foltz* are considered leading cases on noncompete agreements, and their approach should not be dismissed as simply the work of outliers.

As the majority points out, a number of Kansas appellate opinions seem to apply an inferential intermediate step assessing the reasonableness of the noncompete restrictions without deference to the district court's determination before considering revisions of those restrictions. Again, however, the analytical protocol has not been precisely outlined. Appellate courts in many other jurisdictions explicitly review reasonableness as a question of law. The majority has catalogued some of those opinions, and I don't repeat them here.

Ultimately, treating the reasonableness of the particular restrictions in a noncompete agreement as a question of law makes some sense. In general, whether a contract term is reasonable and,

thus, enforceable presents a question of law. Cf. *Gonzales v. Associates Financial Service Co. of Kansas*, 266 Kan. 141, 158, 967 P.2d 312 (1998) (unconscionability of contract "traditionally" question of law for the court); see 17B C.J.S. Contracts § 1007 (reasonableness of contract presents question of law). So what the majority outlines probably reflects the better rule, although it may be a freshly articulated rule in Kansas and not merely a reiteration of the law as it clearly stands now.[*]

[*] More broadly, reasonableness really presents a mixed question of fact and law. The district court may be required to resolve conflicting testimony or other disputed evidence to establish the relevant facts. For example, an employer's sales manager might testify a certain geographical restriction corresponds to the company's market area, while the employee could counter with records showing the company does little or no business in some of the restricted territory. The district court's resolution of that conflict and the resulting finding of fact as to the market area would be reviewed on appeal for substantial competent evidence with considerable deference to any credibility determinations. Given those findings, however, an appellate court would review the district court's ultimate determination of reasonableness without deference as a legal conclusion. See *Geer v. Eby*, 309 Kan. 182, 190-91, 432 P.3d 1001 (2019).

C. A Better Mousetrap for the 21st Century. This journey into the legal world surrounding noncompete agreements leads to a body of Kansas common law that might benefit from a reexamination for the 21st century. Noncompete agreements have proliferated in the past two decades. Some companies have injected noncompete agreements into a wide array of jobs where they promote neither a legitimate employer interest nor any discernible public good and serve only to unfairly curtail the mobility of lower echelon and often poorly compensated workers. See Starr, Prescott, and Bishara, 64 J. L. & Econ. 53, 60-61 (Feb. 2021); Letter to Joseph Simons, chair Federal Trade Commission, https://oag.ca.gov/system/files/attachments/press-docs/11%2015%2019%20Multistate%20FTC%20Non-Compete%20Letter%20FINAL.pdf (Nov. 15, 2019) (attorneys general for 18 states and District of Columbia urge Federal Trade Commission to adopt rules "to bring an end to the abusive use of non-

compete clauses in employment contracts"); Washington State Office of the Attorney General Attorney, *General Bob Ferguson stops King County coffee shop's practice requiring baristas to sign unfair non-compete agreements*, https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring (chain of coffee shops in Seattle area agrees to discontinue use of noncompete agreements with most employees, including baristas and other low-wage workers); U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications*, at 3 (March 2016), https://patentlyo.com/media/2016/05/UST20Non-competes20Report1.pdf ("The prevalence of [non-compete] agreements raises important questions about how they affect worker welfare, job mobility, business dynamics, and economic growth more generally."); Illinois Attorney General, *Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements* (Dec. 7, 2016), https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html (company agrees to discontinue "highly restrictive non-compete agreements" imposed on employees including "low-wage sandwich shop employees and delivery drivers"); Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, The New York Times (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html; Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, The New York Times (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html.

In short, noncompete agreements have become a tool employers frequently use to impair what should be permissible fluidity in the workforce, particularly among lower-wage employees in service businesses. They tend to dampen both upward mobility and wages in job markets—anticompetitive results that impermissibly restrain trade and impede frontline workers from earning a living—contrary to well-established public policy, and they do so without protecting any demonstrably legitimate business interests. As I have indicated, those comparatively narrow interests include proprietary marketing plans, product research and design, and some protection for an existing client or customer base when a

new professional, such as a physician or accountant, or a sales agent joins a business and is expected to develop a close, ongoing relationship with some of those clients or customers. Earlier this year, the Wyoming Supreme Court ably laid out the substantial public policy reasons for especially exacting judicial examination of noncompete agreements and a concomitant requirement that an employer marshal a compelling justification for narrowly tailored restrictions on a carefully limited set of employees. *Hassler v. Circle C Resources*, 505 P.3d 169, 173-74 (Wyo. 2022).

In *Foltz*—the case often viewed as ushering in the modern legal era for noncompete agreements in Kansas— the court held such provisions generally should be enforced consistent with a public policy grounded in an ostensible "freedom to contract." 168 Kan. 714, Syl. ¶ 1 (touting "modern doctrine" governing contracts in restraint of trade); 168 Kan. at 721-22 (recognizing "the paramount public policy is that the freedom to contract is not to be interfered with lightly"). Even on the legal landscape 70 years ago, the *Foltz* decision doesn't seem especially modern, despite its own claim to be so, and looks more like a throwback to the doctrine of substantive economic due process typified in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). There, a bare majority of the Court struck down a New York statute limiting bakers to working no more than 10 hours a day and 60 hours a week because the measure deprived *bakers* of a constitutional liberty interest to contract to labor longer, despite demonstrably adverse effects on their health and the lack of any real bargaining power to negotiate different terms and conditions. 198 U.S. at 53-54; see 198 U.S. at 68-71 (Harlan, J., dissenting). The *Lochner* notion of a liberty interest or some other unbridled right to contract has been rejected. *Ferguson v. Skrupa*, 372 U.S. 726, 729-30, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-94, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

A paramount common-law freedom to contract may not be the legal doppelganger of a substantive due process right to contract, but they are sufficiently kindred notions to suggest the rejection of a constitutional protection should similarly undermine a judicially created fortress for contracts whatever their terms and the

circumstances of their making. There is little in the way of freedom in a distinctly one-sided contract of adhesion between an employer and middle or lower echelon employees. A potential employee would have the right to walk away—and not to contract at all. But the obvious ability to refuse a nonnegotiable contract seems like a pallid form of freedom in the workplace. See *West Coast Hotel Co.*, 300 U.S. at 393 ("The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy*, [169 U.S. 366, 397, 18 S. Ct. 383, 42 L. Ed. 780 (1898)], where we pointed out the inequality in the footing of the parties."). Moreover, the right to contract must yield to or at least accommodate public policies advancing the economic (as well as the physical) health of rank-and-file workers. See *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (contract unenforceable if inimical to public policy); *Oakley v. Domino's Pizza LLC*, 23 Wash. App. 218, 222-23, 235, 516 P.3d 1237 (2022) (court voids as contrary to public policy clause in employment contract requiring arbitration of wage and hour claims and precluding class action proceedings); *Hassler*, 505 P.3d at 174; cf. *Simpson v. Farmers Ins. Co.*, 225 Kan. 508, 508-09, 592 P.2d 445 (1979) (court refuses to enforce clause in motor vehicle insurance policy deemed contrary to public policy).

In contrast to *Foltz*, a more realistic (and modernistic) view would treat noncompete provisions, especially in adhesion contracts or those between employers and employees of plainly disparate bargaining power, as facially contrary to public policy and, thus, viewed with disfavor. The burden should be cast upon the employer to clearly justify restrictions inhibiting the employee's ability to work elsewhere for reasons apart from simply curtailing competition generally or depriving a person of his or her livelihood in a chosen field. Many courts have recognized noncompete restrictions to be disfavored under the common law and, therefore, require substantial reasons to enforce them, since they run counter to a public good in freely permitting workers to earn a living. See, e.g., *Coates v. Bastain Brothers, Inc.*, 276 Mich. App. 498, 507-08, 741 N.W.2d 539 (2007) ("noncompetition agreements are dis-

favored as restraints on commerce," and the party seeking enforcement must establish validity of restrictions); *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 370, 34 N.E.3d 357, 12 N.Y.S.3d 606 (2015) (noncompete covenants "strictly construed" based on "powerful considerations of public policy . . . against sanctioning the loss of a livelihood"); *Washburn v. Yadkin Valley Bank and Trust Co.*, 190 N.C. App. 315, 323, 660 S.E.2d 577 (2008) ("Covenants not to compete restrain trade and are scrutinized strictly."); *Murfreesboro Medical Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005) (as disfavored restraint of trade, covenants not to compete "construed strictly in favor of the employee"); *Hassler*, 505 P.3d at 173-74 (noncompete agreements contravene a "'public policy encourag[ing] employees to seek better jobs from other employers or to go into business for themselves'" and are presumptively invalid, so they will be rigidly reviewed and will require employer "'to prove . . . some special circumstances'" rendering restrictions "necessary") (quoting *Ridley v. Krout*, 63 Wyo. 252, 265, 268,180 P.2d 124 [1947]). My list is merely illustrative. In some states, legislatures have adopted statutes curtailing noncompete provisions in employment contracts. See, e.g., Colo. Rev. Stat. § 8-2-113 (subject to limited exceptions, "any covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void"); La. Stat. Ann. § 23:921 (limiting time and geographical restrictions); Wis. Stat. § 103.465 (noncompete agreements enforceable only if "reasonably necessary").

Finally, courts can best foster sound public policy by refusing to enforce noncompete provisions they find impermissible rather than reforming them to satisfy some equitable notion of reasonableness or fairness and then enforcing that judicially created term. See *Hassler*, 505 P.3d at 178-79; *Harville v. Gunter*, 230 Ga. App. 198, 199, 495 S.E.2d 862 (1998) (appellate court declines to enforce or reform overbroad noncompete agreement). The refuse-to-enforce approach is often called the red-pencil rule, presumably because a court effectively strikes the offending noncompete provision from the employment agreement, figuratively (I suppose) using a red pencil. See Enger, *Offers You Can't Refuse: Post-hire*

Noncompete Agreement Insertions and Procedural Unconscionability Doctrine, 2020 Wis. L. Rev. 769, 780-81 (2020); U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications*, at 14. Wisconsin has codified a red-pencil rule for employment covenants not to compete. Wis. Stat. § 103.465.

The Kansas Supreme Court, of course, has endorsed equitable revision of impermissibly restrictive noncompete provisions. *Eastern Distributing Co.*, 222 Kan. 666, Syl. ¶ 4. And the practice appears to be widely used across jurisdictions. See U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications*, at 16.

But equitable revision promotes several deleterious outcomes. First, it encourages employers to draft especially draconian noncompete provisions because they can be confident a reviewing court will revise them, leaving ostensibly reasonable restrictions in their place. *Hassler*, 505 P.3d at 176-77; Garrison and Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 175-76 (Spring 2008). So an employer has little or nothing to lose by overreaching. Conversely, a red-pencil rule encourages an employer to assess what noncompete provisions may be realistically necessary to shield legitimate business interests and to impose no greater limitations, precisely because an overreach will leave the employer with nothing.

Second, former employees may abide by the noncompete restrictions simply because they appear in a written agreement without realizing they are impermissibly harsh and, thus, unenforceable at least in that form. Former employees may comply because they cannot afford the attorney fees and related costs litigation would impose—whether they sue the employer to be free of the restrictions or the employer sues them to enforce the restrictions (or some equitably revised form of them). Similarly, a prospective employer may be reluctant to hire someone subject to a noncompete agreement for fear of being embroiled in a costly court battle, even though the restrictions appear unreasonable. In those circumstances, either the former employee's ignorance or what has been called the *in terrorem* threat of litigation effectively allows the employer to get away with an illegal restraint of those employees.

See *Hassler*, 505 P.3d at 176-77; Garrison and Wendt, 45 Am. Bus. L.J. at 177. A red-pencil rule would tend to rein in the use of those impermissibly harsh noncompete provisions in the first place.

More prosaically, the equitable reform approach to noncompete agreements hands employers an especially beneficial result inconsistent with customary rules governing contract enforcement. Kansas courts typically refuse to enforce contract provisions that are contrary to public policy. *Varney Business Services v. Pottroff*, 275 Kan. 20, Syl. ¶ 11, 59 P.3d 1003 (2002); *Simpson*, 225 Kan. at 508-09; cf. *GFTLenexa v. City of Lenexa*, 310 Kan. 976, 984, 453 P.3d 304 (2019) (competent adults may enter into contracts that are neither illegal nor contrary to public policy). Likewise, the courts generally decline to make agreements for contracting parties by rewriting vague or otherwise problematic terms to say something they plainly do not. *Quenzer v. Quenzer*, 225 Kan. 83, 85, 587 P.2d 880 (1978) (court may not rewrite contract or make new contract for parties under guise of construing their agreement); *Lauck Oil Co. v. Breitenbach*, 20 Kan. App. 2d 877, 879, 893 P.2d 286 (1995) (The court's "function is to enforce the contract as made" and "not [to] make another contract for the parties."). There is no obvious legal justification for carving out an exception to those rules for noncompete provisions.

III. END OF THE LINE

In conclusion, I doubt the Doan Family Corporation had a legally protectable interest under its contract employing Arnberger for a few months in early 2016 to provide routine tax preparation and filing services to its customers that would justify the noncompete bar precluding her from doing comparable work for any of those customers when she started her own business. The adhesion contract sought to prevent fair competition in derogation of public policies discouraging restraint of trade and barring unnecessary impediments to workers earning a living in their chosen fields of endeavor. I, therefore, respectfully dissent from the majority's decision to remand this action to the district court to further penalize Arnberger.

(522 P.3d 355)

No. 123,647

STATE OF KANSAS, *Appellee*, v. ANTHONY DARRYL ALLEN, *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Sixth Amendment Right to Assistance of Counsel for Criminal Defendants.* The Sixth Amendment guarantees criminal defendants the right to the assistance of legal counsel during all critical stages of a criminal proceeding.

2. SAME—*Right of Self-Representation Implied through Sixth Amendment's Right to Counsel.* Although neither the United States nor the Kansas Constitutions explicitly provide for a right of self-representation, the right has been implied from the right to counsel granted in the Sixth Amendment.

3. CRIMINAL LAW—*Defendant Must Knowingly Waive Right to Counsel to Exercise Right to Self-Representation.* To exercise the right to self-representation, a defendant must make a knowing and intelligent waiver of the right to counsel.

4. SAME—*Waiver of Right to Counsel Must Be Knowingly Made—Determination Based on Facts of Each Case—Burden on State.* The determination of whether a waiver of the right to counsel is knowingly and intelligently made depends on the facts and circumstances of each case. On appeal, the State has the burden of showing that an accused was advised of his or her right to counsel and that the waiver of counsel was knowingly and intelligently made.

5. SAME—*Determination Whether Defendant Made Knowing Waiver of Right to Counsel—Court Must Inform Defendant of Rights.* In determining whether a defendant has made a knowing and intelligent waiver of the right to counsel, a district court must inform the defendant of his or her rights as well as of the potential dangers of self-representation.

6. SAME—*Determination Whether Defendant Made Knowing Waiver of Right to Counsel—Three-Step Framework.* Although district courts are not required to use any specific checklist, the Kansas Supreme Court articulated a three-step framework in *State v. Burden*, 311 Kan. 859, 863, 467 P.3d 495 (2020), for use in determining whether a defendant made a knowing and intelligent waiver of his right to counsel.

7. SAME—*Determination Whether Defendant Made Knowing Waiver of Right to Counsel—District Court's Inquiry for Determination.* At a minimum, a district

court's inquiry should be sufficient to determine whether the defendant comprehends the nature of the charges, the significance of the proceedings, the range of potential punishments, and any additional facts essential to understanding the case.

8. SAME—*Critical Stages of Criminal Proceeding Include Competency Hearing and Motion to Dismiss—Possibility of Substantial Prejudice if No Representation by Counsel.* A competency hearing and a hearing on a motion to dismiss are critical stages of a criminal proceeding because of the substantial prejudice that could result from such hearings without representation by counsel.

9. SAME—*Violation of Sixth Amendment Right to Counsel at Critical Stage——Application of Structural Error Analysis.* A violation of a Sixth Amendment right to counsel at a critical stage of a criminal proceeding is subject to a structural error analysis.

10. APPEAL AND ERROR—*Structural Errors Not Subject to Harmless-Error Analysis.* Structural errors are not amenable to a harmless-error analysis.

Appeal from Johnson District Court; TIMOTHY P. MCCARTHY, judge. Opinion filed December 30, 2022. Reversed and remanded with directions.

Adam Sokoloff, of The Sokoloff Law Firm, of Olathe, for appellant.

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

Before HURST, P.J., MALONE and BRUNS, JJ.

PER CURIAM: A jury convicted Anthony Darryl Allen of two counts of rape and aggravated kidnapping. More than two years before the commencement of his jury trial, the district court granted Allen's request to represent himself. The district court also appointed standby counsel to assist in his defense. Allen continued to represent himself until the second day of trial. At that point, he invoked his right to counsel and standby counsel represented him throughout the remainder of the trial.

On appeal, Allen contends that he did not knowingly and intelligently waive his right to counsel. Although the district court ultimately advised Allen of his rights—including the dangers of self-representation—prior to trial, we find that Allen represented himself during critical stages of this criminal case prior to making a knowing and intelligent waiver of his right to counsel. Thus, we reverse Allen's convictions and we remand this case to the district court for further proceedings.

FACTS

A detailed recitation of the underlying facts is unnecessary based on the limited issue presented on appeal. As such, we will briefly summarize those facts that are material to this appeal. We will then address additional facts as necessary in the Analysis section of our opinion.

On August 2, 2015, Allen was arrested—after a four-hour standoff with the police—at an apartment he shared with T.W. Fortunately, T.W. was able to leave the apartment prior to the standoff and was taken to the hospital to be treated for injuries she had suffered. Two days later, the State charged Allen with one count of the aggravated kidnapping and two counts of rape. Subsequently, the district court appointed legal counsel to represent Allen. Over the course of his criminal case, Allen has been represented by multiple attorneys and has also represented himself at various times.

At a scheduling conference on March 23, 2017, Allen appeared in court with his third appointed counsel. The attorney informed the district court that Allen was refusing to meet with him. Moreover, Allen indicated that he wanted to represent himself because he did not "trust nobody but himself." In response, the prosecutor argued against allowing Allen to represent himself due to the complicated nature of the criminal proceedings as well as the potential sentence. The district court decided to defer ruling on Allen's request for self-representation and ordered that he undergo a competency evaluation. We note that Allen had previously been evaluated and found to be competent to stand trial.

On May 11, 2017, the district court held a hearing addressing several matters. At the outset, the district court indicated that it had reviewed a report from Johnson County Mental Health regarding Allen's competency. After sharing the report with the parties and seeking their input, the district court again found Allen to be competent to stand trial. After it had ruled on the competency issue, the district court turned to other matters.

Unfortunately, the transcript of the May 11th hearing is incomplete because of a malfunction of the recording equipment and only contains the statements made by the district court judge. Nevertheless, it can be gleaned from the portion of the transcript in the

record that the district court asked: "All right. Mr. Allen, is that correct—that you would like to represent yourself in this matter?" Even though Allen's response is absent from the transcript, it is reasonable to assume that he answered in the affirmative because the district court then asked: "And you understand the seriousness of the charges against you?" Again, the transcript does not include Allen's response. Regardless, it is clear that the district court granted Allen's request to represent himself, permitted his third appointed counsel to withdraw, and appointed a fourth attorney to serve as his standby counsel.

A few weeks later, the district court permitted Allen's standby counsel to withdraw due to a conflict and appointed a fifth attorney to serve in that capacity. From May 11, 2017, to September 16, 2019, Allen represented himself at various hearings with the assistance of standby counsel. Even though several of these hearings only involved scheduling issues, Allen also represented himself at a competency hearing held on March 23, 2018, and a hearing on a motion to dismiss held on May 22, 2018.

On July 11, 2018, the district court held a hearing at which it asked Allen if he still intended to represent himself at trial. In response, Allen reiterated his intent to proceed pro se. The district court then asked Allen if he had a chance to talk to his standby counsel about the upcoming trial or regarding criminal procedure. Allen stated that he and standby counsel had "talked about it." Standby counsel also informed the district court that he had been visiting with Allen about the case but was allowing him to take the lead. The district court then conducted a comprehensive colloquy with Allen about his decision to represent himself.

Specifically, the district court "highly advise[d]" Allen to permit his standby counsel to serve as his attorney. The district court warned Allen there were "a lot of things about the trial process, about the rules of evidence that may be difficult for [a self-represented defendant] to maneuver." Even so, Allen reiterated that he wished to proceed pro se. Following his affirmation, the district court advised Allen that he could exercise his right to counsel at any point and warned him that his self-representation would be terminated "if you're disrespectful to somebody in court . . . or

obstruct the trial process." In response, Allen confirmed that he understood.

The district court further advised Allen that he would be bound by the applicable rules of criminal procedure. It also pointed out the "numerous dangers and disadvantage[s]" of self-representation. The district court pointed out that an attorney would be better equipped to handle the various matters that were required to prepare for trial as well as matters that would arise during the jury trial. The district court warned Allen that by representing himself he may inadvertently waive his legal rights and that his ability to prepare for trial could be limited due to his incarceration. In addition, the district court reminded Allen of the potential sentences for each of the charges. Again, Allen stated he understood and confirmed his desire to represent himself.

At a hearing held on August 10, 2018, standby counsel informed the district court that Allen had refused his assistance. Yet again, Allen confirmed that he wanted to continue representing himself. Moreover, standby counsel represented to the district court that he would be prepared for trial. On October 18, 2018, the district court inquired once again about Allen's desire to represent himself at trial. The district court reminded Allen "I have been through the entire list for you as to the reasons why I would suggest that you let [standby counsel] proceed for you. But at any time . . . you can request that [he] take over for you."

On December 7, 2018, standby counsel advised the district court that Allen continued to refuse his offers of assistance. Almost six months later, on May 29, 2019, Allen again confirmed his intent to represent himself. Finally, at a pretrial conference held only a few days before trial, the district court attempted once more to convince Allen not to represent himself at trial. The district court reminded Allen that it did not believe that self-representation was in his best interest. The district court also reminded Allen "that at any time you can change your mind" and have standby counsel to "proceed on your behalf." Further, the district court reminded Allen that it "considers it detrimental for you to not to accept or employ counsel to represent yourself; you understand that?" Allen responded, "Yes, your Honor."

A three-day jury trial began on September 16, 2019. Allen initially represented himself with the assistance of standby counsel.

However, at the start of the second day of trial, Allen invoked his right to be represented by counsel. As a result, standby counsel represented Allen throughout the remainder of the trial. Ultimately, the jury convicted Allen on each of the charges and the district court sentenced him to a controlling term of 331 months in prison.

ANALYSIS

On appeal, Allen contends that although he repeatedly expressed a desire to represent himself during the underlying proceedings, he did not knowingly and intelligently waive his right to counsel. In particular, Allen points to the hearing on May 11, 2017, at which the district court originally granted his request to proceed pro se and appointed standby counsel to assist him. In response, the State contends that if one looks at the record as a whole rather than simply to a single hearing, it is apparent that Allen knowingly and intelligently waived his right to counsel prior to trial.

The State argues the district court properly advised Allen of his rights at a hearing held on July 11, 2018, as well as at the final pretrial conference held a few days before trial. Based on our review of the record on appeal, we agree with the State that the district court appropriately obtained a knowing and intelligent waiver from Allen prior to trial. Nevertheless, the record also reflects that Allen represented himself at critical stages of the proceedings prior to waiving his right to counsel in the manner prescribed by Kansas law.

The Sixth Amendment guarantees criminal defendants the right to the assistance of legal counsel during all critical stages of a criminal proceeding. *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). Although neither the United States nor the Kansas Constitutions explicitly provide for a right of self-representation, the right has been implied from the right to counsel granted in the Sixth Amendment. See *Faretta v. California*, 422 U.S. 806, 821, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). To exercise the right to self-representation, a defendant must make a knowing and intelligent waiver of the right to counsel. 422 U.S. at 835; see also *State v. Bunyard*, 307 Kan. 463, 470, 410 P.3d 902 (2018); *State*

v. Jones, 290 Kan. 373, 376, 228 P.3d 394 (2010); *State v. Vann*, 280 Kan. 782, 793, 127 P.3d 307 (2006).

We exercise unlimited review over questions involving the interrelated rights to counsel and self-representation. *Bunyard*, 307 Kan. at 470. However, the determination of whether a waiver of the right to counsel was knowingly and intelligently made depends on the facts and circumstances of each case. *State v. Buckland*, 245 Kan. 132, 137, 777 P.2d 745 (1989). As a result, we review a district court's findings on a waiver of counsel for substantial competent evidence. See *State v. Hughes*, 290 Kan. 159, 170, 224 P.3d 1149 (2010). Furthermore, the State has the burden of showing that an accused was advised of his or her right to counsel and that their waiver of counsel was knowingly and intelligently made. *State v. Youngblood*, 288 Kan. 659, 662, 206 P.3d 518 (2009).

In determining whether a defendant has made a knowing and intelligent waiver of the right to counsel, a district court must inform the defendant of his or her rights as well as of the potential dangers of self-representation. See *Vann*, 280 Kan. 782, Syl. ¶ 3. To assist district courts in doing so, our Supreme Court has articulated a three-step framework to be used in determining whether a defendant made a knowing and intelligent waiver of his right to counsel. *State v. Burden*, 311 Kan. 859, 863, 467 P.3d 495 (2020):

"First, a court should advise the defendant of the right to counsel and to appointed counsel if indigent. Second, the defendant must possess the intelligence and capacity to appreciate the consequences of his or her decision. And third, the defendant must comprehend the charges and proceedings, punishments, and the facts necessary for a broad understanding of the case.

"To assure the defendant appreciates the consequences of waiving representation by counsel . . . the court [should] explain that the defendant will be held to the same standards as an attorney; that the judge will not assist in or provide advice about presenting a defense; and that it is advisable to have an attorney because many trial techniques, evidence rules, and the presentation of defenses require specialized training and knowledge. [Citations omitted.]" *Burden*, 311 Kan. at 863-64.

Nevertheless, district courts are not required to use any specific checklist. Instead, district courts should "weigh whether a defendant has knowingly and intelligently waived the right to counsel by examining the circumstances of each case." 311 Kan. at 864. At a minimum, the district court's inquiry should be sufficient

to determine whether the defendant comprehends the nature of the charges, the significance of the proceedings, the range of potential punishments, and any additional facts essential to understanding the case. *Buckland*, 245 Kan. at 138.

Here, the record reflects the district court ultimately advised Allen of his legal rights, the consequences of his decision to represent himself, the nature of the charges, and the potential punishment prior to trial. However, Allen argues that the district court failed to appropriately determine whether his waiver of the right to counsel was knowingly and intelligently made at the hearing held on May 11, 2017. Based on our review of the record on appeal, we agree.

As discussed above, the district court considered several matters at the hearing on May 11, 2017. Although the digital recording malfunction makes it difficult to determine everything that occurred at the hearing, the transcript is sufficient for us to ascertain what was said by the district court. Although the transcript reveals that after Allen announced his desire to represent himself at the hearing the district court asked two questions, we find nothing to suggest that the district court took any additional steps to assure that he appreciated the consequences of waiving representation by counsel. Likewise, the State does not point us to anything to establish that Allen made a knowing and intelligent waiver of counsel at that hearing.

Rather, the State argues that "the district court went above and beyond" at subsequent hearings to make sure that Allen's waiver was knowingly and intelligently made prior to trial. In particular, the State points us to a hearing held on July 11, 2018, and to the final pretrial conference held a few days before trial. Even though we agree that the district court did a commendable job in assuring that Allen knew his rights as well as the inherent dangers of self-representation prior to trial, the right to counsel extends to all critical stages of a criminal proceeding. *Jones*, 290 Kan. at 379. Hence, we must look to the events that occurred between May 11, 2017, and July 11, 2018, to determine whether Allen represented himself at any critical stages of the proceedings prior to knowingly and intelligently waiving his right to counsel.

In *State v. Jones*, a criminal defendant was not permitted to represent himself at his preliminary hearing after the district court made a cursory inquiry. Although the defendant later agreed to be represented by counsel at his jury trial, he appealed his convictions and argued that the district court's denial of his motion to represent himself at the preliminary hearing constituted reversible error. On appeal, a panel of this court found that any error by the district court was harmless because the defendant was represented by competent counsel at the trial. On review, the Kansas Supreme Court held that a preliminary hearing is a critical stage of a criminal prosecution and, as a result, the district court had committed structural error that required a reversal of the defendant's convictions. In reaching this conclusion, our Supreme Court found that such errors are not subject to a harmless-error analysis. 290 Kan. at 382-83.

More recently, a panel of this court reached a similar conclusion in *State v. Solton*, No. 123,927, 2022 WL 7824450, at *7 (Kan. App. 2022) (unpublished opinion). In *Solton*, the panel found that a district court violated the defendant's right to counsel when it allowed the defendant to represent himself at a preliminary hearing without first obtaining a knowing and intelligent waiver. Although the State argued that the defendant had effectively waived his right to counsel, the panel found that "cobbled together pieces [of the record] are not the equivalent of a proper waiver of counsel colloquy." 2022 WL 7824450, at *6.

Although the panel acknowledged in *Solton* that the defendant had requested to represent himself several times throughout the proceedings, it found that "the record has no explicit waiver of his right to counsel, let alone a knowing and intelligent waiver, until the pretrial conference." 2022 WL 7824450, at *6. The panel further found that this constituted a structural error "that is not cured because [the defendant] finally knowingly and intelligently waived his right to counsel before the jury trial." 2022 WL 7824450, at *7. Thus, the panel reversed the defendant's convictions and remanded the case for a new proceeding "commencing with a preliminary hearing." 2022 WL 7824450, at *7.

As discussed above, "the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778,

786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009). The United States Supreme Court has identified the critical stages of a criminal proceeding as those that hold significant consequences for the accused. *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); see also *Rothgery v. Gillespie County*, 554 U.S. 191, 212 & n.16, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008). Moreover, the right to counsel entails "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Consequently, a defendant "is entitled to counsel at any proceeding where an attorney's assistance may avoid the substantial prejudice that could otherwise result from the proceeding." *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005) (citing *Coleman v. Alabama*, 399 U.S. 1, 9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 [1970]).

Here, during the 14-month period that Allen represented himself without an adequate determination of whether he had knowingly and intelligently waived his right to counsel, he appeared pro se at several hearings. We find at least two of these hearings to have been critical stages of the criminal proceedings. First, Allen represented himself at a competency hearing held on March 23, 2018, at which the district court ordered Allen to stand trial. Second, Allen represented himself at a hearing held on May 22, 2018, at which the district court considered his motion to dismiss the charges filed against him and also considered a K.S.A. 60-455 motion filed by the State. We note that although Allen had standby counsel available at these hearings, this does not equate to the assistance of counsel as required by the Sixth Amendment. See *Vann*, 280 Kan. at 793.

We recognize that the Kansas Supreme Court has held that a "psychiatric examination of the defendant is not a critical stage during which defendant has a constitutional right to have counsel present." *State v. Mattox*, 305 Kan. 1015, 1054, 390 P.3d 514 (2017). Likewise, our Supreme Court has held that a hearing to determine whether a competency hearing is to be held is not a critical stage. *State v. Gross*, 308 Kan. 1, 15, 417 P.3d 1049 (2018). But we are aware of no Kansas cases that address the issue of whether a competency hearing itself is a critical stage of a criminal

proceeding at which a defendant has a constitutional right to be represented by counsel. However, it is important to recognize that the United States Court of Appeals for the Tenth Circuit as well as several other federal appellate courts have held that a competency hearing is a critical stage. See *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005); see also *United States v. Kowalczyk*, 805 F.3d 847, 856 (9th Cir. 2015); *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012); *Raymond v. Weber*, 552 F.3d 680, 684 (8th Cir. 2009); *Appel v. Horn*, 250 F.3d 203, 215 (3d Cir. 2001); *United States v. Klat*, 156 F.3d 1258, 1262 (D.C. Cir. 1998); *United States v. Barfield*, 969 F.2d 1554, 1556 (4th Cir. 1992).

We agree that a competency hearing is a critical stage of a criminal proceeding because of the substantial prejudice that could result from such a hearing without representation by counsel. Similarly, we find that a hearing on a motion to dismiss is a critical stage of a criminal proceeding. *Solton*, 2022 WL 7824450, at *5. Because there had not yet been an adequate determination of whether Allen had knowingly and intelligently waived his right to counsel at the time these hearings were held, the district court erred in allowing him to represent himself at these critical stages of the criminal proceedings. Likewise, because these hearings constitute critical stages of the criminal proceedings, we find the error is structural in nature and could not be cured by Allen's subsequent knowing and intelligent waiver of his right to counsel prior to trial. *Jones*, 290 Kan. at 382 ("A violation of a Sixth Amendment right to counsel is subject to structural error analysis.").

As a result, we conclude that we are duty-bound to reverse Allen's convictions. Accordingly, we remand this case to the district court for further proceedings. In light of this decision, it is not necessary for us to address the remaining issues presented on appeal.

Reversed and remanded with directions.

* * *

MALONE, J., concurring: I concur that the result reached by the majority is required under Kansas caselaw including *State v.*

Burden, 311 Kan. 859, 863, 467 P.3d 495 (2020); *State v. Vann*, 280 Kan. 782, 793, 127 P.3d 307 (2006); *State v. Buckland*, 245 Kan. 132, 137, 777 P.2d 745 (1989); and especially *State v. Jones*, 290 Kan. 373, 382-83, 228 P.3d 394 (2010). Kansas caselaw establishes that any violation of a defendant's right to counsel at a critical stage of the prosecution is structural error. But I think there should be room for harmless error analysis when there is an inadequate waiver of counsel at a pretrial hearing, provided the defendant adequately waives counsel (or is represented by counsel) by the time the case proceeds to trial or plea.

Anthony Darryl Allen insisted on representing himself at the end of his competency hearing on May 11, 2017, but the record is clear that the district court did not obtain an adequate waiver of counsel at that hearing. The district court later obtained an adequate waiver of counsel from Allen at a pretrial hearing on July 11, 2018, after making sure that Allen understood the nature of the charges, the significance of the proceedings, the range of potential punishment, and the dangers of self-representation. The district court also covered Allen's rights and obtained a knowing and intelligent waiver of counsel at the pretrial conference on September 13, 2019. By the time Allen's case proceeded to jury trial, he had adequately waived his right to counsel, and then he decided to invoke his right to counsel on the second day of trial.

The problem is that in the 14-month interim from May 11, 2017, to July 11, 2018, Allen represented himself at some critical pretrial hearings without adequately waiving his right to counsel. *Jones* holds such a violation is structural error. 290 Kan. at 382-83. *Jones* is slightly distinguishable because there the district court violated the defendant's right to self-representation at the preliminary hearing. Here, the district court violated Allen's right to counsel at other critical pretrial hearings by allowing him to represent himself without a knowing and intelligent waiver of counsel. But both rights emanate from the right to counsel under the Sixth Amendment to the United States Constitution, so the result must be the same. A Sixth Amendment violation of the right to counsel at a critical stage of the prosecution is structural error and cannot be considered harmless.

A critical stage of the prosecution is one that holds significant consequences for the accused. *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). Allen represented himself at two critical stages of the prosecution without having made an adequate waiver of counsel. First, Allen represented himself at a competency hearing on March 23, 2018, at which the district court ordered Allen competent to stand trial. Second, Allen represented himself at a hearing on May 22, 2018, at which the district court considered Allen's pro se motion to dismiss the charges filed against him, and the court also considered a K.S.A. 60-455 motion filed by the State.

Most courts that have addressed the subject hold that a competency hearing is a critical stage of the prosecution, and I agree. But Allen's competency hearing on March 23, 2018, was his third competency hearing in the case, and the district court found Allen competent to stand trial at each hearing. The district court almost always adopts the findings from the court-ordered mental health evaluation at a competency hearing, and the presence of legal counsel rarely will affect the outcome of the hearing. I also agree that a hearing on a motion to dismiss usually would be a critical stage. But here, the district court denied Allen's pro se motion to dismiss "for lack of evidence outside of hearsay statements" because the motion had no merit; Allen having counsel would have made no difference. And as for the State's K.S.A. 60-455 motion, the record reflects it was denied. So, in Allen's case, the record reflects that the pretrial violation of his right to counsel had no prejudicial effect on the outcome of the criminal proceedings against him.

Errors are structural when they defy analysis by harmless error standards because they affect the framework within which the trial proceeds. *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The United States Supreme Court has identified "a 'very limited class of cases'" involving structural errors, including: (1) total deprivation of counsel; (2) lack of an impartial trial judge; (3) denial of the right to self-representation at trial; (4) violation of the right to a public trial; (5) erroneous reasonable doubt instruction; and (6) unlawful exclusion of members of defendant's race from a grand jury. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35

(1999); see *State v. Johnson*, 310 Kan. 909, 914, 453 P.3d 281 (2019) (listing errors).

When a defendant's right to counsel or right to self-representation is denied at a trial, then I agree that the Sixth Amendment violation is structural error. But a situation like Allen's is different where the district court allowed Allen to represent himself at some pretrial hearings without obtaining an adequate waiver of counsel, but later obtained a valid waiver before the trial. Allen repeatedly insisted on representing himself at the pretrial stages in the State's criminal prosecution against him. Significantly, Allen did not change his mind about representing himself even after the district court gave him the proper advisories. It was not until the second day of his jury trial—long after Allen had been properly advised about his right to counsel—that Allen decided he would be better off allowing his standby counsel to take over the proceedings.

In a situation like Allen's—where there is a right to counsel violation during pretrial hearings that is later corrected before the trial or a plea—a court should be allowed to examine the entire record and decide whether the violation denied the defendant a fair disposition and resolution of the charges. The burden must be on the State to show harmless error beyond a reasonable doubt. *State v. Ward*, 292 Kan. 541, 568-69, 256 P.3d 801 (2011) (holding a court will declare a constitutional error harmless only when the party benefitting from the error shows beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record). In Allen's case, based on the record subject to our review, a good argument can be made that the pretrial violation of his right to counsel did not affect the final disposition of his case.

Allen was a difficult defendant. He went through five appointed attorneys and represented himself for much of the case before invoking his right to counsel on the second day of trial. The district court allowed Allen to represent himself at critical pretrial hearings without obtaining an adequate waiver of counsel, but later obtained a valid waiver before the trial. Because the pretrial violation of Allen's right to counsel was corrected before the trial, the violation does not defy analysis by harmless error standards. But finding the violation in Allen's case to be harmless error cannot be squared with the holding in *Jones*. If Allen's case is further

reviewed, the Kansas Supreme Court should reevaluate whether a pretrial violation of a defendant's right to counsel or right to self-representation at a critical stage of the prosecution is subject only to structural error.

BRUNS, J., joins in the foregoing concurrence.