# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF KANSAS

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REPORTER:

SARA R. STRATTON

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Advance Sheets, Volume 316, No. 2
Opinions filed in August – October 2022

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JUSTICES AND OFFICERS OF THE KANSAS SUPREME COURT

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**IN THE SUPREME COURT OF THE STATE OF KANSAS**

**Administrative Order**

2022-RL-073

**Rules Relating to District Courts**

Effective January 1, 2023, the court amends the attached Supreme Court Rule 110.

Dated this 28th day of September 2022.

FOR THE COURT

MARLA LUCKERT
Chief Justice

## Rule 110

## CASA PROGRAMS AND VOLUNTEERS

(a) **Program Standards.** A local court-appointed special advocate (CASA) program must follow standards adopted by the Supreme Court. The standards include the following:

(1) requirements for certification of a local program by the Office of Judicial Administration; and
(2) requirements for certification and training of a CASA volunteer by the local program.

(b) **Written Agreement.** A district court must have a written agreement with the person or group managing the local program. The term of the written agreement must not exceed two years. The agreement governs operation of the program and must accomplish the following:

(1) require the program to meet the standards for CASA programs;
(2) state the court's and the program's responsibilities to each other;
(3) require that volunteers be certified by the local program;
(4) specify procedures for assigning the program to a case and removing the program from a case;
(5) establish procedures for resolving grievances and conflicts for both the program and a volunteer; and
(6) state the requirements the program must meet to be eligible to renew the agreement.

(c) **Local Rules.** A district court must adopt a local court rule governing operation of a local program administered by the court. The rule must include the items specified in subsection (b)(1) through (5).

(d) **CASA Volunteer Duties and Prerequisites.**

(1) **Duties.** The primary duties of a volunteer are to investigate and become acquainted with the facts, conditions, and circumstances affecting a child's welfare; to advocate for the best interests of the child; and to assist the court in obtaining the most permanent, safe, and homelike placement possible. A volunteer should engage in the following activities:
   (A) visit the child as often as necessary to monitor the child's safety and observe whether the child's essential needs are being met;
   (B) attend court hearings involving the child or, if not excused from attendance by the court, arrange for attendance of a qualified substitute approved by the court;
   (C) participate in staffings and, to the extent possible, other meetings about the child's welfare;
   (D) participate in the development of a written reintegration plan and any modification of an existing plan;

(E) submit a written report to the court before each regularly scheduled court hearing involving the child; and
(F) act on the child's behalf as directed by the local program director and the standards adopted by the Supreme Court under subsection (a).

(2) **Prerequisites.** A volunteer must meet the following prerequisites:
(A) be at least 21 years old;
(B) submit a written application to the local program; and
(C) successfully complete screening procedures and a review by the local program.

(e) **CASA Volunteer Notice and Access.** A volunteer is entitled to the following:

(1) notice of a court hearing involving the child; and
(2) access to any district court record within the state pertaining to the child.

(f) **Reporting Requirements.** The district court or local program, as applicable, must provide statistical and other information required by the Office of Judicial Administration.

[**History:** New rule effective January 1, 1986; Restyled rule and amended effective July 1, 2012; Am. effective January 1, 2023.]

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| Booker v. Schnurr | 124,193 | Denied | 09/29/2022 | Unpublished |
| Campbell v. State | 124,212 | Denied | 09/30/2022 | Unpublished |
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| Darnell v. State | 123,725 | Denied | 09/28/2022 | Unpublished |
| Estate of Phillips v. Andover Senior Care | 122,312 | Denied | 09/30/2022 | Unpublished |
| Fisher v. Kansas Dept. of Revenue | 124,169 | Granted | 10/20/2022 | Unpublished |
| Glasgow v. State | 123,311 | Granted | 08/30/2022 | Unpublished |
| Goering v. Huestis | 124,293 | Denied | 09/30/2022 | Unpublished |
| Goodpasture v. State | 123,821 | Denied | 08/29/2022 | Unpublished |
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| Haney v. City of Lawrence | 123,868 | Denied | 09/30/2022 | Unpublished |
| *In re* A.E. | 124,351 | Denied | 10/04/2022 | Unpublished |
| *In re* Care and Treatment of Hemby | 124,120 | Denied | 09/29/2022 | Unpublished |
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| *In re* Marriage of Parrish and Pippen | 124,343 | Denied | 08/30/2022 | Unpublished |
| Kansas Fire and Safety Equipment v. City of Topeka | 123,063 | Granted | 09/23/2022 | 62 Kan. App. 2d 341 |
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| Nicks v. State | 122,386 | Denied | 09/30/2022 | Unpublished |
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| State v. Bolitho | 123,896 | Denied | 09/30/2022 | Unpublished |
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| State v. Brownfield | 123,645 | Denied | 09/02/2022 | Unpublished |
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| State v. Dayvault | 122,784 | Denied | 09/30/2022 | Unpublished |
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| State v. Revell | 123,913 | Denied | 08/29/2022 | Unpublished |
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| State v. Shipley | 123,773 | | | |
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| State v. Singletary | 124,207 | Denied | 08/30/2022 | Unpublished |
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# SUBJECT INDEX
## 316 Kan. No. 2
## (Cumulative for Advance sheets 1 and 2)
## Subjects in this Advance sheets are marked with *.

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APPEAL AND ERROR:

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

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

**Issues Not Raised Before District Court Cannot be Raised on Appeal—Three Exceptions to Preservation Rule**. Generally, issues not raised before the district court cannot be raised on appeal. But this preservation rule is prudential, and appellate courts have recognized three notable exceptions to the rule. To satisfy the preservation rule, a party must either provide a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on in the district court, or if the issue was not raised below, there must be an explanation why the issue is properly before the court. A party who ignores this requirement is considered to have waived and abandoned the issue on appeal. *In re N.E.* ……...…… 391*

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

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

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

**Sua Sponte Consideration of Issue Not Raised by Parties–To Serve Justice or Prevent Denial of Fundamental Rights**. Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua

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APPELLATE PROCEDURE:

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

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

**Disciplinary Proceeding—Disbarment**. A panel of the Kansas Board for Discipline of Attorneys concluded Jack R.T. Jordan violated the Kansas Rules of Professional Conduct during federal court proceedings initiated to obtain a document known as the "Powers e-mail" under the federal Freedom of Information Act, 5 U.S.C. § 552 (2018). Across various pleadings, Jordan persistently accused multiple federal judges of lying about that e-mail's contents, lying about the law, and committing crimes including conspiring with others to conceal the document. The Supreme Court holds clear and convincing evidence establishes Jordan's violations of KRPC 3.1, 3.4(c), 8.2(a), and 8.4(d) and (g), and based on that, he is disbarred from practicing law in the state of Kansas. *In re Jordan* ……...…….. 501*

**— Disbarment.** Attorney charged with felony charge of breach of privacy voluntarily surrendered his license to practice law in Kansas. That charge and the disciplinary complaint filed as a result of that charge both were both pending upon the filing of this opinion.
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**— Discharge from Probation.** Attorney filed motion for discharge from probation, following successful five-year probation period. Supreme Court granted respondent's motion for discharge. *In re Florez* ……..……. 369*

**— Ninety-day suspension**. Attorney stipulated to violations of the Kansas Rules of Professional Conduct regarding conflicts with current clients, duties to former clients, safekeeping property, and candor to tribunals. No exceptions were filed, and respondent is suspended from the practice of law for 90 days by the Supreme Court. *In re Malone* ……..…. 488*

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— **One-year Suspension**. Attorney suspended for one year for violations of KRPC 3.1 (meritorious claims), 3.4 (fairness to opposing party and counsel), 4.2 (communication with represented person), 8.3 (reporting professional conduct), 8.4(c), (d), and (g) (misconduct), and Rule 219 (reporting a criminal charge). A reinstatement hearing will be required if respondent applies for reinstatement of his license. *In re Janoski* ……..……. 370*

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

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

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

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

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

**Interlocal Agreement Made by Fire District is Enforceable—Not Void for Violating Public Policy**. When an interlocal agreement governing the

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operation and management of a fire district is terminated by one of the parties under the terms of the agreement, and the district's assets are allocated under those terms, the fire district itself is not altered or dissolved as a legal entity. Provisions in such interlocal agreements permitting termination and asset allocation after sufficient notice are not void for violating public policy. *Delaware Township v. City of Lansing, Kansas* ..... 86

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

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

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

CIVIL SERVICE:

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

**— Two Groups of Employees in Kansas –Classified and Unclassified Service**. The Kansas Civil Service Act, K.S.A. 75-2925 et seq., divides state civil service employees into two groups: those in the unclassified service and those in the classified service. The unclassified service includes those positions specifically designated as in the unclassified service. The classified service includes those positions in state service not included in the unclassified service. Thus, positions in the state service are presumptively within the classified service unless otherwise specified. *Bruce v. Kelly* ..... 218

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

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

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

CONSTITUTIONAL LAW:

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

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

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

**Fourth Amendment Right Protects against Unreasonable Searches and Seizures—Same Protections under Section 15 of Kansas Constitutional Bill of Rights**. The Fourth Amendment to the United States Constitution protects the right of an individual to be secure and not subject to unreasonable searches and seizures by the government. Section 15 of the Kansas Constitution Bill of Rights offers the same protections. Under the Fourth Amendment and section 15, any warrantless search or seizure is presumptively unreasonable unless it falls within one of the few established and well-delineated exceptions to the warrant requirement. *State v. Bates* ..... 174

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

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COURTS:

**Constitutional Decisions by Appellate Courts—Constitutional Challenges Avoided if Not Necessary**. Appellate courts typically avoid making unnecessary constitutional decisions. Thus, where there is a valid alternative ground for relief, an appellate court need not reach a constitutional challenge. *State v. Galloway* ……..…….. 471*

**Doctrine of Stare Decisis—Ensures Continuing Legitimacy of Judicial Review**. The doctrine of stare decisis provides that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised. The application of stare decisis ensures stability and continuity—showing a continuing legitimacy of judicial review. Thus, courts do not lightly disapprove of precedent. While stare decisis is not an inexorable command, this court endeavors to adhere to the principle unless clearly convinced that a rule of law established in its earlier cases was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent. *In re N.E.* ……..……. 391*

CRIMINAL LAW:

***Alleyne v. United States* Rule of Law—Term of Imprisonment or Statute Authorizing Term of Imprisonment Not Unconstitutional**. The rule of law declared in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), that the Sixth Amendment to the United States Constitution requires any fact that increases a sentence beyond the mandatory minimum to be submitted to a jury and proven beyond a reasonable doubt, does not trigger K.S.A. 2021 Supp. 21-6628(c). The *Alleyne* Court did not find either the term of imprisonment or the statute authorizing the term of imprisonment to be unconstitutional. *State v. Albright* ……..…… 482*

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

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

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

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**Felony-murder Jury Instructions—Res Gestae Requirement of Causation**. Felony-murder jury instructions which only allow a guilty verdict if the jury concludes the death occurred "while" defendant was committing the underlying felony satisfy the res gestae requirement of causation. *State v. Carter* ……..…….. 427*

**Inherently Dangerous Felony—All Participants Equally Guilty as Principals**. If someone dies in the course of an inherently dangerous felony, all the participants in the felony are equally guilty of the felony murder no matter who committed the killing. All participants in a felony murder are principals. *State v. Carter* ……..…….. 427*

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

**Participant in Felony Murder—Principal**. As a principal, a participant in a felony murder cannot be an aider or abettor. *State v. Carter* ….…….. 427*

**Petition for DNA Testing—Summary Denial—Appellate Review**. The summary denial of a petition for DNA testing under K.S.A. 2021 Supp. 21-2512 presents a question of law over which the appellate court has unlimited review. *State v. Angelo* ……..…… 438*

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

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

**Proof of Felony Murder—Direct Causal Connection between Commission of Felony and Homicide**. To prove felony murder, there must be a direct causal connection between commission of the felony and the homicide. Such causal connection is established if the homicide lies within the res gestae of the underlying crime with no extraordinary intervening event to supersede that direct causal connection. *State v. Carter* ……..….. 427*

**Request for Postconviction DNA Testing of Biological Material**. Under K.S.A. 2021 Supp. 21-2512(a), an inmate convicted of first-degree murder or rape may petition the district court for DNA testing of any biological material that: (1) relates to the investigation or prosecution that led to the conviction; (2) is in the actual or constructive possession of the State; and (3) was not previously subjected to DNA testing or can be tested with new

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DNA techniques that provide a reasonable likelihood of more accurate and probative results. *State v. Angelo* ……..…… 438*

**Request for Postconviction DNA Testing under Statute—Three-Part Process Leading to District Court's Decision if Testing Will Be Ordered**. K.S.A. 2021 Supp. 21-2512 governs inmate requests for postconviction DNA testing. The statutory provisions governing the pretesting phase of the proceedings contemplate a three-part process leading up to the district court's decision whether testing shall be ordered. First, the petitioner must allege in the petition that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. Second, once the State has notice of the petition, the statute requires the State to preserve any biological material it previously secured in connection with the case and identify such material in its response. Finally, once the response is filed, the parties may agree that the State has identified and preserved all known biological material and proceed to argue whether testing that identified biological material may produce noncumulative, exculpatory evidence warranting testing under K.S.A. 2021 Supp. 21-2512(c). But if the parties continue to dispute the existence of such biological material, they can present evidence to the district court for appropriate fact-finding. In that circumstance, the petitioner, as the moving party, has the burden to show biological material satisfying the threshold requirements of subsection (a) exists. *State v. Angelo* …… 438*

**Request for Sentence Modification in Postconviction Proceedings—Requirement of Jurisdiction under Statute**. Where a defendant seeks sentence modification in postconviction proceedings, a court lacks jurisdiction and should dismiss the matter unless there is a statute that authorizes the specific requested relief. *State v. Albright* ……...…….. 482*

**Resentencing by District Court on Remand—Modify Only Vacated Sentence—Exception**. On remand for resentencing after an appellate court has vacated a sentence, a district court may modify only the vacated sentence unless a nonvacated sentence is illegal and must be modified as a matter of law. *State v. Galloway* ……..…… 471*

**Restitution—Order of Restitution for Crimes of Conviction or by Agreement under Plea Agreements**. A district court may only order restitution for losses or damages caused by the crime or crimes for which the defendant was convicted unless, under a plea agreement, the defendant has agreed to pay for losses not caused directly or indirectly by the defendant's crime. *State v. Eubanks* ……..…… 355

**Review of Petition for DNA Testing by District Court—Criteria**. In reviewing a petition made under K.S.A. 2021 Supp. 21-2512, the district court first determines whether the biological material sought to be tested meets the criteria set forth in K.S.A. 2021 Supp. 21-2512(a). If those criteria are met, the district court then considers whether testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced. If this requirement is

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met, the district court must order DNA testing of the biological material specified in the petition. *State v. Angelo* ..... 438*

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

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

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

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

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

**Sentencing Appeal—Denial of Motion Requesting Departure Sentence—Abuse of Discretion—Appellate Review**. On appeal from a sentencing, this court reviews a district court judge's denial of a motion requesting a departure sentence for an abuse of discretion. A district court abuses its discretion when its decision turns on an error of law, its decision is not supported by substantial competent evidence, or its decision is one with which no reasonable person would agree. *State v. Galloway* ..... 471*

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

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for reckless acts resulting in unintended injury to innocent bystanders while the defendant engaged in self-defense with a perceived aggressor. *State v. Betts* ……...……. 191

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

EVIDENCE:

**Noncumulative Evidence Is Converse of Cumulative Evidence**. Noncumulative evidence is the converse of cumulative evidence—that is, it is evidence not of the same kind and character or not tending to prove the same thing. *State v. Angelo* …… 438*

**Request for DNA Testing under Statute—Determination of Exculpatory Evidence**. Evidence is exculpatory when it tends to disprove a fact in issue which is material to guilt or punishment. Determining whether evidence is exculpatory under K.S.A. 2021 Supp. 21-2512(c) is not a function of weighing the evidence. It is enough that the evidence tends to establish a criminal defendant's innocence, even if it does so by only the smallest margin. *State v. Angelo* …… 438*

INDICTMENT AND INFORMATION:

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

JURISDICTION:

**Appellate Courts Have Jurisdiction Provided by Law—Appellate Review**. Appellate courts have only the jurisdiction provided by law. That means appellate courts lack jurisdiction to review a district court's decision unless a party has appealed in the time and manner specified by law. Whether jurisdiction exists is a question of law subject to unlimited review. *In re N.E.* ……...…… 391*

KANSAS OPEN RECORDS ACT:

**Strict Liability of Act—Protection of Public from Sexual and Violent Offenders—Not Unconstitutionally Arbitrary**. The strict liability character of a KORA registration violation offense bears a rational relationship

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to the legitimate government interest of protecting the public from sexual and other violent offenders and is thus not unconstitutionally arbitrary. *State v. Genson* ..... 130

MOTOR VEHICLES:

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

PARENT AND CHILD:

**Appeals under K.S.A. 38-2273(a)—Thirty Days to Appeal District Court Judgment**. Appeals under K.S.A. 38-2273(a) must be brought within 30 days of the district court entering judgment. *In re N.E.* ..... 391*

**Revised Kansas Code for Care of Children—Appellate Jurisdiction under Code—Limits to Appealable Orders by Statute**. K.S.A. 38-2273(a) governs appellate jurisdiction under the Revised Kansas Code for the Care of Children, K.S.A. 38-2201 et seq. That statute limits appealable orders to any order of temporary custody, adjudication, disposition, finding of unfitness, or termination of parental rights. An order that does not fit within these five categories is not appealable. *In re N.E.* ..... 391*

**— Framework to Establish Permanency in Child's Placement—Appellate Review**. The Revised Kansas Code for Care of Children establishes a framework of sequential steps towards permanency in the child's placement. An order terminating parental rights is the last appealable order under K.S.A. 38-2273(a). Post-termination orders that address custody are not dispositional orders and are not subject to appellate review. *In re N.E.* ..... 391*

**— Statutory Differences between "Custody" and "Placement."** The Revised Kansas Code for the Care of Children distinguishes between "custody" and "placement." Orders that address the custody of a child during the dispositional phase of a child-in-need-of-care proceeding are dispositional orders, which are appealable under K.S.A. 38-2273(a). Orders during the dispositional phase that address only the placement of the child are not appealable under K.S.A. 38-2273(a). *In re N.E.* ..... 391*

REAL PROPERTY:

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

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in the statutory process for appraising real property at its fair market value. *In re Equalization Appeal of Walmart* ……..…….. 32

SEARCH AND SEIZURE:

**District Court Ruling on Motion to Suppress—Bifurcated Standard of Review Applied by Appellate Courts**. Appellate courts apply a well-settled, bifurcated standard of review when reviewing a district court ruling on a motion to suppress. Under the first part of the standard, an appellate court reviews a district court's factual findings to determine whether they are supported by substantial competent evidence. Substantial competent evidence is defined as such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. Appellate courts do not reweigh the evidence or assess credibility of witnesses when assessing the district court's findings. Under the second part of the bifurcated standard of review, appellate courts review de novo the district court's conclusion of law about whether a reasonable suspicion justifies the investigatory detention. *State v. Bates* ……..……. 174

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

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

STATUTES:

**Severance of Unconstitutional Provision by Court—Intent of Governing Body—Requirements to Sever Portion of Ordinance**. Whether a court may sever an unconstitutional provision from a statute or ordinance and leave the remainder in force and effect depends on the intent of the governing body that drafted it. A court may only sever an unconstitutional portion of an ordinance if, from examination of the ordinance, the court

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finds that (1) the act would have been passed without the objectionable portion, and (2) the ordinance would operate effectively to carry out the intention of the governing body that passed it with such portion stricken.
*City of Wichita v. Trotter* ..... 310

TAXATION:

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

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

TRIAL:

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

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

**Cumulative Error Test—Whether Errors Substantially Prejudiced Defendant and Denied Defendant Fair Trial—Totality of Circumstances**. The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman*

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applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. *State v. Brown* ……..… 154

**Exclusion of Evidence at Trial –Preservation of Issue for Appeal Requires Substantive Proffer—Two-Fold Purpose**. When a district court excludes evidence at trial, the party seeking to admit that evidence must make a sufficient substantive proffer to preserve the issue for appeal. A formal proffer is not required, and we may review the claim as long as an adequate record is made in a manner that discloses the evidence sought to be introduced. The purpose of such a proffer is two-fold—first, to procedurally preserve the issue for review, and second, to substantively demonstrate lower court error. *State v. White* …….. 208

**Felony-murder Jury Instructions—Legally Appropriate to Use "Defendant or Another."** In this case, the use of "defendant or another" in the felony-murder jury instructions to identify who killed each victim is legally appropriate because all participants of felony murder are guilty as principals. It is factually appropriate because the evidence left some question about who fired the lethal shot as to each victim. *State v. Carter* …….. 427*

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

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

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

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

**Jury Instructions—Requirement to Be Legally and Factually Appropriate**. Jury instructions must be legally appropriate by fairly and accurately stating the applicable law. They must also be factually appropriate with sufficient competent evidence to support them. *State v. Carter* …… 427*

**Invited Error Doctrine's Application to Jury Instructions—Question Whether Party's Action Induced Court to Make Instructional Error**.

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Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court. *State v. Valdez* ..... 1

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

No. 110,241

In the Matter of PANTALEON FLOREZ JR., *Respondent.*

(515 P.3d 742)

ORDER OF DISCHARGE FROM PROBATION

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Discharge from Probation*.

On January 24, 2014, the court ordered Pantaleon Florez Jr. suspended from the practice of law in the state of Kansas, in accordance with Supreme Court Rule 203(a)(2) and (5) (2013 Kan. Ct. R. Annot. at 300), for a six-month period. The court then stayed imposition of that discipline and placed Florez on probation for a five-year period, subject to specified terms and conditions. See *In re Florez*, 298 Kan. 811, 316 P.3d 755 (2014).

On August 3, 2022, Florez filed an amended motion to be discharged from probation along with a supporting affidavit in compliance with Supreme Court Rule 227(g)(1) (2022 Kan. S. Ct. R. at 284). That same day, the Office of the Disciplinary Administrator responded that Florez has fully complied with the conditions of his probation, confirmed his eligibility for discharge from probation, and voiced no objection to such discharge.

The court, having reviewed the amended motion, the supporting affidavit, and the response grants Florez' amended motion for discharge from probation. The court denies as moot Florez' original motion to be discharged.

The court orders Florez fully discharged from probation and closes this disciplinary proceeding.

The court orders the publication of this order in the Kansas Reports and assesses any remaining costs of this proceeding to Florez.

Dated this 30th day of August 2022.

LUCKERT, C.J., not participating.

No. 124,955

# In the Matter of JASON M. JANOSKI, *Respondent*.

(516 P.3d 125)

ORIGINAL PROCEEDING IN DISCIPLINE

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

Original proceeding in discipline. Opinion filed September 2, 2022. One-year suspension.

*Kathleen Selzler Lippert*, Deputy Disciplinary Administrator, argued the cause, and *Stanton A. Hazlett*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

*John J. Ambrosio,* of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, argued the cause, and *Jason M. Janoski*, respondent, argued the cause pro se.

PER CURIAM: The Office of the Disciplinary Administrator filed this original action on July 14, 2021, against the respondent, Jason M. Janoski, an attorney admitted in 2010 to the practice of law in Kansas. The complaint alleged violations of the Kansas Rules of Professional Conduct (KRPC). On August 3, 2021, the respondent filed an answer to the complaint. On September 1, 2021, the respondent filed a proposed plan of probation.

On September 22, 2021, a hearing panel conducted a formal hearing by Zoom. The respondent appeared with counsel.

After the hearing, the panel made findings of fact and conclusions of law, together with its recommendation to this court. Relevant portions of the panel's findings and conclusions are quoted below.

"*Findings of Fact*

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

"13. The respondent and E.H. were married and had three children.

"14. The respondent is an alcoholic. He did not acknowledge or accept that he is an alcoholic until December 2019. In late 2016 or early 2017, the respondent began to drink in secret. The respondent's alcohol consumption dramatically increased in the fall of 2018. The respondent testified that in the winter of 2019,

he believed that if he took one more drink he would die, but that if he did not drink he would die. The respondent testified that he consumed alcohol before work and during lunch when working as an attorney.

"15. In 2018, E.H. filed an action in divorce, in Sumner County District Court, case number 18DM46. Since the time the divorce action was filed, E.H. has continuously been represented by counsel. During that same time, the respondent has, at times, been represented and at other times, represented himself. The respondent has had three separate attorneys represent him during this time.

"16. Our Family Wizard ('OFW') is an Internet platform designed to assist parents in communicating about their children. It has messaging and scheduling features. The program is designed so the parties, their counsel, and the court can view all messages sent through OFW.

"17. In November 2018, the district court entered a permanent parenting plan. Both parties agreed to the parenting plan. In the agreed permanent parenting plan, the court established communication avenues between the respondent and E.H. Specifically, the order permitted the parties to communicate through telephone, text messaging, or Our Family Wizard ('OFW'). Under the permanent parenting plan, the court ordered the parties to each visit the OFW website and enroll as a user within 10 days of the date the permanent parenting plan was filed.

"18. The respondent refused to communicate through OFW.

"19. From January 1, 2019, through June 21, 2019, the respondent sent E.H. a total of 268 text messages. Some of the messages were demeaning and disrespectful to E.H. Because the messages were not sent using OFW, the messages were not available for counsel and the district court to review.

"20. In March 2019, the court entered a journal entry of judgment and decree of divorce.

"21. On April 9, 2019, E.H. asked two family members to pick up the children from a visit with the respondent. The respondent refused to allow the children to go with the two family members. As a result, E.H. summoned the police. When E.H. arrived at the exchange location, the respondent released the children to E.H.

"22. During the time the respondent was representing himself in the divorce case, the respondent communicated with E.H. regarding substantive issues related to the divorce without the permission of E.H.'s counsel. By way of example:

"a. On January 4, 2019, the respondent sent a text message to E.H. that provided, 'I sent you an email just now. It is your attorney's letter. Please let me know if you approve of its contents before I respond to your attorney.'

"b. Beginning on April 3, 2019, the following text exchange occurred between the respondent and E.H.:

'[From the respondent] [E.H.], you are required by court order to communicate with me by telephone or text message. I will also allow email. As I've told

you many times, please do not attempt to communicate with me by the portal or expect that I will read it. I will not.'

'[From E.H.] I responded to all your requests on the OFW. Thank you! I know you can easily see the messages on your phone the same way you could an email. All the info pertaining to the kids' schedule, grades, vaccination questions, aviation time etc. will be answered on there! Thanks.

'[From E.H.] *vacation time'

'[From the respondent] So you are openly defying the court order. Duly noted. I offered your attorney a compromise and I suggest you talk to him about it. If it is not accepted, we will have to resolve this in Wellington on a motion to compel compliance. . . .

'[From the respondent] Please see paragraph seven, in which it says that while the parties may use the portal, the parties shall continue to communicate by telephone and text messaging regarding the children.

'[From the respondent] I don't know how it could be more clear. We are both required to communicate by telephone or text.'

"c. On June 12, 2019, and June 13, 2019, the following exchange occurred between the respondent and E.H.:

'[By the respondent] I need to know first thing tomorrow morning whether we are going to have hearings on the motion to modify support and your request not to homeschool. I will need to prepare and file a motion to modify child support tomorrow. Please let me know by 9 AM.

'[By the respondent] $300/hr on these seems dumb to me, but it's up to you. Thanks'.

'[By E.H.] I have asked you to please not text me at night anymore.

'[By E.H.] Also, I understand you want this done. But I would appreciate if you would stop making legal demands/threats. I have let my attorney know you want reduced child support payments.'

'[By the respondent] It's not a threat. I'm going to be out of the state next week. In order to get a hearing this month, I'm going to have to prepare and file a motion today. I've been asking you for three weeks and you still haven't got me an answer. I can't afford my rent without a modification and it needs done.'

"23. Additionally, the respondent communicated directly with E.H.'s attorney at times when the respondent was represented by counsel. The respondent continued to directly communicate with E.H.'s attorney even after his attorney directed him to discontinue that practice.

"24. On April 9, 2019, April 27, 2019, and May 21, 2019, the respondent threatened to sue E.H. in small claims court for damage caused to a hat and for E.H.'s failure to provide him with other personal items. At the hearing on the formal complaint, the respondent acknowledged that his threat to sue had no merit.

"25. Based on the respondent's 'threatening and harassing texts [*sic*] messages and in face confrontations,' the respondent's son's baseball coaches indicated that the child would be removed from the team if the respondent's conduct continued.

"26. The respondent unnecessarily complicated the divorce. By way of example:

"a. The respondent sent several email messages to E.H.'s attorney asking the attorney to agree that a week consists of seven 24 hour periods of time.

"b. The respondent accused E.H.'s attorney of an 'ethics violation' for allowing 'non-clients [to] attend attorney client meetings and knowingly giving up privilege.'

"c. During the pendency of the divorce, the respondent made unreasonable demands. The respondent indicated his willingness to agree to bifurcate and expedite the divorce, provided the decree included language that 'God wants all marriages to be reconciled' and if E.H. and the respondent agreed 'to not remarry anyone but each other, or that marriage [would] be void.'

"27. Because of the nature and volume of the text messages sent by the respondent, on July 16, 2019, through counsel, E.H. filed a motion to limit communication between the parties.

"28. On August 15, 2019, the respondent married J.J.

"29. On August 31, 2019, while attending his youngest child's soccer game, the respondent harassed and yelled at E.H. The respondent also followed E.H. and would not leave her alone. When their five-year-old tried to sit on E.H.'s lap, the respondent removed his son from E.H.'s lap.

"30. On September 3, 2019, the respondent's oldest child was participating in baseball practice with his team. Initially, the respondent and L.H., E.H.'s father, were present and E.H. was not present. Before E.H. arrived, the respondent followed L.H. Several times, L.H. moved his chair away from the respondent and each time, the respondent followed L.H., harassing him. The respondent called L.H. profane names and described E.H.'s mother as an unstable lunatic to L.H. The respondent whispered in L.H.'s ear demeaning names and threats, including that L.H. was a 'weak man,' that L.H. was a 'bitch,' and that the respondent would follow L.H. everywhere. The respondent stated, 'I'm going to be right here the rest of your life.' The respondent came so close to L.H. when he was whispering in his ear that the respondent's lips touched L.H.'s ear.

"31. After E.H. arrived, E.H. and L.H. were seated in lawn chairs outside the fenced-in field area watching practice. The respondent continued the same conduct and began harassing E.H. At one point, while the youngest child sat on E.H.'s lap, the respondent sat between E.H. and L.H. and leaned against E.H.'s legs and the child's legs, frightening E.H. L.H. interrupted the practice and asked the coach to intervene. The baseball coach tried to convince the respondent to stop his conduct. The baseball coach told the respondent that he was only hurting his children. The respondent continued his intimidating conduct even after the admonition by the baseball coach.

"32. While using her mobile phone to video record the respondent's words and actions, the respondent knocked the mobile phone from E.H.'s hand. After

knocking the mobile phone from E.H.'s hand, the respondent claimed it was an accident and falsely claimed that something fell out of his hand which caused the phone to fall. During the altercation, the respondent said to L.H. and E.H. that he hoped their pocketbooks were deep because he expected this to be a '$20,000 project.' The respondent also told E.H., 'I've got unlimited money to fight you.'

"33. E.H.'s two younger children, the respondent's current wife, J.J., and the respondent's two step-children were also present during practice. E.H., L.H., and the children were frightened and intimidated.

"34. During the hearing on the formal complaint, the respondent admitted that he intentionally hit the mobile phone out of E.H.'s hand.

"35. As a result of his actions on September 3, 2019, the respondent was charged with battery against E.H. in Wichita Municipal Court.

"36. On September 5, 2019, L.H. filed a petition seeking a protection from stalking order. The district court granted L.H. a temporary order prohibiting the respondent from stalking L.H. (On October 29, 2020, the court dismissed the protection from stalking order because the temporary order had been on file over a year and the court lacked jurisdiction to extend the temporary order.)

"37. On September 6, 2019, E.H. filed a petition seeking a protection from abuse order. In the petition, E.H. sought an order prohibiting the respondent from contacting her and their three children. The district court granted E.H. a temporary order prohibiting the respondent from contacting her and their children. On November 20, 2019, Mr. Olson entered his appearance on behalf of E.H.

"38. In September or October 2019, the respondent underwent a psychological evaluation with Lance Parker, Ph.D. Dr. Parker diagnosed the respondent with anxiety disorder not otherwise specified, intermittent explosive disorder, and narcissistic personality traits. During the evaluation, the respondent lied to the evaluator regarding his alcohol consumption. As a result, Dr. Parker did not make any diagnoses regarding the respondent's alcohol abuse. The respondent testified that he did not receive a copy of the report and he was unaware of the two of the diagnoses 'for a long time.' The respondent commenced treatment with Dr. Parker.

"39. On September 18, 2019, E.H. filed a motion to modify residency and parenting time. However, on November 5, 2019, E.H. withdrew the motion because of the pending criminal case and the pending petition for protection from abuse order.

"40. On October 4, 2019, the court granted the motion filed in July 2019, to limit communication. The Court ordered that unless 'emergent or substantive matters require immediate communication via telephone or text messaging,' E.H. and the respondent were required to use OFW for communications.

"41. In October 2019, E.H. and L.H. filed complaints against the respondent. The disciplinary administrator docketed the two complaints under one complaint number for investigation.

"42. In December 2019, the respondent accepted and acknowledged that he is an alcoholic.

"a. In January 2020, the respondent completed a 30-day inpatient substance abuse treatment program. Following the in-patient treatment, the respondent continued his treatment with intensive outpatient treatment.

"b. The respondent also began attending one or two AA meetings per week, obtained an AA sponsor, and started working on the 12 steps of recovery.

"c. The respondent also entered into a one-year KALAP monitoring agreement.

"d. Following treatment, the respondent has relapsed into alcohol use on at least six occasions.

"43. On February 10, 2020, the respondent entered a plea of guilty to the charge of battery in municipal court. The respondent and the assistant city attorney entered a deferred judgment agreement. The municipal court placed the respondent's case on the deferred judgment docket. As part of the deferred judgment agreement, the respondent was required to report to a probation officer monthly and within six months:

"a. obtain a batterer's intervention assessment, follow all recommendations, and provide proof of completion;

"b. obtain a mental health evaluation, follow all recommendations, and provide proof of completion;

"c. obtain a drug/alcohol evaluation, follow all recommendations, and provide proof of completion; and

"d. attend an approved parenting class and provide proof of completion.

Under the deferred judgment agreement, the respondent was also required to refrain from using alcohol or drugs, refrain from possessing guns, refrain from violating the law, and pay the fines and fees assessed in the municipal court case. Finally, he was required to have no contact with E.H. and E.H.'s parents.

"44. The respondent owns two guns. Based on the respondent's restrictions under the deferred judgment agreement, the respondent asked J.J. to change the combination on the gun safe so he could not access the guns. However, the gun remained in the respondent's home.

"45. The respondent relapsed in March 2020 and again in late summer 2020.

"46. On August 31, 2020, the respondent provided a written response to the complaints. The respondent supplemented his response in December 2020 and in June 2021. In his responses, he admitted that he was aggressive, irrational, resentful, and angry. In addition, the respondent included inaccurate information in the responses. For example, in the respondent's December 2020 response, he falsely stated '[b]efore I went to treatment, I sought help from a psychologist,

who diagnosed me with anxiety disorder and prescribed medication for me, which I still take.'

"47. On September 3, 2020, the assistant city attorney filed a motion to terminate the respondent's deferred judgment agreement. In the motion, the assistant city attorney alleged that the respondent failed to:

"a. complete a batterer's intervention 24-week program and provide proof of completion;

"b. obtain a mental health evaluation, following all recommendations, and provide proof of completion; and

"c. obtain a drug and alcohol evaluation, follow all recommendations, and provide proof of completion.

"48. On September 25, 2020, the respondent filed a motion to modify the protection from abuse order. Specifically, the respondent asked that the protection from abuse order be dismissed with prejudice. Even though E.H. was represented by Mr. Olson, the respondent did not serve Mr. Olson with the motion to modify the protection from abuse order. Mr. Olson did not learn of the motion until three days before it was scheduled for hearing.

"49. On October 27, 2020, E.H. filed an amended verified motion to modify residency and parenting time. In the amended motion, because the respondent's behavior continued to be erratic and because the respondent had not completed the terms of the deferred judgment agreement, E.H. requested that she be awarded sole legal custody and that the respondent's parenting time be suspended until the protection from abuse order was dismissed and the respondent completed the requirements of the deferred judgment agreement in the criminal case.

"50. On October 29, 2020, E.H. agreed to dismiss the protection from abuse order. As a result, the district court dismissed the protection from abuse order. Even after the protection from abuse order was dismissed, the respondent was prohibited from contacting E.H. under the deferred judgment agreement.

"51. On December 9, 2020, the district court granted, in part, E.H.'s motion to modify residency and parenting time. In its order, the district court found 'that [respondent]'s behavior [was] the worst case of emotional abuse that the Court [had] seen during its tenure on the bench.' The district court ordered that the respondent have supervised parenting time for four hours every other Saturday. The district court also awarded a judgment in E.H.'s favor for child support arrearage in the amount of $7,833.00.

"52. In January 2021, the respondent relapsed again.

"53. On February 20, 2021, someone attempted to break into the respondent's home. J.J. retrieved a gun from the gun safe and gave it to the respondent. The respondent went outside with a flashlight and the gun. The respondent found a man kicking the respondent's garage door. The respondent ordered the man to get on the ground. He pointed the gun at the man until the police arrived. After

the police arrived, the respondent gave the gun back to J.J. and she locked the gun in the safe.

"54. On March 16, 2021, the assistant city attorney filed an amended motion to terminate the respondent's deferred judgment agreement. In that motion, the assistant city attorney alleged that the respondent:

"a. failed to obtain a drug and alcohol evaluation, follow all recommendations, and provide proof of completion;

"b. was in possession of a gun on February 20, 2021; and

"c. failed to pay the fines and fees associated with the municipal court case.

"55. In March 2021, the respondent relapsed again.

"56. In late March 2021, the respondent suffered a debilitating panic attack and was hospitalized. While hospitalized, the respondent's treating physician changed the respondent's medication.

"57. In mid or late April 2021, the respondent relapsed again.

"58. On May 3, 2021, the respondent consumed alcoholic beverages. While intoxicated, the respondent argued with his wife and his 15-year old step-daughter. During the argument, the respondent repeatedly told his step-daughter that her father was a rapist and that her father raped her mother. The respondent stopped the child from entering a hallway leading to her bedroom by blocking a doorway. The respondent refused to move so the child could enter the hallway. J.J. intervened and told the child to take a different path to her bedroom. When J.J. intervened, the respondent used his elbow to hit J.J., striking her on her left cheek right below her left eye, leaving a bruise. The respondent's step-daughter observed the respondent strike J.J.'s face using his elbow. The Wichita police officers placed the respondent under arrest and charged him with domestic battery.

"59. In a supplemental response to the disciplinary complaints, the respondent described the battery on J.J. as follows, '[d]uring the argument in the hallway, I put my hands up in surrender, walked past my wife in the hallway, and my elbow inadvertently hit her cheek.' During the hearing on the formal complaint, the respondent testified that his elbow inadvertently struck J.J. in the face. Based on all the evidence before the hearing, the hearing panel concludes that the respondent's statement in his response and his testimony was misleading.

"60. While the respondent was being arrested, he demanded that the officers also arrest J.J., because days earlier J.J. struck the respondent. At that time, the respondent wanted J.J. to be arrested so her children, his step-children, would be placed in foster care. The officers investigated the respondent's allegation and learned that during an argument earlier in the week, the respondent engaged in similar berating conduct, telling his step-daughter that her father was a rapist.

"61. In mid-May 2021, the respondent began taking impulse control medication.

"62. On May 14, 2021, the assistant city attorney filed a second amended motion to terminate the respondent's deferred judgment agreement. In the third motion, the assistant city attorney alleged that the respondent:

"a. was charged with another criminal offense;

"b. failed to obtain a drug and alcohol evaluation, follow all recommendations, and provide proof of completion;

"c. was in possession of a gun on February 20, 2021; and

"d. failed to pay the fines and fees associated with the municipal court case.

"63. At the time of the hearing on the formal complaint, the respondent testified that he consumed his last drink of alcohol on May 21, 2021.

"64. On May 24, 2021, the respondent moved into a sober living community called Oxford House. There the respondent was required to follow the rules and submit to random testing. The respondent remained at Oxford house until the end of July 2021.

"65. Because the respondent failed to comply with the requirements of the deferred judgment agreement, the municipal court removed the respondent's case from the deferred judgment docket and proceeded with sentencing. Additionally, on September 9, 2021, the respondent entered a plea of no contest to the domestic battery charge stemming from the events of May 3, 2021, when the respondent struck J.J.'s face with his elbow. That same day, the municipal court sentenced the respondent to serve five days in jail followed by supervised probation. The municipal court ordered the respondent to report to jail to serve his sentence on September 23, 2021, the day after the hearing on the formal complaint. As part of his probation, the respondent is subject to random drug and alcohol testing.

"*Conclusions of Law*

"66. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 3.1 (meritorious claims), KRPC 3.4 (fairness to opposing party and counsel), KRPC 4.2 (communication with a represented person), KRPC 8.3 (reporting professional misconduct), KRPC 8.4(c) (engaging in professional misconduct that involves dishonesty), KRPC 8.4(d) (engaging in professional misconduct prejudicial to the administration of justice), KRPC 8.4(g) (engaging in professional misconduct that adversely reflects on the lawyer's fitness as a lawyer), and Rule 219 (reporting a criminal charge), as detailed below.

"67. During the hearing on the formal complaint, the disciplinary administrator withdrew the allegations that the respondent violated KRPC 4.1 (truthfulness in statements to others) and KRPC 4.3 (dealing with unrepresented persons).

"68. In the formal complaint, the disciplinary administrator also charged the respondent with KRPC 3.2 (expediting litigation), KRPC 4.4 (respect for rights of third persons), and Rule 210 (cooperation). In his answer, the respondent admitted

that he violated the Kansas Rules of Professional Conduct. During the prehearing conference, counsel for the respondent clarified that the respondent admitted to violating the rules alleged in the formal complaint. However, for the hearing panel to conclude that the respondent violated a rule, there must be clear and convincing evidence in the record to support the violation. The hearing panel concludes that the disciplinary administrator failed to establish these violations by clear and convincing evidence. Accordingly, the hearing panel hereby dismisses the allegations that the respondent violated KRPC 3.2 (expediting litigation), KRPC 4.4 (respect for rights of third persons), and Rule 210 (cooperation).

"KRPC 3.1

"69. Attorneys are prohibited from bringing or defending a proceeding unless there is a basis for doing so that is not frivolous. KRPC 3.1. Additionally, '[i]t is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the rules of professional conduct.' KRPC 8.4(a). In this case, when the respondent threatened to sue E.H. in small claims court and threatened her with a civil conversion suit, the respondent did not have a basis that was not frivolous. The hearing panel concludes that the respondent attempted to violate KRPC 3.1 through his threats to E.H.

"KRPC 3.4(c)

"70. Clearly, lawyers must comply with court orders. Specifically, KRPC 3.4(c) provides: '[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.' In this case, the respondent violated KRPC 3.4(c). Specifically, the respondent violated the order in the domestic case to pay child support. The district court entered judgment against the respondent in the amount of $7,833 in child support arrearage. The hearing panel concludes that the respondent violated KRPC 3.4(c).

"KRPC 4.2

"71. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order. KRPC 4.2. In this case, the respondent knew that E.H. was represented by counsel throughout the divorce. Despite that knowledge, on several occasions, during the time the respondent was representing himself, the respondent communicated with E.H. regarding the subject of the representation—the divorce. As such, the hearing panel concludes that the respondent violated KRPC 4.2.

"KRPC 8.3(a), KRPC 8.4(b), and Rule 219

"72. Attorneys are required to report misconduct. 'A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.' KRPC 8.3(a).

"73. Also, '[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or

fitness as a lawyer in other respects.' KRPC 8.4(b). Committing the crime of domestic battery reflects adversely on a lawyer's fitness as a lawyer. *See In re Angst*, 278 Kan. 500 (2004).

"74. Finally, Rule 219(c) provides, '[a]n attorney who has been charged with a reportable crime must notify the disciplinary administrator in writing of the charge and court of jurisdiction no later than 14 days after the charge is filed.' A reportable crime includes class A and B misdemeanors and offenses of comparable classification. Domestic battery in the Wichita Municipal Court is a misdemeanor and is an offense of comparable classification to a class B misdemeanor (first offense) and a class A misdemeanor (second or subsequent offense within the preceding five years). *See* Wichita Ordinance number 5.10.025 and K.S.A. 21-5414.

"75. In this case, the respondent failed to notify the disciplinary administrator that he had been charged with domestic battery for striking J.J.'s face with his elbow on May 3, 2021. (The rules in effect at the time he was charged with domestic battery for hitting the cell phone from E.H.'s hand did not require the respondent to report the domestic battery charge.) Thus, the hearing panel concludes that the respondent violated KRPC 8.3(a) and Rule 219 for failing to report that he had been charged with domestic battery in municipal court in May 2021.

"76. Further, the municipal court twice-convicted the respondent of domestic battery. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(b) by committing criminal acts that reflect adversely on his fitness as a lawyer.

"KRPC 8.4(c)

"77. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c). The respondent engaged in conduct involving dishonesty on several occasions:

"a. On September 3, 2019, while at the baseball practice, the respondent intentionally knocked E.H.'s mobile phone from her hand. At the time the respondent hit the phone, he falsely stated that it was an accident and that something he was holding fell out of his hand and the item knocked the phone from E.H.'s hand. At the hearing on the formal complaint, the respondent admitted that his statement—that something accidentally fell out of his hand, knocking the phone from E.H.'s hand—was dishonest.

"b. The respondent provided false information to Dr. Parker at the time the respondent underwent the psychological evaluation. According to the respondent's testimony on the formal complaint, the respondent lied to Dr. Parker when discussing his alcohol consumption.

"c. The respondent provided false information in his response to the initial complaint. In the respondent's December 2020 response, he falsely stated '[b]efore I went to treatment, I sought help from a psychologist, who diagnosed me with anxiety disorder and prescribed medication for me, which I still take.'

The respondent's psychologist did not prescribe medication for him, as psychologists do not have the authority to prescribe medication.

"d. On May 3, 2021, the respondent told the police officers that his wife punched him with a closed fist five times. Later, the respondent modified his statement that his wife punched him with a closed fist two times. However, the respondent now admits that his wife did not punch him with a close fist—rather she slapped him multiple times in an attempt to get the respondent to stop berating his step-daughter and telling his step-daughter that her father is a rapist.

"e. Also on May 3, 2021, the respondent told the police officers that when his elbow struck his wife's cheek it was inadvertent. The respondent repeated that version of the events in his response to the disciplinary administrator's office and his testimony before the hearing panel. After considering all the evidence including the video recorded interviews of J.J. and the respondent's step-daughter and considering the respondent's testimony that he had been drinking that evening, the hearing panel concludes that the respondent engaged in dishonest conduct when he characterized the battery on J.J. as inadvertent.

As such, the hearing panel concludes that the respondent repeatedly engaged in dishonest conduct, in violation of KRPC 8.4(c).

"KRPC 8.4(d)

"78. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d). The respondent engaged in conduct that was prejudicial to the administration of justice when he inundated E.H. with text messages and refused to communicate with E.H. by OFW. As a result of the respondent's refusal to communicate with E.H. through OFW, E.H.'s attorney filed a motion to limit communication, the district court heard the motion, and the district court issued an agreed order limiting the communication between the respondent and E.H. Additionally, the respondent engaged in conduct that was prejudicial to the administration of justice when he filed a motion to modify the protection from abuse order in September 2020 and rather than serve the motion on E.H.'s attorney, the respondent had E.H. served personally. E.H.'s attorney did not learn about the motion until just a few days before the scheduled hearing on the motion. As such, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"KRPC 8.4(g)

"79. 'It is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4(g). The respondent repeatedly engaged in conduct that adversely reflects on his fitness to practice law, when he:

"a. consumed alcohol before work and during lunch when employed as an attorney engaged in the practice of law;

"b. refused to communicate with E.H. through OFW;

"c. inundated E.H. with unnecessary text messages;

"d. contacted E.H.'s attorney at times when he was represented by counsel;

"e. refused to allow two of E.H.'s family members to pick up the children following parenting time;

"f. threatened and harassed the parents and coaches of his son's baseball team to such a degree that the coach indicated that the child would be removed from the team if the respondent's conduct continued;

"g. sent several email messages to E.H.'s attorney asking the attorney to agree that a week consisted of seven 24 hour periods of time;

"h. accused E.H.'s attorney of an ethics violation for allowing E.H.'s parents to attend an attorney meeting;

"i. made unreasonable demands during the divorce, including insisting that E.H. agree to include language in the divorce decree that neither E.H. nor the respondent would be permitted to remarry anyone but each other;

"j. followed, harassed, humiliated, and publicly disparaged E.H. during a child's soccer game and removed their child from E.H.'s lap because it was his parenting time;

"k. followed L.H. at the baseball field, called L.H. profane names, disparaged L.H.'s wife, stated that he hoped L.H. had deep pockets, leaned against L.H. as he sat in a lawn chair, repeatedly whispered demeaning comments to L.H., and touched L.H.'s ear with his lips when whispering demeaning comments to L.H.;

"l. demeaned E.H. at the baseball field, leaned against E.H. and her son's legs, knocked the mobile phone from her hand, stated that he hoped E.H. had deep pockets because 'this is a $20,000 project,' humiliated E.H. and their children by his harassing and disturbing comments, and frightened E.H., her children, and the respondent's step-children;

"m. failed to comply with the terms of the deferred judgment agreement;

"n. berated his 15-year old step-daughter on multiple occasions, blocked her from using a hallway to access her bedroom, repeatedly told his step-daughter that her father is a rapist, and struck J.J. in the face with his elbow;

"o. demanded that his wife be arrested so that his children would be placed in foster care; and

"p. failed to timely pay his child support, resulting in a judgment of arrearage in the amount of $7,833.

Thus, the hearing panel concludes that the respondent repeatedly violated KRPC 8.4(g).

"*American Bar Association*
*Standards for Imposing Lawyer Sanctions*

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

"81. *Duty Violated*. The respondent violated his duty to the public and the legal profession to maintain his personal integrity. The respondent also violated

his duty to the legal system to refrain from engaging in conduct that is prejudicial to the administration of justice.

"82. *Mental State*. The respondent knowingly violated his duties.

"83. *Injury*. As a result of the respondent's misconduct, the respondent caused actual serious injury to E.H., J.J., and their children as well as the legal system and the legal profession.

"Aggravating and Mitigating Factors

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

"85. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on one occasion. In 2014, the respondent entered the attorney diversion program for violating KRPC 7.3 (solicitation of clients). In that case, the respondent learned of a lawsuit by looking at PACER, the federal court system for Public Access to Court Electronic Records. The respondent contacted the defendant in the case and forwarded a copy of the petition which had been filed in the case. The defendant was represented by counsel at the time. The respondent successfully completed the attorney diversion program.

"86. *Dishonest or Selfish Motive*. While there is no evidence that the respondent was motivated by dishonesty, there was evidence that the respondent's misconduct was motivated by selfishness. The respondent's misconduct involved his attempts to control E.H., their children, the divorce proceedings, the language of the divorce decree, E.H.'s future, J.J., and her children. The respondent's need to control is based on selfishness. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by selfishness.

"87. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct. When the respondent struck the cell phone while in E.H.'s hand, the respondent committed the crime of battery. Also, when the respondent struck J.J. with his elbow, leaving a bruise, he committed the crime of battery. Further, over an extended period of time, the respondent engaged in obstructionist conduct in the divorce case and continually sent text messages to E.H. that were demeaning and unnecessary.

"88. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 3.4 (fairness to opposing party and counsel), KRPC 4.2 (communication with represented persons), KRPC 8.3 (reporting professional misconduct), KRPC 8.4 (professional misconduct), and Rule 219 (reporting a criminal charge). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"89. *Submission of False Evidence, False Statements, or Other Deceptive Practices During the Disciplinary Process*. In the respondent's responses to the initial complaints, the respondent included inaccurate information. At the hearing on the formal complaint, the respondent refused to acknowledge that when he struck J.J. with his elbow it was anything more than inadvertence. Additionally, the following exchange occurred between the respondent and Ms. Selzler Lippert:

'Q. [By Ms. Selzler Lippert] So this motion to terminate filed September 3rd was just a mistake?'

'A. [By the respondent] Yes.'

'Q. And you are describing it here today as a mistake?'

'A. Yes. 'Um, Ms.—Ms. Schrock, the prosecutor, has not had any intention of terminating the deferred judgment.'

'Q. Well, we don't have any testimony from her in that regard, so are you—do you have some document that would indicate that?'

'A. No. Simply the reality that the deferred judgment wasn't terminated and that it continued and I accomplished the tasks.'

However, on September 9, 2021, the deferred judgment agreement was terminated, the municipal court found the respondent guilty of domestic battery, and the court sentenced the respondent that same day. The respondent's testimony that he completed the deferred judgment was deceptive. *But see* Transcript, p. 77. (The respondent admitted that the deferred judgment was not completed.) The hearing panel is troubled by the respondent's attempt to minimize his conduct through deceptive testimony.

"90. *Vulnerability of Victim*. The respondent's children, the respondent's step-children, E.H., L.H., and J.J. were vulnerable to the respondent's misconduct.

"91. *Illegal Conduct, Including that Involving the Use of Controlled Substances.* The municipal court convicted the respondent twice of domestic battery. The respondent's criminal conduct is a significant aggravating factor.

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

"93. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct.* The respondent suffers from alcoholism and anxiety. Because of the respondent's anxiety, he was voluntarily hospitalized in April 2021. Further, the respondent testified in great detail regarding his alcohol addiction. It is clear that the respondent's alcoholism directly contributed to his misconduct. The respondent's participation in psychological treatment and period of sobriety further mitigates the misconduct.

"94. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent cooperated with the disciplinary process by providing written responses to the initial complaints. Additionally, in the respondent's answer, he admitted the facts that gave rise to the violations. The mitigation related to this factor is

reduced by the respondent's failure to provide accurate information in the written responses.

"95. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends, and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar of Wichita, Kansas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by several letters received by the hearing panel.

"96. *Imposition of Other Penalties or Sanctions*. The respondent has experienced other sanctions for his . . . conduct. The respondent was convicted of two counts of domestic battery. As a result of his convictions, the municipal court ordered the respondent to serve five days in jail followed by supervised probation.

"97. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct.

"98. *Remoteness of Prior Offenses.* The misconduct which gave rise to the respondent's participation in the attorney diversion program in 2014 is remote in time and character to the misconduct in this case.

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

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

'6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.'

'6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.'

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

"*Recommendation of the Parties*

"100. The disciplinary administrator recommended that the respondent be suspended from the practice of law for one year. The disciplinary administrator further recommended that the respondent serve six months of the suspension and then be placed on probation for three years.

"101. Counsel for the respondent recommended that the respondent be indefinitely suspended from the practice of law, but that the imposition of the suspension be suspended and the respondent be placed on probation for a period of three years under his proposed plan.

"*Consideration of Probation*

"102. When a respondent requests probation, the hearing panel is required to consider Rule 227, which provides:

'(d) Restrictions on Recommendation of Probation. A hearing panel may not recommend that the respondent be placed on probation unless the following requirements are met:

'(1) the respondent complies with subsections (a) and (c) and the proposed probation plan satisfies the requirements in subsection (b);

'(2) the misconduct can be corrected by probation; and

'(3) placing the respondent on probation is in the best interests of the legal profession and the public.'

"103. The respondent developed a workable plan of probation. However, the respondent's plan of probation was not substantial and detailed enough to resolve the issues in this case. To ensure that the respondent does not repeat the misconduct, additional safeguards need to be included in the plan of probation.

"104. The respondent provided a copy of the proposed plan of probation to the disciplinary administrator and each member of the hearing panel more than 14 days before the hearing on the formal complaint. The respondent put the proposed plan of probation into effect before the hearing on the formal complaint by complying with each of the terms and conditions of the probation plan.

"105. Whether the misconduct, in this case, can be corrected by probation is a difficult question to answer. The respondent's misconduct involved criminal conduct, failure to comply with court orders, conduct that prejudiced justice, dishonest conduct, and conduct that adversely reflects on his fitness as a lawyer. Certainly, safeguards can be put into place to address some of the respondent's misconduct. However, some of the misconduct, in this case, cannot be corrected by probation. Specifically, dishonest conduct cannot be effectively supervised. *See In re Stockwell*, 296 Kan. 860, 868, 295 P.3d 572 (2013) ('Moreover, this court is generally reluctant to grant probation where the misconduct involves fraud or dishonesty because supervision, even the most diligent, often cannot effectively guard against dishonest acts.').

"106. Finally, placing the respondent directly on probation is not in the best interests of the legal profession and the citizens of the State of Kansas.

"*Discussion*

"107. The hearing panel is disturbed by the respondent's treatment of his children, his step-children, E.H., L.H., and J.J. The hearing panel concurs in the district court's comments regarding the respondent's severe emotional abuse of his family members.

"108. The hearing panel is troubled by the respondent's violation of court orders. Compliance with orders of the court is a fundamental necessity.

"109. Finally, the hearing panel is also bothered by the portions of the respondent's testimony during the hearing on the formal complaint. The hearing panel concludes that

the respondent minimized his conduct—he did not fully admit to misconduct unless the misconduct was recorded.

"110. On the other hand, the hearing panel is encouraged by the strides that the respondent has made. As of the hearing date, the respondent had been sober since May 21, 2021. The respondent acknowledged the wrongful nature of his misconduct. He demonstrated a genuine desire to not repeat his misconduct.

"111. Because of the serious nature of the respondent's misconduct and because the hearing panel may not recommend probation under Rule 227(d), the hearing panel concludes that a period of suspension is warranted in this case. The hearing panel hopes that the respondent was honest in his statement that he would accept the discipline imposed with gratitude. The hearing panel is hopeful that the respondent will use this time to continue to develop the skills and tools he needs to maintain his sobriety and civility.

"*Recommendation of the Hearing Panel*

"112. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the Court suspend the respondent's license to practice law for two years. The hearing panel further recommends that after the respondent serves six months of the suspension, the Court place the respondent on probation for three years, subject to the terms and conditions in the respondent's proposed plan of probation and also subject to the following additional terms and conditions:

"a. The respondent will not consume any alcoholic or cereal malt beverages.

"b. The respondent will extend his KALAP monitoring agreement to continue throughout the respondent's term of probation. The respondent will submit to random urinalysis tests for alcoholic and cereal malt beverages as directed by his KALAP monitor or by KALAP staff.

"c. The respondent will not violate any orders of any court.

"d. The respondent will meet with the practice supervisor in person on a monthly basis. In addition, the practice supervisor will also have unscheduled meetings with the respondent from time to time.

"e. The respondent will successfully complete the criminal probation through the municipal court.

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

## DISCUSSION

In a disciplinary proceeding, we consider the evidence and the disciplinary panel's findings of fact to determine whether sufficient evidence justifies those findings. We then consider sufficiently supported findings and arguments of the parties to determine whether violations of KRPC occurred and, if they did, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011);

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

Respondent had adequate notice of the formal complaint, the hearing before the panel, and the hearing before this court. The respondent filed an answer to the complaint and had the opportunity to present evidence to the panel. He provided a detailed probation plan to the Disciplinary Administrator and each member of the hearing panel prior to the hearing on the formal complaint. The respondent had the opportunity to present arguments to the panel and to this court. He also had the opportunity to take exception to the hearing panel's findings and conclusions, as set forth in its final hearing report. The respondent chose to take no exceptions.

With no exceptions before us, the panel's factual findings and conclusions of law are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2022 Kan. S. Ct. R. at 287). We find those facts establish by clear and convincing evidence the charged misconduct in violation of KRPC 3.1 (2022 Kan. S. Ct. R. at 390) (meritorious claims); KRPC 3.4 (2022 Kan. S. Ct. R. at 395) (fairness to opposing party and counsel); KRPC 4.2 (2022 Kan. S. Ct. R. at 404) (communication with a represented person); KRPC 8.3 (2022 Kan. S. Ct. R. at 433) (reporting professional misconduct); KRPC 8.4(c) (2022 Kan. S. Ct. R. at 434) (engaging in professional misconduct that involves dishonesty); KRPC 8.4(d) (2022 Kan. S. Ct. R. at 434) (engaging in professional misconduct prejudicial to the administration of justice); KRPC 8.4(g) (2022 Kan. S. Ct. R. at 434) (engaging in professional misconduct that adversely reflects on the lawyer's fitness as a lawyer); and Supreme Court Rule 219 (2022 Kan. S. Ct. R. at 273) (reporting a criminal charge). The evidence supports the panel's conclusions of law. We thus adopt the panel's findings of fact and conclusions of law.

The only remaining issue is to decide the appropriate discipline for these violations. This court is not bound by the recommendations made by the Disciplinary Administrator or the hearing panel. See *In re Biscanin*, 305 Kan. 1212, 1229, 390 P.3d 886 (2017).

During oral arguments, the disciplinary attorney advised us that respondent has not complied with Supreme Court Rule 227(f) (2022

Kan. S. Ct. R. at 283), which requires respondent to file an affidavit of compliance with the terms of his probation plan. No such affidavit was filed. In addition, respondent was to provide reports to the Disciplinary Administrator, but the Disciplinary Administrator's office did not receive any. Aside from the absence of paperwork, both parties gave us information about the abrupt termination of services from the respondent's therapist, but the parties' only common point of agreement was that the services were terminated. There was no agreement as to *why* the services were terminated. Since we are not a fact-finding court, we take no position concerning the reasons for the therapist's absence and consequent inability to provide therapy to the respondent and reports to the Disciplinary Administrator. Regardless, the current absence of therapy—as contemplated by the respondent's probation plan—is troubling, without even considering efforts to replace the absent therapist. The plan's requirement that respondent receive intense therapy implies the respondent *needs* therapy and we know at the time of the hearing he was not getting it.

Ultimately, the Disciplinary Administrator's office recommends the sanction of suspension for one year, plus the requirement of a reinstatement hearing before respondent is again allowed to practice law.

The respondent agrees to a reinstatement hearing, but recommends only a six-month suspension, which would allow him to keep his current position as a paralegal with a law firm (with the potential to regain his attorney status upon reinstatement). After six months, respondent requests the ability to petition our court for reinstatement, knowing that any hearing on the petition will take some time to be resolved. Respondent would be responsible to show us why he should be allowed reinstatement to practice law.

In most attorney discipline cases, our goals are not only to punish ethical violations and protect the public, although those goals must always be paramount. See *In re Jones*, 252 Kan. 236, 241, 843 P.2d 709 (1992). We also endeavor to use this process, if possible, to help salvage careers. Sometimes we cannot. We recognize that dependency and mental health issues are different than criminal activity and should be treated differently. We see those issues here, but we also see ethical violations which caused personal and distressing harm, even abuse—abuse which resulted in two criminal convictions for domestic battery

against two separate victims. We do not take these circumstances lightly.

Considering the findings, conclusions, mitigating circumstances, and aggravating circumstances, we hold that Jason M. Janoski shall be suspended from the practice of law in the state of Kansas for a period of one year, effective on the filing of this opinion, though a minority of the court would impose a lesser sanction. After respondent has served 12 months' suspension, the respondent will be allowed to petition for reinstatement to the practice of law. Whether we grant a hearing on that petition will, of course, depend on what the respondent presents in support. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator.

## CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Jason M. Janoski is suspended for one year from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) for violations of KRPC 3.1, KRPC 3.4, KRPC 4.2, KRPC 8.3, KRPC 8.4(c), KRPC 8.4(d), KRPC 8.4(g), and Supreme Court Rule 219.

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292).

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

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

*In re* N.E.

No. 123,599

# In the Interest of N.E., a Minor Child.

(516 P.3d 586)

SYLLABUS BY THE COURT

1. JURISDICTION—*Appellate Courts Have Jurisdiction Provided by Law—Appellate Review*. Appellate courts have only the jurisdiction provided by law. That means appellate courts lack jurisdiction to review a district court's decision unless a party has appealed in the time and manner specified by law. Whether jurisdiction exists is a question of law subject to unlimited review.

2. PARENT AND CHILD—*Revised Kansas Code for Care of Children—Appellate Jurisdiction under Code—Limits to Appealable Orders by Statute.* K.S.A. 38-2273(a) governs appellate jurisdiction under the Revised Kansas Code for the Care of Children, K.S.A. 38-2201 et seq. That statute limits appealable orders to any order of temporary custody, adjudication, disposition, finding of unfitness, or termination of parental rights. An order that does not fit within these five categories is not appealable.

3 SAME—*Appeals under K.S.A. 38-2273(a)—Thirty Days to Appeal District Court Judgment.* Appeals under K.S.A. 38-2273(a) must be brought within 30 days of the district court entering judgment.

4. SAME—*Revised Kansas Code for Care of Children—Statutory Differences between "Custody" and "Placement."* The Revised Kansas Code for the Care of Children distinguishes between "custody" and "placement." Orders that address the custody of a child during the dispositional phase of a child-in-need-of-care proceeding are dispositional orders, which are appealable under K.S.A. 38-2273(a). Orders during the dispositional phase that address only the placement of the child are not appealable under K.S.A. 38-2273(a).

5. SAME—*Revised Kansas Code for Care of Children—Framework to Establish Permanency in Child's Placement—Appellate Review.* The Revised Kansas Code for Care of Children establishes a framework of sequential steps towards permanency in the child's placement. An order terminating parental rights is the last appealable order under K.S.A. 38-2273(a). Post-termination orders that address custody are not dispositional orders and are not subject to appellate review.

6. APPEAL AND ERROR—*Issues Not Raised Before District Court Cannot be Raised on Appeal—Three Exceptions to Preservation Rule.* Generally, issues not raised before the district court cannot be raised on appeal. But this preservation rule is prudential, and appellate courts have recognized three notable exceptions to the rule. To satisfy the preservation rule, a party must either provide a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on in the district court, or if the

issue was not raised below, there must be an explanation why the issue is properly before the court. A party who ignores this requirement is considered to have waived and abandoned the issue on appeal.

7. COURTS—*Doctrine of Stare Decisis—Ensures Continuing Legitimacy of Judicial Review*. The doctrine of stare decisis provides that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised. The application of stare decisis ensures stability and continuity—showing a continuing legitimacy of judicial review. Thus, courts do not lightly disapprove of precedent. While stare decisis is not an inexorable command, this court endeavors to adhere to the principle unless clearly convinced that a rule of law established in its earlier cases was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.

Review of the judgment of the Court of Appeals in an unpublished opinion filed November 5, 2021. Appeal from Reno District Court; PATRICIA MACKE DICK, judge. Opinion filed September 9, 2022. Judgment of the Court of Appeals dismissing the appeal is affirmed.

*Mitchell F. Engel*, pro hac vice, of Shook, Hardy & Bacon, LLP, of Kansas City, Missouri, argued the cause, and *Vanessa Dittman*, pro hac vice, and *Abilgail Lawson*, pro hac vice, of the same firm, and *Travis J. Ternes*, of Watkins Calcara, Chtd., of Great Bend, were with him on the briefs for appellant maternal grandmother.

*Jennifer L. Harper*, assistant district attorney, argued the cause, and *Thomas Stanton*, district attorney, was with her on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: N.E. was four months old when the State took her into protective custody and placed her with a foster family. We refer to her by initials in this opinion because she is a minor. See Kansas Supreme Court Rule 7.043 (2022 Kan. S. Ct. R. at 50). Over the next year and a half, the district court held child-in-need-of-care (CINC) proceedings under the Revised Kansas Code for the Care of Children (Revised Code), K.S.A. 38-2201 et seq. During those proceedings, N.E.'s grandmother sought custody of N.E. When the district court denied Grandmother's request, she appealed to a panel of the Court of Appeals, which dismissed the appeal for lack of jurisdiction.

We granted Grandmother's petition to review the panel's jurisdictional holding. The Revised Code's appellate jurisdiction

statute, K.S.A. 38-2273(a), limits which district court decisions may be appealed in a CINC proceeding. That jurisdictional statute, as construed under our precedent in *In re N.A.C.*, 299 Kan. 1100, 329 P.3d 458 (2014), bars appellate review of each of the district court orders from which Grandmother has appealed. The doctrine of stare decisis warrants our continued adherence to *In re N.A.C.* Thus, we affirm the judgment of the Court of Appeals and dismiss the appeal for lack of jurisdiction.

## FACTS AND PROCEDURAL BACKGROUND

The circumstances that led to the Department for Children and Families (DCF) taking custody of N.E. are tragic, but they are not the focus of this appeal. To answer the jurisdictional question, we concentrate on the district court proceedings under the Revised Code, which the Legislature enacted in 2006 to address the custody and care of a minor. See L. 2006, ch. 200, § 1. Specifically, we focus on those facts relevant to, and proceedings conducted under, the portion of the Revised Code that applies when a young child is taken into protective custody—the CINC proceedings.

We do not ordinarily discuss the legal framework in this section of the opinion. But here, a general understanding of the statutory scheme governing CINC proceedings is important to place the facts and district court proceedings in their proper context and to fully appreciate their significance to the jurisdictional question raised in this appeal.

CINC proceedings unfold in a specific, temporal order. See 299 Kan. at 1110-15. First, during the temporary-custody phase, a district court decides whether it should temporarily place the child in the custody of specific persons or entities listed by statute, such as the Secretary of DCF. See K.S.A. 38-2243(f), (g)(1). Second, during the adjudication phase, the district court determines whether the child meets one or more statutory definitions of a "child in need of care." See K.S.A. 38-2202(d)(1)-(14) (defining a child in need of care); K.S.A. 38-2251 (providing for adjudication). Third, during the dispositional phase, the district court enters orders that address the custody and case planning of a child adjudicated as a "child in need of care." K.S.A. 38-2253(a). Fourth, during the termination phase, the district court decides

whether a parent is "unfit" under several statutory factors and whether it is in the best interests of the child to terminate parental rights. See K.S.A. 38-2269(a)-(g)(1). Finally, if the court decides to terminate parental rights, then during the post-termination phase, the district court facilitates placement of the child in a permanent family setting, whether through adoption or the appointment of a permanent custodian. See K.S.A. 38-2269(g)(2) (providing options for district court after termination of parental rights).

With one important exception noted below, N.E.'s case followed the typical progression of CINC proceedings under the statutory framework described above. Those proceedings began in August 2019, when the State took protective custody of N.E., and they ended in January 2021, when Grandmother appealed and N.E. was adopted by her foster family.

*Temporary Custody Phase*

During the temporary-custody phase in August 2019, the district court temporarily placed N.E. in the custody of DCF, which immediately placed N.E. with a foster family. For reasons that will become important later, we note that the temporary custody order placed conditions on DCF's ability to make a "kinship care placement." Under the Revised Code, a "placement" is the decision by the individual or agency having custody of the child about "where and with whom the child will live." K.S.A. 38-2202(z). A "kinship care placement," then, is a placement "in the home of an adult with whom the child or the child's parent already has close emotional ties." K.S.A. 38-2202(q). The district court imposed two conditions on such placements. First, it ordered that DCF could make no short-term kinship placements without the approval of the guardian ad litem, the court-appointed attorney who represents the child's interests in a CINC proceeding. See K.S.A. 38-2205(a) (providing for appointment of attorney for the child in a CINC proceeding). Second, the court ordered that DCF could make no long-term kinship placements unless a "kinship assessment" had been completed and the court had scheduled a review hearing.

Grandmother appeared in person at the temporary custody hearing. And the district court provided "the parents, grandparents

and/or interested parties, who were present at [the] hearing . . . with informational materials pertaining to their respective rights and responsibilities in connection with the proceedings." But nothing in the record suggests that Grandmother objected to the placement limitations in the temporary custody order at that time. Nor did Grandmother appeal from the temporary custody order. See K.S.A. 38-2273(a) (permitting the appeal of "any order of temporary custody").

*Adjudication Phase*

During the adjudication phase in September 2019, the district court adjudicated N.E. as a child in need of care. In its September 19th Journal Entry and Orders of Adjudication and Disposition, the district court found that N.E. met three of the statutory definitions of a child in need of care. The district court also specified that its previous findings and orders would remain in effect. Neither parent contested the district court's adjudication of N.E. as a child in need of care. Grandmother did not appear at the adjudication hearing. And nothing in the record suggests that she objected at that time to the adjudication of N.E. as a child in need of care or to the district court's continuation of its previous findings and orders. As with the temporary custody order, Grandmother did not appeal the order of adjudication. See K.S.A. 38-2273(a) (permitting the appeal of an adjudication order).

*Dispositional Phase*

The dispositional phase began when the district court ordered N.E. to remain in the custody of DCF as part of its September 19, 2019 Orders of Adjudication and Disposition. As noted, DCF had exercised its custodial authority by placing N.E. with a foster family. But six to nine months into the dispositional phase, two events added complexity to these CINC proceedings. First, in March 2020, the COVID-19 pandemic impacted the way courts could safely conduct judicial proceedings in Kansas courtrooms. In response, our court entered administrative orders suspending "statutory time standards or deadlines applying to the conduct or processing of judicial proceedings." See, e.g., Administrative Order

2020-PR-016 (imposing statewide restrictions on judiciary operations effective March 18, 2020). Second, in May 2020, Grandmother engaged counsel and became significantly more involved in the proceedings.

*Grandmother Requests Placement*

The order and timing of the later proceedings is important to our jurisdictional analysis. In March 2020, a supervisor at St. Francis Ministries, the social-service agency managing N.E.'s case on behalf of DCF, informed the district court that Grandmother wanted DCF to place N.E. in Grandmother's home, rather than with the foster family. After gathering input from the parties, the district court issued an April 30th email ruling finding that placement with Grandmother was not in N.E.'s best interests.

*Grandmother Moves for Custody and Other Procedural Developments*

On May 22, 2020, Grandmother's counsel filed a motion for interested party status and custody of N.E. In the motion, Grandmother noted that a permanency hearing had been scheduled for June 4, and that neither permanent placement, termination of parental rights, nor adoption had yet been completed. Thus, Grandmother argued that she had a right to be heard as an interested party seeking custody and placement of N.E. Grandmother did not request a stay of, or otherwise object to, the court's setting of the permanency hearing for June 4.

While Grandmother's custody motion was pending, the district court conducted a hearing on June 4, 2020, to evaluate progress towards a permanent placement of N.E. Grandmother appeared by counsel at the permanency hearing. After the hearing, the district court entered its June 15th Permanency Hearing Journal Entry and Order. There, the district court found that reintegration with N.E.'s parents was not a viable permanency objective and adoption might be in N.E.'s best interests. Thus, the district court ordered the State to file a pleading to terminate parental rights, and it determined that a new permanency plan should be submitted to achieve the goal of adoption. The district court also found that N.E.'s needs were being adequately met in her current

placement with the foster parents and such placement continued to be in N.E.'s best interests. Based on these findings, on June 17, the State moved to find N.E.'s parents unfit and to terminate their parental rights. See K.S.A. 38-2264(i) (directing the State to move to terminate parental rights within 30 days of district court's finding on reintegration).

Meanwhile, two other significant developments occurred. First, the district court entered an order on June 11, 2020, memorializing the finding from its April 30th email ruling that placement with Grandmother would not be in N.E.'s best interests. Grandmother would later appeal from this June 11th placement order. Second, on June 19, the district court entered a scheduling order setting Grandmother's custody motion for an evidentiary hearing on August 4. And three days later, on June 22, the district court set the State's motion to terminate parental rights for hearing on August 20.

But things did not go as scheduled. The day before the hearing on Grandmother's custody motion, the State's attorney asked for a continuance because she was quarantined pending the results of a COVID-19 test. The district court reluctantly rescheduled the hearing for September 8, 2020. Nothing in the record suggests Grandmother objected to this continuance or the new date set for the evidentiary hearing on her custody motion.

*Termination Phase*

Though Grandmother's custody motion remained pending, the court moved on to the termination phase of the CINC proceedings and conducted an evidentiary hearing on the State's motion to terminate parental rights on August 20, 2020. At the hearing, N.E.'s father relinquished his parental rights, and after making the statutorily required findings, the district court terminated the parental rights of N.E.'s mother. The district court findings and conclusions were memorialized in the August 28th Finding of Unfitness and Order Terminating Parental Rights. There, the district court terminated parental rights and ordered N.E. to remain in DCF custody for adoption proceedings. See K.S.A. 38-2270(a)(1) (permitting district court to place child with DCF for adoption if adoption is viable after the termination of parental rights).

Grandmother appeared in person and through counsel at the August 20th termination hearing. But the transcript of this hearing is not included in the record. Thus, there is no evidence to suggest Grandmother objected to the district court's decision to proceed with the termination hearing on August 20 while her custody motion was still pending. Nor did she move to continue the August 20th termination hearing. Likewise, there is no evidence to suggest Grandmother objected in district court to the State's motion to terminate parental rights or to any of the findings, conclusions, or orders memorialized in the August 28th Findings of Unfitness and Order Terminating Parental Rights. Even so, Grandmother would later appeal from this order.

*Post-Termination Phase*

After the district court terminated parental rights, N.E.'s CINC proceedings moved to the post-termination phase. At the end of the termination hearing on August 20, 2020, the district court scheduled a permanency hearing for September 3. But on August 27, Grandmother moved to continue that permanency hearing to September 8, the date set for the evidentiary hearing on her custody motion. By scheduling "the matters to be heard at the same time," Grandmother argued the continuance would promote judicial economy. Grandmother also argued that if the district court made a permanency decision before ruling on her custody motion, it could render her motion moot, depriving Grandmother "of her day in Court" and the opportunity to be given "substantial consideration as a placement option" for N.E. The district court agreed to continue the permanency hearing and to conduct a consolidated hearing on permanency and Grandmother's custody motion on September 8.

But the COVID-19 pandemic continued to impact the post-termination phase of the CINC proceedings. On September 4, 2020, the State moved to continue the consolidated hearing on permanency and Grandmother's custody motion because one of the State's witnesses was in quarantine. In its motion, the State confirmed that neither the guardian ad litem nor Grandmother objected to the requested continuance. The district court granted the State's motion and reset the consolidated hearing for October 9.

On October 9, 2020, the district court conducted an evidentiary hearing on Grandmother's custody motion. But the district court did not hear from all interested parties because counsel for the foster parents was in quarantine and unable to attend. Thus, the district court took Grandmother's custody motion under advisement and continued the permanency hearing to November 13. But as the November hearing approached, foster parents moved for a continuance because their expert witness was unavailable and out of state. Counsel for foster parents explained that her recent COVID-19-related illness had prevented her from securing the witness' availability and attendance for the November 13th hearing. The district court found good cause to continue the consolidated hearing both because "grandmother's attorney is ill and a witness for the foster parents is unavailable." The district court reset the hearing for December 18.

Grandmother filed a letter to the district court on December 3, 2020, requesting a ruling on her motion for interested party status and custody of N.E. On December 10, the district court ruled on that request in its journal entry clarifying findings. There, the district court determined that Grandmother had interested party status by law and that no order was needed to memorialize this status. The district court then found that it had rejected Grandmother's request for placement of N.E. in its June 11th order. The district court had agreed to hear more evidence at the October 9th hearing on Grandmother's custody motion. But after the October 9th hearing, the district court had taken Grandmother's custody motion under advisement, rather than ruling on the merits, because counsel for foster parents could not attend because of COVID-19. The district court found that it was appropriate to take Grandmother's motion under advisement until all parties had the chance to be heard and "a complete ruling can be made." And it concluded that any timelines governing the adjudication of motions taken under advisement had been suspended by our court's COVID-19 orders.

The district court conducted the evidentiary hearing on permanency and custody on December 18, 2020, as scheduled. All parties and interested parties, including foster parents and Grandmother, appeared in person or through counsel. On December 22, the district court entered its Journal Entry of Permanency Hearing for Child in Need of Care Post-Termination. In this journal entry, the district court

found that adequate progress toward the permanency goal of adoption had not occurred and that placement with foster parents was in the best interests of N.E. The district court terminated DCF custody and placed N.E. in the custody of foster parents for adoption. Grandmother would later appeal this order.

The district court entered its journal entry addressing findings under advisement on January 6, 2021. There, the district court again found that Grandmother had "filed a motion for interested party status and a request for change in custody" on May 22, 2020. And while the court had denied Grandmother's request for placement in its June 11th order, it had agreed to hear more evidence on the custody request at the hearing on Grandmother's custody motion in October. But because "counsel for the foster parents was quarantined and unable to be present" at the October evidentiary hearing, the court decided to take the motion under advisement and "not enter further orders until after the permanency hearing scheduled for December 18, 2020[,] at which time the foster parents would have an opportunity to express their intentions and desires to the court." Based on these findings, the district court ruled that all matters taken under advisement had been resolved in the December 22, 2020 journal entry finding that reasonable efforts toward permanency had not been achieved and that changing custody from DCF to foster parents was in N.E.'s best interests. Given this journal entry, the district court found that all matters taken under advisement were moot. Grandmother would later appeal this order.

On the day the district court filed its January 6, 2021 journal entry, the foster parents adopted N.E. in a separate court action in Reno County District Court. It is unclear from the record whether the same district court judge presided over that action. Two days later, on January 8, the district court entered a final order terminating its jurisdiction over the case under K.S.A. 38-2270(c) ("the court's jurisdiction over the child shall cease" when an adoption decree is filed). So ended the district court proceedings in this case.

*Grandmother Appeals*

Five days after the district court terminated jurisdiction, Grandmother appealed to a panel of the Court of Appeals, asking it to vacate N.E.'s adoption, remand the matter for assignment of a new district court judge, and transfer custody of N.E. back to

DCF. Grandmother alleged that the district court had committed four errors: (1) it disregarded this state's "familial preference doctrine" and the "substantial consideration" statutorily afforded to grandparents in CINC proceedings; (2) it lacked authority under the Revised Code to limit kinship placements; (3) it rejected Grandmother's petition for custody based on improper, inadmissible, and inaccurate information; and (4) it had not adequately considered what was in N.E.'s best interests, as the Revised Code required.

Perhaps anticipating questions about appellate jurisdiction, Grandmother opened her appellate brief by identifying the four court orders from which she appealed and arguing why the Revised Code granted appellate courts subject matter jurisdiction over each of these orders. As noted, those four orders included: (1) the June 2020 order memorializing the placement findings set forth in the district court's April 2020 email ruling; (2) the August 2020 order terminating parental rights; (3) the December 2020 journal entry memorializing its post-termination permanency findings and conclusions; and (4) the January 2021 journal entry clarifying that the December 2020 journal entry had resolved all matters the district court had taken under advisement.

The panel was not convinced. It dismissed Grandmother's appeal for lack of jurisdiction after holding that none of the orders were appealable under K.S.A. 38-2273(a). *In re N.E.*, No. 123,599, 2021 WL 5144521, at *9 (Kan. App. 2021) (unpublished opinion). Given that outcome, the panel refrained from addressing the merits of Grandmother's appeal. See *In re Estate of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151 (2020) (a court that dismisses for lack of jurisdiction should not opine on the merits).

Grandmother then petitioned our court for review. We granted review of the panel's jurisdictional holding.

## ANALYSIS

The task before us is narrow: we must decide whether the panel erred in concluding that Kansas appellate courts lack jurisdiction over Grandmother's appeal. Given that limited scope, we will not address Grandmother's substantive critiques of the district court's decisions.

*I. Legal Framework and Standard of Review*

Appellate courts have only the jurisdiction provided by law. *Williams v. Lawton*, 288 Kan. 768, 778, 207 P.3d 1027 (2009). CINC proceedings are civil, and appellate jurisdiction in civil cases is mainly defined by statute. See K.S.A. 38-2201(a); *Wiechman v. Huddleston*, 304 Kan. 80, Syl. ¶ 1, 370 P.3d 1194 (2016). That means appellate courts lack jurisdiction to review a district court order unless a party has appealed in the time and manner specified by law. 304 Kan. 80, Syl. ¶ 1. The existence of jurisdiction is a question of law subject to unlimited appellate review. *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1121, 307 P.3d 1255 (2013). Questions involving statutory interpretation are also questions of law subject to unlimited review. *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 875, 317 P.3d 770 (2014).

Typically, in civil actions, a party may appeal to the Court of Appeals as a matter of right from "[a] final decision in any action." K.S.A. 2021 Supp. 60-2102(a)(4). But the Revised Code contains its own appellate jurisdiction statute, K.S.A. 38-2273(a). This statute grants appellate courts jurisdiction to review only five types of orders in CINC cases: "An appeal may be taken by any party or interested party from any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights." K.S.A. 38-2273(a). The parties agree that Grandmother is an "interested party" to the CINC proceedings because she is N.E.'s grandparent. See K.S.A. 38-2202(m).

We have recognized the history of K.S.A. 38-2273(a) confirms that the "[L]egislature intended to limit appellate jurisdiction to particular categories of orders and to permit interlocutory review of them instead of requiring litigants to wait for final orders." *In re N.A.C.*, 299 Kan. at 1108. And because K.S.A. 38-2273(a) is the more specific statute, it controls over K.S.A. 2021 Supp. 60-2102(a)(4). 299 Kan. at 1108-09. Thus, K.S.A. 38-2273(a) is the controlling statute that defines the scope of an appellate court's jurisdiction to review CINC orders, and if an order does not fit within the five categories of appealable orders under that statute, "it is not appealable." See 299 Kan. 1100, Syl. ¶ 3.

In *In re N.A.C.*, we held that the Legislature's deliberate sequencing of the stages of CINC proceedings under the Revised Code showed that an order terminating parental rights is the last appealable order in a CINC case. See 299 Kan. 1100, Syl. ¶ 6. Orders entered after termination of parental rights, including orders finding that the state agency has not made reasonable efforts or progress toward adoptive placement and orders removing children from state agency custody and placing them directly with their foster parents, are not appealable under K.S.A. 38-2273(a). 299 Kan. 1100, Syl. ¶ 6.

Appellate jurisdiction to review CINC orders is also limited temporally. To secure appellate jurisdiction, parties must file a notice of appeal from each appealable order specified in K.S.A. 38-2273(a) within 30 days of the district court's judgment. See K.S.A. 38-2273(c) (providing that K.S.A. chapter 60, article 21 governs procedure for appeals under the Revised Code); see K.S.A. 2021 Supp. 60-2103(a) (specifying that the time within which an appeal may be taken must be 30 days from entry of judgment). Failure to timely appeal typically deprives the appellate court of subject matter jurisdiction. See *State v. Hooks*, 312 Kan. 604, 606, 478 P.3d 773 (2021). But in response to the COVID-19 pandemic, our court issued administrative orders on March 18, 2020, suspending all "statutory time standards or deadlines applying to the conduct or processing of judicial proceedings." See Administrative Order 2020-PR-016; see also L. 2020, ch. 4, § 1 (authorizing the Kansas Supreme Court to issue order extending or suspending any deadlines or time limitations established by statute during any state of disaster emergency). Thus, any order the district court entered after March 18, 2020, is not subject to the 30-day statutory deadline for appeal.

Given this legal framework, the controlling question on appeal is whether the orders that Grandmother has appealed fit within any of the five categories of appealable orders specified in the statute, and if applicable, whether Grandmother timely appealed from these orders.

## *II. Appellate Jurisdiction to Review the Challenged Orders*

Having extensively reviewed the Revised Code's statutory scheme and our caselaw interpreting it, we conclude that the orders that Grandmother has challenged are not appealable under

K.S.A. 38-2273(a) for three reasons, which we will summarize here and expand upon below.

First, the June 2020 order was not a dispositional order because it concerned a placement decision, not a custody decision, and placement decisions are not appealable under K.S.A. 38-2273(a). Second, despite her assertions to the contrary, Grandmother preserved no claim of error related to the August 2020 order terminating parental rights. Instead, Grandmother challenges the conditions the district court imposed on kinship care placements. But the district court imposed those conditions in its September 2019 temporary custody order. Grandmother failed to appeal the temporary custody order at all, let alone within the statutory deadline in effect at that time. Finally, the December 2020 and January 2021 journal entries were entered during the post-termination phase of the CINC proceedings, months after the district court terminated parental rights. In *In re N.A.C.*, we held that post-termination orders are not appealable under K.S.A. 38-2273(a), and we reaffirm that holding today under the doctrine of stare decisis. 299 Kan. 1100, Syl. ¶ 6. We now discuss these three conclusions in turn.

### *A. The District Court's June 2020 Order Is Not an Appealable Dispositional Order Under K.S.A. 38-2273(a)*

The first order in the CINC proceedings that Grandmother challenges is the June 2020 placement order. The timeline of events is important here because it confirms the June 2020 order was a placement order, not a dispositional custody order. And K.S.A. 38-2273(a) does not authorize appellate court review of placement orders.

On March 25, 2020, a supervisor at St. Francis Ministries informed the district court that Grandmother wanted "placement" of N.E. The district court did not hold an in-person hearing on that request because, to mitigate the spread of COVID-19, our court had limited district court functions to emergency operations only. Under those orders, a hearing on a placement decision was not classified as an emergency operation. See Administrative Order 2020-PR-016 (enumerating emergency operations in CINC cases).

After reviewing documents submitted to the court in response to Grandmother's placement request and hearing from the parties by email, the district court denied Grandmother's request in an April 30, 2020 email. Then on May 22, Grandmother moved for custody of N.E. And on June 11, 2020, the district court entered the placement order that Grandmother has challenged on appeal. It explained the purpose of the June 2020 order was to "further memorialize findings made by the court and stated in an email on April 30, 2020," and it concluded that placement with Grandmother was not in N.E.'s best interests.

The panel held that the June 2020 order was not a dispositional order subject to appeal under K.S.A. 38-2273(a) because it was not a ruling on Grandmother's custody motion. *In re N.E.*, 2021 WL 5144521, at *8-9. Instead, the panel found that the order was "a summary of the email exchanges between the parties leading to the district court's initial rejection" of Grandmother's request for placement. 2021 WL 5144521, at *9. The law and the record support the panel's conclusion.

The Revised Code distinguishes between the "placement" and the "custody" of a child. Custody is "the status . . . that vests in a custodian . . . the right to physical possession of the child and the right to determine placement of the child, subject to restrictions placed by the court." K.S.A. 38-2202(h). In contrast, placement is "the designation by the individual or agency having custody of where and with whom the child will live." K.S.A. 38-2202(z).

Orders addressing the *custody* of a child that are entered during the dispositional phase of a CINC proceeding are dispositional orders—one of the five types of appealable orders under K.S.A. 38-2273(a). See *In re N.A.C.*, 299 Kan. at 1119. But orders addressing the *placement* of a child are not dispositional orders, and K.S.A. 38-2273(a) does not vest appellate courts with jurisdiction to review such orders. See *In re D.M.M.*, 38 Kan. App. 2d 394, 399, 166 P.3d 431 (2007) ("If the legislature had intended to allow an order regarding a change in placement to be appealable, the legislature could have easily listed this as an appealable order under the statute.").

The record before us makes clear that the June order was not a ruling on Grandmother's May 22, 2020 custody motion. Grandmother did not move for custody of N.E. until May, after the district court had issued its April 30th email ruling denying Grandmother's placement request. And the district court expressly stated that the purpose of the June 11th order was to memorialize the findings from this April email ruling. The June order did not address or modify DCF's custody of N.E. Instead, the court found that moving the minor child to Grandmother's home was not in the child's best interests and ordered that the child remain in foster care where DCF had placed N.E. See K.S.A. 38-2202(z) (defining placement as "the designation . . . of where and with whom the child will live").

The developments following the June 2020 order confirm this conclusion. Roughly one week after issuing the June order, the district court issued a scheduling order setting Grandmother's custody motion for an evidentiary hearing on August 4. This setting would have been unnecessary if the district court had ruled on Grandmother's custody motion in its June order. The August setting was later continued to October, when the district court received evidence on the custody motion. The district court took the custody motion under advisement after the October hearing, rather than issuing a ruling. On December 3, Grandmother requested a ruling on her custody motion. Again, Grandmother's request would have been unnecessary if the district court had ruled on her custody motion in the June order. The district court resolved Grandmother's custody motion in its December 2020 post-termination journal entry on permanency and its January 2021 journal entry ruling on matters taken under advisement.

This record, coupled with the Revised Code's definition of "custody" and "placement," confirm that the district court's June 2020 order addressed only Grandmother's March 2020 request for placement of N.E., not the custody of the child. Orders addressing the district court's placement decisions are not appealable under K.S.A. 38-2273(a). Thus, the appellate courts have no jurisdiction to review this order.

*B. Traditional Rules of Issue Preservation and the Controlling Appellate Jurisdiction Statutes Preclude Grandmother from Using the August 2020 Order Terminating Parental Rights as a Vehicle to Challenge the Placement Limitations Set Forth in the District Court's 2019 Temporary Custody Order*

The second order in the CINC proceedings that Grandmother purports to challenge is the August 2020 order terminating the parental rights of N.E.'s mother and father. In that order, the district court made the requisite findings for a termination of parental rights under K.S.A. 38-2269 (a) and (g)(1) and ordered N.E. to remain in DCF custody for adoption proceedings.

We say that Grandmother has only "purported" to appeal from the August 2020 order terminating parental rights because she does not challenge any of the findings, conclusions, or ancillary rulings set forth in that order. Grandmother has not challenged the statutory findings of unfitness, the termination decision itself, or the directive to continue custody with DCF for adoption. In short, Grandmother has challenged nothing in the termination order on appeal.

But even if she had raised a challenge to the termination order on appeal, her arguments would not be properly before this court. Grandmother appeared at the termination hearing in person and by her attorney. But the record on appeal does not include the transcript of the termination hearing, any exhibits introduced at that hearing, or any other submissions Grandmother may have filed in response to the State's motion for findings of unfitness and to terminate parental rights. Thus, there is no evidence to suggest that Grandmother raised any issue or lodged any objection in district court to the State's motion or to the findings and conclusions in the August 2020 termination order.

Generally, issues not raised before the district court cannot be raised on appeal. *State v. Keys*, 315 Kan. 690, 696, 510 P.3d 706 (2022). But this preservation rule is prudential, and appellate courts have recognized three notable exceptions to the rule, including when:

"(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is determinative; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the trial court may be affirmed because it was right for the wrong reason." *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 (2019).

To satisfy the preservation rule, a party must either provide a "pinpoint reference to the location in the record on appeal where the issue was raised and ruled on" in the district court, or "[i]f the issue was not raised below, there must be an explanation why the issue is properly before the court." See Kansas Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 36). A party who ignores this requirement is considered to have waived and abandoned any exception to the preservation rule. See *State v. Meredith*, 306 Kan. 906, 909, 399 P.3d 859 (2017).

Grandmother provides no citation to the record where she challenged or objected to the State's motion to terminate parental rights or the district court's termination order. And she has briefed no exception to the preservation rule on appeal. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) ("[A]n exception must be invoked by the party asserting the claim for the first time on appeal."). Thus, even if subject matter jurisdiction were proper, Grandmother waived and abandoned any challenge to the termination order. See *State v. Farmer*, 312 Kan. 761, 766, 480 P.3d 155 (2021) (issue treated as waived and abandoned where appellant disregarded Supreme Court Rule 6.02).

Rather than challenging the findings and conclusions in the August 2020 termination order, Grandmother objects to the limitations the district court imposed on short-term and long-term kinship care placements. On appeal, Grandmother contends that the district court lacked statutory authority to impose those placement limitations. She asks the appellate courts to return N.E. to DCF custody so that the agency can make placement decisions free from the extra-statutory constraints.

But the district court imposed these limitations in the temporary-custody order entered at the outset of the CINC proceedings, not in the order terminating parental rights. In the September 2019 temporary custody order, the district court ordered that no short-term kinship care placement will be made without approval of the guardian ad litem. And no long-term kinship care placement could

be made until a kinship assessment had been completed and forwarded to the court and a review hearing set. The August 2020 termination order, entered almost one year after the temporary custody order, does not mention these limitations on kinship placement at all. Nor does the termination order continue prior orders of the district court.

Whatever the merits of Grandmother's substantive challenge to the district court's limitations on kinship care placement, the appellate courts have no jurisdiction to evaluate them under the circumstances presented here. K.S.A. 38-2273(a) permits a party or interested party to appeal from "any order of temporary custody." As an interested party, Grandmother could have challenged the kinship care placement limitations by timely appealing from the temporary custody order. Grandmother appeared in person at the temporary custody hearing in August 2019, and the district court advised Grandmother of her rights as an interested party at that hearing. But Grandmother did not appeal that order.

The district court entered the temporary custody order at least six months before our administrative order suspended statutory deadlines in response to the COVID-19 pandemic. Thus, any appeal of the temporary custody order (and the placement limitations in it) had to be filed within the 30-day statutory deadline for appeal. See K.S.A. 38-2273(c) (providing that K.S.A. chapter 60, article 21 governs procedure for appeals under the Revised Code); K.S.A. 2021 Supp. 60-2103(a) (a party must appeal within 30 days of the district court entering judgment). Grandmother's failure to timely appeal from the temporary custody order deprives the appellate courts of jurisdiction to review the kinship care limitations established in that order. See *Wiechman*, 304 Kan. 80, Syl. ¶ 1 (Appellate courts lack jurisdiction to entertain a civil appeal that is not taken within the time limitations prescribed by the applicable statutes.).

Grandmother asserts that the kinship placement limitations in the temporary custody order continued to constrain DCF's placement decisions nearly one year later when the district court terminated parental rights. Thus, Grandmother contends that she may legitimately challenge those limitations by appealing from the August 2020 termination order. And she notes that her January 2021

notice of appeal is timely, even though filed more than 30 days after the termination order, because the termination order was entered after our court had suspended statutory timelines because of COVID-19.

Grandmother's argument fails for at least two reasons. First, there is no evidence in the record to suggest that the kinship care placement limitations in the temporary custody order remained in force one year later when the district court terminated parental rights. The August 2020 termination order neither references these limitations nor continues the effectiveness of the district court's prior orders. And by law, temporary custody orders are short lived. These orders "remain in effect until modified or rescinded by the court or an adjudication order is entered but not exceeding 60 days, unless good cause is shown and stated on the record." K.S.A. 38-2243(g)(2). The record does not reflect that any party established good cause to extend the temporary custody orders beyond this 60-day statutory period.

Second, Grandmother's argument would circumvent the applicable appellate jurisdiction statutes and render them meaningless. As noted, the August 2020 termination order did not address, incorporate, or continue the kinship care placement limitations in the 2019 temporary custody order. And the applicable statutes required Grandmother to challenge those limitations by appealing the temporary custody order within 30 days. See K.S.A. 38-2273(c) (providing that K.S.A. chapter 60, article 21 governs procedure for appeals under the Revised Code); K.S.A. 2021 Supp. 60-2103(a) (a party must appeal within 30 days of the district court entering judgment). Grandmother failed to do so. Permitting Grandmother to challenge the limitations in the 2019 temporary custody order through an appeal from the 2020 termination order would circumvent the requirements of K.S.A. 38-2273(c) and K.S.A. 2021 Supp. 60-2103(a). Thus, Grandmother cannot manufacture or bootstrap appellate jurisdiction by using the August 2020 termination order as a vehicle to appeal the kinship care placement limitations in the September 2019 temporary custody order.

The panel also concluded that it lacked jurisdiction over this portion of Grandmother's appeal. We agree with that conclusion

but depart from the panel's reasoning. We hold that Grandmother has raised an untimely challenge to the temporary-custody order, and her failure to timely appeal from that order deprives appellate courts of jurisdiction over these claims. In contrast, the panel held that it lacked jurisdiction because "only the parents have standing to appeal" a termination order. *In re N.E.*, 2021 WL 5144521, at *8. We are skeptical of the panel's sweeping pronouncement.

To satisfy the Kansas Constitution's case-or-controversy requirement, Grandmother needed to establish both statutory and common law standing to appeal this order. See *In re T.M.M.H.*, 307 Kan. 902, 908, 416 P.3d 999 (2018). But K.S.A. 38-2273(a) expressly allows an "interested party," including a grandparent, to appeal a termination order. Thus, Grandmother seemingly had statutory standing to appeal. And, under the present showing, we are unwilling to foreclose the possibility that a grandparent could establish common-law standing to challenge orders terminating parental rights or other ancillary rulings made in such orders. See *Baker v. Hayden*, 313 Kan. 667, 674, 490 P.3d 1164 (2021) (establishing common-law standing requires showing "'a personal interest in a court's decision'" and that the person "'personally suffers some actual or threatened injury as a result of the challenged conduct'"). In any event, because we hold that Grandmother has raised an untimely challenge to the temporary-custody order, and her failure to timely appeal from that order deprives appellate courts of jurisdiction over these claims, we need not decide the standing issue here.

C. *K.S.A. 38-2273(a) Precludes Appellate Review of the District Court's December 2020 and January 2021 Post-termination Orders*

The final two orders that Grandmother has challenged are the December 2020 journal entry and the January 2021 journal entry. The December 2020 journal entry reflects the district court's post-termination permanency rulings, including its finding that DCF had failed to make reasonable efforts or progress toward adoptive placement, and its attendant orders terminating DCF custody and placing N.E. in the custody of foster parents for adoption. In the January 2021 journal entry, the district court first explained why

it had taken Grandmother's custody motion under advisement after the October 2020 evidentiary hearing and through the conclusion of the post-termination permanency hearing on December 18, 2020. Then, it ruled that all matters it had taken under advisement were resolved by the custody orders in the December 2020 journal entry.

The panel concluded that our holding in *In re N.A.C.* foreclosed appellate jurisdiction over these two orders. *In re N.E.*, 2021 WL 5144521, at *7-8. In *In re N.A.C.*, we held that appellate courts lack jurisdiction to review post-termination orders in CINC proceedings because they are not an "order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights" under K.S.A. 2012 Supp. 38-2273(a). 299 Kan. 1100, Syl. ¶ 6. Acknowledging as much, Grandmother asks us to reconsider *In re N.A.C.*'s holding.

To resolve the jurisdictional question, we first examine the holding in *In re N.A.C.* and conclude that the doctrine of stare decisis warrants our continued adherence to this precedent. Then, we analyze both of the challenged orders under *In re N.A.C.*'s holding and conclude that this precedent forecloses appellate review of the December 2020 and January 2021 journal entries.

*1. Stare Decisis Analysis of* In re N.A.C.

Grandmother's appeal from these two post-termination orders requires us to address a threshold inquiry: whether the doctrine of stare decisis warrants our continued adherence to *In re N.A.C.* "The doctrine of stare decisis provides that 'points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised.'" *State v. Clark*, 313 Kan. 556, 565, 486 P.3d 591 (2021) (quoting *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362-63, 361 P.3d 504 [2015]). "'"The application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review."'" *State v. Davidson*, 314 Kan. 88, 93, 495 P.3d 9 (2021). Thus, "we do not lightly disapprove of precedent." *State v. Spencer Gifts*, 304 Kan. 755, 766, 374 P.3d 680 (2016).

"'While "stare decisis is not an inexorable command," this court endeavors to adhere to the principle unless clearly convinced a rule of law established in its

earlier cases ""was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."" [Citations omitted.]'" *Clark*, 313 Kan. at 565.

In *In re N.A.C.,* we determined that the Legislature had structured CINC proceedings as a sequence of steps and that the appealable orders listed in K.S.A. 2012 Supp. 38-2273(a)—orders of temporary custody, adjudication, disposition, unfitness, and termination of parental rights—corresponded to those steps. 299 Kan. at 1115-16. As a result, we held that an order terminating parental rights is the last appealable order in a CINC proceeding under K.S.A. 38-2273(a), and orders entered post-termination are not appealable. 299 Kan. 1100, Syl. ¶ 6.

Grandmother contends that *In re N.A.C.*'s holding was erroneous. She claims that some post-termination orders (like the one that denied her custody motion) are properly classified as dispositional orders because they address custody and are entered after the child has been adjudicated as a child in need of care. See 299 Kan. at 1119 (defining dispositional orders). Because K.S.A. 38-2273(a) allows an appeal from "*any* . . . disposition," Grandmother reasons *In re N.A.C.* wrongly concluded that the statute precludes appellate review of post-termination orders addressing custody. The dissent in *In re N.A.C.* raised the same point, but the majority rejected this construction of the Revised Code's jurisdiction statute. See 299 Kan. at 1123 (Johnson, J., dissenting).

We are not "clearly convinced" *In re N.A.C.*'s holding was originally erroneous. First, *In re N.A.C.*'s interpretation of the appellate jurisdiction statute is logical and better harmonizes this statute with other provisions in the Revised Code when read *in pari materia*. See *State v. Mora*, 315 Kan. 537, 543, 509 P.3d 1201 (2022) ("[S]tatutes relating to the same subject should be considered *in pari materia* to achieve consistent, harmonious, and sensible results whenever possible."). As noted, K.S.A. 38-2273(a) identifies five categories of appealable orders under the Revised Code: "An appeal may be taken by any party or interested party from any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights." But "[n]one of the appealable orders listed in K.S.A. 2012 Supp. 38-2273(a) are defined in the Revised Code's definitional statute, K.S.A. 2012

Supp. 38-2202." *In re N.A.C.*, 299 Kan. at 1110. Even so, *In re N.A.C.* reasoned that "each [type of appealable order] is given context by its own statutory provisions that establish deadlines, notice requirements, and required underlying findings or legal conclusions. So, while the appealable orders are not explicitly defined, the governing statutes for each give description and meaning to the terms." 299 Kan. at 1110-11.

Focusing on dispositional orders specifically, *In re N.A.C.* acknowledged that "[t]here is more complexity to the statutory scheme governing dispositional orders than the other [appealable] orders." 299 Kan. at 1113. But again, the statutory scheme gives context and meaning to the phrase "order of . . . disposition" as used in K.S.A. 38-2273(a). A summary of the statutory framework governing the dispositional and termination phases of a CINC proceeding helps illustrate this point.

The timing for dispositional orders is dictated by K.S.A. 38-2253(b), which states "[a]n order of disposition may be entered at the time of the adjudication if notice has been provided . . . but *shall be entered within 30 days* following adjudication, unless delayed for good cause shown." (Emphasis added.) The substance of the dispositional hearing and attendant order are addressed by K.S.A. 38-2253:

"(a) At a dispositional hearing, the court shall receive testimony and other relevant information with regard to the safety and well being of the child and may enter orders regarding:

(1) Case planning which sets forth the responsibilities and timelines necessary to achieve permanency for the child; and

(2) custody of the child."

K.S.A. 38-2255(b) and (c) create two paths for custody during the dispositional phase—"either the court places the child in the parent's custody or it removes the child from parental custody." 299 Kan. at 1113. If the district court chooses the latter option, *In re N.A.C.* identified the various findings and orders that the district court must make under the Revised Code:

"For example, it must find probable cause that certain conditions exist, such as 'allowing the child to remain in [the] home is contrary to the welfare of the child.' K.S.A. 2012 Supp. 38-2255(c)(1)(B). And if the court makes the required findings and removes the child from the parent's custody, it may award custody to: (1) a child's relative; (2) a person with whom the child has close emotional ties;

(3) any other suitable person; (4) a shelter facility; (5) a youth residential facility; or (6) the Secretary. This custody order 'shall continue until further order of the court.' K.S.A. 2012 Supp. 38-2255(d). In addition, if the person to whom custody is awarded is not a parent, a permanency plan that conforms to the requirements of K.S.A. 2012 Supp. 38-2264 (permanency hearing: purpose, procedure, time for hearing, and authorized orders) must be prepared. K.S.A. 2012 Supp. 38-2255(e).

"Once a dispositional order is entered, the court may rehear the matter on its own motion or the motion of a party or interested party. And if there is a rehearing, the court may enter any dispositional order authorized by the Revised Code, except modification of a registered child support order." 299 Kan. at 1113-14.

See K.S.A. 38-2256.

*In re N.A.C.* reasoned that the statutory requirements and timelines governing each phase of a CINC proceeding provide meaning to the types of appealable orders identified in K.S.A. 38-2273(a).

"The terms 'order of temporary custody,' 'adjudication,' and 'disposition' must be seen as terms of art, each with a particular meaning within the Revised Code that clearly establishes a sequence of court-supervised events all marching toward permanency. This is evidenced by the time limitations within the Revised Code for each phase's duration, which ensure progress toward permanency is achieved; the differences at each phase in factual findings and legal conclusions; and in the options available to the district court in each phase." 299 Kan. at 1116.

And under this sequencing, dispositional orders are limited temporally. Reading the CINC provisions together, an order of disposition is defined as those orders "concerning child custody entered after the child is adjudicated a child in need of care. But this dispositional phase ends once an order terminating parental rights is entered, precluding appellate review of any later orders because post-termination orders are not considered 'dispositional orders.' [Citations omitted.]" 299 Kan. at 1119. This is true, in part, because the termination of parental rights statute limits the actions the court can take once parental rights have been terminated—"the court can authorize an adoption, appoint a permanent custodian, or order continued permanency planning." 299 Kan. at 1120; see K.S.A. 38-2269(g)(2). "Notably absent is the authority to enter a dispositional order" under K.S.A. 38-2255. 299 Kan. at 1120. "This, of course, makes sense because when parental rights have been terminated, it is necessarily true that the district court is

no longer doing what the disposition phase requires: weighing whether the parent should have custody and, if not, whether reintegration is possible. That ship has sailed." 299 Kan. at 1120-21.

*In re N.A.C.*'s construction of K.S.A. 38-2273(a) is thus "consistent with the statutes governing dispositions and termination of parental rights. It is also consistent with the Legislature's decision to limit the appealable issues under K.S.A. 2012 Supp. 38-2273(a)." 299 Kan. at 1119-20.

The dispositional rehearing statute, K.S.A. 38-2256, does not undermine *In re N.A.C.*'s holding or its supporting rationale. K.S.A. 38-2256 permits the court to "rehear the matter" after it has entered a dispositional order. The statute does not expressly limit rehearing to those motions entered before the termination of parental rights. Thus, one might argue the rehearing statute supports a broader definition of the phrase "order of disposition" in K.S.A. 38-2273(a)—one that includes post-termination orders affecting the child's custody.

But as we explained in *In re N.A.C.*, construing an "order of disposition" to be limited temporally to those disposition orders entered after adjudication but before termination of parental rights gives meaning to the rehearing statute and K.S.A. 38-2273(a):

> "But this reasoning [that the rehearing statute allows for post-termination orders of disposition] oversimplifies and wrongly dispenses with the prior caselaw, which does not necessarily deny an appeal of a dispositional order issued after a rehearing. After all, the time period between a first order of disposition and a termination of parental rights may be significant, and more than one order of disposition might be required, especially if the goal is to first attempt parental reintegration. Nothing in the jurisdictional statute prevents an appeal from any dispositional orders entered after rehearing. But the cutoff under the Revised Code's structure . . . is the order terminating parental rights . . . . [Citations omitted.]" 299 Kan. at 1120.

And *In re N.A.C.*'s construction better harmonizes the rehearing statute and K.S.A. 38-2273(a) with the termination of parental rights statutes. As noted, those statutes limit the district court's authority to enter orders of disposition post-termination because at that stage of the CINC proceeding the district court is no longer considering whether the parent should have custody or whether reintegration is possible. 299 Kan. at 1120-21.

*In re N.A.C.*'s construction not only brings the various provisions of the Revised Code into harmony, but it "is also consistent with the legislature's obvious intent to limit the types of appealable issues so there is timely closure in these cases. Otherwise, it is easy to see how these cases could turn into back-and-forth campaigns of endless litigation and appeals by persons other than the child's parents." 299 Kan. at 1121. Grandmother's proposed construction fails to read the statutory provisions *in pari materia* and conflicts with the Legislature's intent to promote timely resolution of CINC proceedings. In fact, Grandmother's interpretation of a disposition order "could leave children exposed to an endless circle of appellate custody battles." 299 Kan. at 1120.

Granted, *In re N.A.C.*'s holding insulates detrimental placement decisions from appellate review. But "our district court judges who are tasked with presiding over these difficult CINC cases are well aware of the stakes." 299 Kan. at 1122. And this concern is simply part of the cost-benefit analysis the Legislature employed when it adopted the Revised Code and chose to limit the scope of appealable orders in CINC proceedings to ensure timely progression towards permanency. The separation-of-powers doctrine prevents us from second-guessing the Legislature's judgment on this public policy matter, as another Court of Appeals panel observed:

> "We simply cannot create a new category of appeals so that appeals like this one may be heard. Nor should we. The legislature has worked hard to create a comprehensive Code for Care of Children. It has attempted to balance the protection of the rights of children, parents, and other interested parties against the need for speed sufficient to ultimately allow children to move on and live their lives. We respect the choice the legislature has made here." *In re A.F.*, 38 Kan. App. 2d 742, 746, 172 P.3d 63 (2007).

See *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 274, 202 P.3d 7 (2009) ("It is not the function of the courts to substitute their social and economic beliefs for the judgment of the legislature or to determine whether a statute is wise or necessary.").

In sum, *In re N.A.C.*'s holding is logical, and its construction of K.S.A. 38-2273(a) is preferable when reading the various provisions of the Revised Code *in pari materia*. And *In re N.A.C.*'s holding was not groundbreaking. Several panels of the Court of

Appeals had adopted the same construction of K.S.A. 38-2273(a) long before *In re N.A.C.* See 299 Kan. at 1115 ("The vast majority of appeals under the Revised Code and its predecessor have been decided by our Court of Appeals with little review from this court. Over time, numerous Court of Appeals panels have developed caselaw consistently viewing both the Revised Code and its predecessor as creating a statutory framework of sequential steps or phases."). For these reasons, we are not clearly convinced that the holding in *In re N.A.C.* was originally erroneous.

Nor are we "clearly convinced" *In re N.A.C.*'s holding is no longer sound because of changing conditions. In the eight years since *In re N.A.C.*, the Legislature has expressed no disagreement, through statutory amendment, with our interpretation of K.S.A. 38-2273(a). See *State v. Quested*, 302 Kan. 262, 278, 352 P.3d 553 (2015) ("The doctrine of stare decisis is particularly compelling in cases where, as here, the legislature is free to alter a statute in response to court precedent with which it disagrees but declines to do so."). Perhaps the most significant development to occur since *In re N.A.C.* is that the composition of our court has changed. But "we should be highly skeptical of reversing an earlier decision where nothing has changed except the composition of the court." *State v. Marsh*, 278 Kan. 520, 577, 102 P.3d 445 (2004) (McFarland, C.J., dissenting); see also *Davidson*, 314 Kan. at 95 (Standridge J., concurring) (A "change in the membership of this court cannot, in and of itself, justify a departure from the basic principle of stare decisis.").

We therefore reaffirm the holding in *In re N.A.C.*: an order terminating parental rights is the last appealable order under K.S.A. 38-2273(a), and post-termination orders are not appealable, even if they address custody. See 299 Kan. 1100, Syl. ¶ 6.

*2. Application of* In re N.A.C. *to Challenged Orders*

Having reaffirmed *In re N.A.C.*, we next apply this precedent to the December 2020 and January 2021 journal entries from which Grandmother has appealed.

As noted, the December 2020 journal entry memorialized the district court's post-termination permanency decisions. This journal entry included the district court's finding that DCF had failed

to make reasonable efforts or progress toward adoptive placement and its attendant orders terminating DCF custody and placing N.E. in the custody of foster parents for adoption.

In *In re N.A.C.*, the appellant challenged nearly identical orders. We found appellate jurisdiction lacking over the district court's post-termination decisions, including:

"(1) the district court's finding that the responsible state agency failed to make reasonable efforts or progress toward adoptive placement; and (2) its attendant orders, which were contingent under the statute upon that first finding, removing the child from state agency custody and placing her directly with her foster parents with permission to adopt." 299 Kan. at 1101.

Grandmother has challenged the December 2020 journal entry, which made the same findings and entered the same attendant custody orders at issue in *In re N.A.C.* Thus, *In re N.A.C.* is apposite and controls the jurisdictional question presented here. Thus, K.S.A. 38-2273(a) does not provide appellate courts with jurisdiction to review the December 2020 journal entry.

Grandmother also appeals from the January 2021 journal entry. There, the district court found that various pandemic-related issues had required it to take Grandmother's custody motion under advisement (after the October 2020 evidentiary hearing on the motion and until all parties could be heard at the December 2020 post-termination permanency hearing). Then, the district court ruled that all matters it had taken under advisement, which necessarily included Grandmother's custody motion, were resolved by the custody orders in the December 2020 post-termination journal entry on permanency. Under *In re N.A.C.*, K.S.A. 38-2273(a) likewise forecloses appellate review of the January 2021 journal entry because this order was entered months after the district court terminated parental rights.

But we recognize that the timeline of events and procedural history here could raise more complicated questions of equity and fairness. On May 22, 2020, prior to the termination of parental rights, Grandmother moved for custody of N.E. The district court set that motion for evidentiary hearing on August 4, during the dispositional phase of N.E.'s CINC proceedings. In the meantime,

on June 17, the State moved for findings of unfitness and termination of parental rights. The district court set that motion for evidentiary hearing on August 20.

Had matters progressed as scheduled, the district court would have ruled on Grandmother's custody motion during the dispositional phase before it terminated parental rights. And if the district court had ruled on the motion during the dispositional phase, we see no reason why Grandmother could not have pursued a timely appeal of the decision as a dispositional order under K.S.A. 38-2273(a).

But disruptions caused by the COVID-19 pandemic impacted the scheduling and progression of the proceedings. The district court continued the August 4 evidentiary hearing on Grandmother's custody motion because the State's attorney was in quarantine. That evidentiary hearing was reset to September 8, 2020. In the meantime, no party moved to continue the hearing on the State's motion to terminate parental rights. And the district court conducted that hearing as scheduled on August 20, where it terminated parental rights and set the matter for a permanency hearing on September 3. The district court memorialized these findings and conclusions in the August 28th journal entry, thus terminating the dispositional and termination phases of N.E.'s CINC proceedings.

After the district court entered its termination orders, Grandmother expressed concern that conducting a permanency hearing before the evidentiary hearing on her custody motion could render the latter moot. Thus, Grandmother moved to continue the September 3rd post-termination permanency hearing to September 8—the date set for the hearing on the custody motion. The district court granted Grandmother's request.

But the State moved to continue the September 8, 2020 consolidated hearings on permanency and custody because one of its key witnesses was in COVID-19 quarantine. The district court rescheduled the hearing for October 9. On that date, the district court took evidence on the custody motion. But not all interested parties were present—counsel for foster parents could not attend because of illness related to COVID-19. The district court took evidence from the available parties on the custody motion and continued

the rest of the consolidated hearing to November 13. It took Grandmother's custody motion under advisement until all parties could be heard at the November permanency hearing. But again, the November 13th hearing was continued because Grandmother's attorney was ill and foster parents' expert witness was unavailable. The district court conducted the consolidated hearing on December 18, where it terminated DCF custody and placed N.E. in the custody of foster parents for adoption, as memorialized in the December 2020 journal entry. And, in its January 2021 journal entry, the district court confirmed that its December post-termination permanency decisions had resolved Grandmother's custody motion.

These facts reveal that the district court's ruling on Grandmother's custody motion did not follow the same progressive sequencing of CINC phases contemplated in the Revised Code. This may prompt concerns that the district court violated Grandmother's due-process rights or otherwise erred by ruling on Grandmother's custody motion (filed before termination of parental rights) only after the dispositional and termination phases had ended and the matter had progressed to the post-termination phase.

But appellate courts cannot create equitable exceptions to statutory jurisdictional requirements. *State v. Frye*, 294 Kan. 364, 369, 277 P.3d 1091 (2012). And even if the district court's sequencing of the CINC proceedings and the timing of its orders could constitute error, Grandmother did not raise those concerns in the district court or on appeal. See *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014) ("[C]onstitutional grounds for reversal cannot be raised for the first time on appeal."); see also *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) ("Issues not briefed are deemed waived or abandoned."). Thus, Grandmother waived or abandoned any claim of error based on the timing or sequencing of the CINC phases.

There is no evidence in the record to suggest that Grandmother objected to the State's request to continue the August 4, 2020 evidentiary hearing on her custody motion. Nor is there any evidence that Grandmother objected to the August 20th setting for the hearing on the State's motion to terminate parental rights.

Grandmother did not move to continue the August 20th termination hearing to ensure that the district court ruled on her custody motion during the dispositional phase before it terminated parental rights. In fact, Grandmother appeared in person and by counsel at the August 20th termination hearing and there is no evidence in the record that Grandmother objected to moving forward with the hearing as scheduled. Quite simply, Grandmother allowed the termination hearing to proceed on August 20 and allowed the district court to enter orders terminating parental rights on August 28 without objection.

And nothing in the record suggests that the district court scheduled or rescheduled these matters intentionally to deprive Grandmother of her right to appeal the ruling on her custody motion. To the contrary, the record confirms that the district court's schedule was impacted most significantly by complications related to the pandemic.

In short, Grandmother preserved no objection at the district court and waived any objection on appeal to the timing or progression of the CINC proceedings—specifically, the district court's decision to proceed to the post-termination phase before ruling on the custody motion filed during the dispositional phase. Thus, we reserve for another day whether a district court errs by proceeding in such a manner.

We hold that appellate courts lack jurisdiction to review the district court's December 2020 and January 2021 post-termination journal entries. Because we also hold that appellate courts lack jurisdiction to review the June 2020 placement order and the August 2020 termination order under K.S.A. 38-2273(a), we dismiss this appeal for lack of jurisdiction.

Judgment of the Court of Appeals dismissing the appeal is affirmed.

* * *

STANDRIDGE, J., dissenting: I dissent from the majority's interpretation of K.S.A. 38-2273(a), based on its continued adherence to *In re N.A.C.*, 299 Kan. 1100, 329 P.3d 458 (2014), to bar appellate review of the district court's December 2020 and January

2021 orders. I would find these orders qualify as orders of disposition that constitute appealable orders under K.S.A. 38-2273(a).

K.S.A. 38-2273(a) provides that "[a]n appeal may be taken by any party or interested party from any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights." Although the term "disposition" is not defined in the general definitional section of the Revised Kansas Code for Care of Children (Code), "dispositional orders have been interpreted to be those concerning child custody entered after the child is adjudicated a child in need of care." *In re N.A.C.*, 299 Kan. at 1119.

The majority reaffirms *In re N.A.C.*'s holding that dispositional orders are limited temporally, construing the Code's statutory requirements and timelines governing each phase of a child in need of care proceeding to mean that the dispositional phase ends once an order terminating parental rights is entered. But this reading of the Code ignores the basic rules of statutory construction. 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). If we find the statutory language is plain and unambiguous, we do not speculate about the legislative intent behind that clear language and should refrain from reading something into the statute that is not readily found in its words. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). The majority's holding is inconsistent with the plain and unambiguous language of K.S.A. 38-2273(a), which provides that "[a]n appeal may be taken by any party or interested party from *any* order of . . . disposition." (Emphasis added.) If the Legislature had intended for the term "disposition" to refer solely to those orders entered before termination, it could have said as much, i.e., "any order of . . . disposition entered prior to termination." The majority reads a pre-termination requirement into the statute where there is none.

The Legislature intentionally left open the possibility for the court to enter multiple orders of disposition. K.S.A. 38-2256 authorizes the court to rehear *any* order of disposition on its own motion or the motion of any party or interested party, after which

the court may enter any dispositional order authorized by the Code. Again, the Legislature, through its plain and unambiguous language, did not limit rehearing to those orders entered before the termination of parental rights.

I am also unpersuaded by the argument that the Legislature failed to provide courts with express authority to enter a post-termination dispositional order under K.S.A. 38-2255. The court's authority under the termination of parental rights statute includes the ability to authorize an adoption and appoint a permanent custodian, both of which concern the custody of a child adjudicated a child in need of care and therefore meet the definition of a dispositional order. To construe the statutory scheme otherwise results in unreasonable and arbitrary results. See *Garcia v. Ball*, 303 Kan. 560, 569, 363 P.3d 399 (2015) (courts interpret statutes to avoid absurd or unreasonable results). As the following chronology shows, the resulting inconsistency is particularly conspicuous in this case.

Grandmother filed a motion for custody of N.E. on May 20, 2020. A month later, the district court found reintegration with N.E.'s parents was not a viable permanency objective and adoption might be in N.E.'s best interests. Around this time, the district court scheduled a hearing on Grandmother's custody motion for August 4, 2020, and a hearing on the State's motion to terminate parental rights for August 20, 2020.

But on August 3, 2020, the State filed a motion to continue Grandmother's custody hearing because the State's attorney was quarantined pending the results of a COVID-19 test. The court granted the motion and reset the custody hearing for September 8, 2020. The court did not, however, move the hearing on the State's motion to terminate parental rights. After hearing the evidence on August 20, the court granted the State's motion to terminate parental rights and ordered N.E. to remain in the custody of the Department for Children and Families (DCF).

The court did not hear evidence related to Grandmother's motion for custody until October 9, 2020. And even then, the court took the matter under advisement. The court finally ruled on Grandmother's motion in an order dated January 6, 2021, denying it as moot. The ruling came almost eight months after it was filed

and, ironically, on the same day the court granted foster parents' petition for adoption.

Based on this chronology, the majority holds we do not have jurisdiction to consider an appeal from the district court's decision to deny Grandmother's motion for custody because the dispositional decision was made after the court terminated parental rights. But the majority's interpretation of the statute also compels a different conclusion: *we would have had jurisdiction* to review the appeal if the State's attorney had not been exposed to COVID-19 requiring quarantine and the district court had denied Grandmother's motion at the scheduled hearing on August 4. The Legislature could not have intended the statutory scheme to lead to such an unreasonable and inconsistent result. This is especially true here, where Grandmother filed a timely motion and requested a timely hearing but was deprived of her ability to appeal simply because she had no control over the court's docket.

Finally, the majority's interpretation of the Code to limit appellate review of a dispositional order to those entered before termination does little to further the objective of protecting the child's welfare and serving the best interests of the State. See K.S.A. 38-2201(b)(2) ("The code shall be liberally construed to carry out the policies of the state" which include "provid[ing] that each child who comes within the provisions of the code shall receive the care, custody, guidance control and discipline that will best serve the child's welfare and the interests of the state."). Indeed, the majority acknowledges that "*In re N.A.C.*'s holding insulates detrimental placement decisions from appellate review." *In re N.E.,* 316 Kan. 391, 419, 516 P.3d 586 (2022).

Considering the specific language set forth within K.S.A. 38-2273(a), the statutory scheme as a whole, and the Code's underlying purpose of protecting the child's welfare and serving the best interests of the State, I would hold a dispositional order subject to appeal under K.S.A. 38-2273(a) includes any dispositional order authorized by the Code, including post-termination orders. Here, the district court's December 2020 order removed N.E. from the legal custody of DCF and placed her in the custody of foster parents for adoption. In the January 2021 order, the court ruled that

all matters taken under advisement, including Grandmother's custody motion, were resolved by the December 2020 order. Because these orders both impacted the legal custody of N.E., I would find they constitute appealable orders of disposition under K.S.A. 38-2273(a).

State v. Carter

No. 122,626

# STATE OF KANSAS, *Appellee*, v. JOHNATHAN ELI CARTER, *Appellant*.

(516 P.3d 608)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions—Requirement to Be Legally and Factually Appropriate.* Jury instructions must be legally appropriate by fairly and accurately stating the applicable law. They must also be factually appropriate with sufficient competent evidence to support them.

2. CRIMINAL LAW—*Proof of Felony Murder—Direct Causal Connection between Commission of Felony and Homicide.* To prove felony murder, there must be a direct causal connection between commission of the felony and the homicide. Such causal connection is established if the homicide lies within the res gestae of the underlying crime with no extraordinary intervening event to supersede that direct causal connection.

3. SAME—*Felony-murder Jury Instructions—Res Gestae Requirement of Causation*. Felony-murder jury instructions which only allow a guilty verdict if the jury concludes the death occurred "while" defendant was committing the underlying felony satisfy the res gestae requirement of causation.

4. SAME—*Inherently Dangerous Felony—All Participants Equally Guilty as Principals.* If someone dies in the course of an inherently dangerous felony, all the participants in the felony are equally guilty of the felony murder no matter who committed the killing. All participants in a felony murder are principals.

5. SAME—*Participant in Felony Murder—Principal.* As a principal, a participant in a felony murder cannot be an aider or abettor.

6. TRIAL—*Felony-murder Jury Instructions—Legally Appropriate to Use "Defendant or Another."* In this case, the use of "defendant or another" in the felony-murder jury instructions to identify who killed each victim is legally appropriate because all participants of felony murder are guilty as principals. It is factually appropriate because the evidence left some question about who fired the lethal shot as to each victim.

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed September 16, 2022. Affirmed.

*Sam S. Kepfield,* of Hutchinson, argued the cause and was on the brief for appellant.

*Matt J. Maloney*, assistant district attorney, argued the cause, and *Marc Bennett,* district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: A jury convicted Johnathan Eli Carter of two counts of first-degree felony murder, one count of criminal discharge of a firearm at an occupied dwelling, and one count of criminal possession of a weapon by a convicted felon. Carter now appeals, arguing the district court erred in its jury instructions on his two felony-murder charges. For the reasons below, we find no error and affirm the district court.

## FACTS AND PROCEDURAL HISTORY

On the day of the shooting, Betty Holloman was at home with her family and some friends, including Brenton Oliver. The trouble started when Jamion Wimbley drove up to drop someone off. While Wimbley was sitting in his parked car, Oliver ran outside, yelling. Wimbley and Oliver—members of rival gangs—argued for a while. Then Wimbley disengaged, told Oliver he would be back, and sped off.

Later that day, Carter—affiliated with the same gang as Wimbley—drove to Holloman's home to pick up one of the guests. After another argument broke out, Carter got out of his car holding a handgun. Holloman's husband warned Carter not to start anything, so Carter began to get back in his car, but Oliver rushed him.

Chaos then erupted as Wimbley's car came back down the street. With Wimbley were two more of Carter's associates. As Wimbley pulled up across the street from Holloman's house, someone began firing shots from the backseat window of Wimbley's car. By this point, Carter and Oliver were physically fighting. Wimbley jumped from his car to help Carter while their two associates continued firing.

In the ensuing gunfight, Holloman and Oliver were shot. Carter, Wimbley, and their associates all fled. Holloman died at the scene and Oliver died a short time later at the hospital.

An autopsy revealed that Oliver had been shot five times. Ballistics evidence showed at least four guns had been used in the shooting. Law enforcement recovered four firearms during their investigation, but they were unable to match any bullets or casings from the scene to three of the firearms. They linked six .22 caliber bullet casings found at the scene to a .22 Ruger found in the car Carter had been driving on the day of the shooting. The coroner also extracted two .22 caliber bullets from Oliver's upper back which were linked to the same .22 Ruger as the six casings. A third .22 caliber bullet was recovered from Oliver's fatal wound. Law enforcement could not link it to a specific gun.

Police arrested Carter about a week after the shooting. In an interview, he admitted firing six shots at Oliver as Oliver was running toward Holloman's house. Carter explained that he had been at Holloman's house simply to pick up a guest and he had no stake in the ongoing arguments among the others who were at Holloman's house that day, so he was angry that he had gotten wrapped up in their conflict.

The State charged Carter with the first-degree premeditated murder of Oliver or, in the alternative, the first-degree felony murder of Oliver; the first-degree felony murder of Holloman; criminal discharge of a firearm at an occupied dwelling; and criminal possession of a weapon by a convicted felon.

The jury convicted Carter of the felony murder of Oliver; the felony murder of Holloman; criminal discharge of a firearm; and criminal possession of a weapon. Separate juries also convicted Wimbley and his passengers of crimes arising from Holloman's and Oliver's deaths. See *State v. Wimbley*, 313 Kan. 1029, 1031, 493 P.3d 951 (2021); *State v.* [*Quincy*] *Carter*, 312 Kan. 526, 528, 477 P.3d 1004 (2020); *State v.* [*Brent*] *Carter*, 311 Kan. 783, 787-88, 466 P.3d 1180 (2020). Carter timely appeals.

## ANALYSIS

Carter challenges the elements instructions for his felony-murder charges. He asserts those instructions were erroneous because they contained no language on res gestae or causation. Thus, he asserts the jury did not have to find a causal connection between the underlying felony of criminal discharge of a firearm and

the killing of Oliver and Holloman. He further argues that this asserted error was not harmless because the jury may have convicted him for the killings even if he did not fire the fatal shot.

*Standard of Review and Preservation*

We follow a three-step process when analyzing jury instruction issues. First, we determine whether we can or should review the issue—that is, whether there are any jurisdictional or preservation problems. Second, we consider the merits to determine whether an error occurred at the district court level. Third, if an error has occurred, we assess whether that error requires reversal. Whether a party has properly preserved an instructional issue determines the standard of review for reversibility on the third step. *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Jurisdiction is proper under K.S.A. 2021 Supp. 22-3601. Because Carter objected below, we review his jury instruction claims under the nonconstitutional, or statutory, harmless error standard, which is the standard of review for a preserved instruction issue. See *State v. McCullough*, 293 Kan. 970, Syl. ¶ 9, 270 P.3d 1142 (2012) (under nonconstitutional harmless error standard, party benefitting from error must show there is no reasonable probability error affected the trial's outcome in light of the entire record). The parties agree that this is the appropriate standard of review.

When reviewing alleged jury instruction errors, we must determine whether the instructions given were both legally and factually appropriate. For an instruction to be legally appropriate, it must fairly and accurately state the applicable law. *State v. McDaniel*, 306 Kan. 595, 615, 395 P.3d 429 (2017). We exercise unlimited review in determining whether an instruction was legally appropriate. *State v. Johnson*, 304 Kan. 924, 931-32, 379 P.3d 70 (2016). For an instruction to be factually appropriate, there must be sufficient evidence—viewed in a light most favorable to the requesting party—to support the jury instruction. *State v. Bodine*, 313 Kan. 378, 386, 486 P.3d 551 (2021).

When analyzing whether instruction error has occurred, this court does not look at one instruction in isolation but considers the instructions as a whole. *State v. Llamas*, 298 Kan. 246, 261, 311 P.3d 399 (2013). "If the instructions properly and fairly state the

law as applied to the facts in a case, and the jury could not have been reasonably misled by them, those instructions will not result in reversible error even if they were in some manner erroneous." *State v. Craig*, 311 Kan. 456, 461, 462 P.3d 173, *cert. denied* 141 S. Ct. 918 (2020).

*Discussion*

The district court gave the following felony-murder instructions at trial:

"INSTRUCTION 5 (Theory 1(b))

"Johnathan Carter is charged in Count Two with murder in the first degree of Brenton Oliver (felony murder). Johnathan Carter pleads not guilty.

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

"1. Johnathan Carter *or another* killed Brenton Oliver.

"2. The killing was done while Johnathan Carter was committing criminal discharge of a firearm.

"3. This act occurred on or about the 1st day of December, 2015, in Sedgwick County, Kansas.

"The elements of criminal discharge of a firearm are listed in Instruction 11." (Emphasis added.)

"INSTRUCTION 10

"Johnathan Carter is charged in Count Three with murder in the first degree of Betty Holloman (felony murder). Johnathan Carter pleads not guilty.

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

"1. Johnathan Carter *or another* killed Betty Holloman.

"2. The killing was done while Johnathan Carter was committing criminal discharge of a firearm.

"3. This act occurred on or about the 1st day of December, 2015, in Sedgwick County, Kansas.

"The elements of criminal discharge of a firearm are listed in Instruction 11." (Emphasis added.)

To supplement pertinent parts of the above felony-murder instructions—and to provide an elements instruction for the separate charge against Carter of criminal discharge of a firearm at an occupied dwelling—the district court gave the jury the following instruction:

"INSTRUCTION 11

"Johnathan Carter is charged in Count Four with criminal discharge of a firearm. Johnathan Carter pleads not guilty.

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

"1. Johnathan Carter discharged a firearm at a dwelling.

"2. Johnathan Carter did so recklessly and without authority.

"3. The dwelling was occupied by a human being at the time, whether or not Johnathan Carter knew or had reason to know it was occupied.

"4. This act occurred on or about the 1st day of December, 2015, in Sedgwick County, Kansas."

At the jury instruction conference, Carter objected to Instructions 5 and 10. Defense counsel stated that as written, the instructions did not require the jury to find a causal connection between the killing and the underlying felony, thus lowering the State's burden to prove felony murder:

"[S]pecifically, what [the jury instruction] says is, [element one of felony murder] is, Johnathan Carter or another killed Brenton Oliver. Again, that can be anybody. There is no causal link between [elements] one and two. And the killing was done while Johnathan Carter was committing a [*sic*] criminal discharge of a firearm. What we mean by that is if [the State] can show, just for argument's sake, that Johnathan Carter criminally discharged a firearm at an occupied dwelling. If they can show that, then basically the way this is written, if somebody else on the other side of Wichita kills somebody, then he's responsible for it. It doesn't say anything to indicate how one and two are linked. It doesn't provide any additional elements. I think, as it [*sic*] written, it's not a crime."

Carter also challenged the causation elements' omission because the underlying felony was criminal discharge of a firearm at an occupied dwelling, but the evidence showed Carter was shooting at Oliver, not the house. Finally, Carter objected to the term "or another" in element one, stating, "[T]hat needs to be identified what it is." He raised the same arguments in his objection to Instruction 10.

The State responded that language in the second element provided the causal link between elements one and two: "the killing was done while Johnathan Carter was committing criminal discharge of a firearm."

The district court agreed with the State, holding that the instruction is "right out of the statute . . . [and] PIK" and the "causal connection that the defense has a concern about is taken care of with using that same word killed and killing in elements one and two."

Carter later moved to arrest judgment or for a new trial. In the motion, he again challenged Instructions 5 and 10, asserting there were two problems with the instructions: (1) the instructions did

not require the jury to find a causal connection between the killing and the underlying felony; and (2) the instructions did not require the jury to find a connection between the individual who killed the victims and Carter. After hearing arguments, the district court denied Carter's motion for arrest of judgment or a new trial.

*Causation*

Carter asserts in this appeal the jury instructions regarding his felony-murder charges were not legally appropriate because they did not require the jury to find a causal connection between the res gestae of the underlying crime (criminal discharge of a firearm at an occupied dwelling) and each killing.

Felony murder is the killing of a human being "in the commission of, attempt to commit, or flight from any inherently dangerous felony." K.S.A. 2021 Supp. 21-5402(a)(2). Here, the "felony" is criminal discharge of a firearm, which is included in the statutory list of inherently dangerous felonies. K.S.A. 2021 Supp. 21-5402(c)(1)(O).

Our caselaw has addressed both res gestae and causal connection in the context of felony murder. Specifically, "[i]t is true that there must be a direct causal connection between the commission of the felony and the homicide to invoke the felony murder rule. However, the general rules of proximate cause used in civil actions do not apply. [Citation omitted.]" *State v. LaMae*, 268 Kan. 544, 555, 998 P.2d 106 (2000).

> "In order to establish felony murder, the State must prove two causation elements. First, the death must lie within the res gestae of the underlying crime, which is defined in this context as acts committed before, during, or after the happening of the principal occurrence, when those acts are so closely connected with the principal occurrence as to form, in reality, a part of the occurrence. Second, the felony and the homicide must have a direct causal connection, which exists unless an extraordinary intervening event supersedes the defendant's act and becomes the sole legal cause of death. [Citation omitted.]" *State v. Cameron*, 300 Kan. 384, 396-97, 329 P.3d 1158 (2014), *cert. denied* 574 U.S. 1035 (2014).

The existence of a direct causal connection turns on the time, distance, and the causal relationship between the acts related to the underlying crime (here, Carter's firearm discharge) and the killing. *McDaniel*, 306 Kan. at 616. Thus, the jury's thought pro-

cess involves determining whether acts related to the firearm discharge and the killing were close enough in time, close enough in distance, and close enough in causal relationship to "form, in reality, a part of the occurrence." *Cameron*, 300 Kan. at 396.

We turn, then, to analyze whether the instructions required the jury to go through the necessary thought process to establish the res gestae relationship and the causal connection between Carter's actions and each killing. As referenced by the district court, the jury instructions match those recommended by the Judicial Council in the Pattern Instructions for Kansas-Criminal. See PIK Crim. 4th 54.120. We have previously held that the use of the PIK language sufficiently incorporates the causation elements required under the law for felony murder. See *McDaniel*, 306 Kan. at 616. That remains true here.

The instructions require not only that the death occur during the commission of the felony with which Carter was charged but also that the killing be perpetrated by the defendant or another in the commission of that felony. *LaMae*, 268 Kan. at 555. In other words, the instructions only allowed a guilty verdict if the jury concluded the killings happened "while" Carter was committing criminal discharge of a firearm. This covers the res gestae requirement of causation. See *McDaniel*, 306 Kan. at 616 (requirement that jury find killing was done "while" defendant was committing underlying felony necessarily required jury to consider whether killing occurred before felony); *State v. Jackson*, 280 Kan. 541, 551, 124 P.3d 460 (2005) (requirement that jury find killing done "while" felony being committed required acquittal if jury believed killing occurred after completion of felony). Although Carter denied committing the underlying crime, the jury separately and specifically convicted him of that crime. By doing so, the jury rejected Carter's defense.

Having established the res gestae of the criminal firearm discharge with the homicides, only an extraordinary intervening event would have superseded Carter's acts to become the sole legal cause of the killing and thus break the direct causal connection between the commission of the underlying felony and the homicide. *State v. Phillips*, 295 Kan. 929, 941, 287 P.3d 245 (2012). Carter has not argued any such intervening event either before the

jury or this court, so we need not consider whether one might exist. See *State v. Littlejohn*, 298 Kan. 632, 655-56, 316 P.3d 136 (2014) (an issue not briefed by the appellant is deemed waived and abandoned).

Contrary to Carter's assertions, we conclude that the jury instructions appropriately required the jury to make the necessary res gestae and causal connections between the underlying felony of criminal discharge of a firearm and the killings of both Oliver and Holloman. We find no error in this aspect of the instructions.

*Additional Language*

Along with his causation challenge, Carter also claims error because the jury could have convicted Carter even if he had not fired the fatal shots. By making this claim of error, Carter presumes it matters who fired the fatal shot. He asserts that Instructions 5 and 10 were inappropriate because they required the State to prove only that Carter "or another" killed Oliver and Holloman, when the State should have been required to prove that Carter "or another for whom he was legally responsible" killed Oliver and Holloman. He claims that merely stating "or another" could have led to an *improper* finding of guilt if the jury believed Carter did not fire the fatal shots. For reasons set forth below, Carter is mistaken.

The language Carter proposes is taken from Instruction 14, which states:

"[A] person is criminally responsible for a crime if the person, either before or during its commission, and with the mental culpability required to commit the crime, intentionally aids another to commit the crime.

"All participants in a crime are equally responsible without regard to the extent of their participation. However, the mere association with another person who actually commits the crime, or mere presence in the vicinity of the crime, is insufficient to make a person criminally responsible for the crime."

This is commonly called the "aider and abettor" instruction.

Carter relies on *McDaniel* to support his argument, where the district court indeed used that same phrase in the felony-murder instruction. 306 Kan. at 613-14. But even though the *McDaniel* instruction was—as a whole—found to be legally appropriate, that phrase was never at issue.

Here, the aider and abettor instruction was given only for the charges of premeditated murder of Oliver and criminal discharge of a firearm at an occupied dwelling, and not for either charge of felony murder. Carter's assertion demonstrates a basic misunderstanding of what must be shown for one to be guilty of felony murder.

It was not necessary for the State to prove Carter either committed the killings or intentionally assisted someone else to commit the killings. For a felony-murder charge, the State need only prove that the killing occurred while Carter committed the underlying felony of criminal firearm discharge, assuming there was no qualifying intervening event. *State v. Dupree*, 304 Kan. 377, 393, 373 P.3d 811 (2016) ("If someone dies in the course of an inherently dangerous felony . . . 'all the participants . . . [are] equally guilty of the felony murder, regardless of who fired the fatal shot.' In short, all participants in a felony murder are principals."); *State v. Thomas*, 239 Kan. 457, 462, 720 P.2d 1059 (1986) ("Under the felony-murder rule, an armed principal in an aggravated robbery cannot be an aider and abettor."). Consequently, "a participant in a felony murder cannot be an aider or abettor and should not be identified as a[n] aider or abettor on a judgment form." *State v. Littlejohn*, 260 Kan. 821, 822, 925 P.2d 839 (1996).

In summary, the use of "or another" here was legally appropriate because all participants of felony murder are guilty as principals. *Dupree*, 304 Kan. at 393. The State was not required to prove that Carter specifically fired the shots that killed the victims—only that the killing occurred during the underlying inherently dangerous felony, of which Carter was convicted. "If someone dies in the course of an inherently dangerous felony . . . 'all the participants . . . [are] equally guilty of the felony murder, regardless of who fired the fatal shot.' [Citation omitted.]" 304 Kan. at 393. As established by our caselaw, Carter is still legally a principal in the felony murder.

The instruction was also factually appropriate because the evidence left some question about who fired the lethal shot as to each victim. If the evidence shows or suggests that someone other than the defendant fired the fatal shot, adding "or another" allows the instructions to match the particular factual scenario more closely.

*Dupree*, 304 Kan. at 393. Because this language was both legally and factually appropriate, the district court did not err by including "or another" in the challenged instructions.

Finding no error in the jury instructions given by the district court, we affirm Carter's convictions.

Affirmed.

State v. Angelo

No. 124,071

STATE OF KANSAS, *Appellee*, v. PATRICK ANGELO JR. *Appellant*.

(518 P.3d 27)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Petition for DNA Testing—Summary Denial—Appellate Review.* The summary denial of a petition for DNA testing under K.S.A. 2021 Supp. 21-2512 presents a question of law over which the appellate court has unlimited review.

2. SAME—*Request for Postconviction DNA Testing under Statute—Three-Part Process Leading to District Court's Decision if Testing Will Be Ordered*. K.S.A. 2021 Supp. 21-2512 governs inmate requests for postconviction DNA testing. The statutory provisions governing the pretesting phase of the proceedings contemplate a three-part process leading up to the district court's decision whether testing shall be ordered. First, the petitioner must allege in the petition that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. Second, once the State has notice of the petition, the statute requires the State to preserve any biological material it previously secured in connection with the case and identify such material in its response. Finally, once the response is filed, the parties may agree that the State has identified and preserved all known biological material and proceed to argue whether testing that identified biological material may produce noncumulative, exculpatory evidence warranting testing under K.S.A. 2021 Supp. 21-2512(c). But if the parties continue to dispute the existence of such biological material, they can present evidence to the district court for appropriate fact-finding. In that circumstance, the petitioner, as the moving party, has the burden to show biological material satisfying the threshold requirements of subsection (a) exists.

3. SAME—*Request for Postconviction DNA Testing of Biological Material.* Under K.S.A. 2021 Supp. 21-2512(a), an inmate convicted of first-degree murder or rape may petition the district court for DNA testing of any biological material that: (1) relates to the investigation or prosecution that led to the conviction; (2) is in the actual or constructive possession of the State; and (3) was not previously subjected to DNA testing or can be tested with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

4. SAME—*Review of Petition for DNA Testing by District Court—Criteria.* In reviewing a petition made under K.S.A. 2021 Supp. 21-2512, the district court first determines whether the biological material sought to be tested meets the criteria set forth in K.S.A. 2021 Supp. 21-2512(a). If those criteria are met, the district court then considers whether testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that

the petitioner was wrongfully convicted or sentenced. If this requirement is met, the district court must order DNA testing of the biological material specified in the petition.

5. EVIDENCE—*Request for DNA Testing under Statute—Determination of Exculpatory Evidence.* Evidence is exculpatory when it tends to disprove a fact in issue which is material to guilt or punishment. Determining whether evidence is exculpatory under K.S.A. 2021 Supp. 21-2512(c) is not a function of weighing the evidence. It is enough that the evidence tends to establish a criminal defendant's innocence, even if it does so by only the smallest margin.

6. EVIDENCE—*Noncumulative Evidence Is Converse of Cumulative Evidence.* Noncumulative evidence is the converse of cumulative evidence—that is, it is evidence not of the same kind and character or not tending to prove the same thing.

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Opinion filed September 30, 2022. Affirmed in part, reversed in part, and remanded.

*Reid T. Nelson,* of Capital and Conflicts Appeals Office, argued the cause and was on the brief for appellant.

*Kayla L. Roehler*, assistant district attorney, argued the cause, and *Mark A. Dupree Sr.,* district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: A jury convicted Patrick Angelo Jr. of two counts of first-degree murder for the shooting deaths of Kevin Brown and Jamie Wilson at a house in Kansas City. These convictions were mainly supported by incriminating testimony from witnesses who were at or near the house around the time of the shooting. In hopes of challenging this testimony, Angelo later petitioned for postconviction DNA testing under K.S.A. 2021 Supp. 21-2512. This statute requires a district court to order testing of biological material that is related to the case and in the State's possession when results *may* yield exculpatory, noncumulative evidence.

In support of his petition, Angelo argued DNA testing of various biological material could show the lack of his DNA and the presence of another suspect's DNA. He claimed these results would constitute exculpatory evidence probative of the identity of the shooter. Angelo also argued these results would impeach the testimony of the State's lone eyewitness to the shootings, who

identified Angelo as the culprit. But the district court summarily denied Angelo's petition after finding the only evidence in State custody that Angelo sought to have tested—the victims' clothing—would not produce exculpatory evidence.

Angelo now appeals the district court's denial of his petition. On appeal, the State defends the district court's conclusion that DNA testing of biological material on the victims' clothing could not produce exculpatory evidence. But the State also argues that summary denial of the petition was appropriate because Angelo failed to meet his burden to show the existence of biological material on the victims' clothing.

These issues require us to interpret K.S.A. 2021 Supp. 21-2512 to clarify the procedures and respective burdens of the parties during the pretesting phase of the proceedings. Our statutory interpretation reveals the Legislature contemplated a three-part process leading up to the district court's first decision point—whether to order DNA testing. First, the petitioner must allege in the petition that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. Second, once the State has notice of the petition, the statute requires the State to preserve any biological material it previously secured in connection with the case and identify such material in its response. Finally, once the response is filed, the parties may agree that the State has identified and preserved all known biological material and proceed to argue whether testing that identified biological material may produce noncumulative, exculpatory evidence warranting testing under K.S.A. 2021 Supp. 21-2512(c). But if the parties continue to dispute the existence of such biological material, they can present evidence to the district court for appropriate fact-finding. In that circumstance, the petitioner, as the moving party, has the burden to show biological material satisfying the threshold requirements of subsection (a) exists.

Because the parties did not have the benefit of this statutory interpretation, their pleadings did not disclose the existence of a factual dispute concerning the presence of biological material on the victims' clothing, and thus the district court did not conduct an evidentiary hearing. These circumstances warrant a remand for further proceedings consistent with our statutory interpretation.

Of course, such a remand would be futile if the district court correctly concluded that testing the biological material on the victims' clothing (material the district court presumed existed) could not yield exculpatory evidence. But under the facts of this case, we conclude such potential DNA test results may be exculpatory, and the district court erred in concluding to the contrary. We thus reverse the district court's ruling that even if biological material exists on the victim's clothing, it would not produce exculpatory evidence. However, this holding alone is not sufficient for Angelo to prevail in his quest for DNA testing. This is because the district court never made any fact finding about the actual existence of biological material on the victim's clothing. As such, we remand the matter for this factual inquiry and further proceedings consistent with this opinion.

## FACTS AND PROCEDURAL BACKGROUND

In 2004, victims Brown and Wilson were staying at a house on Haskell Avenue in Kansas City with several other people, including Angelo's son, Patrick Angelo III (Little Pat). On February 18, police officers raided the house, seized drugs and guns, and arrested several people. Two days later, officers returned to the house on the report of a double homicide. They found Brown's body in a hallway outside the bathroom. Brown had suffered two gunshot wounds to the left side of his head, one of which was a contact wound. They also found Wilson's body on the floor of a nearby bedroom. She had suffered a single contact gunshot wound to the back of her head.

During the investigation, police identified Angelo, Little Pat, and Little Pat's friend, Maurice Williams Jr. (Little Reese), as potential suspects. In a police interview, Little Pat first denied being at the house the night of the murders. But Little Pat later admitted he and Angelo were there, and he pointed to Angelo as the shooter. The State charged Angelo with two counts of first-degree murder. Angelo was arrested in Missouri about a week after the murders and extradited to Kansas several months later.

At Angelo's trial, the State presented evidence that the owner of the Haskell house had agreed to rent it to Little Pat and his friends for several months to prevent the house from going into

foreclosure. Little Pat, Little Reese, and others used the house to buy and sell drugs, and they also partied there. The State also presented evidence that a ring belonging to Angelo went missing before the murders. Brown was the last person known to have the ring. Angelo's girlfriend had also accused Brown of propositioning her.

The State's case relied most heavily on the testimony of four witnesses: Curtis Brooks, Maurice Williams Sr., Little Pat, and Little Reese.

Brooks, who was staying at the Haskell house with Brown and Wilson, testified he was at the house with the victims when Angelo and Little Pat came over. Both Angelo and Little Pat seemed upset. Little Pat immediately went upstairs while Angelo retrieved something from a vent. At trial, Brooks testified that he did not know what Angelo retrieved from the vent. But at preliminary hearing, Brooks said Angelo had retrieved a revolver. Angelo then asked Brooks where Brown was located. Brooks told Angelo that Brown was in the basement. Angelo instructed Brooks to direct Brown to the bathroom whenever he came upstairs. Brooks complied. Little Pat then came back downstairs, and Brooks told him Angelo and Brown were in the bathroom.

Brooks said he was afraid Little Pat had come to the house to collect money Brooks owed him. So Brooks asked another person at the house for a ride to Brooks' nephew's house. When Brooks left the Haskell house, Angelo, Brown, and Little Pat were all in the bathroom with the door closed. At his nephew's, Brooks requested a gun for protection. His nephew did not have a gun but offered to cover Brooks' debt. Brooks then returned to the Haskell house after being gone about 10 minutes. When Brooks opened the door, he saw two bodies lying on the floor. Brooks immediately returned to his nephew's house.

Williams testified he was at Brooks' nephew's house the night of the murders. Brooks came over saying something was wrong with Brown, and Brown was lying on the floor of the Haskell house. Williams drove to the Haskell house. When he looked in the window, he saw someone lying on the floor. He went inside and saw Brown had been shot in the head. He also saw a woman,

who had also been shot, lying in the bedroom. He left the house and drove to a nearby gas station to call the police.

Little Pat testified that Angelo drove him and Little Reese to the Haskell house on the night of the murders. Little Pat and Little Reese both went to the house to retrieve some of their property. But Little Pat was unsure why Angelo wanted to go with them. Angelo parked around the corner from the house, and he and Little Pat got out. Once in the house, Little Pat immediately went upstairs. He looked around for his and Little Reese's property for about 10 minutes. When he went back downstairs, he heard a loud noise, and saw Brown slump onto Angelo in the hallway outside the bathroom. Little Pat fled the house. As he ran to the car, he heard two more loud sounds.

Little Pat said he got back to the car shortly before Angelo. Inside the car, Little Pat heard Angelo mumble something, but he could not understand what Angelo said. Little Reese later told Little Pat that Angelo had said Brown was dead.

Finally, Little Reese testified he was arrested during the drug raid on the Haskell house and was not released from jail until the day of the murders. Angelo drove him and Little Pat over to the house. Little Reese stayed in the car while Angelo and Little Pat went inside. Little Reese asked them to retrieve his coat and his keys from the house. When they returned to the car about 10 to 15 minutes later, Little Reese heard Angelo say Brown was dead. Little Reese later asked Little Pat what had happened. Little Pat said he heard gunshots and saw Brown slump onto Angelo. Little Reese later overheard Little Pat tell Angelo over the phone that he was not going to jail for something he did not do.

While this witness testimony provided the evidentiary foundation for the State's theory of the case, the State also introduced certain forensic evidence. None of the DNA evidence presented at trial linked Angelo to the shooting. A forensic scientist testified she performed DNA testing on biological material found on four items collected at the crime scene—two .380 caliber cartridge cases, a swab of blood taken from the living room floor, and a swab of blood taken from the hallway wall. No DNA profile was obtained from the first cartridge case. The second cartridge case contained a partial DNA profile matching victim Wilson. Both the

swab from the living room floor and the swab from the wall contained a DNA profile consistent with victim Brown. Investigators collected other items from the scene for possible DNA testing, including a beer bottle, a sexual assault kit from each victim, and a stocking cap. But the forensic scientist did not test those items because she, along with investigators and prosecutors, found them to be nonprobative.

Angelo's first trial ended in a hung jury. At his second trial, the jury convicted him of two counts of first-degree murder. This court affirmed his convictions on direct appeal. *State v. Angelo*, 287 Kan. 262, 197 P.3d 337 (2008). Angelo has since filed several postconviction motions. See *Angelo v. State*, No. 123,237, 2022 WL 569738 (Kan. App. 2022) (unpublished opinion); *Angelo v. State*, No. 109,660, 2014 WL 1096834 (Kan. App. 2014) (unpublished opinion). The only relief he has obtained is a remand for resentencing after the Court of Appeals found his original sentence was illegal. 2014 WL 1096834, at *4-5. After resentencing, we affirmed his new sentence on appeal. *State v. Angelo*, 306 Kan. 232, 236, 392 P.3d 556 (2017).

In his most recent motion, Angelo petitioned for postconviction DNA testing under K.S.A. 2021 Supp. 21-2512. In that petition, he asked for DNA testing of: (1) the clothes he wore on the day of the murders; (2) the alleged murder weapon; (3) residue from his hands; and (4) the victims' clothing.

In response, the State noted that Angelo was in Missouri custody for nearly four months after the murders before he was extradited to Kansas. Thus, the State never had custody of the clothes he wore on the day of the murders. Likewise, law enforcement never recovered any guns in connection with the double homicide, so there were no guns to test. And the State did not collect any residue from Angelo's hands because he was in Missouri custody for several months after the murders.

As for the victims' clothing, the State conceded these items remained in State custody. But it argued DNA testing of the clothing would not produce noncumulative, exculpatory evidence. The State explained that the victims lived in a home with several other people. And the residents hosted parties and sold drugs from the home, which meant there were often other visitors at this location.

If the DNA of someone other than Angelo or the victims were found on the victims' clothing, the State argued the test results would establish only that the person may have had contact with the victims at an unknown time. It would not tend to prove that the person was the shooter.

The district court denied Angelo's petition without a hearing. The court found the State had only the victims' clothing in its custody and DNA testing of the clothing would not produce exculpatory evidence.

Angelo appeals the district court's denial of his petition. Jurisdiction is proper. K.S.A. 2021 Supp. 22-3601(b)(4) (right to appeal off-grid convictions to Supreme Court).

## ANALYSIS

Angelo claims the district court erred by summarily denying his petition for postconviction DNA testing. He does not challenge the district court's finding that only the victims' clothing satisfied the threshold requirements for postconviction DNA testing under K.S.A. 2021 Supp. 21-2512(a). Instead, he argues only that the district court erroneously concluded that testing biological material on the victims' clothing could not produce exculpatory evidence. And at oral argument, appellant's counsel confirmed Angelo had narrowed his request for postconviction DNA testing to biological material on victim Brown's clothing only. As such, our analysis similarly focuses on the request to test biological material on this clothing.

Angelo argues DNA testing of the biological material from the victim's clothing would show the lack of his DNA, and such results would undermine Little Pat's trial testimony inculpating Angelo in the double murder and tend to prove Angelo was not the shooter. Angelo also contends the exculpatory character of these test results would be enhanced if the DNA profile also matched one of the witnesses who had opportunity and motive to commit the crimes.

The State argues summary denial of Angelo's petition was proper because the statute permits testing of biological material only and Angelo failed to carry his burden to prove biological material was present on the victim's clothing. The State also argues

that if biological material is present on the victim's clothing, then the district court properly concluded that DNA test results would not be exculpatory.

To resolve these competing arguments, we first identify the scope of our review and the controlling legal framework. Second, we interpret K.S.A. 2021 Supp. 21-2512 to address the State's argument that Angelo failed to show the existence of biological material on the victim's clothing. Finally, we review and reverse the district court's ruling that DNA testing of biological material on the victim's clothing could not produce exculpatory evidence.

## I. *Standard of Review and Legal Framework*

When a district court summarily denies a petition for postconviction DNA testing, its adjudication of the petition is based on the files (including the parties' pleadings), record of the underlying trial, and any legal arguments from a nonevidentiary hearing. Thus, appellate courts are in just as good a position as the district court to assess the merits of the petition, and our review is unlimited. *State v. Lackey*, 295 Kan. 816, 819, 286 P.3d 859 (2012). This appeal also requires us to interpret K.S.A. 2021 Supp. 21-2512. The interpretation of a statute presents a question of law over which we have unlimited review. *Lackey*, 295 Kan. at 819-20.

The right to postconviction DNA testing is defined by statute. K.S.A. 2021 Supp. 21-2512 provides:

> "(a) Notwithstanding any other provision of law, a person in state custody, at any time after conviction for murder in the first degree as defined by K.S.A. 21-3401, prior to its repeal, or K.S.A. 2021 Supp. 21-5402, and amendments thereto, or for rape as defined by K.S.A. 21-3502, prior to its repeal, or K.S.A. 2021 Supp. 21-5503, and amendments thereto, may petition the court that entered the judgment for forensic DNA testing (deoxyribonucleic acid testing) of any biological material that:
>
> (1) Is related to the investigation or prosecution that resulted in the conviction;
>
> (2) is in the actual or constructive possession of the state; and
>
> (3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

"(b)(1) The court shall notify the prosecuting attorney of a petition made under subsection (a) and shall afford the prosecuting attorney an opportunity to respond.

(2) Upon receiving notice of a petition made under subsection (a), the prosecuting attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section.

"(c) The court shall order DNA testing pursuant to a petition made under subsection (a) upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced.

"(d) The cost of DNA testing ordered under subsection (c) shall be borne by the state or the petitioner, as the court may order in the interests of justice, if it is shown that the petitioner is not indigent and possesses the means to pay.

"(e) The court may at any time appoint counsel for an indigent applicant under this section.

"(f)(1) Except as provided in subsection (f)(3), if the results of DNA testing conducted under this section are unfavorable to the petitioner, the court:

(A) Shall dismiss the petition; and

(B) in the case of a petitioner who is not indigent, may assess the petitioner for the cost of such testing.

(2) If the results of DNA testing conducted under this section are favorable to the petitioner and are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at a trial or sentencing, the court shall:

(A) Order a hearing, notwithstanding any provision of law that would bar such a hearing; and

(B) enter any order that serves the interests of justice, including, but not limited to, an order:

(i) Vacating and setting aside the judgment;

(ii) discharging the petitioner if the petitioner is in custody;

(iii) resentencing the petitioner; or

(iv) granting a new trial.

(3) If the results of DNA testing conducted under this section are inconclusive, the court may order a hearing to determine whether there is a substantial question of innocence. If the petitioner proves by a preponderance of the evidence that there is a substantial question of innocence, the court shall proceed as provided in subsection (f)(2).

"(g) Nothing in this section shall be construed to limit the circumstances under which a person may obtain DNA testing or other postconviction relief under any other provision of law."

Together, these provisions contemplate at least two possible decision points for a district court in the adjudication of a petition for postconviction DNA testing: (1) whether testing should be ordered in the first instance under subsection (c); and (2) if testing is ordered,

the appropriate disposition or remedy under subsection (f) depending on the nature of the test results.

Because the district court summarily denied Angelo's petition and did not order DNA testing, we focus on those provisions relevant to the first decision point—whether testing shall be ordered. In deciding whether to order testing in the first instance, the district court first determines whether the biological material sought to be tested meets the criteria set forth in K.S.A. 2021 Supp. 21-2512(a)(1)-(3). *Lackey*, 295 Kan. at 820. If those criteria are met, the district court then considers whether "testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced." K.S.A. 2021 Supp. 21-2512(c). If met, then the district court "shall order DNA testing" of the biological material specified in the petition. K.S.A. 2021 Supp. 21-2512(c); 295 Kan. at 821.

As for K.S.A. 2021 Supp. 21-2512(c)'s requirement that the potential evidence be "noncumulative," "[w]e have defined that term's opposite, i.e., cumulative evidence, as 'evidence of the same kind to the same point, and whether it is cumulative is to be determined from its kind and character, rather than its effect.'" *State v. George*, 308 Kan. 62, 71-72, 418 P.3d 1268 (2018) (quoting *State v. Rodriguez*, 295 Kan. 1146, 1158, 289 P.3d 85 [2012]); see also Black's Law Dictionary 479 (11th ed. 2019) ("[Of evidence] tending to prove the same thing <cumulative testimony>."). Thus, noncumulative evidence is the converse—that is, evidence "not of the same kind and character or not tending to prove the same thing." *George*, 308 Kan. 62, Syl. ¶ 4.

As for K.S.A. 2021 Supp. 21-2512(c)'s requirement that the potential evidence also be "exculpatory," we have defined "exculpatory evidence" as evidence that "simply '"tends to disprove a fact in issue which is material to guilt or punishment."'" *State v. Johnson*, 299 Kan. 890, 894, 327 P.3d 421 (2014) (quoting *Lackey*, 295 Kan. at 823). Evidence need not be exonerating to be exculpatory—that is, the evidence need not definitively establish a criminal defendant's innocence. *George*, 308 Kan. at 67; *Lackey*, 295 Kan. at 823. It is enough that the evidence tends to establish a criminal defendant's innocence, even if it does so by only the smallest margin. *George*, 308 Kan. at 71; *Lackey*, 295 Kan. at 823.

When determining whether evidence is exculpatory under K.S.A. 2021 Supp. 21-2512(c), we have made clear that the district court should not weigh the evidence or consider its potential effect on the verdict. "That this potentially exculpatory evidence may be of very little evidentiary value does not matter at this stage [when the court is deciding whether to order testing in the first instance]." *George*, 308 Kan. at 68. It is only after DNA testing has been completed that a court may be called on under K.S.A. 2021 Supp. 21-2512(f) to make "'a "probabilistic determination about what reasonable, properly instructed jurors would do" with the new evidence in light of the totality of the circumstances.'" *State v. Hernandez*, 303 Kan. 609, 618, 366 P.3d 200 (2016) (quoting *Lackey*, 295 Kan. at 824). "But the statute does not contemplate that exercise of discretion in determining whether to order the testing in the first instance." *Lackey*, 295 Kan. at 824.

II. *The Allegations in Angelo's Petition Satisfied the Threshold Requirements for Postconviction DNA Testing, and Angelo's Failure to Make an Evidentiary Showing that Biological Material Is Present on the Victim's Clothing Does Not Provide an Independent Basis to Affirm the Summary Denial of Angelo's Petition*

Here, the district court summarily denied Angelo's petition because DNA testing of any biological material would not produce exculpatory results. Nevertheless, the State argues summary denial of the petition was proper because Angelo failed to show biological material exists on the items he sought to test. According to the State, K.S.A. 2021 Supp. 21-2512 permits DNA testing of known biological material only—it does not permit testing to determine whether an item contains biological material. The State believes this interpretation of the statute places the burden on Angelo to show biological material is present on any physical evidence an inmate identifies for testing in the petition—here, victim Brown's clothing. Because Angelo purportedly failed to carry this evidentiary burden, the State argues the district court properly denied the petition without an evidentiary hearing. In other words, the State contends the district court's ruling was right, albeit for a different reason. See *State v. Vasquez*, 287 Kan. 40, 59, 194 P.3d 563 (2008) (Kansas Supreme Court may affirm a district court's ruling "if it is right even for the wrong reason.").

The State's argument requires us to interpret K.S.A. 2021 Supp. 21-2512 to identify the pretesting procedures and burdens of the respective parties leading up to the district court's decision whether to order DNA testing under K.S.A. 2021 Supp. 21-2512(c). As discussed in the following sections of the opinion, our statutory interpretation confirms the State's argument is not without merit—the statute authorizes testing of
biological material only, and as the moving party, the burden is on Angelo to show the existence of biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a)(1)-(3).

But as we will explain, our statutory interpretation also reveals the Legislature contemplated a three-part process for the pretesting phase of the proceedings. And that three-part process is not set out in any of our prior decisions. Because neither the parties nor the district court had the benefit of this statutory interpretation at the time of the district court proceedings, those proceedings did not conform to this three-part procedure.

Thus, while we find the State's argument does not provide an independent basis to affirm the summary denial of Angelo's petition, it does demonstrate the propriety of a remand for further proceedings consistent with our statutory interpretation. To support this conclusion, we first interpret the various provisions of the statute to identify the procedures governing the pretesting phase of the proceedings. Then, we apply this statutory interpretation to circumstances at hand.

### A. *K.S.A. 2021 Supp. 21-2512 Limits the Scope of Permissible Testing and Contemplates a Three-Part Process for the Pretesting Phase of the Proceedings*

We begin by interpreting the statute to define the permissible scope of postconviction DNA testing and to identify the procedures governing the pretesting phase of the proceedings.

#### 1. *Rules of Statutory Interpretation*

The rules governing statutory interpretation are well-established:

"The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we

begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. [Citations omitted.]" *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

But even when the language of the statute is clear, we still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013). "Thus, the doctrine of *in pari materia* has utility beyond those instances where statutory ambiguity exists. It can be used as a tool to assess whether the statutory language is plain and unambiguous in the first instance, and it can provide substance and meaning to a court's plain language interpretation of a statute." *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022).

2. *The Statute Limits Testing to Biological Material, Not Physical Evidence, and Contemplates a Three-part Procedure Leading Up to the District Court's Decision Whether to Order Testing*

K.S.A. 2021 Supp. 21-2512 provides "an opportunity for exoneration to innocent individuals convicted of severe crimes." *State v. Cheeks*, 298 Kan. 1, 6, 310 P.3d 346 (2013), *overruled on other grounds by State v. LaPointe*, 309 Kan. 299, 434 P.3d 850 (2019). The statute accomplishes this legislative purpose by using "DNA testing to help determine if one who is in state custody 'was wrongfully convicted or sentenced' and if so, to vacate and set aside the judgment, discharge the person if in custody, resentence, or grant a new trial." *State v. Denney*, 278 Kan. 643, 654, 101 P.3d 1257 (2004).

But the scope of K.S.A. 2021 Supp. 21-2512 is not unlimited. Its "legislatively-created procedures evince a laudable, yet limited, effort to provide for postconviction DNA testing under narrow circumstances." *State v. Denney*, 283 Kan. 781, 793-94, 156 P.3d 1275 (2007). These limitations and the procedures governing

the pretesting phase of the proceedings are largely contained in K.S.A. 2021 Supp. 21-2512(a)-(c). Those subsections describe in chronological order a three-part procedure governing the pretesting phase of the proceedings, and each subsection reveals important substantive limits to the right to postconviction DNA testing.

First, K.S.A. 2021 Supp. 21-2512(a) identifies the class of individuals eligible to pursue postconviction DNA testing and the threshold requirements for such testing. Subsection (a) provides that inmates convicted of first-degree murder or rape may petition "for forensic DNA testing . . . of any biological material" when such material:

> "(1) Is related to the investigation or prosecution that resulted in the conviction;
>
> "(2) is in the actual or constructive possession of the state; and
>
> "(3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results." K.S.A. 2021 Supp. 21-2512(a).

To state a claim for postconviction DNA testing, a petition must allege facts sufficient to meet these requirements. Thus, when addressing a petition under K.S.A. 2021 Supp. 21-2512, the district court first determines whether biological material on the items sought to be tested meet the criteria in K.S.A. 2021 Supp. 21-2512(a)(1)-(3). *Lackey*, 295 Kan. at 820.

The plain language of this subsection contains two significant limitations. First, it limits the class of eligible petitioners to those who are in custody after being convicted of first-degree murder or rape. See K.S.A. 2021 Supp. 21-2512(a). Second, and more pertinent to the issue at hand, it limits the scope of testing to "*any biological material*" that is related to the case, in the actual or constructive possession of the State, and which was not previously tested or can be retested with new DNA techniques that are more accurate and probative. (Emphasis added.) Eligible petitioners may request DNA testing of biological material only. The plain language of subsection (a) does not contemplate or provide for testing of other physical evidence to determine whether biological material is present. And K.S.A. 2021 Supp. 21-2512(a) requires

that a petition for postconviction DNA testing allege that biological material satisfying the threshold requirements for testing exists.

Once a petition for postconviction DNA testing has been filed, subsection (b) identifies the appropriate procedures and duties of the prosecution and district court:

> "(b)(1) The court shall notify the prosecuting attorney of a petition made under subsection (a) and shall afford the prosecuting attorney an opportunity to respond.
>
> (2) Upon receiving notice of a petition made under subsection (a), the prosecuting attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section." K.S.A. 2021 Supp. 21-2512(b).

The plain language of subsection (b) first requires the district court to notify the prosecuting attorney of the petition for postconviction DNA testing. "The purpose of the notification requirement is at least two-fold: First, it gives the State an opportunity to respond to the request; and, second, it provides a warning to the State that the biological material in question must be preserved." *Lackey*, 295 Kan. at 821.

As for the State's preservation duty, once the prosecution has notice of the petition, it must take necessary steps to ensure that "biological material that was secured in connection with the case is preserved." K.S.A. 2021 Supp. 21-2512(b)(2). This statutory language is important in two respects. First, like subsection (a), it focuses on "biological material" specifically, rather than items of evidence generally. Second, the plain language requires the State to preserve only biological material that "*was secured* in connection with the case." K.S.A. 2021 Supp. 21-2512(b). The Legislature's use of the past-tense phrase, "was secured," makes clear the Legislature intended the State only preserve the "biological material" it previously secured in its investigation or prosecution of the defendant. See https://www.merriam-webster.com/dictionary/secured (defining verb "secure" "to relieve from exposure to danger: act to make safe against adverse contingencies"); see also https://www.oxfordlearnersdictionaries.com/us/definition/english/secure_1?q=secured (identifying "secured" as the past simple use of the term "secure"). The plain language cannot be read to

impose a duty on the State to call its crime scene investigators back in to examine or re-examine the physical evidence and determine whether any of those items contain biological material that the prosecution had not previously "secured."

As for the State's opportunity to respond, when the pretesting provisions are read together in harmony, it is apparent the Legislature intended the State's response to identify all biological material it previously secured in connection with the case. As noted, under subsection (a), a petition must generally allege that biological material exists, and such material satisfies the threshold requirements for testing. Under subsection (b), the State must preserve any remaining biological material that it previously secured in connection with the case, and the State has an opportunity to respond to the petition. Only after the parties have submitted these pleadings does the statute then authorize the district court to decide whether testing shall be ordered because it "may produce noncumulative, exculpatory evidence relevant to" petitioner's wrongful conviction claim. K.S.A. 2021 Supp. 21-2512(c); *Lackey*, 295 Kan. at 821.

The very purpose of these statutory provisions would be undermined if subsection (b) did not require that the State's response identify the biological material it previously secured in connection with the case. Without this information, neither the petitioner nor the district court would be alerted to the possibility the State controverts petitioner's allegations regarding the existence of biological material. And the district court could find petitioner's allegations to have been deemed admitted even though the State believes no such biological material exists. The district court could then proceed to subsection (c) and determine whether testing should be ordered without first conducting an evidentiary hearing to resolve (the undisclosed) factual dispute regarding the existence of biological material. In turn, the district court could order testing under subsection (c), even though the items to be tested may contain no biological material—an order that would contravene the Legislature's clear intention to limit postconviction DNA testing to biological material only.

Reading the plain language of these subsections together and in harmony, K.S.A. 2021 Supp. 21-2512 creates a three-step process leading up to the district court's first decision point—whether to order DNA testing. First, the petition must allege that biological material exists and satisfies the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). Second, once the State has notice of the petition, it must preserve any remaining biological material that it previously "secured in connection with the case" and identify such biological material in its response. K.S.A. 2021 Supp. 21-2512(b)(2). Finally, once the pleadings have been filed, the parties will either agree or dispute that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. If the parties agree such biological material exists, then they can proceed to argue whether testing will produce noncumulative, exculpatory evidence compelling the district court to order testing under K.S.A. 2021 Supp. 21-2512(c). But if they continue to dispute the existence of such biological material, then they can present evidence to the district court for appropriate fact-finding. In that situation, the petitioner, as the proponent of DNA testing, bears the burden to prove the existence of such biological material. See *In re K.E.*, 294 Kan. 17, 23, 272 P.3d 28 (2012) ("movant generally bears the burden of proof on a motion"). With this statutory interpretation in mind, we apply the three-part procedure to the facts at hand.

B. *The Pretesting Procedures in K.S.A. 2021 Supp. 21-2512 Do Not Support the District Court's Decision to Summarily Deny Angelo's Petition*

To address the State's argument that Angelo failed to meet his burden to show the existence of biological material satisfying the threshold requirements for testing, we apply the three-part statutory procedure (outlined above) to the district court proceedings.

1. *Step One—Angelo Stated a Claim for Postconviction DNA Testing*

We first analyze the sufficiency of the allegations in Angelo's petition. Our precedent makes clear that an eligible inmate need

not specifically allege how DNA testing would produce noncumulative, exculpatory evidence. Instead, K.S.A. 2021 Supp. 21-2512

"merely requires the prisoner to allege that the evidence is related to the investigation or prosecution of his or her conviction, that the State has possession or constructive possession of the evidence, and that the evidence was not previously subjected to DNA testing or that it could be tested using new DNA testing techniques." *Bruner v. State*, 277 Kan. 603, 606, 88 P.3d 214 (2004).

While the pleading requirement set forth in *Bruner* generally remains true, we must provide some clarification in light of our statutory interpretation. A petition for postconviction DNA testing must still generally allege that the "evidence" is related to the investigation, is in the possession of the State, and has not been tested previously or is eligible for retesting. But the "evidence" referenced in *Bruner* necessarily refers to "biological material" specifically because K.S.A. 2021 Supp. 21-2512 does not authorize testing of physical evidence to determine whether biological material is present. Thus, our point of clarification is that when an inmate's petition requests testing of other physical evidence, it must also contain allegations sufficient to establish that biological material is present on that physical evidence.

But this pleading requirement is not rigorous. In *Hernandez*, the petitioner sought to test various items of physical evidence, including blankets, sheets, towels, and a box of condoms. He also alleged that he believed those items of physical evidence contained biological material. The State's response did not controvert this latter allegation. And we held the petition alleged facts sufficient to satisfy the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). *Hernandez*, 303 Kan. at 615.

Here, like in *Hernandez*, Angelo requested DNA testing of physical evidence—victim Brown's clothing. And also like *Hernandez*, he alleged his belief that biological material was present on that item:

"In the States Ap[p]ellee Brief (Pg. 35) first paragraph (quoting) 'In fact, as the District Court noted the State could have spent much more time putting on evidence of the same [additional DNA evidence] but chose not to.' Jennifer S. Tatum, Assistant District Attorney[']s above statement*, petitioner is left to believe State prosecutor possibly withheld* [emphasis added] *exculpatory evidence, or*

*had in her constructive possession some type of biological material that could have been tested or already had been tested*." (Emphasis added.).

Angelo couples these allegations with others claiming that DNA testing of the victim's clothing will yield exculpatory results. These allegations are premised on the belief that those items of evidence contain biological material amenable to forensic DNA testing. Angelo further alleged that these items (and the material on such items) are related to the case, are in the State's possession, and had not been previously tested.

As a pro se petitioner, we liberally construe Angelo's petition and the allegations in it. *Bruner*, 277 Kan. at 605. So construed, Angelo's petition sufficiently alleged the existence of biological material on the victim's clothing and that this material satisfied the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). Thus, under the first step of the three-part process governing the pretesting phase of the proceeding, Angelo's petition stated a claim for postconviction DNA testing.

2. *Step Two—The State's Response Did Not Disclose a Factual Dispute Regarding the Existence of Biological Material Sought to Be Tested*

Under the second step of the pretesting process, the State responds to the petition. Under our interpretation of K.S.A. 2021 Supp. 21-2512, the State's response should have identified the biological material it previously secured in connection with the case. Of course, the State did not have the benefit of this statutory interpretation at the time it filed the response. And not surprisingly, the response did not identify such biological material. Nor did it specifically controvert Angelo's allegations that biological material was present on the victim's clothing. Without this information, the district court was not alerted to the fact the State disputed Angelo's allegations that the items he sought to test contained biological material.

3. *Step Three—Without Disclosure of a Factual Dispute, the District Court Could Not Know an Evidentiary Hearing Was Necessary*

The State's failure to disclose a factual dispute regarding the existence of biological material on victim Brown's clothing also impacts the third and final step of the pretesting process. In this final stage, the parties will either agree that all biological material has been identified or dispute this fact. If the parties agree, then they can proceed to argue whether testing should be ordered under K.S.A. 2021 Supp. 21-2512(c). But if the parties dispute that biological material exists, then they can present evidence to the district court for fact-finding. Here, because the State's response did not identify the biological material it had previously secured or specifically deny the allegations regarding the existence of biological material on victim Brown's clothing, the district court could not have known the proper course was to conduct an evidentiary hearing for fact-finding to determine whether the victim's clothing contained biological material.

In sum, Angelo's petition stated a claim for postconviction DNA testing and the State's response did not disclose a factual dispute as to the existence of biological material on Brown's clothing. Without that disclosure, the State's response did not trigger Angelo's burden to prove up his allegation that biological material was present. Nor was Angelo otherwise given the opportunity to make this showing because the district court did not hold an evidentiary hearing. For these reasons, we cannot affirm the district court's summary denial of Angelo's petition on the alternative theory that Angelo failed to meet his burden to show the existence of biological material satisfying the threshold requirements for testing.

Nevertheless, the State's arguments on appeal suggest there may be a factual dispute regarding the presence of biological material on the victim's clothing. If the State had the benefit of our statutory interpretation at the time, then its response would have disclosed this dispute and the need for an evidentiary hearing. Because we conclude in the following section that the district court erred by concluding that testing biological material on the victim's

clothing would not produce exculpatory evidence, these circumstances demonstrate the propriety of a remand for further proceedings consistent with our statutory interpretation.

## III. *The District Court Erred by Concluding that Testing Would Not Produce Exculpatory Evidence*

Finally, we reach Angelo's challenge to the district court's ruling that testing would not have produced exculpatory evidence. As previously noted in section I, we apply the same statutory framework that controlled the district court's analysis below. Thus, we exercise unlimited review to determine whether DNA testing of the presumed biological material may have yielded noncumulative, exculpatory evidence under K.S.A. 2021 Supp. 21-2512(c).

Before addressing the merits of Angelo's argument, we briefly pause to address two other issues relevant to the scope of our review. First, the district court found the victims' clothing was the only item Angelo sought to have tested that met the threshold criteria for postconviction DNA testing. See K.S.A. 2021 Supp. 21-2512(a)(1)-(3). The court found the other items listed in Angelo's petition (Angelo's clothing from the day of the murders, the murder weapon, and any residue collected from Angelo's hands) did not meet these criteria because those items were not in the State's possession. See K.S.A. 2021 Supp. 21-2512(a)(2) (An inmate convicted of first-degree murder "may petition the court . . . for forensic DNA testing [] of any biological material that . . . is in the actual or constructive possession of the state."). Angelo does not challenge those findings on appeal. Thus, we affirm the district court's ruling that these other items failed to meet the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a).

Second, as discussed above, the district court was not alerted to any factual dispute about the presence of biological material on victim Brown's clothing, and thus it simply presumed biological material was present for the purposes of its ruling. We will likewise presume biological material is present on Brown's clothing for the limited purpose of testing the district court's legal conclusion. But nothing in this opinion should be construed to affirm or support the validity of the presumption that biological material is

present as a matter of fact or to limit argument or evidence on the question in subsequent proceedings.

As for the district court's judgment, it ruled that testing the presumed biological material on the victims' clothing would not produce exculpatory evidence. It found "the DNA of a large number of people could be present in the house, [so t]he fact that another party's DNA was present on the clothes of either deceased party would simply not lead to the conclusion that the party was the shooter." Likewise, the court found that test results showing the absence of Angelo's DNA would not tend to show that someone other than Angelo was the shooter. The district court explained "[t]he consensus of the [trial] testimony is that Angelo was present and ran from the scene very soon after noises/shots were heard. His own son [Little Pat] places him at the scene in direct contact with one of the victims." Based on these findings the district court summarily denied Angelo's petition.

We conclude the district court erred by summarily denying Angelo's petition for testing of the presumed biological material on Brown's clothing for two reasons. First, the district court erred by weighing the potential test results against other incriminating evidence adduced at trial. Second, even if the test results are not exonerating, they may be probative of the identity of the shooter—a disputed question of material fact at Angelo's trial. And favorable test results could be used to impeach the testimony of Little Pat, the State's only eyewitness to the shootings. Under the facts unique to this case, such
evidence could be exculpatory under our precedent construing K.S.A. 2021 Supp. 21-2512(c). And this evidence would not be cumulative to the other forensic evidence introduced at trial.

A. *The District Court Improperly Weighed the Evidence to Summarily Deny Angelo's Petition*

In summarily denying Angelo's petition, the district court focused on the potential for any DNA test results to be exculpatory. But in conducting this analysis, the court appears to have weighed the evidence. The district court found "[t]he consensus of the [trial] testimony is that Angelo was present and ran from the scene very soon after noises/shots were heard. His own son [Little Pat]

places him at the scene in direct contact with one of the victims." And given the strength of this incriminating trial testimony, the district court concluded that test results confirming the absence of Angelo's DNA (or the presence of a third party's DNA) would not prove Angelo was not the shooter.

But when deciding whether K.S.A. 2021 Supp. 21-2512(c) requires the court to order testing in the first instance, the district court's inquiry is limited to whether the results may produce noncumulative, exculpatory evidence. The district court does not have discretion at this stage of the proceedings to consider the weight of the exculpatory evidence or its potential effect on the verdict. *Lackey* illustrates this point.

Lackey was convicted of first-degree premeditated murder and rape. At trial, the State presented evidence that sperms cells found in the victim's vagina matched Lackey's DNA, and that Lackey could not be excluded as a contributor to the DNA profile from the victim's fingernail scrapings. Lackey later petitioned under K.S.A. 2021 Supp. 21-2512 for DNA testing of hairs found on the victim's body. The district court summarily denied Lackey's petition, and the Court of Appeals affirmed, finding "'DNA testing on the short hairs would not produce exculpatory evidence in this case when Lackey's DNA was consistent with the DNA found in [the victim's] vagina and underneath her fingernails.'" *Lackey*, 295 Kan. at 823. We reversed the panel's decision, holding the Court of Appeals improperly weighed the evidence in determining whether DNA testing of the hairs would produce exculpatory evidence. 295 Kan. at 823-24.

*Lackey* confirms that the strength of the inculpatory trial evidence is not a relevant consideration in determining whether DNA test results may produce exculpatory evidence under K.S.A. 2021 Supp. 21-2512(c). Rather, at this stage, the focus of the inquiry is limited to whether such results may tend to prove or disprove a disputed material fact, even if the results would do so by only the slightest margin. See *George*, 308 Kan. at 68; *Haddock v. State*, 295 Kan. 738, 769, 286 P.3d 837 (2012). The district court may weigh the evidence only after testing has been ordered—when it makes a "'probabilistic determination about what reasonable, properly instructed jurors would do' with the new evidence in light

of the totality of the circumstances" under K.S.A. 2021 Supp. 21-2512(f). *Lackey*, 295 Kan. at 824.

Thus, under K.S.A. 2021 Supp. 21-2512(c), the district court erred by considering whether other trial evidence convincingly established that Angelo was the shooter and whether the test results from the presumed biological material on Brown's clothing could adequately overcome that evidence.

B. *DNA Testing of the Presumed Biological Material from Brown's Clothing Could Produce Noncumulative, Exculpatory Evidence*

In reviewing the district court's conclusion that testing would not produce exculpatory evidence, we remain mindful that subsection (c) sets a low threshold for ordering DNA testing of biological material. A petitioner need not show with certainty that DNA testing of the specified items will produce noncumulative, exculpatory evidence. Instead, the possibility of generating such evidence will suffice. *Hernandez*, 303 Kan. at 617; see also K.S.A. 2021 Supp. 21-2512(c) ("The court shall order DNA testing" if "testing *may* produce noncumulative, exculpatory evidence." [Emphasis added.]). What is more, a petitioner need not specifically allege how the DNA testing would produce evidence that meets the standard set by K.S.A. 2021 Supp. 21-2512(c). *Lackey*, 295 Kan. at 824; *Bruner v. State*, 277 Kan. 603, 606, 88 P.3d 214 (2004). And as previously noted, test results need not be exonerating to be exculpatory. The potential DNA test results need only be probative of a material fact in issue at trial.

Thus, summary dismissal of a petition under K.S.A. 2021 Supp. 21-2512(c) is proper if the test results would be nonexculpatory as a matter of law. This low threshold for testing may permit a petitioner to engage in a "fishing expedition" for DNA evidence, but it is an expedition the Legislature has deemed worthwhile. 277 Kan. at 606.

1. *Testing May Produce Exculpatory Evidence*

Angelo argues DNA test results may show the lack of his DNA on the presumed biological material from Brown's clothing and the presence of a witness' DNA, and such evidence would be

exculpatory. Angelo explains that Little Pat testified he saw Brown slump onto Angelo right after the shooting. From this testimony, Angelo infers that the physical contact created the opportunity for his biological material to transfer to Brown's clothing. Thus, Angelo claims test results showing the lack of his DNA in the presumed biological material on Brown's clothing would tend to impeach Little Pat's testimony and show Angelo was not the shooter. Angelo claims the exculpatory character of this evidence would be enhanced by the presence of the DNA of another witness at trial. This conclusion is especially true, according to Angelo, if the DNA profile matched Little Reese's or Little Pat's DNA because both had opportunity and motive to commit the murders.

In similar circumstances, we have held that DNA testing may produce exculpatory evidence. For example, in *Hernandez*, we held the lack of petitioner's DNA or the presence of a third-party's DNA in the biological material on items collected from the crime scene would be exculpatory evidence relevant to the identity of the perpetrator. There, petitioner was convicted of raping his 13-year-old daughter, C.H. Hernandez later petitioned for postconviction DNA testing of biological material on the bedding collected from C.H.'s bed and the bed Hernandez shared with his wife—the two locations where the sexual assaults occurred. The district court summarily denied the petition after a non-evidentiary hearing, and the Court of Appeals affirmed.

We reversed, explaining that test results confirming the lack of petitioner's DNA on the biological material from the bed sheets could be exculpatory:

> "[W]e disagree with the panel's assessment that the absence or presence of DNA from Hernandez, his wife, and/or C.H., in whatever combination, or in conjunction with third party DNA, could never tend to prove or disprove the materially disputed fact that sex acts between Hernandez and C.H. occurred in his bed or her bed. For instance, the presence of DNA from Hernandez and/or his wife on their bed, coupled with the absence of C.H.'s DNA, would tend to disprove that Hernandez sexually abused C.H. on that bed. Similarly, the presence of DNA from C.H. and/or her boyfriend on her bed, without any DNA from Hernandez, would be exculpatory evidence." *Hernandez*, 303 Kan. at 620.

We reached the same conclusion in *George*. There, petitioner was convicted of raping a woman in a gas station storeroom.

George maintained a defense of mistaken identity. He later petitioned for postconviction DNA testing of hair samples police collected from the scene of the rape. We held that DNA test results showing the hair samples did not match George's DNA would be exculpatory for purposes of K.S.A. 2021 Supp. 21-2512:

"[E]ven if the testing of the hairs found at the spot where the rape occurred only revealed that George's DNA was not present, the results would be exculpatory because they would 'tend' to disprove his guilt. At a minimum, they would tend to show he had not been at that spot. . . . That this potentially exculpatory evidence may be of very little evidentiary value does not matter at this stage." *George*, 308 Kan. at 68.

In a concurring opinion, Justice Stegall emphasized that the presence of a third party's DNA at the crime scene was not probative of whether George had also been at that scene. Justice Stegall reasoned that proof that one person was in a place sometime in the past has no tendency to prove or disprove that another person was also in that place sometime in the past. Even so, Justice Stegall concurred in the decision because DNA testing of the hairs could produce marginally exculpatory evidence probative of the identity of the perpetrator, if the profile did not match George's DNA:

"The reason the DNA testing in this case has an ever-so-slight tendency to demonstrate George is not the perpetrator of this crime is [] because . . . the evidence—i.e., the only hairs found in the entire large, publicly accessible storeroom which also just happened to have been found at the precise location of the crime—creates the possibility of doubt as to the identity of the perpetrator." 308 Kan. at 77 (Stegall, J., concurring).

*Hernandez* and *George* suggest that where the identity of the perpetrator is in issue at trial, DNA testing of biological material from the items collected at the crime scene may produce exculpatory evidence where the results show the lack of petitioner's DNA coupled with the presence of a third party's DNA. See *Johnson*, 299 Kan. at 894 ("'DNA testing is intended to confirm or dispute the identity of individuals involved in or at the scene of a purported crime.' So DNA evidence may be exculpatory if it tends to establish innocence based on an individual's identity. [Citation omitted.]").

The facts unique to Angelo's petition confirm that *Hernandez* and *George* are apposite and DNA test results showing the absence of Angelo's DNA and the presence of a witness' DNA on the presumed biological material from Brown's clothing would be exculpatory evidence under K.S.A. 2021 Supp. 21-2512(c).

First, the identity of the shooter was in issue at Angelo's trial. Angelo did not dispute that he was present at the scene on the night of the murders. Indeed, he called police shortly after the shooting and told them he had been at the Haskell house that night. But Angelo claimed Brown and Wilson were both alive when he left the house and denied that he was the shooter.

Second, Little Pat's trial testimony heightens the potential relevance of any biological material found on Brown's clothing. Little Pat testified that Brown slumped against Angelo after Angelo shot him. This physical contact suggests the possibility that Angelo's DNA transferred to Brown's clothing after the first shot was fired. If DNA testing of this presumed biological material revealed a profile matching Angelo's DNA, the district court would not have excluded the evidence as irrelevant. Indeed, such a test result would be highly probative of the identity of the shooter—the evidence would align with the State's theory of the case and corroborate Little Pat's account of the murders. So why would the opposite test result (no DNA from Angelo in the presumed biological material from Brown's clothing) not be probative of the identity of the shooter? Such a result would support Angelo's defense. It would rebut the State's theory of the case. And it could be used to impeach Little Pat's testimony. Little Pat's testimony (that Brown slumped onto Angelo after the shooting) creates a nexus between Angelo and Brown's clothing sufficient to conclude that testing the presumed biological material on that clothing may produce exculpatory evidence.

Granted, there are several, nonexculpatory explanations for a test result showing the lack of defendant's DNA in the presumed biological material from Brown's clothing. The contact may have been too brief for any biological material to transfer, clothing may have impeded the transfer of DNA, and so forth. But those explanations go to the weight of the evidence. They do not deprive the evidence of all exculpatory value. Of course, as noted in section

II, we have no confirmation that Brown's clothing contains biological material amenable for testing, which demonstrates the need for a remand for further proceedings. But presuming such biological material is present (as the district court did), we conclude test results may yield exculpatory evidence as a matter of law.

And if DNA testing not only showed the absence of Angelo's DNA but also the presence of a third party's DNA in the presumed biological material from Brown's clothing, then such results would enhance the exculpatory character of the evidence. This rationale is particularly true here if testing confirms the presence of Little Pat's or Little Reese's DNA.

The trial testimony established that Little Pat and Little Reese were at first suspects in the double homicide. Both Little Pat and Little Reese had the opportunity to commit the murders—both admitted to being at the house at the time of the shootings.

The trial evidence also showed Little Pat and Little Reese had potential motive for the killings. Little Pat and Little Reese were friends, and they, along with several associates, were selling drugs from the Haskell house. Police raided the home and seized drugs and other incriminating evidence two days before the murders. Police arrested several occupants during the raid, including Little Reese. But victim Wilson, who was present during the raid, was not arrested. This could have raised Little Reese's suspicion about Wilson's involvement with law enforcement. And the double homicide occurred on the very night Little Reese was released from jail, two days after police arrested him in the raid.

The raid on the Haskell house not only threatened Little Pat's and Little Reese's drug-selling operations and exposed them to potential imprisonment, but it also gave Brown a chance to steal from them. A witness at trial testified that after the raid, Brown stole money and electronic equipment that belonged to Little Pat from the house. According to that witness, Little Pat was angry about the stolen property and had been looking for Brown. Another witness testified Little Pat came over to the house shortly after the raid wielding a baseball bat and demanding to know what had happened to his missing property. Brown and Wilson were at

the house at the time, and Little Pat threatened them, even hitting a wall with the bat.

Jurors could have inferred from other circumstantial evidence that Little Pat and Little Reese had decided to pin the murders on Angelo. During Little Pat's police interview, he lied to investigators for hours, claiming he had an alibi. Eventually, Little Pat admitted he was at the house at the time of the shooting but identified his father, Angelo, as the shooter. During Little Reese's police interview, he originally denied that anyone had said anything about a shooting when Angelo and Little Pat returned to the car on the night of the double homicide. But later, Little Reese testified that when Angelo returned to the car, he said Brown was dead.

Given this trial evidence, DNA test results showing the presence of Little Pat's or Little Reese's DNA on the presumed biological material from Brown's clothing could tend to implicate them in the shooting. And when coupled with the absence of Angelo's DNA, such test results would tend to disprove Little Pat's identification of Angelo as the shooter. While this potential evidence may or may not exonerate Angelo, it has at least a slight tendency to disprove his guilt. That alone satisfies the statutory threshold for ordering DNA testing under K.S.A. 2021 Supp. 21-2512(c).

2. *DNA Testing May Produce Noncumulative Evidence*

The district court did not find that DNA testing would produce cumulative evidence. And the State does not take that position on appeal. Even so, we briefly address whether testing of the presumed biological material on Brown's clothing would produce noncumulative evidence to ensure that our review of the petition under K.S.A. 2021 Supp. 21-2512(c) is complete and there is no alternative basis to affirm the district court ruling given the record before us. See *Vasquez*, 287 Kan. at 59 (Kansas Supreme Court may affirm a district court's ruling "if it is right even for the wrong reason.").

Angelo's trial was not devoid of DNA evidence. The State tested two cartridge cases and two swabs of blood collected at the scene, and this testing produced DNA profiles matching only victims Brown and Wilson. The forensic scientist also broadly affirmed that none of the

items recovered from the scene and tested produced a profile matching Angelo's DNA.

But there is a crucial difference between those items the State tested and the presumed biological material on Brown's clothing. The trial evidence established a physical connection between Angelo and Brown's clothing. The evidence did not establish a similar connection between Angelo and any of the items the State tested.

At trial, Little Pat testified that he heard gunshots and then saw Brown slump onto Angelo. If true, this contact could have created the potential for Angelo's biological material to transfer to Brown's clothing. If DNA test results showed the presence of Angelo's DNA on Brown's clothing, that result would tend to corroborate Little Pat's testimony that Angelo was the shooter. On the other hand, if DNA test results showed the lack of Angelo's DNA, that result could be used to challenge Little Pat's account of the shootings and thus tend to show Angelo was not the shooter.

The same cannot be said for the other items the State tested. No one saw Angelo load the gun or move any cartridge cases after the shooting. No one testified that Angelo had bled on the wall or the floor. The testimony established no nexus between Angelo and the items the State submitted for testing.

Thus, results from a DNA test of the presumed biological material on Brown's clothing would be unique in their potential to either corroborate or contradict the State's eyewitness testimony. The State's DNA testing of the cartridges and blood stains did not possess the same potential to serve as impeachment evidence. See *George*, 308 Kan. 62, Syl. ¶ 4 (noncumulative evidence is evidence "not of the same kind and character or not tending to prove the same thing"). For these reasons, we conclude that DNA testing of the presumed biological material on Brown's clothing would not produce cumulative evidence. Those results may also be exculpatory because they would tend to disprove Little Pat's identification of Angelo as the shooter, even if by only the smallest degree.

## CONCLUSION

We conclude the State's argument that Angelo failed to meet his burden to show the existence of biological material on Brown's clothing does not provide an alternate basis to affirm the district

court's ruling. Angelo's petition alleged the presence of biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). The State's response did not reveal a factual dispute as to this issue, likely because the State did not have the benefit of our statutory interpretation at the time. Thus, Angelo never had the opportunity to make this showing because no evidentiary hearing was conducted.

Yet the State's argument suggests it disputes Angelo's allegations concerning the presence of biological material on the victim's clothing. If the State had the benefit of the three-step process identified in this opinion, then its response could have disclosed this factual dispute and demonstrated the need for an evidentiary hearing. Thus, we remand this case for further proceedings consistent with our statutory interpretation.

As we noted, such a remand would be futile if the district court nevertheless properly concluded that DNA testing of the presumed biological material on Brown's clothing could not produce exculpatory evidence. But assuming such biological material exists, DNA testing may produce exculpatory evidence if the results show the absence of Angelo's DNA on Brown's clothing coupled with the presence of Little Pat's or Little Reese's DNA. Such results may ultimately carry little evidentiary weight, but the Legislature has set a low bar for ordering DNA testing under K.S.A. 2021 Supp. 21-2512(c), and concomitantly, a high bar for summary dismissal at this stage. Based on the facts and evidence unique to this case, Angelo's petition surpasses the low bar.

We thus affirm the district court's judgment denying DNA testing of biological material on: (1) the clothes Angelo wore on the day of the murders; (2) the alleged murder weapon; and (3) residue from Angelo's hands. We reverse the district court's ruling that even if biological material exists on the victim's clothing, testing would not produce exculpatory evidence. But this holding alone is not sufficient for Angelo to prevail in his quest for DNA testing because the district court made no fact finding about the actual existence of biological material on the victim's clothing. As such, we remand the matter for this factual inquiry and further

proceedings consistent with this opinion and the three-part procedure governing the pretesting phase of proceedings under K.S.A. 2021 Supp. 21-2512.

Judgment of the district court is affirmed in part and reversed in part, and the case is remanded.

BILES, J., concurs in the result.

No. 124,178

# STATE OF KANSAS, *Appellee*, v. CRYSTAL DAWN GALLOWAY, *Appellant*.

(518 P.3d 399)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing Appeal—Denial of Motion Requesting Departure Sentence—Abuse of Discretion—Appellate Review.* On appeal from a sentencing, this court reviews a district court judge's denial of a motion requesting a departure sentence for an abuse of discretion. A district court abuses its discretion when its decision turns on an error of law, its decision is not supported by substantial competent evidence, or its decision is one with which no reasonable person would agree.

2. SAME—*Resentencing by District Court on Remand—Modify Only Vacated Sentence—Exception.* On remand for resentencing after an appellate court has vacated a sentence, a district court may modify only the vacated sentence unless a nonvacated sentence is illegal and must be modified as a matter of law.

3. COURTS—*Constitutional Decisions by Appellate Courts—Constitutional Challenges Avoided if Not Necessary.* Appellate courts typically avoid making unnecessary constitutional decisions. Thus, where there is a valid alternative ground for relief, an appellate court need not reach a constitutional challenge.

Appeal from Cherokee District Court; STEVEN A. STOCKARD, judge. Opinion filed October 14, 2022. Affirmed in part, vacated in part, and remanded with directions.

*Peter Maharry*, of Kansas Appellate Defender Office, was on the brief for appellant.

*Natalie Chalmers*, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: For the second time, Crystal Dawn Galloway appeals sentences imposed after a jury convicted her of one count of premeditated first-degree murder, one count of arson, and one count of interference with law enforcement. In her first appeal, we vacated Galloway's hard 50 life sentence for premeditated murder after agreeing with Galloway's argument that the district court judge improperly refused to consider a lack of criminal history as

a possible mitigating factor supporting a downward departure to a hard 25 life sentence. We remanded for resentencing. *State v. Galloway*, 311 Kan. 238, 252-54, 459 P.3d 195 (2020).

On remand, a different district court judge, after considering Galloway's criminal history and her other proffered mitigating factors, again imposed a hard 50 life sentence for premeditated murder. The judge then turned to Galloway's sentences for arson and interference with law enforcement even though we had not vacated those sentences in the first appeal. The judge reimposed the same terms of imprisonment for these convictions as those ordered at Galloway's first sentencing hearing. But he ran these sentences consecutive to each other and to the hard 50 life sentence even though the first judge had ordered that Galloway would serve these sentences concurrently with each other and with her life sentence. In this current appeal, Galloway claims the second judge erred in imposing these sentences, arguing:

1. The judge abused his discretion in imposing a hard 50 life sentence;

2. The judge lacked authority on remand to change Galloway's sentences for arson and interference with law enforcement from concurrent to consecutive sentences; and

3. The judge violated Galloway's due process rights by vindictively ordering consecutive sentences.

After considering the parties' briefs, we hold the judge did not abuse his discretion by imposing a hard 50 life sentence. But the judge lacked statutory authority to change the concurrent nature of the sentences. Because of our holding on that statutory basis, we need not address Galloway's constitutional due process argument.

We thus affirm Galloway's sentence in part and vacate in part and remand for imposition of concurrent sentences.

## FACTS AND PROCEDURAL BACKGROUND

Galloway's convictions arise from the murder of Robin Fought. Galloway's motive for killing Fought arose from the cir-

cumstances of her attempting to regain custody of her five children who were in the custody of the State of Kansas. Galloway worked under the supervision of a caseworker on a plan to reintegrate her children into her home. Fought reported to Galloway's caseworker his concerns that Galloway planned to kidnap her children and leave Kansas. He also reported Galloway was in contact with Dakota Cunningham, who Fought employed. Cunningham and Galloway had been in a relationship, and Galloway, who was pregnant at the time of Fought's murder, identified Cunningham as the father of the child she was carrying. But the reintegration plan prohibited any contact with Cunningham, and Fought's report consequently jeopardized Galloway's efforts to regain custody of her children.

Days after the report to Galloway's caseworker, Fought's partially burned body was found near a burning pickup truck. He had been stabbed multiple times, and a gas can with a partially burned paper wick sat on his body. Evidence led police to arrest Galloway and Cunningham, both of whom had fled to Oklahoma after the murder.

Police discovered text messages and pictures on Galloway's phone discussing plans to murder Fought. Police also recovered DNA evidence of Galloway's blood on the handle of the knife used to kill Fought, on the gas can placed on his body, and on the partially burned paper in the gas can.

After the jury convicted Galloway, she moved for a departure from the presumptive hard 50 life sentence. She argued her lack of any criminal history justified a departure sentence. She also pointed out that a 50-year sentence would exceed her actuarial life expectancy. A district court judge denied her motion. He concluded Galloway's lack of criminal history deserved no consideration. The judge imposed a hard 50 life sentence for premeditated first-degree murder and concurrent sentences of 13 months for arson and 9 months for interference with law enforcement.

In resolving her direct appeal, we rejected most of Galloway's claims of error. We did, however, find merit to her argument that the sentencing court erred when it refused to consider a statutorily

enumerated mitigating factor, her lack of criminal history. We vacated the hard 50 sentence and remanded the case to the district court for resentencing. See *Galloway*, 311 Kan. at 252-54.

On remand, Galloway filed an amended motion for departure. She argued several new reasons justified a departure from the presumptive sentence: She lacked substantial capacity for judgment when the offense was committed because of physical or mental impairment; she suffered from drug and alcohol addiction that contributed to her actions; she was in a state of extreme emotional distress at the time of the offense; she suffered physical, emotional, or sexual abuse as a child; and she had been directly exposed to domestic abuse, either as a victim or witnessing the actions where another is a victim. At the resentencing hearing, Galloway's counsel resurrected the argument that Galloway had no criminal record. Counsel also argued that Cunningham was the one who killed Fought and yet had received a sentence of only 13 and a half years for second-degree murder.

Galloway testified at the resentencing hearing. She explained she was about one and a half to two months pregnant at the time of the offenses. She said she had gestational diabetes throughout her pregnancy that caused severe fatigue and vomiting. She also reported having blackouts that she recognized from her experiences in prior pregnancies to be related to low blood sugar. But she admitted she had no tests to verify that self-diagnosis. According to Galloway, these conditions impaired her judgment at the time of the offenses. She also reported experiencing stress because the State had removed her children from her custody and because she was working on her case plan to try to get her children back. She also admitted she was under the influence of marijuana at the time of Fought's murder, or at least she used marijuana shortly before the murder.

Galloway admitted to being at the crime scene but denied active participation. She said she did not stab the victim or burn his truck. She attributed to Cunningham the text messages that the State argued proved premeditation. She asserted that Cunningham possessed her phone on the day before and the day of the murder. She denied helping to plan the crime.

According to Galloway, she was at the scene because Cunningham called her and asked her to pick him up. When she arrived, Cunningham and Fought were arguing. Cunningham pulled a knife, and Galloway tried to get the knife from him. In the process, she cut her finger. Cunningham then stabbed Fought. Galloway said she did not call the police because Cunningham had her phone. She testified Cunningham forced her into fleeing and she complied out of fear for her life. Galloway denied she suffered physical or domestic abuse or violence during her relationship with Cunningham, but said he sometimes raised his voice and told her she had to do what he said. She said she tried to convince Cunningham they should turn themselves in to authorities.

The State rebutted Galloway's arguments by pointing out the State removed Galloway's children from her custody about seven months before Fought's death. The State also emphasized evidence tying Galloway to the crime that she had not explained away, pointing to her DNA found on the gas can and on the paper wick improvised from a phonebook page. And the State impeached aspects of Galloway's testimony through cross-examination. For example, after testifying Cunningham possessed her phone on the day of Fought's murder, Galloway admitted she had her phone before arriving at the crime scene.

A different district court judge than the one who first sentenced Galloway, addressed each of Galloway's arguments in support of her motion for departure from the presumptive hard 50 life sentence. The judge acknowledged that each argument "if proven, by substantial and compelling evidence, could amount to mitigating circumstances." But the judge determined Galloway had failed to establish that any of these factors presented a substantial and compelling reason to depart from a presumptive sentence.

The district court judge imposed a hard 50 life sentence for premeditated murder, a consecutive 13-month sentence for arson, and a consecutive 9-month sentence for interference with law enforcement. Making the sentences consecutive added 22 months to Galloway's sentence as compared to her original sentence under which the three sentences were concurrent. Galloway timely appealed.

This court has jurisdiction under K.S.A. 2021 Supp. 22-3601(b)(3) (vesting appellate jurisdiction over cases in which maximum sentence of life imprisonment imposed).

## ANALYSIS

### *1. No error in denying departure*

Under Kansas statutes, a district court sentencing a defendant convicted of first-degree premeditated murder shall sentence a defendant to a hard 50 life sentence unless the sentencing judge finds substantial and compelling reasons support departing to a hard 25 life sentence. See K.S.A. 2014 Supp. 21-6620(c); K.S.A. 2014 Supp. 21-6623.

K.S.A. 2021 Supp. 21-6625(a) establishes a nonexclusive list of mitigating circumstances, including:

> "(1) The defendant has no significant history of prior criminal activity.
> (2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.
> . . . .
> (4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
> (5) The defendant acted under extreme distress or under the substantial domination of another person.
> (6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired."

We have interpreted the term substantial as used in this context to mean "'something that is real, not imagined, and of substance, not ephemeral.'" *State v. Grable*, 314 Kan. 337, 345, 498 P.3d 737 (2021) (quoting *State v. Morley*, 312 Kan. 702, Syl. ¶ 3, 479 P.3d 928 [2021]). And a compelling reason "'is one that forces a court—by the case's facts—to abandon the status quo and venture beyond the presumptive sentence.'" *Grable*, 314 Kan. at 345 (quoting *Morley*, 312 Kan. 702, Syl. ¶ 4).

On appeal from a sentencing, this court reviews a district court judge's denial of a motion requesting a departure sentence for an abuse of discretion. A district court abuses its discretion when its decision turns on an error of law, its decision is not supported by

substantial competent evidence, or its decision is one with which no reasonable person would agree. See *Grable*, 314 Kan. at 341.

In arguing error, Galloway contends the judge failed to properly weigh three mitigating factors: her extreme emotional distress that meant she acted without capacity, the disparity between Cunningham's sentence and hers, and her lack of criminal history. The judge addressed each of these arguments and recognized each as a potential basis for departure if proven and if found to be substantial and compelling under the facts and circumstances of the case. But he held that Galloway failed to establish that she acted without capacity or that she received a disparate sentence. And he held her lack of criminal history did not present a substantial and compelling reason for departure under the facts of the case. We find no abuse of discretion in these conclusions.

As to the first point, Cunningham points to the uncontroverted evidence of her pregnancy at the time of her offense, her loss of custody of her children, and her ongoing efforts to complete her reintegration plan. She argues these circumstances caused extreme emotional distress that meant she lacked substantial capacity. The judge accepted that extreme emotional distress might be a mitigator, but he explained that Galloway failed to meet the burden of persuading him those circumstances existed. The judge observed Galloway, even years after the crime, appeared to be remorseless. She persistently shifted blame to others. He also noted that the only evidence supporting this factor came from Galloway's testimony. And he found, "based upon the significant inconsistencies in her testimony today, that her testimony is unreliable, untrustworthy, and not credible." The judge also described her statements as self-serving and uncorroborated. In sum, the judge was not persuaded by Galloway's attempt to mitigate her culpability. Likewise, the jury determined she premeditated the murder, which reveals the jurors concluded she was able to plan the murder beforehand. See *Galloway*, 311 Kan. at 246.

Galloway offers no basis for us to reweigh those determinations. See *State v. Shockley*, 314 Kan. 46, 53, 494 P.3d 832 (2021) ("An appellate court does not reweigh conflicting evidence, evaluate witness credibility, or determine questions of fact, and the

court presumes the district court found all facts necessary to support its judgment."). And we hold that reasonable people could agree with the district court judge's conclusion that Galloway's actions before and after the crimes demonstrated that she acted with cold calculation rather than a lack of capacity that might have mitigated her culpability for the offense.

Likewise, the judge acknowledged that disparate sentences might be a legitimate departure factor, but he again held that Galloway failed to establish the factor. Before us, Galloway argues the district court's sentence here thwarts the sentencing guideline goal of standardizing sentences of similarly situated defendants. But we agree with the district judge's conclusion that Galloway and Cunningham are not similarly situated and, thus did not receive a disparate sentence. As the judge noted, Cunningham pleaded no contest to second-degree murder. He faced a lesser charge and spared the State and Fought's family a trial. The district court judge did not abuse his discretion by concluding Galloway failed to establish she received a disparate sentence.

Finally, the judge acknowledged that Galloway's lack of criminal history could constitute a mitigating circumstance supporting departure. But the judge determined this left her "lack of criminal history as the established mitigating factor." He then held "[t]hat alone, given the heinous, brutal, and gruesome murder made by someone who today appears to me to be remorseless, does not rise to the level of a substantial and compelling reason. For those reasons, the Motion for Durational Departure is denied."

We agree that while the statute recognizes lack of criminal history *may* support a departure, the statute does not require a district court depart when a defendant lacks a criminal history. We have found no abuse of discretion in district courts' denials of motions for departure sentence when a person convicted of first-degree premeditated murder had no criminal history and asserted other mitigating factors, including mental health issues. See *Grable*, 314 Kan. at 340, 345-46; *State v. McLinn*, 307 Kan. 307, 348-49, 409 P.3d 1 (2018). Here, the district court did not abuse its discretion when it did not grant a departure sentence based on Galloway's lack of criminal history for a crime the district court found to be "heinous, brutal, and gruesome." Cf. *McLinn*, 307 Kan. at

349 (no abuse of discretion denying departure motion for murder that court described as "heinous, atrocious and cruel on so many levels").

Before concluding this discussion, we note that Galloway's amended motion included other reasons for departure—specifically that she suffered physical, emotional, and sexual abuse as a child and that she was a victim or witness to domestic abuse. But she advances no arguments related to these factors on appeal and has thus abandoned them. See *State v. Bailey*, 313 Kan. 895, 897, 491 P.3d 1256 (2021) (party abandons arguments by failing to adequately brief them).

In summary, we hold Galloway failed to establish that the district court judge committed an abuse of discretion by rejecting Galloway's mitigation arguments. He made no error of law, his findings are supported by substantial competent evidence, and reasonable people could agree with his conclusion that Galloway failed to establish a substantial and compelling reason to depart from the presumptive hard 50 sentence.

*2. Error in consecutive sentences*

Galloway also argues the district court judge erred by changing the concurrent nature of her sentences for arson and interference with law enforcement sentences to make them consecutive to each other and to her life sentence. The State does not dispute this position, noting in its brief that "[t]he State agrees with Galloway that this Court's precedent establishes that the district court was not authorized to modify the grid sentences to run consecutively to her murder sentence or each other."

As the parties note, under our precedent the district court judge lacked authority under the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2021 Supp. 21-6801 et seq., to modify the arson and interference with law enforcement sentences on remand. This lack of authority under the KSGA modifies the previous rule under which "Kansas courts had broad common law discretion to modify sentences on remand." *State v. Warren*, 307 Kan. 609, 612, 412 P.3d 993 (2018). Under pre-KSGA principles, Kansas courts treated sentences as a single entity, and a remand to correct a sentence on one count opened the door for the district

court to resentence the defendant on any or all counts. 307 Kan. at 612. But in adopting the KSGA, the Legislature limited this broad authority because "nothing in the statutory scheme allows resentencing on other convictions following the vacating of a sentence on appeal." 307 Kan. at 613. A limited exception to this rule applies when vacating one sentence renders another sentence unlawful. See *State v. Morningstar*, 299 Kan. 1236, 1244-45, 329 P.3d 1093 (2014). This limited exception does not apply here, and "[b]arring the need to alter a nonvacated sentence as a matter of law, the district court may only modify the vacated sentence." *Warren*, 307 Kan. at 615; see *State v. Jamerson*, 309 Kan. 211, 216, 433 P.3d 698 (2019); *State v. Moore*, 309 Kan. 825, 829, 441 P.3d 22 (2019).

Here, the district court originally ordered concurrent sentences. And Galloway challenged only the hard 50 sentence in her first appeal. See *Galloway*, 311 Kan. at 238-39. On remand, the district court judge's resentencing authority extended to only the hard 50 sentence. In changing Galloway's sentences for arson and interference with law enforcement from concurrent to consecutive sentences, the district court exceeded its statutory authority.

The State asks us to remedy this error without remand "[i]f possible." It cites K.S.A. 60-2106(c) and *State v. Fraire*, 312 Kan. 786, 481 P.3d 129 (2021), as authority for this outcome. *Fraire* does state that "[a]n illegal sentence may be corrected without a new sentencing hearing." 312 Kan. at 797. But there we also explained that this rule applies only when, under K.S.A. 60-2106(c), the mandate of this court is determinative of an action, meaning no further action is necessary. That circumstance arose in *Fraire* because this court vacated postrelease supervision, and no further proceedings were necessary because "a sentencing court has no authority to order a term of postrelease supervision in conjunction with an off-grid indeterminate life sentence." 312 Kan. at 797 (quoting *State v. Cash*, 293 Kan. 326, Syl. ¶ 2, 263 P.3d 786 [2011]). In other words, no judicial action was required. In contrast, here, an order must be entered making the sentences either concurrent or consecutive. Although we have held there is only one option—concurrent sentences as imposed at the first sentencing hearing—this court does not impose judgment and sentence,

district courts do. See K.S.A. 22-3424. We thus must remand for the district court to enter that order.

3. *Due Process Issue Not Reached*

Because Galloway is entitled to her requested relief on statutory grounds, we need not reach her argument that the district court violated her right to constitutional due process by ordering her to serve consecutive sentences. "Appellate courts generally avoid making unnecessary constitutional decisions. Thus, where there is a valid alternative ground for relief, an appellate court need not reach a constitutional challenge." *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, Syl. ¶ 3, 367 P.3d 282 (2016). We exercise that discretion here and decline to address the issue.

## CONCLUSION

We find no abuse of discretion in the district court's decision not to depart from the statutorily mandated hard 50 sentence imposed on Galloway. But we vacate the portion of the sentence requiring Galloway serve consecutive sentences. We remand to the district court with directions to impose Galloway's sentences to run concurrent with the life sentence and with each other.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion.

State v. Albright

No. 124,319

STATE OF KANSAS, *Appellee*, v. WILLIAM D. ALBRIGHT, *Appellant.*

(518 P.3d 415)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Request for Sentence Modification in Postconviction Proceedings—Requirement of Jurisdiction under Statute.* Where a defendant seeks sentence modification in postconviction proceedings, a court lacks jurisdiction and should dismiss the matter unless there is a statute that authorizes the specific requested relief.

2. SAME—Alleyne v. United States *Rule of Law—Term of Imprisonment or Statute Authorizing Term of Imprisonment Not Unconstitutional.* The rule of law declared in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), that the Sixth Amendment to the United States Constitution requires any fact that increases a sentence beyond the mandatory minimum to be submitted to a jury and proven beyond a reasonable doubt, does not trigger K.S.A. 2021 Supp. 21-6628(c). The *Alleyne* Court did not find either the term of imprisonment or the statute authorizing the term of imprisonment to be unconstitutional.

Appeal from Kingman District Court; FRANCIS E. MEISENHEIMER, judge. Opinion filed October 14, 2022. Affirmed.

*Daniel O. Lynch*, of Johnston, Eisenhauer, Eisenhauer & Lynch, LLC, of Pratt, was on the brief for appellant.

*Jodi Litfin*, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: William Albright appeals the district court's denial of his motion to modify his sentence under K.S.A. 2021 Supp. 21-6628(c), which requires a court to modify a sentence if certain sentencing provisions are found unconstitutional. Albright, who is serving a life sentence for first-degree premeditated murder, argues he is entitled to a sentence modification because one of the statutory provisions that the sentencing court relied on when imposing his sentence was later found unconstitutional in *State v. Soto*, 299 Kan. 102, 122-24, 322 P.3d 334 (2014). But we considered and rejected the same argument in *State v. Coleman*, 312

Kan. 114, 472 P.3d 85 (2020). And we have recently and repeatedly reaffirmed that holding. We therefore affirm the denial of Albright's motion.

## FACTS AND PROCEDURAL BACKGROUND

A jury convicted Albright of first-degree premeditated murder in 1999. We set out the facts underlying that conviction in *State v. Albright*, 271 Kan. 546, 547-49, 24 P.3d 103 (2001). We need not revisit them to resolve the issue before us.

When Albright committed his crime, the penalty for first-degree premeditated murder varied depending on whether the sentencing court made certain factual findings. If the court found that one or more statutory aggravating circumstances were present and were not outweighed by mitigating circumstances, it had to impose a life sentence without the possibility of parole for 40 years (commonly called a hard 40 sentence). See K.S.A. 21-4635(a)-(c) (Furse 1995); K.S.A. 21-4636 (Furse 1995) (providing aggravating circumstances); K.S.A. 21-4637 (Furse 1995) (providing nonexhaustive list of mitigating factors). Without that finding, the penalty was still life imprisonment, but the defendant would be eligible for parole after 25 years. See K.S.A. 1998 Supp. 22-3717(b)(1).

Albright received a hard 40 sentence after the sentencing court found by a preponderance of the evidence that he had committed the murder for monetary gain—an aggravating factor under K.S.A. 21-4636(c) (Furse 1995). We affirmed Albright's conviction and sentence. 271 Kan. at 560.

Several years later, Albright secured a second trial after a panel of the Court of Appeals held that his defense attorney's deficient representation had deprived him of a fair trial. See *State v. Albright,* No. 90,216, 2004 WL 1041350, at *9 (Kan. App. 2004) (unpublished opinion). At his retrial in 2005, Albright was again convicted of premeditated first-degree murder.

After that verdict but before sentencing, Albright filed a posttrial motion arguing that the hard 40 sentencing scheme violated a defendant's Sixth Amendment jury-trial right as stated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.

2d 435 (2000). *Apprendi* held that any fact (other than the existence of a prior conviction) that increases the statutory maximum penalty must be found by a jury beyond a reasonable doubt. 530 U.S. at 490. Albright claimed that K.S.A. 1999 Supp. 21-4635 violated *Apprendi* because it allowed a sentencing court to extend the time until parole eligibility from 25 years to 40 years based on facts that the judge, not the jury, had found. The sentencing court denied that motion and again imposed a hard 40 life sentence after finding that Albright had committed the murder for monetary gain.

On appeal, we rejected Albright's *Apprendi* argument and affirmed his conviction and sentence, reasoning that *Apprendi*'s holding expressly applied to facts that raise the statutory *maximum* penalty, not facts that raise the statutory *minimum* penalty. See *State v. Albright*, 283 Kan. 418, 423-25, 153 P.3d 497 (2007). Albright's sentence became final in April 2007 after we issued the mandate in that case.

Albright's argument would prove prescient because six years later, in *Alleyne*, the United States Supreme Court held that the Sixth Amendment required any fact increasing a mandatory *minimum* sentence also be found by a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 107-08, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The following year, we applied *Alleyne* to strike down K.S.A. 1999 Supp. 21-4635 because the statute permitted a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt. *Soto*, 299 Kan. 102, Syl. ¶ 9.

Albright seized on our decision in *Soto*. In 2016, he filed a pro se motion for resentencing. In that motion, Albright asserted that his sentence was unconstitutional under *Alleyne* because it resulted from judicial fact-finding. *State v. Albright*, 307 Kan. 365, 366-67, 409 P.3d 34 (2018). On appeal from the district court's denial of Albright's motion, we construed his claim both as a motion under K.S.A. 22-3504 to correct an illegal sentence and a motion under K.S.A. 60-1507 to collaterally attack his sentence. See *State v. Redding*, 310 Kan. 15, 18, 444 P.3d 989 (2019) (courts

should liberally construe pro se postconviction motions to "consider the relief requested, rather than a formulaic adherence to pleading requirements").

We held that neither statute afforded Albright an avenue for relief. *Albright*, 307 Kan. at 368-69. A motion under K.S.A. 60-1507 that is filed more than one year after a sentence has become final may be considered only to "prevent a manifest injustice." K.S.A. 2021 Supp. 60-1507(f)(2). Albright's motion was filed several years after his sentence became final, and because we had recently held that the rule of law declared in *Alleyne* could not provide the basis for a manifest-injustice finding, we concluded that Albright was entitled to no relief under that statute. *Albright*, 307 Kan. at 368 (citing *Kirtdoll v. State*, 306 Kan. 335, 341, 393 P.3d 1053 [2017]). And because "'the definition of an illegal sentence does not include a claim that the sentence violates a constitutional provision,'" we determined that Albright could not "'use a motion to correct an illegal sentence under K.S.A. 22-3504 to seek relief based on the constitutional holding in *Alleyne*.'" 307 Kan. at 368 (quoting *State v. Brown*, 306 Kan. 330, 332, 393 P.3d 1049 [2017]). Thus, we affirmed the district court's denial of Albright's motion. 307 Kan. at 368-69.

In May 2020, Albright filed another pro se motion, which is the subject of this appeal. This time, Albright asserted that he was entitled to a sentence modification under K.S.A. 2021 Supp. 21-6628(c). That statute is a fail-safe provision that requires a court to modify a sentence when the term of imprisonment or the statute authorizing the term of imprisonment are found to be unconstitutional. Citing our holding in his previous appeal, Albright argued that K.S.A. 2021 Supp. 21-6628(c) was the "procedural vehicle" for his claim. He emphasized that his motion "should not be construed as either a motion to correct an illegal sentence or a K.S.A. 60-1507 motion."

While Albright's motion was pending in the district court, we issued our opinion in *Coleman*. There, we held that K.S.A. 2019 Supp. 21-6628 does not provide a statutory vehicle for a sentence modification based on a defendant's claim that a hard 40 sentence violates the Sixth Amendment as interpreted in *Alleyne*. *Coleman*,

312 Kan. at 119-20, 123-24. The State filed a supplemental memorandum arguing that *Coleman* controlled Albright's claim. The district court agreed and denied Albright's motion.

Albright now appeals the district court's decision to our court.

## ANALYSIS

Where a defendant seeks sentence modification in postconviction proceedings, a court lacks jurisdiction and should dismiss the matter unless there is a statute that "authoriz[es] the specific requested relief." 312 Kan. at 120-21. Whether such a statutory vehicle exists presents a question of law that we review de novo, meaning that we give no deference to the district court's conclusions. See 312 Kan. at 117, 120-21.

Albright points solely to K.S.A. 2021 Supp. 21-6628(c) as the necessary statutory vehicle authorizing his request for a sentencing modification. In the past, we have also construed similar motions as motions under K.S.A. 22-3504 to correct an illegal sentence or motions under K.S.A. 60-1507 collaterally attacking a sentence. See, e.g., *State v. Appleby*, 313 Kan. 352, 356, 485 P.3d 1148 (2021); *Coleman*, 312 Kan. at 121-24. But such a construction is not appropriate here. In Albright's last appeal, we held that the same substantive claim Albright raises in this appeal cannot support a motion under either of those statutes. *Albright*, 307 Kan. at 368-69. And although "pro se postconviction pleadings must be analyzed by their content, not necessarily by their label," Albright specifically requested that the court not construe his motion under K.S.A. 22-3504 or K.S.A. 60-1507. *Coleman*, 312 Kan. at 120. Given that context, we will focus only on Albright's claim that he is entitled to relief under K.S.A. 2021 Supp. 21-6628(c).

Under that statute, a court must modify a defendant's sentence if that person's "mandatory term of imprisonment or any provision of chapter 341 of the 1994 Session Laws of Kansas authorizing such mandatory term is held to be unconstitutional." K.S.A. 2021 Supp. 21-6628(c). Albright contends that K.S.A. 2021 Supp. 21-6628(c) applies to him because K.S.A. 21-4635, the statute under which the sentencing court found the existence of the aggravating factor necessary to impose his hard 40 sentence, was a provision

of chapter 341 of the 1994 session laws and was found unconstitutional under *Alleyne* and *Soto*. See L. 1994, ch. 341, § 6.

But as Albright recognizes, this court considered and rejected that argument in *Coleman*. There, we held that the "change in law effected in *Alleyne* . . . does not trigger K.S.A. 2019 Supp. 21-6628(c)" because the "*Alleyne* Court did not find either the term of imprisonment or the statute authorizing the term of imprisonment to be unconstitutional." 312 Kan. 114, Syl. ¶ 5. Given that holding, Albright argues not that the district court erred but that this court should overrule *Coleman*.

We decline Albright's invitation to revisit our decision in that case. As we recognized earlier this year, we have "recently and repeatedly reaffirmed *Coleman*." *State v. Bedford*, 314 Kan. 596, 599, 502 P.3d 107 (2022). Like the defendant in *Bedford*, Albright "only reprises the failed arguments advanced" in those recent appeals. 314 Kan. at 599. Thus, we hold the district court correctly denied Albright's motion.

The judgment of the district court denying Albright's motion is affirmed.

No. 125,292

# In the Matter of TERRENCE J. MALONE, *Respondent*.

(518 P.3d 406)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Ninety-day suspension*.

Original proceeding in discipline. Opinion filed October 14, 2022. Ninety-day suspension.

*W. Thomas Stratton Jr.*, of Disciplinary Administrator's office, argued the cause and was on the formal complaint for the petitioner.

*John J. Ambrosio*, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, argued the cause, and *Terrence J. Malone*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Terrence J. Malone, of Dodge City. Malone received his license to practice law in Kansas in September 1975.

The Disciplinary Administrator's office filed a formal complaint against Malone alleging violations of the Kansas Rules of Professional Conduct (KRPC). Respondent answered the formal complaint on October 4, 2021. On November 22, 2021, respondent entered into a joint agreement with the Disciplinary Administrator's office stipulating to violations of KRPC 1.15 (safekeeping property) (2022 Kan. S. Ct. R. at 372), KRPC 1.8 (conflict of interest, current clients, specific rules) (2022 Kan. S. Ct. R. at 350), KRPC 3.3 (candor toward the tribunal) (2022 Kan. S. Ct. R. at 391), and KRPC 1.9 (duties to former clients) (2022 Kan. S. Ct. R. at 358).

Respondent personally appeared and was represented by counsel at the complaint hearing before a panel of the Kansas Board for Discipline of Attorneys, which was conducted on December 2, 2021. After the hearing, the panel determined that respondent had violated KRPC 1.8(a), KRPC 1.9(c), KRPC 1.15(a) and (c), and KRPC 3.3(a). The panel set forth its findings of fact

and conclusions of law, along with its recommendation on disposition, in a final hearing report, the relevant portions of which are set forth below.

## FACTUAL AND PROCEDURAL BACKGROUND

"*Findings of Fact*

. . . .

"19. In mid-July 2019, the respondent entered into an oral agreement with S.R. to represent S.R. in a felony criminal case. S.R. had been charged with one count of aggravated assault, a severity level 7 person felony; criminal threat, a severity level 9 person felony; and battery with physical contact, a class B misdemeanor. S.R. had retained respondent in previous criminal matters.

"20. The respondent and S.R. agreed that the respondent would charge a flat fee of $5,000.00 for the representation. The agreement was not reduced to writing.

"21. The terms of the representation agreement were not fully disclosed or transmitted to S.R.

"22. The respondent received a payment of $1,000.00 toward the flat fee from S.R. in August 2019.

"23. This $1,000.00 payment reduced the amount owed on the oral flat fee agreement to $4,000.00.

"24. On August 8, 2019, S.R. executed a certificate of title transferring title to a Yamaha motorcycle he owned as collateral for the $4,000.00 balance still owed.

"25. S.R. understood that the respondent would hold the title to the motorcycle while S.R. made payments and until he fully paid the $4,000.00 balance. Further, S.R. understood that S.R. would retain possession of the motorcycle during the period he made payments toward the balance owed.

"26. The respondent never advised S.R. in writing of the desirability of seeking the advice of independent counsel before entering into this arrangement with the respondent.

"27. The respondent and S.R.'s oral agreement did not specify when the balance of the flat fee was due or what circumstances would trigger S.R.'s obligation to deliver the motorcycle to the respondent.

"28. S.R. did not consent in writing to the essential terms of the payment and collateral arrangement to pay the respondent's fee.

"29. The respondent and S.R. did not reach an agreement as to the value of the motorcycle. The respondent had not seen the motorcycle and did not know the condition of the motorcycle when he received the title from S.R.

"30. S.R. made three payments of $100.00 to the respondent between August and September 2019.

"31. S.R. entered into a plea agreement negotiated on his behalf by the respondent. Around the end of November 2019, S.R. [pled] guilty to one count of criminal threat, a severity level 9 felony. With S.R.'s criminal history, the sentence for this conviction was presumptive probation. S.R. was ultimately placed on probation for 12 months. Based on the allegations in the complaint and S.R.'s criminal history, the outcome was favorable.

"32. S.R. never received an itemized invoice from the respondent.

"33. On or about December 3, 2019, S.R. tried to pay the respondent $800.00 toward the balance owed for the respondent's attorney fee. The respondent refused this payment because he believed that the money came from S.R[.]'s mother.

"34. A title to the motorcycle in the respondent's name was issued on December 17, 2019. Around that same time the respondent had the motorcycle insured in his name.

"35. On the title transfer form, the respondent wrote that the value of the motorcycle was $2,000.00. At the time he wrote this, the respondent had not seen the motorcycle and did not know its condition.

"36. In a January 8, 2020, text message to S.R., the respondent wrote:

'[S.R.] I really don't want to sue you. But if the motorcycle is not delivered to my home by next Monday 5pm in good running condition I will have to file suit. If you wish to buy the cycle back for $6,000 then deliver that amount in cash by next Monday by 5pm[.]'

"37. The respondent later looked at S.R.'s file and realized that his request that S.R. pay $6,000.00 was in error because the total fee was only $5,000. Further, his request that S.R. pay $6,000.00 did not account for the $1,300.00 S.R. had already paid the respondent.

"38. On January 27, 2020, the respondent contacted the Dodge City, Kansas Police Department to report that S.R. stole the motorcycle.

"39. When he made this report, the respondent knew that S.R. had recently [pled] guilty to criminal threat, a severity level 9 felony, and was still serving his probation sentence for that conviction.

"40. The respondent testified that at the time he made his theft report he was aware it could have resulted in the revocation of S.R.'s probation.

"41. On January 29, 2020, the respondent filed a petition in Ford County District Court, case number 20-LM-132, against S.R. for replevin and conversion of the motorcycle. In the petition, the respondent listed the estimated value of the motorcycle as $6,000.00 and claimed damages of $50.00 per day beginning December 10, 2019, for lost use of the motorcycle.

"42. The petition did not mention the agreed $5,000.00 flat fee for the respondent's representation of S.R. or the payments S.R. had made and offered the respondent. During his testimony, the respondent acknowledged that he should have done so.

"43. When the respondent filed this petition, he still had not seen and did not know the value of the motorcycle. The respondent testified that he listed the value of the motorcycle as $6,000.00 because that is the amount S.R. represented to the respondent the motorcycle was worth.

"44. On March 1, 2020, the respondent filed an amended petition in 20-LM-132 against S.R. alleging the same claims of replevin and conversion, asserting the value of the motorcycle was $6,000.00, and claiming $50.00 per day damages for loss of use since December 11, 2019.

"45. On March 2, 2020, through counsel Michael Giardine, S.R. filed a counter-petition in 20-LM-132 against the respondent alleging one count of conversion. In the counter-petition, S.R. estimated the motorcycle was worth $7,500.00.

"46. On March 15, 2020, the respondent filed an answer to S.R.'s counter-petition. In his answer, the respondent denied that the motorcycle was worth $7,500.00.

"47. On November 25, 2020, S.R. submitted his disciplinary complaint to the disciplinary administrator's office.

"48. On May 25, 2021, 20-LM-132 was dismissed.

"49. S.R. later filed a quiet title action against the respondent in Ford County District Court case number 21-CV-69.

"50. On September 1, 2021, S.R. and the respondent settled this matter via an agreement that the respondent would sign the motorcycle title back over to S.R., would pay the filing fees in 21-CV-69, and would pay $1,686.50 in attorney fees to Mr. Giardine. The $1,686.50 amount represented the difference between $5,386.50 in legal fees incurred by S.R. to defend 20-LM-132 and prosecute 21-CV-69 and the remaining $3,700.00 in legal fees that S.R. owed the respondent.

"51. The respondent did pay S.R. the $1,686.50 agreed to in the parties' settlement as well as an additional $500.00.

"*Conclusions of Law*

"52. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.8(a) (conflict of interest: current

clients: specific rules), 1.9(c) (duties to former clients), 1.15(a) and (c) (safekeeping property), and 3.3(a) (candor toward the tribunal) as detailed below.

"KRPC 1.8(a)

"53. KRPC 1.8(a) provides:

'(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; and

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.'

"54. Comment 16 to KRPC 1.8 states, in part: 'When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a).' The hearing panel concludes that the respondent's fee arrangement with S.R. is governed by the requirements of KRPC 1.8(a).

"55. Here, the evidence showed that the fee agreement between the respondent and S.R. was not in writing. Further, S.R. understood that the respondent would hold the motorcycle title until S.R. paid the balance of the attorney fee, while the respondent believed that he was entitled to take possession of the motorcycle if the full fee was not paid by the end of the representation.

"56. There was no written agreement stating a date or triggering event when the full balance of the fee was due. Further, there was no written agreement that the respondent could take possession of the motorcycle or obtain title to the motorcycle in the respondent's name if the full balance was not paid by a certain date.

"57. There was no agreement between the respondent and S.R. regarding the value of the motorcycle.

"58. Finally, the respondent's communications to S.R. caused uncertainty regarding the amount the respondent believed was owed to him. ([R]espondent requests $6,000.00 from S.R. where oral agreement for fee was $5,000.00 and S.R. had paid the respondent $1,300.00.)

"59. The hearing panel concludes that the terms of the fee agreement, including the terms surrounding title to and possession of S.R.'s motorcycle, were

not transmitted to S.R. in writing in a manner that could be reasonably understood by S.R.

"60. Further, the respondent did not advise S.R. in writing of the desirability of seeking the advice of independent legal counsel on the transaction.

"61. Finally, S.R. did not sign a written informed consent to the essential terms of the transaction with the respondent or the respondent's role in the transaction.

"62. The respondent stipulated that he violated KRPC 1.8.

"63. The respondent's fee agreement with S.R., including the terms surrounding title to and possession of S.R.'s motorcycle, did not comply with KRPC 1.8(a). Accordingly, the hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 1.8(a).

"KRPC 1.9(c)

"64. KRPC 1.9(c) provides:

'(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.'

"65. In late November 2019, S.R. entered into a plea agreement and was sentenced to 12-months probation. The respondent represented S.R. in this matter, including plea negotiation and sentencing. Thus, the respondent acquired knowledge about S.R.'s probation status through his representation. Further, the respondent's fee arrangement involving the motorcycle was related to the respondent's representation of S.R.

"66. On January 27, 2020, the respondent contacted the Dodge City, Kansas Police Department to report that S.R. stole the motorcycle. The respondent knew that his report could disadvantage S.R., including but not limited to potential revocation of S.R.'s probation and S.R.'s incarceration.

"67. The respondent stipulated that he violated KRPC 1.9.

"68. The hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 1.9(c).

"KRPC 1.15(a) and (c)

"69. Lawyers must keep the property of their clients safe and separate from the lawyer's property. KRPC 1.15(a) requires lawyers to 'hold property of clients

. . . that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.'

"70. Pursuant to KRPC 1.15(c):

'When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.'

"71. The respondent was in possession of the motorcycle title, which was at the center of a fee dispute between the respondent and S.R. It is clear from the evidence that S.R. and the respondent disagreed about the amount of the remaining balance owed to the respondent, when the full balance was due, and how the motorcycle and its title were to be treated in the transaction. Until these disputes were resolved, the respondent was required to keep the motorcycle title separate from his own property. See KRPC 1.15(a) and (c).

"72. The respondent did not keep the motorcycle title separate from his own property. Instead, the respondent applied to have the title transferred to his name and obtained insurance in his name on the motorcycle.

"73. Further, the respondent took steps to gain possession of the motorcycle, including reporting to the Dodge City, Kansas Police Department that S.R. stole the motorcycle and filing a petition in 20-LM-132 for replevin and conversion.

"74. The respondent stipulated that he violated KRPC 1.15.

"75. Accordingly, the hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 1.15(a) and (c).

## "KRPC 3.3(a)

"76. KRPC 3.3(a)(1) provides that '[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.'

"77. The respondent wrote that the motorcycle was worth $2,000.00 on the title transfer form. Contrary to the value the respondent listed on the title transfer form, the respondent stated in his petition in 20-LM-132 that the motorcycle was worth $6,000.00.

"78. Further, the respondent did not advise the district court that the total fee owed was $5,000.00 and that S.R. had already paid $1,300.00 of that amount, meaning that S.R. only owed $3,700.00 at the time the petition was filed.

"79. Instead, the respondent stated that the motorcycle was given to the respondent 'as payment for representation,' implying that the amount owed to the

respondent was the value of the motorcycle represented in the petition: $6,000.00.

"80. The respondent stipulated that he violated KRPC 3.3.

"81. Accordingly, the hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 3.3(a).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

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

"83. *Duty Violated*. The respondent violated his duties to his client S.R. and to the legal system.

"84. *Mental State*. The respondent intentionally violated his duties.

"85. *Injury*. As a result of the respondent's misconduct, the respondent caused potential harm and actual harm to S.R. and the legal system. The respondent caused actual harm to S.R. in the form of legal fees and stress associated with the civil lawsuit and retention and transfer to his name of S.R.'s motorcycle title. The respondent caused potential harm to S.R. in the form of possible probation revocation and incarceration by reporting to the Dodge City, Kansas Police Department that S.R. stole the motorcycle.

The respondent caused actual harm to S.R. by creating unnecessary stress about possible negative impact on S.R.'s criminal probation. The respondent caused actual harm to the legal system with his lack of candor to the tribunal.

"Aggravating and Mitigating Factors

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

"87. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on one occasion. In August 2008, the respondent entered into a diversion agreement with the disciplinary administrator's office. The respondent successfully completed the diversion and the matter was dismissed on August 29, 2008. The hearing panel notes that this prior discipline is remote in time and unrelated to the current misconduct.

"88. *Dishonest or Selfish Motive*. Respondent had represented S.R. on previous occasions. The behavior that led to this disciplinary complaint was motivated by selfishness grounded in respondent's misguided desire to teach S.R. a

lesson in responsibility, including not burdening S.R.'s mother with his debts. Moreover, this selfishness was manifested in respondent's effort to collect money he believed he was owed without regard for the negative impact his actions may have on S.R.—such as reporting to the police that S.R. committed theft, transferring the motorcycle title to his name without resolving the fee dispute with S.R., and engaging in civil litigation adverse to S.R.

"89. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct. The respondent's misconduct was not the result of an isolated act or mistake but was the result of a course of conduct where the respondent engaged in several separate acts, including filing the application for title to the motorcycle, calling the Dodge City, Kansas Police Department to report S.R. stole the motorcycle, filing a petition, amended petition, and answer to counter-petition in 20-LM-132 asserting claims to the motorcycle and asserting an unsupported value. Further, the respondent testified that it was his common practice to not utilize written agreements in all of his cases that did not involve personal injury or workers compensation claims.

"90. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.8(a) (conflict of interest: current clients: specific rules), 1.9(c) (duties to former clients), 1.15(a) and (c) (safekeeping property), and 3.3(a) (candor toward the tribunal).

"91. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1975. At the time of the misconduct, the respondent had been practicing law for 44 years.

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

"93. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent fully cooperated with the disciplinary process. Additionally, the respondent admitted in his answer some of the facts that gave rise to the violations and entered into a stipulation to other facts and to violating KRPC 1.8, 1.9, 1.15, and 3.3. Further, the respondent settled the civil dispute with S.R., returned the motorcycle title to S.R., and paid S.R. $1,686.50 to cover the difference between S.R.'s legal fees incurred in the civil matters and the amount still owed the respondent as well as $500.00 to reimburse other fees incurred by S.R.

"94. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct*. As indicated above, the respondent paid S.R. $1,686.50 to cover the difference between S.R.'s legal fees incurred in the civil matters and the amount still owed the respondent as well as $500.00 to reimburse other fees incurred by S.R.

"95. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct.

"96. *Remoteness of Prior Offenses.* The misconduct which gave rise to the respondent's 2008 diversion is remote in character and in time to the misconduct in this case. The prior misconduct resulting in diversion involved an improper comment by the respondent during closing argument in a case where he served as a prosecutor.

"97. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar of Ford County, Kansas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by the testimony of Representative Bradley Ralph, retired District Court Judge Daniel Love, Glenn Kerbs, and David Rebein, and by 54 letters received by the hearing panel.

"98. *Respondent's Contribution to the Community*. Evidence presented at the formal hearing established that the respondent's legal services are valuable to his community and that interruption of respondent's practice would pose a significant loss to his community. The hearing panel believes respondent's behavior was clearly inappropriate but not likely to be repeated. As such, in reaching recommended discipline, the hearing panel considered that the respondent's misconduct is unlikely to be repeated and that more severe discipline may inordinately harm the respondent's community and clients he serves.

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

'4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.'

'4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'

'4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.'

'4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.'

'6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.'

'6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial

action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.'

"*Recommendation of the Parties*

"100. The disciplinary administrator recommended that the respondent's license to practice law be suspended for 90 days. The disciplinary administrator did not recommend that the respondent be required to undergo a reinstatement hearing under Rule 232 (2022 Kan. S. Ct. R. at 293).

"101. The respondent recommended that he receive public censure.

"*Recommendation of the Hearing Panel*

"102. Accordingly, based upon the findings of fact, conclusions of law, aggravating and mitigating factors, and the Standards listed above, the hearing panel unanimously recommends that the respondent's license to practice law be suspended for 30 days. The hearing panel does not recommend that the respondent be required to undergo a reinstatement hearing under Rule 232 (2022 Kan. S. Ct. R. at 293).

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

DISCUSSION

In a disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so the court must determine whether it is supported by clear and convincing evidence. *In re Hodge*, 307 Kan. 170, 209-10, 407 P.3d 613 (2017). If so, the finding will not be disturbed. The court does not reweigh conflicting evidence, assess witness credibility, or redetermine questions of fact when undertaking its factual analysis. *In re Hawver*, 300 Kan. 1023, 1038, 339 P.3d 573 (2014).

Respondent was given adequate notice of the formal complaint, to which he filed an answer. Prior to the hearing before the disciplinary panel, respondent entered into a joint agreement with the Disciplinary Administrator's office stipulating to violations of KRPC 1.15 (safekeeping property) (2022 Kan. S. Ct. R. at 372), KRPC 1.8 (conflict of interest, current clients, specific rules) (2022 Kan. S. Ct. R. at 350), KRPC 3.3 (candor toward the tribunal) (2022 Kan. S. Ct. R. at 391), and KRPC 1.9 (duties to former clients) (2022 Kan. S. Ct. R. at 358). No exceptions were filed in the case, and the findings of fact and conclusions of law in the hearing panel's final report are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2022 Kan. S. Ct. R. at 287). The evidence before the panel clearly and convincingly established that the charged misconduct violated KRPC 1.15 (safekeeping property), KRPC 1.8 (conflict of interest, current clients, specific rules), KRPC 3.3 (candor toward the tribunal), and KRPC 1.9 (duties to former clients).

The only issue left for us to resolve is the appropriate discipline. The Disciplinary Administrator's office recommended that we suspend respondent's license to practice law for 90 days. The Disciplinary Administrator did not request or recommend that the respondent be subject to a reinstatement hearing under Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293). The respondent recommended that he receive public censure. The disciplinary panel recommended that we suspend respondent's license to practice law for 30 days and that he not be required to undergo a hearing prior to reinstatement.

This court is not bound by the recommendations made by the Disciplinary Administrator or the hearing panel. See *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). Here, a majority of the court follows the recommendations of the Disciplinary Administrator. A minority of the court would have imposed a shorter period of suspension.

In adopting the discipline recommended by the Disciplinary Administrator's office, we considered the mitigating factors, including that respondent cooperated fully with the disciplinary process; he made a timely, good-faith effort to make restitution and remedy the consequences of his misconduct; he expressed genuine remorse; respondent has made significant contributions to charity and the community in his area; and his prior misconduct was remote in time and character to this misconduct.

Even so, we cannot overlook the fact that respondent's misconduct caused actual harm to his former client, S.R., who incurred fees and costs defending the civil suit Respondent filed against him. Respondent's misconduct also placed S.R.'s liberty in peril. Respondent wrongfully reported to law enforcement that S.R. had stolen Respondent's motorcycle. Respondent knew, or should have known, this misleading report could have provided the district court grounds to revoke S.R.'s probation (which Respondent previously negotiated on behalf of S.R.) and to sentence S.R. to a term of imprisonment. These facts, coupled with the other aggravating circumstances found by the panel, warrant a suspension greater than the 30-day period recommended by the panel. Thus, we order that respondent's license be suspended for 90 days.

## CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Terrence J. Malone is suspended for 90 days from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) for violating KRPC 1.8, 1.9, 1.15, and 3.3.

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

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

BILES and STANDRIDGE, JJ., not participating.

No. 124,956

# In the Matter of JACK R.T. JORDAN, *Respondent*.

(518 P.3d 1203)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Disbarment.*

Original proceeding in discipline. Opinion filed October 21, 2022. Disbarment.

*Alice L. Walker*, Deputy Disciplinary Administrator, argued the cause, and *Julia A. Hart*, Deputy Disciplinary Administrator, and *Gayle B. Larkin*, Disciplinary Administrator, were with her on the brief for petitioner.

*Jack R.T. Jordan*, respondent, argued the cause and was on the briefs pro se.

PER CURIAM: This is a contested attorney discipline proceeding against Jack R.T. Jordan, of North Kansas City, Missouri, who was admitted to practice law in Kansas in 2019. A panel of the Kansas Board for Discipline of Attorneys concluded Jordan violated the Kansas Rules of Professional Conduct during federal court proceedings initiated to obtain a document known as the "Powers e-mail" under the federal Freedom of Information Act, 5 U.S.C. § 552 (2018). Across various pleadings, Jordan persistently accused multiple federal judges of lying about that e-mail's contents, lying about the law, and committing crimes including conspiring with others to conceal the document.

The panel unanimously found Jordan's conduct violated KRPC 3.1 (frivolous claims and contentions) (2022 Kan. S. Ct. R. at 390); 3.4(c) (disobeying obligations under tribunal rules) (2022 Kan. S. Ct. R. at 395); 8.2(a) (making false or reckless statement regarding qualifications or integrity of a judge) (2022 Kan. S. Ct. R. at 432); 8.4(d) (conduct prejudicial to the administration of justice) (2022 Kan. S. Ct. R. at 434); and 8.4(g) (conduct adversely reflecting on lawyer's fitness to practice law) (2022 Kan. S. Ct. R. at 434). The panel recommends disbarment, and the Disciplinary Administrator's office agrees. Jordan filed exceptions to the panel's report and argues discipline cannot be imposed because the First Amendment to the United States Constitution protects his statements. He also claims his assertions have not been proven false.

We hold clear and convincing evidence establishes Jordan's violations of KRPC 3.1, 3.4(c), 8.2(a), and 8.4(d) and (g). And based on that, we disbar him from practicing law in this state.

## PROCEDURAL BACKGROUND

The Disciplinary Administrator filed a formal complaint alleging various KRPC violations against Jordan on August 27, 2021. He answered on September 16, 2021. The panel conducted a one-day hearing on January 12, 2022. Respondent appeared pro se. The Disciplinary Administrator called Jordan and its investigator W. Thomas Stratton Jr. as witnesses. Jordan repeatedly invoked the Fifth Amendment when asked about his conduct. Stratton's testimony established that Jordan had previously admitted he carefully considered his actions, and that Jordan did not supply any evidence he had ever viewed the Powers e-mail before accusing federal judges of lying about its contents. The panel issued an 87-page report that provides in relevant part:

### *"Findings of Fact*

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

"Administrative Proceedings and Lawsuit in District of Columbia

"43. The respondent's wife, M.J., was injured at the U.S. Consulate in Erbil, Iraq. The respondent represented M.J. in an action under the Defense Base Act.

"44. During administrative proceedings, the respondent sought production of an email that the respondent referred to as 'Powers' email'.

"45. Administrative Law Judge Merck denied production of an unredacted version of Powers' email to the respondent based on attorney-client privileged information within the email.

"46. The respondent filed interlocutory appeals and requests for reconsideration of Administrative Law Judge Merck's decision regarding Powers' email.

"47. The respondent submitted a Freedom of Information Act ('FOIA') request to the U.S. Department of Labor ('DOL') for certain documents, including Powers' email, which was denied.

"48. On September 19, 2016, the respondent filed a lawsuit against the DOL, *Jordan v. United States Department of Labor*, 17-cv-02702 (U.S. District Court, District of Columbia, September 19, 2016).

"49. This matter was assigned to the Honorable Judge Rudolph Contreras, District Court Judge for the U.S. District Court for the District of Columbia.

"50. Judge Contreras reviewed Powers' email *in camera*.

"51. After Judge Contreras conducted an *in camera* review of Powers' email, he ruled that the email was protected by attorney-client privilege.

"52. Judge Contreras' decision was affirmed on appeal to the D.C. Circuit Court of Appeals.

"Jordan v. U.S. Department of Labor (18-cv-6129) in Western District of Missouri

"53. On August 29, 2018, the respondent filed a lawsuit *pro se* on his own behalf, *Jordan v. U.S. Department of Labor*, 18-cv-6129, challenging the denial of FOIA requests for Powers' email in the United States District Court for the Western District of Missouri.

"54. The Honorable Judge Ortrie Smith, District Court Judge for the Western District of Missouri, presided over this matter.

"55. The DOL filed a motion to dismiss a portion of the respondent's complaint relating to Powers' email.

"56. Judge Smith granted the DOL's motion to dismiss relating to Powers' email.

"57. On April 9, 2019, the respondent appealed the matter to the Eighth Circuit Court of Appeals.

"58. On February 21, 2020, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court.

"[F.T.] v. U.S. Department of Labor (19-cv-00493) in Western District of Missouri

"59. On June 26, 2019, F.T. filed a lawsuit against the DOL in the District Court for the Western District of Missouri, *[F.T.] v. U.S. Department of Labor*, 19-cv-00493, seeking a court order that the DOL release Powers' email. F.T. filed this suit after having filed FOIA requests for certain documents, including Powers' email.

"60. The Honorable Judge Ortrie Smith presided over this matter.

"61. On July 25, 2019, Judge Smith issued an order staying the matter pending the Eighth Circuit Court of Appeals' resolution of the appeal in *Jordan v. U.S. Department of Labor*, 18-cv-6129.

"62. On October 17, 2019, the respondent entered his appearance to represent F.T. in [*F.T.*] *v. U.S. Department of Labor*, 19-cv-00493. F.T.'s former attorneys were granted leave to withdraw the next week. At the time of the former attorneys' withdrawal, the respondent was F.T.'s only attorney.

"63. On November 19, 2019, the respondent filed a document titled, 'Plaintiff's Suggestions Supporting Motion to Remedy Judge Smith's Lies and Crimes and Lift the Stay or Disqualify Judge Smith'.

"64. Within that filing, the respondent wrote headlines that included, in part, the following statements:

- 'Judge Smith Is Knowingly and Willfully Violating Federal Law and the Constitution',
- 'Judge Smith Is Knowingly and Willfully Abusing Any Potential Discretion',
- 'Judge Smith Is Knowingly and Willfully (Criminally) Failing to Comply with the APA and Clear and Controlling Supreme Court Precedent',
- 'Judge Smith Is Committing Crimes and Helping Ray and other DOL and DOJ Employees Commit Crimes', and
- 'Judge Smith Must Be Disqualified If He Fails to Promptly Remedy
- His Knowing and Willful Violations of the Constitution and Federal Law'.

([T]he respondent acknowledged during his testimony that what is stated in public court filings filed by him was indeed written by him. . . .)

"65. The respondent wrote in the body of that filing further statements about Judge Smith, including:

'Plaintiff, [F.T.], respectfully requests that the Court very promptly remedy each knowing and willful falsehood ("Lie") and violation of the Constitution or federal law and crime by Judge Smith below or promptly disqualify Judge Smith for the following reasons.

* * *

'To demonstrate how truly exceptional Judge Smith's conduct and contentions are, Plaintiff shows below that each such contention was a Lie, and Judge Smith is violating his oaths of office and the Constitution and committing crimes, specifically, to help DOL and DOJ employees violate their oaths and the Constitution and commit crimes.

* * *

'For the foregoing reasons, Judge Smith's mere contention that he (secretly and silently) "already considered" every issue and legal authority presented by Plaintiff is irrelevant and wholly inadequate. It also necessarily is either a Lie or

a confession to a crime. It certainly could be both. If he "considered" such authorities, he necessarily knew that he never had any power to knowingly violate or disregard any provision of the Constitution or federal law to deny Plaintiff any constitutional or statutory right. He swore or affirmed he would not engage in such egregious misconduct. Neither Judge Smith nor the DOL or DOJ ever even contended that he had any such power under any circumstances. He merely pretends to have such power. Such pretense has been wholly unjustified, and it cannot be justified. It is a violation of federal law; it is a violation of Judge Smith's oaths of office; it is criminal; and it is "treason to the Constitution."

* * *

'Judge Smith's contentions and conduct for years in Jordan and in this case demonstrate that his primary goal is to knowingly violate and help the DOL and DOJ knowingly violate federal law to conceal evidence that DOL and DOJ employees asserted Lies (in a DOL adjudication or to the D.C. District Court or D.C. Circuit Court) when they purported to quote a privilege notation or they represented that Powers' email contains an express or explicit request for legal advice. Judge Smith's actions (and refusals to act) are so inimical to our entire systems of government and law that they are criminal.

* * *

'Judge Smith committed criminal conspiracy: he and DOJ [*sic*] and DOJ employees "joined in" an "understanding," and each "knew the purpose" was to deprive Plaintiff or Jordan of clearly-established constitutional and statutory rights.

* * *

'Judge Smith implied that he had "broad discretion" and "inherent power" to violate or disregard clear plain language of the Constitution, federal law, and Supreme Court precedent. But Judge Smith's vague references to whatever "discretion" or "inherent power" he might have were irrelevant and illusory. They were blatantly deceitful declarations of his intent to defraud. Judge Smith has openly declared his intent to decide this case fraudulently, just as he "decided" Jordan fraudulently. A judge who pretends to have "broad discretion" and "inherent power" to violate or disregard clear plain language of the Constitution, federal law, and Supreme Court precedent must be disqualified.'

"66. On January 8, 2020, Judge Smith issued an order denying the relief sought in the respondent's filing.

"67. On January 8, 2020, Judge Smith also issued a separate order titled 'Order Directing Plaintiff and Plaintiff's Counsel to Show Cause'.

"68. Within the January 8, 2020, Order Directing Plaintiff and Plaintiff's Counsel to Show Cause, Judge Smith ordered that 'Plaintiff and her counsel must show cause why either or both should not be held in contempt' and directed the Clerk of the District Court to 'randomly assign this matter to another Article III

judge for the limited purposes of conducting a show cause proceeding and issuing any order resulting therefrom.'

"69. Judge Smith further ordered that 'neither Plaintiff nor her counsel shall file a motion or other filing responsive to this Order in this Court.'

"70. Judge Smith further ordered that 'Plaintiff and her counsel shall await further instruction from the judge assigned to conduct the show cause proceeding and issue any order resulting therefrom.'

"71. On January 13, 2020, the Honorable Chief Judge Beth Phillips of the District Court for the Western District of Missouri issued an order in [*F.T.*] *v. U.S. Department of Labor* (19-cv-00493) wherein Chief Judge Phillips ruled that the respondent's motion 'accuses Judge Smith of engaging in intentional wrongdoing: knowingly issuing unlawful orders, conspiring with Defendant's counsel, lying, and committing crimes' and that the 'Filing does not support these accusations with any facts beyond Jordan's and [F.T.'s] disagreement with the Stay Order.' Chief Judge Phillips directed the respondent and F.T. 'to respond as detailed in this Order and show cause why they should not be held in contempt or sanctioned.'

"72. Specifically, Chief Judge Phillips' January 13, 2020, Order required the respondent and F.T. to 'show cause why they should not be sanctioned for violating Rule 11(b)(3),' and to 'show cause why [Missouri's Rules of Professional Responsibility 4- 8.2(a), 4-3.3(a)(1), 4-8.4(c), and 4-8.4(d), contained in Local Rule 83.6(c)(1)] have not been violated and why sanctions are not appropriate.'

"73. Chief Judge Phillips' January 13, 2020, Order included 'Attachment A,' which contained specific statements from the respondent's November 19, 2019, filing that the respondent and F.T. were to address and show cause why they should not be held in contempt and sanctioned.

"74. On February 18, 2020, the respondent filed an 'Answer to Show Cause Order Regarding Contentions That Judge Smith Asserted Lies and Committed Crimes' in [*F.T.*] *v. U.S. Department of Labor* (19-cv-00493).

"75. Attached to the filing were documents titled: 'Supplement A: Analysis of Crimes and Lies By Judge Smith and Jeffrey Ray,' 'Supplement B: Analysis of FOIA and Related Legal Authorities That Judge Smith Is Evading by Staying Cases Pertaining to Powers' Email,' and 'Declaration of Jack Jordan'.

"76. Within the Answer to Show Cause Order, the respondent wrote headlines that included, in part, the following statements:

- 'Judge Smith Clearly Illegally Targeted and Threatened [F.T.]',
- 'Regarding Jordan, Judge Phillips Illegally Refused to Comply with Federal Law and Failed to Even Acknowledge the Constitution or Controlling Law',

- 'Judge Phillips Had No Power to Change, Contradict, Disregard or Violate FRCP 83, Local Rule 83.6 or FRCP 53', and
- 'An Investigation Was Required But Judge Phillips Blocked Respondents' Access to Relevant Evidence'.

"77. The respondent argued in the Answer to Show Cause Order that the respondent and F.T. should not be sanctioned or held in contempt because Chief Judge Phillips' Show Cause Order and other related orders denied the respondent and F.T. due process.

"78. The respondent wrote in the body of that filing further statements about Judge Smith and Chief Judge Phillips, including:

'If Judge Phillips believes that [the November 19, 2019, "Plaintiff's Suggestions Supporting Motion to Remedy Judge Smith's Lies and Crimes and Lift the Stay or Disqualify Judge Smith"] was "intended to harass," she *must* believe that Judge Smith's order was intended to harass. Judge Smith's actions seemed designed to illegally intimidate [F.T.]—as [F.T.] already had addressed in detail even before Judge Smith issued his order to cause [*sic*] the issuance of the [Show Cause Order]. Such intimidation and threats were criminal.

* * *

'Jordan also relied on the plain language of federal law, the U.S. Constitution, and Supreme Court precedent. In contrast, Judge Smith relied on mere indirection and misdirection, including pretenses that statements in Eighth Circuit opinions—which did not (and did not even purport to) address the legal issues and legal authorities presented by Jordan—could somehow change or contradict or justify disregarding or violating the plain language of federal law, the U.S. Constitution, and Supreme Court precedent that Jordan presented. As addressed in [the respondent's November 19, 2019 Suggestions Supporting Motion] and herein (including Supplements A and B hereto), Judge Smith's pretenses were so blatantly illegal that they were absurd. They were criminal.

* * *

'Even with respect to Jordan, alone, the *issuance of the* [*Show Cause Order*]—and the issuance of Judge Smith's order causing the issuance of the [Show Cause Order]—were patently illegal.

* * *

'Even before that, Judge Phillips did not even *contend* that the *issuance of either the* [*Show Cause Order*] or *Judge Smith's order* was legal. Judge Phillips did not even *contend* that the *issuance of either the* [*Show Cause Order*] or *Judge Smith's order* was consistent with (and did not deny Jordan the due process required in) FRCP 83, Local Rule 83.6, FRCP 53 or the Constitution. Instead, Judge Phillips asserted two irrelevant issues and one contention that clearly was false.

* * *

'As a condition of employment, every federal judge and agency employee must swear or affirm that he or she will at all times "support and defend the Constitution" against "*all* enemies," including "*domestic*" enemies. Among the most insidious domestic enemies of the constitution is a federal judge or a DOJ attorney, who—like Judge Smith, Judge Contreras and Ray have in cases regarding Powers' email—used his position and authority to attack and undermine (1) federal law and the Constitution and (2) citizens (like [F.T.] and Jordan) who are attempting to support and defend the Constitution. Such a judge or DOJ attorney is the equivalent of the inside man in a bank heist. He *said* he would protect; he wears the *uniform* of a person employed to protect; and he *pretends* to protect. But, in fact, he *facilitates crimes* against the very institutions he pretends to protect.

[* * *]

'"Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." The efforts of multiple DOL attorneys and ALJs and multiple DOJ attorneys and federal judges to conceal evidence at issue in this case is evidence that crime is particularly contagious and insidious when DOJ attorneys and federal judges conspire to commit them.

[* * *]

'Judge Phillips also is undermining the institutions she swore to protect. A judge's decisions failing to apply the standard enunciated in federal law are an "evil" that "spreads in both directions," avoiding "consistent application of the law" and preventing "effective review of" decisions by superior "courts."

* * *

'Judge Phillips knows that her conduct was illegal and criminal.'

"79. Supplement A to the respondent's February 18, 2020, Answer to Show Cause Order, included a headline that stated: 'Much of the Evidence that the Conduct of Judge Smith and Ray (and potentially Garrison) Was Criminal Is Circumstantial.' Another headline stated that 'There Is Copious Evidence' that Judge Smith's conduct was "Criminal."'

"80. Supplement A indicates the following 'Documentary Evidence of Conspiracy': 'A. DOL Requests and Judge Smith's Orders Regarding Refusing to Join [F.T.],' 'B. DOL Requests and Judge Smith's Orders Regarding Staying [(*F. T.*) *v. U.S. Department of Labor* (19-cv-00493)],' and 'C. DOJ Requests and Judge Smith's Orders Regarding Staying [(R.C.) v. U.S. Department of Justice, (19-cv-00905)]'.

"81. Notably, in Supplement A, the respondent argued that evidence of his allegations about Judge Smith in his November 19, 2019, filing was 'circumstantial,' and was based on the respondent's assertion that Judge Smith misrepresented what was contained in Powers' email (which the respondent had not read) and also on the respondent's assertion that Judge Smith 'knew' that Judge Smith was not abiding by the respondent's interpretation of what the law required. Moreover, the respondent argued that the fact the unredacted Powers' email was not provided to him was evidence of deceit by those withholding the email from him.

"82. In Supplement B, the respondent stated in the title of the document that Judge Smith was 'evading' legal authorities and later in the document stated that Judge

Smith 'repeatedly failed or even expressly refused to apply the following law even though he knew he was bound to do so.'

"83. In the 'Declaration of Jack Jordan,' attached to the respondent's February 18, 2020, Answer to Show Cause Order, the respondent 'declare[d] under penalty of perjury' pursuant to 28 U.S.C. § 1746, in part, that:

'30. In no proceeding involving me has anyone ever even identified *any* word used in any "express" or "explicit" request in Powers' email or any factor that he considered to determine that *any* request in Powers' email sought advice that was of a *legal* nature.

'31. [The November 19, 2019, "Plaintiff's Suggestions Supporting Motion to Remedy Judge Smith's Lies and Crimes and Lift the Stay or Disqualify Judge Smith"] was not presented for any improper purpose whatsoever. It was not presented to harass anyone, cause any unnecessary delay, or needlessly increase the cost of litigation. It was submitted for the purposes stated in FRCP 1: to secure the just, speedy, and inexpensive determination of whether the DOL violated FOIA with respect to [F.T.'s] FOIA request. My inquiry into the facts, evidence and legal authorities relevant to [the November 19, 2019, filing] in the captioned case (as well as my Answer dated February 18, 2020 to Judge Phillips' Show Cause Order related to [the November 19, 2019, filing]) included all filings in federal court or DOL proceedings and all legal authorities that were dated before November 19, 2019 that were included in my Answer. My inquiry included far more. Specifically to address falsehoods asserted, and violations of law and crimes, by DOL and DOJ attorneys, DOL judges and federal judges, before November 19, 2019, I devoted more than two years to studying and explaining to courts and DOJ adjudicators FOIA and other sections of the APA, their legislative history, federal rules of procedure and evidence, the U.S. Constitution, the Declaration of Independence of 1776, and Supreme Court precedent spanning hundreds of years.'

"84. On March 4, 2020, Chief Judge Phillips issued an order sanctioning the respondent.

"85. In the Order, Chief Judge Phillips ruled that the respondent and F.T. were afforded due process in the proceeding.

"86. Chief Judge Phillips concluded that the respondent 'violated Rule 11 of the Federal Rules of Civil Procedure, and has done so in a manner that demonstrates his contempt for the Court' and that the respondent's filing 'contains multiple statements and accusations that had no reasonable basis in fact.' Chief Judge Phillips ruled that the respondent's 'conduct qualifies under the dictionary-definition of "contempt".'

"87. Chief Judge Phillips imposed a sanction on the respondent of $1,000.00, to be paid by the respondent to the Clerk of the Court.

"88. On April 1, 2020, the respondent filed a document titled 'Notice of Noncompliance with Illegal and Criminal Order Purporting to Impose Criminal Penalties'.

"89. In this filing, the respondent stated that he 'refuses to pay any portion of any such penalty because no valid obligation exists requiring Jordan to do so.'

"90. The respondent also stated in this filing that 'Judge Phillips [*sic*] order to show cause and her order holding Jordan in criminal contempt were illegal and criminal.'

"91. On May 5, 2020, the respondent filed 'Plaintiff's Motion to Reconsider and Vacate Order Imposing Sanctions and Order Refusing to Disqualify Judge Smith.'

"92. In this filing, the respondent stated that 'Judge Smith used Judge Phillips (and Judge Phillips and Judge Smith conspired) to violate Jordan's due process rights'.

"93. The respondent further stated that 'Judge Smith asserted Lies and committed crimes.'

"94. The respondent also stated that Judge Smith and attorneys involved in the case 'supported and defended enemies of the Constitution to thwart and undermine the Constitution.'

"95. On May 6, 2020, the respondent filed 'Plaintiff's Supplement to Motion to Reconsider and Vacate Order Imposing Sanctions'. This document contained statements by the respondent about Judge Phillips and Judge Smith as well as attorneys involved in the case similar to those made in his May 5, 2020, filing.

"96. On May 13, 2020, the respondent filed 'Plaintiff's Second Supplement to Motion to Reconsider and Vacate Order Imposing Sanctions'. This document contained statements by the respondent about Judge Phillips and Judge Smith as well as attorneys involved in the case similar to those made in his May 5, 2020, and May 6, 2020, filings.

"97. On June 29, 2020, the respondent filed 'Plaintiff's Corrected Motion to Reconsider and Vacate Judge Smith's Lies and Evidence of Criminal Conspiracy to Conceal Material Facts and Dispositive Evidence.' This document contained statements by the respondent about Judge Phillips and Judge Smith as well as attorneys involved in the case similar to those made in his May 5, 2020, May 6, 2020, and May 13, 2020, filings.

"98. On June 30, 2020, Judge Smith issued an order denying the respondent's Corrected Motion to Reconsider.

"99. In the June 30, 2020, order Judge Smith ruled as follows:

'Plaintiff's counsel has filed numerous motions in this matter, including but not limited to ten motions to reconsider (not including the motions discussed above). These motions, including the most recently filed motions, are largely frivolous, unprofessional, and scurrilous, if not defamatory, in tone and content. The Court refers Plaintiff's counsel to Judge Phillips's March 4, 2020 Order wherein Judge Phillips determined Plaintiff's counsel violated Rule 11, sanctioned him, and referred him to the Kansas Bar Association.

'Three dispositive motions are pending in this matter. Yet, Plaintiff continues to file other motions. The Court warns Plaintiff that additional frivolous motion practice will be met with additional sanctions, another referral to the Kansas Bar Association, and referrals to other jurisdictions wherein counsel is licensed to practice law. This warning should not come as a surprise to Plaintiff's counsel because other courts recently issued similar warnings to counsel.'

"100. On July 1, 2020, the respondent filed two documents in the matter. One was 'Plaintiff's Motion for Order Stating the Law and Showing Judge Smith did not Lie About the Law,' and the second was 'Plaintiff's Motion for Order Stating the Law Showing Judge Smith's Threat was not Criminal'.

"101. Within these documents, the respondent stated, in part:

'Judge Smith is committing crimes by *personally* concealing evidence of whether or not (1) Powers' email contains either Key Phrase and (2) Clubb and Ray acted in bad faith by misrepresenting either Key Phrase.

* * *

'To knowingly violate Plaintiff's right to such evidence, Judge Smith chose to criminally threaten Plaintiff and Plaintiff's counsel if Plaintiff continued to seek evidence of whether or not Powers' email contains either Key Phrase.

* * *

'Judge Smith's intimidation also was criminal because he used intimidation to personally conceal and help the Culprits conceal (and encourage the Culprits to conceal) evidence that he *knew* shows that DOL and DOJ employees (and Judge Contreras) committed federal crimes.

* * *

'Judge Smith must state the law, not Lie about the law. The fact that Judge Smith has again willfully failed to state the law, and instead chosen to resort to threats speaks volumes.

[* * *]

'Judge Smith is a traitor to the judiciary and an enemy of the Constitution. To *personally* criminally conceal evidence of *two phrases* on a *couple pages* of Powers' email—and to help the Culprits conceal such evidence—Judge Smith routinely Lies and

commits crimes, including threatening and attempting to intimidate Plaintiff and Plaintiff's counsel.'

"102. On July 1, 2020, Judge Smith issued an order striking these two filings from the record due to noncompliance with the Court's June 30, 2020, Order.

"103. On July 6, 2020, Judge Smith issued an Order wherein he ruled that:

'Despite the Court's directive [in its June 30, 2020, order], Plaintiff's counsel filed two motions on July 1, 2020; (1) "Plaintiff's Motion for Order Stating the Law and Showing Judge Smith Did Not Lie About the Law," and (2) "Plaintiff's Motion for Order Stating the Law Showing Judge Smith's Threat Was Not Criminal." These motions are the precise type of filings prohibited by the Court. That is, the motions are "frivolous, unprofessional, and scurrilous, if not defamatory, in tone and content.'"

"104. Judge Smith ruled that:

'Plaintiff and her counsel are prohibited from filing anything further in this matter without the Court's prior approval. Moreover, the Court will not allow Plaintiff and her counsel to file motions that seek the same relief sought in other motions, rehash arguments previously presented, or include frivolous, unprofessional, or scurrilous tone or content.'

"105. Judge Smith also ordered the respondent to provide a copy of the July 6, 2020, Order to his client, F.T.

"106. On July 6, 2020, the respondent filed 'Plaintiff's Motion for Leave to File Notice of Appeal.'

"107. This filing included, in part, the following statements by the respondent:

'Judge Smith has . . . (3) *knowingly* misrepresented that something about FOIA precludes all discovery in this case regarding anything more than the DOL's searches for records and (4) criminally threatened Plaintiff and Jordan for the purpose of helping the DOL and Ray conceal evidence of the Key Phrases.

* * *

'The efforts by Judge Smith and Ray to conceal (from Plaintiff and Jordan) such material facts and relevant evidence is criminal.'

"108. On July 20, 2020, Judge Smith issued another order sanctioning the respondent in the amount of $500.00 '[f]or his repeated violations of [the] Court's Orders, including but not limited to the Court's Orders prohibiting Plaintiff's counsel from emailing Chambers staff and Clerk's Office staff.' Judge Smith further ordered that 'Plaintiff and her counsel are permitted to file a Notice of Appeal pertaining to this Order but shall not file anything further in this matter. The Court reiterates Plaintiff and her counsel are prohibited from contacting Chambers staff and Clerk's Office staff.'

"109. Within his July 20, 2020, Order, Judge Smith also directed 'the Clerk's Office to transmit this Order to the Office of the Kansas Disciplinary Administrator and the New York Attorney Grievance Committee.'

"[R.C.] v. U.S. Department of Labor (19-cv-00905) in Western District of Missouri

"110. In February 2019, the respondent filed a FOIA request on behalf of another client, R.C., for Powers' email. The request was denied that same month.

"111. While the respondent represented F.T. in [*F.T.*] *v. U.S. Department of Labor*, 19-cv-00493, he also represented R.C. in a lawsuit filed November 9, 2019, in the District Court for the Western District of Missouri seeking injunctive relief allowing R.C. to obtain Powers' email, [*R.C.*] *v. U.S. Department of Justice*, 19-cv-00905.

"112. On February 11, 2020, Judge Smith stayed proceedings in [*R.C.*] *v. U.S. Department of Justice*, 19-cv-00905 pending the Eighth Circuit's disposition of [*F.T.*] *v. U.S. Department of Labor*, 19-cv-00493, which was stayed pending the Eighth Circuit's disposition of *Jordan v. U.S. Department of Labor*,18-cv-6129.

"113. On May 6, 2020, the court lifted the stay.

"114. On July 13, 2020, Judge Smith denied R.C.'s motion for judgment on the pleadings and granted the Department of Justice's motion for summary judgment.

"115. On July 13, 2020, the respondent filed a notice of appeal on behalf of F.T. On July 14, 2020, the respondent filed a notice of appeal on behalf of R.C.

"116. On July 14, 2020, the Eighth Circuit Court of Appeals docketed case number 20-2430, [*R.C.*] *v. U.S. Department of Labor*. On July 16, 2020, the Eighth Circuit Court of Appeals docketed case number 20-2439, [*F.T.*] *v. U.S. Department of Labor*. On July 23, 2020, the Eighth Circuit Court of Appeals docketed case number 20-2494, *Jordan v. U.S. Department of Labor*.

"117. On the court's own motion, R.C. and F.T.'s cases were consolidated for briefing, submission, and disposition. The *Jordan* case was treated as a back-to-back appeal and submitted to the same Eighth Circuit Court of Appeals panel.

"118. On January 19, 2021, the respondent filed 'Appellant's Motion to Order the DOL and DOJ to Publicly File Parts of Powers' Email' in the *Jordan* case 20-2494.

"119. Within this filing in the Eighth Circuit Court of Appeals, the respondent claimed that Judge Smith, Judge Contreras, and other federal district court judges and administrative law judges communicated to the respondent 'lies, threats, intimidation or punishment.' The respondent also claimed that Judge

Smith and Judge Contreras violated canons of the Code of Judicial Conduct, violated federal law, committed crimes, and concealed evidence, among other allegations.

"120. On January 20, 2021, the Eighth Circuit Court of Appeals ordered that the respondent's January 19, 2021, motion be taken with the case for consideration by the panel.

"121. On July 30, 2021, the Eighth Circuit Court of Appeals affirmed the sanctions imposed on the respondent by the District Court.

"122. On August 1, 2021, the respondent filed 'Appellant's Motion for the Issuance of a Published (Or At Least Reasoned) Opinion' in the Jordan case 20-2494.

"123. Within this August 1, 2021, filing, the respondent stated, in part:

'Standing alone, the [Eighth Circuit Court of Appeals] Opinion shows no more ability to comprehend clear commands in federal law or the Constitution, or to write about the foregoing, than would be expected of a young college student who had either no real aptitude for or no genuine interest in even practicing law. The Opinion showed absolutely no comprehension of, much less respect for, the limits that all three judges *knew* Appellants clearly *showed* federal law, the Constitution and copious U.S. Supreme Court precedent imposed on their powers.

* * *

'As the product of at least two circuit court judges, the opinion shows blatant disrespect for clearly controlling authority . . . .

* * *

'The judges lied repeatedly.

* * *

'The judges responsible for the Judgment and Opinions above are abusing the legitimacy and confidence that many federal judges have earned . . . .

* * *

'They [the judges on the Eighth Circuit Court of Appeals panel] are essentially con men perpetrating a con, *i.e.*, playing a confidence game.'

"124. On August 2, 2021, the respondent filed 'Appellant's Motion for the Issuance of a Published (Or At Least Reasoned) Opinion' in the F.T. case 20-2439. In this filing, the respondent made the same types of statements as those made in the August 1, 2021, filing in the *Jordan* case 20-2494.

"125. On August 6, 2021, the Eighth Circuit Court of Appeals denied the August 1 and 2, 2021, motions. The Court directed the Clerk of the Court to serve

copies of this August 6, 2021, order and the respondent's motion on the pertinent disciplinary bar authorities.

"126. On August 8, 2021, the respondent filed 'Appellant's Supplemental Memorandum Supporting Motion for the Issuance of a Published (Or At Least Reasoned) Opinion' in the *Jordan* case 20-2494.

"127. Within this filing, the respondent made similar statements as those made in his August 1 and 2, 2021 filings, including, in part:

'In a truly evil and utterly loathsome manner such [Eighth Circuit Court of Appeals panel] judges have attacked and undermined the very same federal law and Constitution that such judges swore they would "support and defend" *every* way possible in every appeal by bearing *"true faith and allegiance* to the" Constitution.

* * *

'The judges of this Court, themselves, deliberately fabricated that lie—because they *knew* Judge Smith and senior U.S. Department of Justice ("DOJ") attorneys blatantly and knowingly violated federal law (including FRCP Rules 43 and 56) and the First and Fifth Amendments and two FOIA requesters' rights thereunder.

* * *

'They [the Eighth Circuit Court of Appeals panel judges] are attacking the Constitution in an evil, violent, cowardly, loathsome manner by failing to address in this forum at this time the clear, emphatic Supreme Court precedent and provisions of federal law and the Constitution that have been presented to them repeatedly.

* * *

'The responsible judges' pretense that tacking a few citations onto their lies, above, somehow countered all the clear commands and prohibitions above was a blatant con job. It blatantly played on the confidence of Americans that federal circuit court judges would not *knowingly* and *deliberately* violate the Constitution and their oaths. It is impossible to show that any statement in anything these judges cited in any way countered anything that Appellant presented. Such citations were intended solely to deceive and lend false legitimacy to evil and violent attacks on the Constitution. They deceitfully purported to use Supreme Court decisions to attack and undermine the Constitution and other Supreme Court decisions directly on point. Those were the actions of devious, deceitful con men.'

"128. On August 9, 2021, the Eighth Circuit Court of Appeals issued an Order denying the pending motions, ruled that no further filings from the respondent would be accepted in 20-2430, 20-2439, or 20-2494, 'except for a proper petition for rehearing,' and ordered the respondent 'to show cause within 30 days why he should not be suspended or disbarred from practicing law in this court.'

"129. After this disciplinary matter was docketed, the respondent sent letters in response to the docketed complaint on April 7, 2020, June 12, 2020, July 10, 2020, July 27, 2020, December 9, 2020, December 11, 2020, December 21, 2020, and August 21, 2021.

"130. Within the respondent's response letters, the respondent stated, in part:

'I reasonably believed every assertion I made about Judge Smith.

'Judge Phillips knowingly and willfully violated clear provisions of the U.S. Constitution and federal law governing her powers and duties as a judge or Chief Judge. *See id*. In connection with the foregoing, Judge Phillips knowingly and willfully committed crimes.

'The evidence shows that Judge Smith (and Deputy U.S. Attorney Jeffrey Ray and Judge Phillips) are using their positions to commit many crimes.

'The following tricks and devices used by Judge Smith were criminal attempts to conceal facts that were material to, and evidence that was relevant to, DOL and DOJ proceedings.

'It is an irrefutable fact that *any* government employee (including any DOJ attorney and any judge) involved in any of the FOIA cases pertaining to Powers' email is committing at *least* one federal crime by concealing the portions of Powers' email proving whether DOL ALJ Larry Merck in a DOL adjudication (to help defraud an employee who was seriously injured serving this country's interests working under difficult and dangerous conditions in Iraq) and then DOL or DOJ employees and Judge Contreras and Judge Smith (to defeat FOIA and undermine multiple courts and use courts for the same fraudulent purposes as ALJ Merck) knowingly misrepresented particular phrases and words in Powers' email. Such conduct clearly is criminal.

'Judges Smith and Phillips cannot circumvent and violate Respondent's constitutional rights by enlisting the aid of any state disciplinary authority.

'Judges Smith and Phillips clearly and irrefutably illegally and criminally sought to violate Respondent's rights under the Constitution and federal law by failing to address Respondent's conduct in compliance with the Constitution and federal law. They sought to make employees of the Kansas Court system their accomplices by shifting this matter to Kansas disciplinary proceedings.

'As you know, I have appealed to the Eighth Circuit the egregious efforts by Judges Smith and Phillips to abuse the Kansas Disciplinary Administrator to knowingly violate my rights under clear and mandatory federal law and the U.S. Constitution . . . . Please understand that Judges Smith and Phillips and DOJ attorneys are attempting to abuse state authorities to violate my rights under federal law (including federal criminal law) and the U.S. Constitution.'

"131. On November 2, 2021, the Eighth Circuit Court of Appeals issued an order disbarring the respondent from practicing law in the Eighth Circuit.

"132. On November 17, 2021, the Eighth Circuit Court of Appeals issued an order ruling that:

'[The respondent's] motion to vacate the Court's order of November 2, 2021 disbarring him from practicing law in this Court has been considered by the court, and the motion is denied. It is further ordered that Mr. Jordan is barred

from making any further filings in this case, including any filings related to his disbarment.'

"133. During the hearing on this matter, the respondent testified that he carefully considered his filings in front of Judge Smith and Judge Phillips prior to filing them.

"134. The respondent also stated during his testimony that:
'Judges have lied about Powers e-mail. They have never ruled. You cannot show me any decision where any judge has addressed any evidence that Powers e-mail could possibly be privileged. Not one. That's not a ruling, those are lies and crimes.'

"135. Further, the respondent testified:
'What I have said is that they lied by saying things that they knew or believed were false, and I've said they've committed crimes by knowingly and willfully violating litigants' and lawyers' rights and privileges under the U.S. Constitution by concealing evidence that they knew was relevant. So it's—it's extremely false to say that what I said that they did was criminal was related exclusively to the content of Powers e-mail. It wasn't. It was—it was related first and foremost to the content of their judgments and opinions and the motions that were filed by the—by litigants, the filings—.'

"136. When asked whether he 'truly believed that' his filings containing allegations against Judge Smith and Judge Phillips 'were necessary to get the evidence [he was] denied for years,' i.e., an unredacted copy of Powers' email, the respondent asserted his Fifth Amendment privilege and declined to testify. After asserting his Fifth Amendment privilege, the respondent was asked, '[b]ut you did not deny to answer that to Mr. Stratton during the interview on July 9, 2020?' The respondent stated: 'Wait a minute. This is hearsay. If you want Mr. Stratton to come testify about what I said to him, get him to testify.'

"137. The hearing panel concluded that the respondent waived his Fifth Amendment privilege regarding statements he made previously to Mr. Stratton during the disciplinary investigation.

"138. Deputy disciplinary administrator W. Thomas Stratton, Jr., who conducted an investigation in this disciplinary matter, testified that he interviewed the respondent on July 9, 2020, and that the respondent 'sought to assure me he had carefully considered the course of action that he should take prior to making the allegations against Judge Smith, or any of the judges who were part of the Powers' e-mail litigation and against whom allegations have been made.' Further, Mr. Stratton testified the respondent 'said the allegations had not been made lightly at all. He truly believed they were necessary to get the evidence that has been denied for years and on which he has briefed many times to many courts.' Specifically, the evidence the respondent sought for years was '[t]he unredacted Powers e-mail in its entirety.'

"139. Mr. Stratton testified that the respondent asked Mr. Stratton to obtain Powers' email and the respondent provided Mr. Stratton no evidence that the respondent or someone he associated with had viewed an unredacted version of Powers' email. Further, the respondent provided Mr. Stratton with no evidence to support the respondent's assertion that the judges had lied about the contents of Powers' email.

"140. The respondent called no witnesses to testify and offered no exhibits for admission during the hearing.

## *"Conclusions of Law*

"141. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 3.1 (meritorious claims and contentions), KRPC 3.4(c) (fairness to opposing party and counsel), KRPC 8.2(a) (judicial and legal officials), and KRPC 8.4(d) and (g) (professional misconduct) as detailed below.

## "KRPC 3.1

"142. 'A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.' KRPC 3.1.

## "Applying Rule 220(b)

"143. Pursuant to Rule 220(b) (2022 Kan. S. Ct. R. at 275), if based on a standard less than clear and convincing evidence, 'a certified copy of a judgment or ruling in any action involving substantially similar allegations as a disciplinary matter is prima facie evidence of the commission of the conduct that formed the basis of the judgment or ruling, regardless of whether the respondent is a party in the action.'

"144. 'The respondent has the burden to disprove the findings made in the judgment or ruling.' Rule 220(b) (2022 Kan. S. Ct. R. at 275).

"145. Here, Chief Judge Phillips ruled on January 13, 2020, that the respondent's motion 'accuses Judge Smith of engaging in intentional wrongdoing: knowingly issuing unlawful orders, conspiring with Defendant's counsel, lying, and committing crimes,' and that the 'Filing does not support these accusations with any facts beyond Jordan's and [F.T.'s] disagreement with the Stay Order.' Chief Judge Phillips further found that 'it appears the Filing is intended to harass.'

"146. The respondent had an opportunity to, and did answer Chief Judge Phillips' January 13, 2020, show cause order via an answer filed February 18, 2020 (with supplements and a declaration attached).

"147. On March 4, 2020, Chief Judge Phillips considered the respondent's answer and attached supplements and declaration and found the respondent's 'defense of his actions unpersuasive.' Chief Judge Phillips further ruled that the respondent presented no 'evidentiary support or the likelihood of evidentiary support for his accusations.'

"148. Chief Judge Phillips concluded that the respondent 'violated Rule 11 of the Federal Rules of Civil Procedure, and has done so in a manner that demonstrates his contempt for the Court' and that the respondent's filing 'contains multiple statements and accusations that had no reasonable basis in fact.' Chief Judge Phillips ruled that the respondent's 'conduct qualifies under the dictionary-definition of "contempt".'

"149. Chief Judge Phillips sanctioned the respondent and ordered him to pay $1,000.00 to the Clerk of the Court.

"150. Both the January 13, 2020, and March 4, 2020, orders were certified by the Clerk of the District Court for the Western District of Missouri.

"151. The respondent presented no evidence during the formal hearing to disprove the findings in Chief Judge Phillips' rulings.

"152. Applying Rule 220(b), based upon Chief Judge Phillips' rulings in her January 13, 2020, and March 4, 2020, orders, the hearing panel concludes that there is clear and convincing evidence that the respondent violated KRPC 3.1.

## "Absent Application of Rule 220(b)

"153. Even without applying Rule 220(b), the hearing panel concludes that there is clear and convincing evidence that the respondent violated KRPC 3.1.

"154. Since becoming licensed to practice law in the state of Kansas in October 2019, the respondent made frivolous claims in [*F.T.*] *v. U.S. Department of Labor*, 19-cv- 00493 in the following filings (filed in the District Court for the Western District of

Missouri, unless otherwise indicated):

- 'November 19, 2019, "Plaintiff's Suggestions Supporting Motion to Remedy Judge Smith's Lies and Crimes and Lift the Stay or Disqualify Judge Smith";
- 'February 18, 2020, "Answer to Show Cause Order Regarding Contentions That Judge Smith Asserted Lies and Committed Crimes", "Supplement A: Analysis of Crimes and Lies By Judge Smith and Jeffrey Ray", "Supplement B: Analysis of FOIA and Related Legal Authorities That Judge Smith is Evading by Staying Cases Pertaining to Powers' Email", and "Declaration of Jack Jordan";
- 'April 1, 2020, "Notice of Noncompliance with Illegal and Criminal Order Purporting to Impose Criminal Penalties";
- 'May 5, 2020, "Plaintiff's Motion to Reconsider and Vacate Order Imposing Sanctions and Order Refusing to Disqualify Judge Smith";

- 'May 6, 2020, "Plaintiff's Supplement to Motion to Reconsider and Vacate Order Imposing Sanctions";
- 'May 13, 2020, "Plaintiff's Second Supplement to Motion to Reconsider and Vacate Order Imposing Sanctions";
- 'June 29, 2020, "Plaintiff's Corrected Motion to Reconsider and Vacate Judge Smith's Lies and Evidence of Criminal Conspiracy to Conceal Material Facts and Dispositive Evidence";
- 'July 1, 2020, "Plaintiff's Motion for Order Stating the Law and Showing Judge Smith did not Lie About the Law";
- 'July 1, 2020, "Plaintiff's Motion for Order Stating the Law Showing Judge Smith's Threat was not Criminal";
- 'January 19, 2021, "Appellant's Motion to Order the DOL and DOJ to Publicly File Parts of Powers' Email" filed in the Eighth Circuit Court of Appeals;
- 'August 1, 2021, "Appellant's Motion for the Issuance of a Published (Or At Least Reasoned) Opinion" filed in two cases in the Eighth Circuit Court of Appeals; and
- 'August 8, 2021, "Appellant's Supplemental Memorandum Supporting Motion for the Issuance of a Published (Or At Least Reasoned) Opinion" filed in the Eighth Circuit Court of Appeals.'

"155. Only a portion of the frivolous statements the respondent made are quoted in the findings of fact above. There were many other frivolous statements made by the respondent about the presiding judges and others involved in the referenced litigation, but for the sake of brevity, those are not explicitly quoted in this report. The hearing panel concludes that, at minimum, all of the statements by the respondent in these filings that are quoted or cited in the findings of fact section contain an assertion or controvert an issue therein that is frivolous.

"156. Within these filings, the respondent repeatedly made frivolous claims that Judge Smith lied, violated his oath of office, violated the U.S. Constitution, was committing crimes, confessed to committing a crime, committed 'treason to the Constitution,' was 'blatantly deceitful,' declared his intent to defraud or decide the case fraudulently, illegally targeted and threatened F.T., engaged in actions that were designed to illegally intimidate F.T., used his position and authority to attack and undermine the U.S. Constitution and federal law, used and conspired with Chief Judge Phillips to violate the respondent's due process rights, supported and defended enemies of the Constitution, violated canons of the Code of Judicial Conduct, and concealed evidence.

"157. Regarding Chief Judge Phillips, within these filings the respondent repeatedly made frivolous claims that Chief Judge Phillips blocked the respondent's access to relevant evidence, issued a show cause order that was patently illegal, asserted issues that were irrelevant and asserted one contention that was false, was undermining the institutions she swore to protect, knew her conduct was illegal and criminal, issued an order to show cause and order holding the respondent in criminal contempt that were illegal and criminal, and conspired with Judge Smith to violate the respondent's due process rights.

"158. The respondent repeatedly made frivolous claims about the Eighth Circuit Court of Appeals judges who sat on the panel to decide the respondent's appeals, including his assertions that the panel judges lied repeatedly, abused the 'legitimacy and confidence that many federal judges have earned,' were 'con men perpetrating a con, *i.e.*, playing a confidence game,' attacked and undermined federal law and the U.S. Constitution, deliberately fabricated a lie, attacked the Constitution 'in an evil, violent, cowardly, loathsome manner,' and cited to Supreme Court decisions to undermine other Supreme Court decisions the respondent deemed directly on point and 'to deceive and lend false legitimacy to evil and violent attacks on the Constitution.'

"159. These statements were all made by the respondent and were all contained in the respondent's filings in the District Court for the Western District of Missouri and/or in the respondent's filings in the Eighth Circuit Court of Appeals.

"160. Further, during the disciplinary investigation in this matter, the respondent submitted numerous letters to the disciplinary administrator's office making the same frivolous claims as he made in his court filings.

"161. The respondent provided no evidence to support the claims he made in his November 19, 2019, filing or later filings and did not establish that there was likely any evidence to support these claims. An attorney's own belief in his accusations about a judge, when unsupported by the record, does not support his claim. See *In re Landrith*, 280 Kan. 619, 644, 124 P.3d 467 (2005).

"162. During the formal hearing, the respondent presented no evidence to show he had a basis to make these claims that was not frivolous.

"163. Accordingly, the hearing panel concludes, without applying Rule 220(b), that there is clear and convincing evidence that the respondent violated KRPC 3.1.

## "KRPC 3.4(c)

"164. Clearly, lawyers must comply with court rules and orders. Specifically, KRPC 3.4(c) provides: '[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.'

"165. In this case, the respondent violated KRPC 3.4(c) by repeatedly violating Federal Rule of Civil Procedure ('FRCP') 11 and filing motions in the District Court for the Western District of Missouri that were prohibited by court order.

## "Applying Rule 220(b)—Violation of FRCP 11

"166. Pursuant to Rule 220(b) (2022 Kan. S. Ct. R. at 275), if based on a standard less than clear and convincing evidence, 'a certified copy of a judgment or ruling in any action involving substantially similar allegations as a disciplinary matter is prima facie evidence of the commission of the conduct that formed the

basis of the judgment or ruling, regardless of whether the respondent is a party in the action.'

"167. 'The respondent has the burden to disprove the findings made in the judgment or ruling.' Rule 220(b) (2022 Kan. S. Ct. R. at 275).

"168. On January 13, 2020, Chief Judge Phillips ordered the respondent to show cause why he and F.T. 'should not be sanctioned for violating Rule 11(b)(3).'

"169. The respondent had an opportunity to, and did answer Chief Judge Phillips' January 13, 2020, show cause order via an answer filed February 18, 2020 (with supplements and a declaration attached).

"170. On March 4, 2020, Chief Judge Phillips ruled that the respondent 'violated Rule 11 of the Federal Rules of Civil Procedure, and has done so in a manner that demonstrates his contempt for the Court' and that the respondent's filing 'contains multiple statements and accusations that had no reasonable basis in fact.' Chief Judge Phillips ruled that the respondent's 'conduct qualifies under the dictionary-definition of "contempt"'.

"171. Federal Rule of Civil Procedure 11(b)(3) provides:

'By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .'

"172. Chief Judge Phillips imposed a sanction on the respondent for his violation of FRCP 11(b)(3) in the amount of $1,000.00, to be paid to the Clerk of the Court.

"173. Chief Judge Phillips' March 4, 2020, order is prima facie evidence that the respondent 'knowingly disobey[ed] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.' See KRPC 3.4(c); Rule 220(b) (2022 Kan. S. Ct. R. at 275).

"174. The March 4, 2020, order was certified by the Clerk of the District Court for the Western District of Missouri.

"175. The respondent presented no evidence during the formal hearing to disprove the findings in Chief Judge Phillips' ruling and none is found in the record.

"176. Applying Rule 220(b), based upon Chief Judge Phillips' rulings in her March 4, 2020, order, the hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 3.4(c).

"Absent Application of Rule 220(b)—Violation of FRCP 11

"177. Even without applying Rule 220(b), the hearing panel concludes that there is clear and convincing evidence that the respondent violated KRPC 3.4(c) by violating FRCP 11.

"178. In his filings in the District Court for the Western District of Missouri, including his answer and attached documents to Chief Judge Phillips' January 13, 2020, show cause order, the respondent provided no evidence to support his claims in his November 19, 2019, filing and did not establish that there was likely any evidence to support these claims.

"179. During the formal hearing, the respondent presented no evidence to show the factual contentions he made in his November 19, 2019, filing had evidentiary support or would likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

"180. The hearing panel concludes that the respondent's violation of KRPC 3.4(c) was knowing (and intentional) because the respondent testified during the formal hearing that he carefully considered his filings in front of Judge Smith and Chief Judge Phillips prior to filing them and continued to assert during his testimony at the formal hearing that these judges lied about Powers' email, concealed evidence, and committed crimes despite an absence of evidence to support his contentions.

"181. Further, the hearing panel concludes based on the evidence that the respondent's conduct was knowing (and intentional) because the respondent had not read an unredacted version of Powers' email at the time he made the allegations in his November 19, 2019, filing. See Rule 240 (2022 Kan. S. Ct. R. at 323) ('[t]he Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question.'). Thus, the respondent's allegations about Judge Smith in his November 19, 2019, filing was based on the respondent's knowledge that he lacked evidence of what Powers' email actually said.

"182. Accordingly, the hearing panel concludes, without applying Rule 220(b), there is clear and convincing evidence that the respondent violated KRPC 3.4(c) by knowingly disobeying FRCP 11(b)(3).

"Applying Rule 220(b)—Violation of Court Order

"183. Pursuant to Rule 220(b) (2022 Kan. S. Ct. R. at 275), if based on a standard less than clear and convincing evidence, 'a certified copy of a judgment or ruling in any action involving substantially similar allegations as a disciplinary matter is prima facie evidence of the commission of the conduct that formed the basis of the judgment or ruling, regardless of whether the respondent is a party in the action.'

"184. 'The respondent has the burden to disprove the findings made in the judgment or ruling.' Rule 220(b) (2022 Kan. S. Ct. R. at 275).

"185. Here, Judge Smith ruled on July 6, 2020, that:

'Despite the Court's directive [in its June 30, 2020, order], Plaintiff's counsel filed two motions on July 1, 2020; (1) "Plaintiff's Motion for Order Stating the Law and Showing Judge Smith Did Not Lie About the Law," and (2) "Plaintiff's Motion for Order Stating the Law Showing Judge Smith's Threat Was Not Criminal." These motions are the precise type of filings prohibited by the Court. That is, the motions are "frivolous, unprofessional, and scurrilous, if not defamatory, in tone and content."'

"186. Further, on July 20, 2020, Judge Smith issued an order sanctioning the respondent in the amount of $500.00 '[f]or his repeated violations of [the] Court's Orders, including but not limited to the Court's Orders prohibiting Plaintiff's counsel from emailing Chambers staff and Clerk's Office staff.'

"187. The July 6, 2020, and July 20, 2020, orders were certified by the Clerk of the District Court for the Western District of Missouri.

"188. The respondent presented no evidence during the formal hearing to disprove the findings in Judge Smith's rulings and none is found in the record.

"189. Applying Rule 220(b), based upon Judge Smith's rulings in his July 6, 2020, and July 20, 2020, orders, the hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 3.4(c).

"Absent Application of Rule 220(b)—Violation of Court Order

"190. Even without applying Rule 220(b), the hearing panel concludes that there is clear and convincing evidence that the respondent violated KRPC 3.4(c) by violating Judge Smith's June 30, 2020, court order.

"191. On June 30, 2020, Judge Smith issued an order ruling as follows:

'Plaintiff's counsel has filed numerous motions in this matter, including but not limited to ten motions to reconsider (not including the motions discussed above). These motions, including the most recently filed motions, are largely frivolous, unprofessional, and scurrilous, if not defamatory, in tone and content. The Court refers Plaintiff's counsel to Judge Phillips's March 4, 2020 Order wherein Judge Phillips determined Plaintiff's counsel violated Rule 11, sanctioned him, and referred him to the Kansas Bar Association.

'Three dispositive motions are pending in this matter. Yet, Plaintiff continues to file other motions. The Court warns Plaintiff that additional frivolous motion practice will be met with additional sanctions, another referral to the Kansas Bar Association, and referrals to other jurisdictions wherein counsel is licensed to practice law. This warning should not come as a surprise to Plaintiff's counsel because other courts recently issued similar warnings to counsel.'

"192. On July 1, 2020, the respondent filed two documents in the matter. One was 'Plaintiff's Motion for Order Stating the Law and Showing Judge Smith did not Lie About the Law,' and the second was 'Plaintiff's Motion for Order Stating the Law Showing Judge Smith's Threat was not Criminal'.

"193. Within these documents, the respondent stated, in part:

'Judge Smith is committing crimes by *personally* concealing evidence of whether or not (1) Powers' email contains either Key Phrase and (2) Clubb and Ray acted in bad faith by misrepresenting either Key Phrase.

* * *

'To *knowingly* violate Plaintiff's right to such evidence, Judge Smith chose to criminally threaten Plaintiff and Plaintiff's counsel if Plaintiff continued to seek evidence of whether or not Powers' email contains either Key Phrase.

* * *

'Judge Smith's intimidation also was criminal because he used intimidation to personally conceal and help the Culprits conceal (and encourage the Culprits to conceal) evidence that he *knew* shows that DOL and DOJ employees (and Judge Contreras) committed federal crimes.

* * *

'Judge Smith must state the law, not Lie about the law. The fact that Judge Smith has again willfully failed to state the law, and instead chosen to resort to threats speaks volumes.

* * *

'. . . Judge Smith is a traitor to the judiciary and an enemy of the Constitution. To *personally* criminally conceal evidence of two phrases on a *couple pages* of Powers' email—and to help the Culprits conceal such evidence—Judge Smith routinely Lies and commits crimes, including threatening and attempting to intimidate Plaintiff and Plaintiff's counsel.'

"194. The hearing panel concludes that the respondent's July 1, 2020, filings were filed in violation of the court's June 30, 2020, order.

"195. Further, the hearing panel concludes that the respondent's violation of KRPC 3.4(c) was knowing (and intentional) because the respondent testified during the formal hearing that he carefully considered his filings in front of Judge Smith and Chief Judge Phillips prior to filing them and continued to assert during his testimony at the formal hearing that these judges lied about Powers' email, concealed evidence, and committed crimes despite an absence of evidence to support his contentions.

"196. Further, the hearing panel concludes based on the evidence that the respondent's conduct was knowing (and intentional) because the respondent had not read an unredacted version of Powers' email at the time he made the allegations in his November 19, 2019, filing. See Rule 240 (2022 Kan. S. Ct. R. at 323) ('[t]he Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question . . .').

"197. KRPC 3.4(c) provides an exception for where a lawyer disobeys an obligation of a tribunal when the lawyer presents 'an open refusal based on an assertion that no valid obligation exists.' The panel finds that the respondent provided no evidence to show that the order he refused to obey was anything other than a valid obligation as set out in the rule.

"198. Accordingly, the hearing panel concludes, without applying Rule 220(b), there is clear and convincing evidence that the respondent's July 1, 2020, filings made claims that were frivolous and that the respondent violated KRPC 3.4(c) by knowingly disobeying the court's order that he cease filing further frivolous motions.

"KRPC 8.2(a)

"199. KRPC 8.2(a) provides:

'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.'

"200. The respondent asserts that the First Amendment to the United States Constitution and United States Supreme Court case law such as *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), and *Pickering v. Board of Ed.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), requires that the disciplinary administrator's office prove that the statements he made about judges in his filings were false. Further, the respondent argues that the disciplinary administrator's office must not only prove that he asserted a falsehood, but that he did so with actual malice. He argues that the disciplinary administrator's office failed to prove that he made any false statement with actual malice. The respondent's arguments are not supported by United States Supreme Court and Kansas Supreme Court case law surrounding attorney discipline matters.

"201. '[B]oth the United States Supreme Court and this court have previously recognized that the freedom of speech is not inevitably without limitation. Lawyers, in particular, trade certain aspects of their free speech rights for their licenses to practice.' *In re Comfort*, 284 Kan. 183, 202, 159 P.3d 1011 (2007).

"202. In *In re Pyle*, 283 Kan. 807, 821, 156 P.3d 1231 (2007), the Supreme Court held that it was required 'to navigate the tension between First Amendment freedom of speech, enjoyed by all citizens, and the limits that can be placed on exercise of that freedom because a particular citizen chose to become a Kansas lawyer.'

"203. The Court held:

'A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.'

*Pyle*, 283 Kan. at 821, quoting *In re Johnson*, 240 Kan. 334, 336, 729 P.2d 1175 (1986).

"204. '[E]ven a statement cast in the form of an opinion ("I think that Judge X is dishonest") implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty.' *Pyle*, 283 Kan. at 821, quoting *Matter of Palmisano*, 70 F.3d 483,487 (7th Cir. 1995), *cert. denied* 517 U.S. 1223, 116 S.Ct. 1854, 134 L.Ed.2d 954 (1996).

"205. The *Pyle* court discussed *In re Landrith*, 280 Kan. 619, 124 P.3d 467 (2005), in which case the Court 'disbarred an attorney for, among other violations, his repeated baseless, inflammatory, and false accusations against opposing counsel, judges, state district court employees, Court of Appeals staff, and municipal officers and employees.' *Pyle*, 283 Kan. at 822.

"206. The *Pyle* court noted that in *Landrith*:

'Landrith produced no evidence to support any of his accusations but argued that the First Amendment protected his speech. We rejected his argument, emphasizing that, in those instances where a lawyer's unbridled speech amounts to misconduct that threatens a significant State interest, it is clear that a State may restrict the lawyer's exercise of personal rights guaranteed by the federal and state Constitutions.'

*Pyle*, 283 Kan. at 822, citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

"207. 'A lawyer's right to free speech is tempered by his or her obligations to the courts and the bar, obligations ordinary citizens do not undertake.' *Pyle*, 283 Kan. at 822-823, citing *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); see *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 115 L.Ed.2d 888 (1991); see also *In re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L.Ed.2d 1473 (1959). 'It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.' *Gentile*, 501 U.S. at 1071, citing *Sacher v. United Sates*, 343 U.S. 1, 8, 72 S. Ct. 451, 96 L. Ed. 717 (1952); see *Fisher v. Pace*, 336 U.S. 155, 69 S. Ct. 425, 93 L. Ed. 569 (1949).

"208. Courts weigh 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue.' *Gentile*, 501 U.S. at 1073.

'Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in

another quite different capacity, also. As a lawyer he was an "officer of the court, and, like the court itself, an instrument . . . of justice . . . ."'

*Gentile*, 501 U.S. at 1074, quoting *In re Cohen*, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 166 N.E.2d 672 (1960), also quoted in *Cohen v. Hurley*, 366 U.S. 117, 126, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961).

"209. KRPC 8.2(a) is violated if a lawyer makes a statement that the [lawyer] knows to be false, or if the lawyer makes a statement 'with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . .' KRPC 8.2(a). The hearing panel concludes that KRPC 8.2(a) is sufficiently clear in the conduct it proscribes and that KRPC 8.2(a) is not unconstitutional.

"210. Thus, the hearing panel disagrees with the respondent's assertion that the disciplinary administrator's office must prove that the respondent made a false statement with actual malice. United States Supreme Court and Kansas Supreme Court case law is clear that a lawyer may be held to the requirements of KRPC 8.2(a) in an attorney discipline matter without infringing on the lawyer's rights under the First Amendment.

"Applying Rule 220(b)

"211. Pursuant to Rule 220(b) (2022 Kan. S. Ct. R. at 275), if based on a standard less than clear and convincing evidence, 'a certified copy of a judgment or ruling in any action involving substantially similar allegations as a disciplinary matter is prima facie evidence of the commission of the conduct that formed the basis of the judgment or ruling, regardless of whether the respondent is a party in the action.'

"212. 'The respondent has the burden to disprove the findings made in the judgment or ruling.' Rule 220(b) (2022 Kan. S. Ct. R. at 275).

"213. On March 4, 2020, Chief Judge Phillips ruled that:

'Jordan has made baseless allegations that Judge Smith intentionally and knowingly issued legally incorrect rulings, engaged in criminal misconduct, lied, and conspired with one of the parties in a case to the detriment of the other. Thus, Jordan has made statements about Judge Smith's qualifications and integrity that he knew were false or, at least, he acted with reckless disregard to their truth or falsity when he signed and submitted the [November 19, 2019] Filing. This violates Rule 4-8.2(a).'

"214. Missouri Rule of Professional Conduct 4-8.2(a) contains the exact same language as KRPC 8.2(a).

"215. Chief Judge Phillips' March 4, 2020, order is prima facie evidence that the respondent made 'a statement that [the respondent knew] to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of' Judge Smith. See KRPC 8.2(a); Rule 220(b) (2022 Kan. S. Ct. R. at 275).

"216. The March 4, 2020, order was certified by the Clerk of the District Court for the Western District of Missouri.

"217. The respondent presented no evidence during the formal hearing to disprove the findings in Chief Judge Phillips' ruling and none is found in the record.

"218. Applying Rule 220(b), based upon Chief Judge Phillips' rulings in her March 4, 2020, order, the hearing panel concludes there is clear and convincing evidence that the respondent violated KRPC 8.2(a).

"Absent Application of Rule 220(b)

"219. Even without applying Rule 220(b), the hearing panel concludes that there is clear and convincing evidence that the respondent violated KRPC 8.2(a) with his statements about Judge Smith, Chief Judge Phillips, and the Eighth Circuit Court of Appeals panel judges.

"220. In around a dozen filings from 2019 to 2021, the respondent repeatedly made serious derogatory allegations about the qualifications and integrity of Judge Smith, Chief Judge Phillips, and the panel judges of the Eighth Circuit Court of Appeals. These included allegations of criminal activity, lies, misrepresentations, conspiracy with parties to matters pending before the court, violations of the judicial canons, and even treason to the Constitution. All of these allegations stem, in one way or another, from these judges' rulings in connection with decisions to decline to order disclosure of Powers' email, which these judges concluded was protected from disclosure by attorney-client privilege.

"221. The hearing panel concludes that the respondent's violation of KRPC 3.4(c) was knowing (and intentional) because the respondent testified during the formal hearing that he carefully considered his filings in front of Judge Smith and Chief Judge Phillips prior to filing them and continued to assert during his testimony at the formal hearing that these judges lied about Powers' email, concealed evidence, and committed crimes despite an absence of evidence to support his contentions.

"222. Further, the hearing panel concludes based on the evidence that the respondent's conduct was knowing (and intentional) because the respondent had not read an unredacted version of Powers' email prior to these statements about Judge Smith, Chief Judge Phillips, and the panel judges. See Rule 240 (2022 Kan. S. Ct. R. at 323) ('[t]he Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question . . .').

"223. The respondent's allegations that any judge lied about the privileged status of or what was contained in the unredacted version of Powers' email (or any of his other allegations stemming from that premise, including criminal activity, conspiracy, treason, etc.) were, at the very least, made with reckless disregard for the truth or falsity of the qualifications or integrity of Judge Smith, Chief Judge Phillips, and the panel judges. See KRPC 8.2(a).

"224. The hearing panel concludes that the reasoning the respondent provided in argument for why he made those allegations against Judge Smith, Chief Judge Phillips, and the panel judges is unpersuasive.

"225. Accordingly, the hearing panel concludes there is clear and convincing evidence that the respondent repeatedly violated KRPC 8.2(a) in his filings in the District Court for the Western District of Missouri in [*F.T.*] *v. U.S. Department of Labor*, 19-cv-00493 and the Eighth Circuit Court of Appeals in docket numbers 20-2439, [*F.T.*] *v. U.S. Department of Labor* and 20-2494, *Jordan v. U.S. Department of Labor*.

## "KRPC 8.4(d) and 8.4(g)

"226. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d). Further, '[i]t is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4(g).

"227. The following is not an exhaustive list of the ways the respondent violated KRPC 8.4(d) and (g), but are a few representative examples of his violations of these rules.

"228. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when he made numerous statements about Judge Smith, Chief Judge Phillips, and the Eighth Circuit panel judges that were personal derogatory attacks, served no legitimate purpose other than to insult and harass the judges, and were not supported by any credible evidence.

"229. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when he, as determined by the hearing panel above, violated Federal Rule of Civil Procedure 11(b)(3), and violated Judge Smith's June 30, 2020, order. This conduct resulted in the respondent being sanctioned and ordered to pay $1,000.00 by Chief Judge Phillips on March 4, 2020, and again being sanctioned and ordered to pay $500.00 by Judge Smith on July 20, 2020.

"230. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when his conduct required judicial reassignment to another Article III judge for the purpose of a show cause hearing for the respondent to show why he and his client F.T. should not be held in contempt.

"231. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when he filed the April 1, 2020, 'Notice of Noncompliance with Illegal and Criminal Order Purporting to Impose Criminal Penalties' on April 1, 2020, wherein the respondent did not merely argue that Chief Judge Phillips' sanction order was invalid but asserted that the order was 'criminal'.

"232. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when the respondent filed repeated motions to reconsider, all containing the same frivolous allegations about judges and attorneys and rehashing the same arguments the respondent had presented previously to the same court and for which the respondent had been sanctioned. These

included the Respondent's May 5, 2020, 'Plaintiff's Motion to Reconsider and Vacate Order Imposing Sanctions and Order Refusing to Disqualify Judge Smith', May 6, 2020, 'Plaintiff's Supplement to Motion to Reconsider and Vacate Order Imposing Sanctions', May 13, 2020, 'Plaintiff's Second Supplement to Motion to Reconsider and Vacate Order Imposing Sanctions', and June 29, 2020, 'Plaintiff's Corrected Motion to Reconsider and Vacate Judge Smith's Lies and Evidence of Criminal Conspiracy to Conceal Material Facts and Dispositive Evidence'.

"233. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when he filed two motions on July 1, 2020 and a July 6, 2020 'Motion for Leave to File Notice of Appeal', that violated Judge Smith's June 30, 2020, order, and that contained the same frivolous allegations about judges and attorneys and rehashed the same arguments the respondent had presented previously to the same court and for which the respondent had been sanctioned.

"234. The respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law when the respondent filed the August 1, 2020, and August 2, 2020, 'Motions for Issuance of a Published (Or At Least Reasoned) Opinion' and later the August 8, 2020, 'Supplemental Memorandum Supporting Motion for the Issuance of a Published (Or At Least Reasoned) Opinion' in the Eighth Circuit Court of Appeals that served no legitimate purpose in the appeal.

"235. The hearing panel notes that on November 2, 2021, the Eighth Circuit Court of Appeals disbarred the respondent from practicing in that court. On November 17, 2021, the Eighth Circuit denied the respondent's motion to vacate the disbarment order and barred the respondent from making any further filings in the case, including filings relating to his disbarment. The disciplinary administrator's office did not argue, and the hearing panel does not make a finding whether the discipline imposed against the respondent in the Eighth Circuit is evidence of reciprocal discipline warranting application of Rule 221 (2022 Kan. S. Ct. R. at 276). However, the Eighth Circuit's orders are evidence of the prejudicial impact of the respondent's conduct on the administration of justice and adversely reflect on his fitness to practice law.

"236. Accordingly, the hearing panel concludes there is clear and convincing evidence that the respondent engaged in conduct that was prejudicial to the administration of justice and that adversely reflects on his fitness to practice law, in violation of KRPC 8.4(d) and KRPC 8.4(g).

## "*American Bar Association Standards for Imposing Lawyer Sanctions*

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

"238. *Duty Violated*. The respondent violated his duty to the legal system and to the legal profession.

"239. *Mental State*. The respondent intentionally violated his duties. The respondent confirmed during his testimony at the formal hearing that he carefully considered the statements he made in his filings. Further, the investigator, Mr. Stratton, testified that the respondent told Mr. Stratton that 'he had carefully considered the course of action that he should take prior to making the allegations against' the federal judges, that 'the allegations had not been made lightly at all' and that he 'truly believed they were necessary to get the evidence that has been denied for years.' The respondent was warned several times by the judges he appeared before that his conduct was sanctionable and violated attorney ethical rules, but he persisted in the same type of conduct in repeated filings making the same statements and rehashing the same arguments. The respondent's repeated derogatory statements of a similar nature in numerous filings about judges and attorneys involved in the underlying federal cases establishes his conduct was intentional.

"240. *Injury*. As a result of the respondent's misconduct, the respondent caused actual injury to the legal system and to the legal profession. See *In re Landrith*, 280 Kan. 619, 648, 124 P.3d 467 (2005) (respondent's conduct caused injury to the legal system by wasting valuable court resources and injury to the legal profession by his false accusations against members of the judiciary, attorneys, and others).

## "Aggravating and Mitigating Factors

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

"242. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on one occasion. The respondent was disbarred from practicing in the Eighth Circuit on November 2, 2021. The respondent's motion to vacate his disbarment in the Eighth Circuit was denied, and he was barred from any further filings in that court on November 17, 2021.

"243. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct by repeatedly engaging in similar misconduct and violations of Kansas Rules of Professional Conduct 3.1, 3.4(c), 8.2(a), and 8.4(d) and (g) from the time he became licensed to practice law in Kansas in late 2019 until 2021. The respondent engaged in the misconduct found by the hearing panel in at least 12 filings in the District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals.

"244. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 3.1 (meritorious claims and contentions), KRPC 3.4(c) (fairness to opposing party and counsel), KRPC 8.2(a) (judicial and legal officials), and KRPC 8.4(d) and (g) (professional misconduct). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"245. *Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Process*. During his testimony, the respondent invoked the Fifth Amendment privilege against self-incrimination. On several of the occasions the respondent invoked the Fifth Amendment privilege, the hearing panel concluded that the privilege did not apply and directed the respondent to answer the question posed. This included questions the respondent was asked about statements he had previously made to the individual investigating this disciplinary matter. Despite the hearing panel's direction that the respondent answer these questions, the respondent refused. The hearing panel concludes that this conduct constituted bad faith obstruction of the disciplinary proceeding by the respondent intentionally failing to comply with rules or orders of the disciplinary process. Further, the respondent sent emails to the hearing panel members, attorneys for the disciplinary administrator's office and the kbda@kscourts.org email address—which is the official filing email address for the Kansas Board for Discipline of Attorneys—containing arguments regarding his disciplinary matter after the November 19, 2021, deadline for filing motions set by the hearing panel and without seeking prior permission to do so. In an email sent on December 19, 2021, the respondent stated, in part, that 'ODA and Panel attorneys are abusing their powers to pretend they have the authority to harass good Constitution-supporting attorneys who expose lies and crimes of judges and government attorneys,' and '[y]ou violated the U.S. Constitution and your own oaths (and commit federal crimes) by pretending that you have the power to do what state judges clearly and irrefutably lack the power to do.'

"246. *Submission of False Evidence, False Statements, or Other Deceptive Practices During the Disciplinary Process*. On December 17, 2021, the disciplinary administrator's office filed a 'Notice of Intent to Call Witnesses', which the hearing panel previously ordered it to file if it planned to call witnesses during the hearing. On December 18, 2021, the respondent filed 'Objections to ODA Witnesses'. On January 5, 2022, at 7:49 a.m., the respondent sent an email to Ms. Walker, Ms. Hart, all three members of the hearing panel, and the kbda@kscourts.org email address asking Ms. Walker and Ms. Hart to '[p]lease confirm that you will not call any judge or government attorney to testify at the hearing.' Later that same day, at 5:04 p.m., the respondent sent an email to Ms. Walker, Ms. Hart, all three members of the hearing panel, and the kbda@kscourts.org email address stating, 'The hearing will begin in less than a week. Please kindly provide the information I requested below.' The respondent failed to disclose to the hearing panel that that same day, at 3:22 p.m., Ms. Walker sent an email to the respondent and Ms. Hart only that stated: 'We have complied with the orders of the panel and have filed notice of the witnesses we believe we will need to call at this time. Although we do not anticipate it, if that changes we would file notice with the hearing panel.' Further, the respondent asserted that the disciplinary administrator's office asserted 'falsehoods' in its 'briefing,' relied on 'bushwhacking tactics to prevail,' and were 'knowingly violating Respondent's rights.' The respondent made similar statements in motions he filed in this disci-

plinary matter. The hearing panel concludes that the respondent had no reasonable basis to make these statements and that his conduct in presenting these statements to the hearing panel was deceptive.

"247. *Refusal to Acknowledge Wrongful Nature of Conduct*. The respondent has refused to acknowledge his repeated violations of KRPC 3.1, 3.4(c), 8.2(a), or 8.4(d) and (g). Instead, the respondent has maintained throughout these proceedings that he has not committed any misconduct and that he was entitled to make the statements he made about the judges and attorneys in federal court. Accordingly, the hearing panel concludes that the respondent refused to acknowledge the wrongful nature of his conduct.

"248. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 2019. The respondent was admitted to the practice of law in New York in 1998. At the time of the misconduct, the respondent had been licensed to practice law in at least one state for more than 20 years. The hearing panel concludes that the respondent had substantial experience in the practice of law at the time of his misconduct.

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

"250. *Imposition of Other Penalties or Sanctions*. The respondent has experienced other sanctions for his conduct. The respondent was sanctioned and ordered to pay $1,000.00 by Chief Judge Phillips on March 4, 2020, and was sanctioned and ordered to pay $500.00 by Judge Smith on July 20, 2020. However, the respondent filed with the United States District Court for the Western District of Missouri a 'Notice of Noncompliance with Illegal and Criminal Order Purporting to Impose Criminal Penalties' on April 1, 2020, after Chief Judge Phillips' sanction order was issued. There was no evidence presented that the respondent paid the $1,000.00 or the $500.00 sanction. Further, the respondent was disbarred for his misconduct from practicing in the Eighth Circuit Court of Appeals on November 2, 2021.

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

'6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

'6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

'7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.'

"*Recommendation of the Parties*

"252. The disciplinary administrator recommended that the respondent be disbarred.

"253. The respondent recommended that he not be disciplined because he believed there was no evidence indicating that he violated the Kansas Rules of Professional Conduct.

"*Discussion*

"254. On October 26, 2021, in its 'Response to Respondent's Constitutional Claims', the disciplinary administrator's office asked the panel to find that the First Amendment does not prohibit a finding of misconduct here and that this disciplinary process does not violate the respondent's due process rights. The respondent filed both versions of his response on November 29, 2021, arguing that the disciplinary administrator's office was violating his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

"255. On December 13, 2021, the hearing panel issued an order wherein it declined to make any findings or conclusions of law on this issue prior to issuing the final hearing report. See Rule 226(a)(1) (2022 Kan. Ct. R. at 281) ('the hearing panel will issue a final hearing report setting forth findings of fact, conclusions of law, aggravating and mitigating factors, and a recommendation of discipline or that no discipline be imposed . . . [f]ollowing a hearing on a formal complaint').

"256. Now that the formal hearing in this matter has concluded, the hearing panel concludes as a matter of law that the respondent's constitutional rights have not been violated by this disciplinary proceeding.

"257. Applying the authorities and reasoning discussed in the section discussing KRPC 8.2(a) above, the hearing panel concludes that the respondent's First Amendment rights have not been violated. See *Gentile v. State Bar of Nevada*, 501 U.S.1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991); *In re Comfort*, 284 Kan. 183, 159 P.3d 1011 (2007); *In re Pyle*, 283 Kan. 807, 156 P.3d 1231 (2007); *In re Landrith*, 280 Kan. 619, 124 P.3d 467 (2005); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972).

"258. Further, the hearing panel concludes that the respondent's rights under the Fifth and Fourteenth Amendments have not been violated in this disciplinary proceeding.

"259. In an attorney disciplinary proceeding, a respondent 'is entitled to procedural due process, and that due process includes fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense.' *In re Knox*, 309 Kan. 167,170, 432 P.3d 654 (2019) citing *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

"260. The respondent was served with a copy of the formal complaint in this matter, presented and argued multiple motions and responses to motions wherein he thoroughly briefed his arguments, and was provided the opportunity to present evidence on his own behalf, although he elected not to.

"261. The respondent invoked the Fifth Amendment privilege against self-incrimination during his testimony where he believed a question may elicit a response that could place him in criminal jeopardy. The hearing panel ruled that the Fifth Amendment was not properly invoked where the respondent was asked about a statement he had previously made to the investigator in this disciplinary matter, because the respondent had waived the privilege. However, the hearing panel affirmed the respondent's right to invoke the Fifth Amendment privilege when it had not been previously waived by him.

"262. The hearing panel concludes that this disciplinary proceeding complies with due process requirements and does not violate any of the respondent's constitutional rights.

"263. Finally, the hearing panel took under advisement the disciplinary administrator's motion during the formal hearing to accept Exhibits 24 through 29, 39, 40, and 41 to prove the truth of the matter asserted. The hearing panel previously admitted these exhibits via its order dated December 13, 2021, pursuant to hearsay exception K.S.A. 60-460(o) 'to prove the content of the record.'

"264. During the formal hearing, the disciplinary administrator's office again asked that the hearing panel admit the exhibits for all purposes, including to prove the truth of the matter asserted. The disciplinary administrator's office cited *State v. Baker*, 237 Kan. 54, 697 P.2d 1267 (1985), to support its argument that a properly certified copy of a court record is grounds to admit the record under the K.S.A. 60-460(o) hearsay exception.

"265. The hearing panel agrees that the exhibits, which are properly certified by the custodians of those court records, are admissible under K.S.A. 60-460(o). But K.S.A. 60-460(o) limits the use of those records under the exception 'to prove the content of the record.' In *Baker*, the Supreme Court upheld admission of a journal entry of judgment from another district court to prove that the defendant had a prior felony conviction. *Baker*, 237 Kan. at 55. The Court applied K.S.A. 60-460(o) similarly in *City of Overland Park v. Rice*, 222 Kan. 693, 567 P.2d 1382 (1977), where the Court upheld admission of a prior order of driver's license suspension under K.S.A. 60-460(o) as evidence of the period of suspension for a subsequent prosecution for driving on a suspended license. In both of these cases, the court records were admitted 'to prove the content of the record' or in other words, to prove that the prior conviction or suspension happened and when it

happened. These records were not admitted through K.S.A. 60-460(o) to prove the truth of the matter asserted in any statements made within those documents.

"266. The disciplinary administrator's office did not call any witnesses or provide any further evidentiary foundation during the formal hearing to support admitting these exhibits for any other purpose.

"267. Based on the plain language of K.S.A. 60-460(o) and based on the manner in which the Kansas Supreme Court has applied K.S.A. 60-460(o) to court records previously, the hearing panel concludes that Exhibits 24 through 29, 39, 40, and 41 were properly admitted 'to prove the content of the record,' and the panel considers them only for that purpose.

"268. The hearing panel notes, however, that a prior judgment or ruling of a court that is 'verbal parts of an act' determining the rights or obligations of the parties 'merely to show the fact of its having been made' is not hearsay and may be considered for this non-hearsay use. *Baldridge v. State*, 289 Kan. 618,215 P.3d 585 (2009); *State v. Oliphant*, 210 Kan. 451, 454, 502 P.2d 626 (1972); see also *U.S. v. Boulware*, 384 F.3d 794, 806 (9th Cir. 2004). Further, a court shall take judicial notice of 'such facts at the request of a party if the party furnishes the court with sufficient information to comply with the request and has given the adverse party notice and an opportunity to respond,' such as whether a particular order has been entered. *Matter of Starosta*, 314 Kan. 378, 499 P.3d 458, 466 (2021).

"269. The hearing panel took documents that are certified court orders within these exhibits into consideration in a manner consistent with this analysis.

"*Recommendation of the Hearing Panel*

"270. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be disbarred.

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

OBJECTION TO RESPONDENT'S RULE 6.09 LETTER

Just seven days before oral argument, Jordan filed a letter of additional authority, presumably under Kansas Supreme Court Rule 6.09 (2022 Kan. S. Ct. R. at 40), although he did not reference that rule as authority for his submission. This letter asserts that in a minute order, dated September 1, 2022, "Judge Contreras repeatedly confirmed that he lied about Powers' email." The Disciplinary Administrator objects to Jordan's letter because it violates Rule 6.09, which prohibits submitting additional authority less than 14 days before oral argument. It also notes that even if

the timing is overlooked, Jordan inaccurately characterizes the minute order's content.

The only exception to the Rule 6.09 deadline is to address additional authority published or filed less than 14 days before oral argument. This exception does not apply. We sustain the objection.

## RESPONDENT'S MOTION TO COMPEL

Three days before oral argument, Jordan filed a "Respondent's Motion to Compel (And Renewed Request For) Release of Hearing Recordings." He asks this court to either release or order the Kansas Board for Discipline of Attorneys to provide him with a copy of each audio or video recording made during the panel's evidentiary hearing on January 12, 2022. He claims entitlement under the Kansas Open Records Act, K.S.A. 45-215 et seq. He asserts he repeatedly requested these copies, and that representatives of the Board and the Disciplinary Administrator's office denied production. He declares these representatives have engaged in "criminal misconduct." The Disciplinary Administrator's office filed a response asking us to deny the motion.

We agree with the Disciplinary Administrator's office. Jordan's motion has at least two fatal flaws. First, to the extent it seeks relief under KORA, Jordan is in the wrong court. KORA provides procedures for pursuing such claims with a district court. See K.S.A. 45-222(a) ("The district court of any county in which public records are located shall have jurisdiction to enforce the purposes of this act with respect to such records, by injunction, mandamus, declaratory judgment or other appropriate order, in an action brought by any person."). Second, K.S.A. 45-218(a) expressly requires a records custodian to allow inspection of recordings and to make "suitable facilities" available for that purpose. But KORA does not obligate reproduction. K.S.A. 45-219(a) makes that point clear by providing:

> "A public agency shall not be required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices, unless such items or devices were shown or played to a public meeting of the governing body thereof."

We deny the motion.

## DISCUSSION

Jordan was given adequate notice of the formal complaint and he filed an answer. He was also given adequate notice of the hearings before the panel and this court. He appeared at both proceedings.

In a disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations occurred and, if they did, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. Kansas Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281); *In re Huffman*, 315 Kan. 641, 674, 509 P.3d 1253 (2022). Clear and convincing evidence is that which causes a fact-finder to believe it is highly probable that the facts asserted are true. *Huffman*, 315 Kan. at 674.

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so the court must determine whether it is supported by clear and convincing evidence. If so, the finding will not be disturbed. The court does not reweigh conflicting evidence, reassess witness credibility, or redetermine questions of fact when undertaking its factual analysis. 315 Kan. at 674.

Jordan filed exceptions to the panel's final hearing report, contending it "is so lacking in findings of actual facts and conclusions of actual law as to be worthless except as evidence that Panel attorneys lied and committed crimes . . . ." The headings contained in Jordan's filing designate exceptions to the following paragraphs of the final hearing report: 17; 42; 51; 63-65; 70-71; 73-86; 88-97; 99-101; 103-104; 106-107; 112; 122-128; 130-141; 143-170; 172-185; 188-191; 194-225; 227-236; 238-240; 242-247; 249-250; 252-253; 256-258; 261-265; and 270.

The Disciplinary Administrator points out Jordan's exceptions encompass 59 of the panel's 98 factual findings, and 90 of the panel's 96 conclusions of law. It also contends Jordan "failed to brief most of the exceptions taken." But the Disciplinary Administrator does not identify those abandoned exceptions.

The Disciplinary Administrator further argues Jordan's brief fails to comply with Kansas Supreme Court Rule 6.02(a)(4)-(5) (2022 Kan. S. Ct. R. at 35). Regarding Rule 6.02(a)(4), it contends

that within Jordan's brief, "many" of his factual assertions are not keyed to the record. It believes these un-keyed assertions should be presumed to lack support. Regarding Rule 6.02(a)(5), the Disciplinary Administrator contends Jordan failed to meet the rule's requirement that each issue begin with a pinpoint citation to the record where the issue was raised and ruled upon. It does not suggest a remedy for this violation. More specifically, the Disciplinary Administrator contends Jordan's argument concerning the Kansas Public Speech Protection Act should be deemed waived because it was not presented to the hearing panel.

Jordan responds to the un-briefed exceptions and Rule 6.02 arguments only by claiming "[w]aiver must" also "be applied against the ODA because this Court must ensure the ODA afforded Jordan due process of such law and equal protection under such law." He argues the Disciplinary Administrator "failed to demonstrate that any court could punish" his conduct; "failed to state any fact or legal authority that could counter any fact or legal authority" he presented; and failed to address the authorities he relies on.

With these claims in mind, "[a] respondent must advance arguments in their brief to support any exceptions, or they are deemed waived or abandoned. . . . The brief must also support the exceptions with appropriate record citations." *Huffman*, 315 Kan. at 675. Jordan's opening brief designates four issues, but they all seek mainly to establish a claim that imposing any discipline here violates his First Amendment rights as applied to the states through the Fourteenth Amendment of the United States Constitution.

To the extent Jordan's factual contentions touch on the panel's findings on specific rule violations, we address them as applicable to each violation found.

*Application of the First Amendment*

Jordan's first issue asserts the admittedly uncontroversial proposition that discipline must not be imposed in violation of the First Amendment. See *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990) (reversing judgment imposing discipline on attorney

for violation of rule prohibiting holding oneself out as a specialist, because imposition of discipline for violating the rule violated the First Amendment). His brief then attempts to demonstrate the constitutional violations he asserts.

Jordan's second and third issues broadly challenge what he views as the restrictions on his right to petition the government and content-based regulations on speech imposed by the KRPC provisions at issue. He also contends discipline may not be imposed for his statements because the Disciplinary Administrator, in his view, fails to demonstrate his assertions about judges lying and committing crimes were false. More specifically, he contends Federal Rule of Civil Procedure 11, which was the basis for Chief Judge Phillips' contempt order, and the KRPC provisions the hearing panel found he violated, must withstand strict scrutiny because they are content-based regulations on speech as applied to him. And by citing caselaw governing civil libel and criminal defamation cases involving critique of public officials, he argues the falsity of his claims must be shown to impose discipline. In doing so, he relies on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), and *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Extending this argument, Jordan's fourth issue says he was criticizing the judges in their official capacity, so he cannot be held accountable for what he asserts was merely libeling the government.

Taking Jordan's right-to-petition contention first, we can quickly dispense with it. "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition. [Citations omitted.]" *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). Any discipline imposed here is premised on Jordan's baseless assertion of frivolous factual issues while litigating his FOIA cases in federal court. The right to petition does not shield him from discipline.

Similarly, his strict scrutiny argument misconstrues the scope of his First Amendment rights. All the misconduct here arises

from his assertions made in court filings or from the fact of the filings themselves. And a lawyer's in-court advocacy is not protected speech under the First Amendment. See *In re Hawver*, 300 Kan. 1023, 1042-45, 339 P.3d 573 (2014) (holding lawyer retained no First Amendment interest in statements made to jury on behalf of client, and discipline could be imposed for statements' failure to meet standard of competence required by KRPC 1.1). This includes advocacy in motions filed in a court proceeding. See *Mezibov v. Allen*, 411 F.3d 712, 720 (6th Cir. 2005) ("[I]n filing motions and advocating for his client in court, Mezibov was not engaged in free expression; he was simply doing his job. In that narrow capacity, he voluntarily accepted almost unconditional restraints on his personal speech rights, since his sole raison d'etre was to vindicate his client's rights.").

Jordan claims his freedom of speech is "no less" just because he has a law license, citing equal protection and due process principles. But "[t]he courtroom is a nonpublic forum . . . where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir. In fact, the courtroom is unique even among nonpublic fora because within its confines [courts] regularly countenance the application of even viewpoint-discriminatory restrictions on speech." *Mezibov*, 411 F.3d at 718. "The government 'is permitted to set reasonable subject-matter limitations, except in public forums that are opened to all speech by tradition or government decree.'" *Three categories of forums and non-forums—Traditional public forums—Content-based regulation*, 1 Smolla & Nimmer on Freedom of Speech § 8:5.

As we previously held,

> "An attorney's speech is limited both in and outside the courtroom. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 111 S. Ct. 2720, 115 L.Ed.2d 888 (1991) (opinion of Rehnquist, C.J.). 'It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed.' 501 U.S. at 1071. And even a lawyer's out-of-court advocacy may be subject to limitation when it conflicts with ethics rules that serve substantial government interests, such as guaranteeing criminal defendants' rights to fair trials, or protecting public confidence in the legal system. See 501 U.S. at 1071 (government interest in preserving right to fair trial prevailed over attorney's First Amendment interest in statements to press substantially likely to affect trial's outcome or prejudice [venire] panel); *In re*

*Landrith*, 280 Kan. 619, 638-39, 124 P.3d 467 (2005) (First Amendment not defense to discipline for attorney's false and inflammatory accusations in pleadings filed with the court against judges, attorneys, court staff, and others)." *Hawver*, 300 Kan. at 1042-43.

Jordan's attempt to apply First Amendment standards applicable in libel cases to his conduct is also misplaced. He cites United States Supreme Court caselaw regarding the standards for imposing civil liability and criminal penalties for criticism of public officials. See *Milkovich*, 497 U.S. 1; *Garrison*, 379 U.S. 64; *New York Times*, 376 U.S. 254. But the "[t]he *New York Times* standard of 'actual malice' in a civil action for libel is not appropriate in a proceeding to discipline an attorney." *In re Johnson*, 240 Kan. 334, 340, 729 P.2d 1175 (1986).

Again, we have previously explained:

"Other jurisdictions have recognized that, unlike a layman, a bar member's right to free speech may be regulated. In *State ex rel. Nebraska State Bar Assn. v. Michaelis,* 210 Neb. 545, 316 N.W.2d 46 (1982), an attorney had placed a newspaper advertisement which listed several factual charges of misconduct, illegal acts, and other violations of the law, which he knew or should have known to be false, by the then incumbent county attorney, the city attorney, and several other attorneys practicing in the region. The court stated that '[a] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice . . . . "A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. *A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics;* and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.'" 210 Neb. at 556-58.

"Upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers." *Johnson*, 240 Kan. at 336-37.

For these reasons, the First Amendment does not shield Jordan from discipline for his motion practice that asserted frivolous factual claims as the basis for requesting relief from court orders, KRPC 3.1; knowingly violated court rules and orders, KRPC 3.4(c); impugned the integrity and qualifications of judges, KRPC 8.2(a); was prejudicial to the administration of justice, KRPC 8.4(d); and adversely reflected on his fitness to practice law, KRPC 8.4(g). Although Jordan argues he only sought to express

what he believes to be constitutionally protected criticism of the judges at issue, he was not free to do so in a manner violating ethical limitations on his conduct in court and in his filings in court proceedings.

*Application of Supreme Court Rule 220(b)*

Jordan argues the panel erred when applying Kansas Supreme Court Rule 220(b) (2022 Kan. S. Ct. R. at 275) to admit certified court judgments as prima facie evidence of misconduct. He argues the rule violates "Kansas law and the Due Process and Equal Protection Clauses of the Fourteenth Amendment" and the separation of powers. We disagree.

Rule 220 provides:

"(b) Judgment or Ruling. Except as otherwise provided in subsection (c), a certified copy of a judgment or ruling in any action involving substantially similar allegations as a disciplinary matter is prima facie evidence of the commission of the conduct that formed the basis of the judgment or ruling, regardless of whether the respondent is a party in the action. The respondent has the burden to disprove the findings made in the judgment or ruling.

"(c) Judgment or Ruling Based on Clear and Convincing Evidence. For the purpose of a disciplinary board proceeding, a certified copy of a judgment or ruling described in subsection (b) that is based on clear and convincing evidence is conclusive evidence of the commission of the conduct that formed the basis of the judgment or ruling. The respondent may not present evidence that the respondent did not commit the conduct that formed the basis of the judgment or ruling."

Jordan's due process, equal protection, and "Kansas law" arguments appear rooted in his perception that Rule 220 conflicts with K.S.A. 60-460(o)(1), which permits certified official records to be admitted only to prove their contents. Application of Rule 220(b), he contends, deprived him of the opportunity to confront "any witnesses against him."

The certified records the panel relied on establish that the federal courts made the factual findings and legal rulings contained within them. Rule 220(b) and (c) operate similarly to the commonplace doctrine of collateral estoppel, which prevents relitigation of previously determined issues. See *Venters v. Sellers*, 293 Kan. 87, 98, 261 P.3d 538 (2011) (collateral estoppel prevents parties from attacking prior adjudication when a prior judgment on the merits determined the parties' rights and liabilities; collateral estoppel applies when the parties are the same or in privity and the issue litigated is both determined and

necessary to support the judgment). Although the Disciplinary Administrator is not a party to the prior actions, "[n]onmutual offensive collateral estoppel, a form of issue preclusion, 'preclude[s] a defendant from relitigating an issue the defendant has previously litigated and lost to another plaintiff.'" *Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 79 (2d Cir. 2019).

Chief Judge Phillips found Jordan made frivolous factual assertions with no reasonable basis in fact about Judge Smith in his filings. Jordan had an opportunity to litigate this issue in the contempt proceedings before Chief Judge Phillips. And Rule 220(b) afforded Jordan the opportunity to supply evidence to the panel tending to show a factual basis for his claims that Judge Smith lied, committed crimes, or conspired with any other person to unlawfully deny Jordan access to the e-mail. He declined to do so.

Jordan also argues Rule 220 violates separation of powers, citing *Jones v. Continental Can Co.*, 260 Kan. 547, 920 P.2d 939 (1996). But *Jones* is distinguishable. It held a Supreme Court rule concerning time-limit computation could not be applied to expand the statutory time to take an appeal in a workers compensation case. The *Jones* court reasoned it could not expand its own jurisdiction by court rule. It explained the court's rulemaking power is limited to "rules necessary to implement the court's constitutional and statutory authority and does not include the power to expand that authority." 260 Kan. at 558. The holding and rationale in *Jones* have no bearing on the court's authority to make and enforce Rule 220.

Our court's appellate jurisdiction is limited to that provided by law. Kan. Const. art. 3, § 3. By contrast, "[t]he power to regulate the bar, including the power to discipline its members, rests inherently and exclusively with" this court. *State ex rel. Stephan v. Smith*, 242 Kan. 336, 371, 747 P.2d 816 (1987). "The matters of contempt or discipline are left exclusively for the courts." 242 Kan. at 371.

We hold the panel properly applied Rule 220.

*Clear and convincing evidence supports the panel's rules violation findings.*

Jordan does not argue insufficient evidence to support the panel's misconduct findings as a separately designated issue. Instead, he attacks these findings on the grounds that "[n]o one even contended,

much less attempted to show, that any statement by Jordan was false regarding any fact or that it in any way adversely affected the administration of justice." We hold that clear and convincing evidence supports each rule violation the panel found.

KRPC 3.1 provides that a lawyer may not "assert or controvert an issue" in a proceeding "unless there is a basis for doing so that is not frivolous." In the Missouri federal court actions, Jordan asserted Judge Smith lied about the law and contents of the Powers e-mail, committed crimes, and more generally was a "traitor to the judiciary and an enemy of the Constitution" in seeking relief from Judge Smith's orders denying him and his clients access to the Powers e-mail and staying the case pending appeal. Chief Judge Phillips' contempt order found Jordan failed to establish a factual basis for these claims or a likelihood that such basis could be developed. The order also found the accusations lacked a reasonable basis in fact. These findings established the contentions were frivolous, and Jordan failed to adduce evidence at the panel hearing to rebut the presumption.

Under KRPC 3.4(c) (2022 Kan. S. Ct. R. at 395), it is misconduct to "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." This includes violation of court orders. See *In re Hult*, 307 Kan. 479, 493, 410 P.3d 879 (2018) (attorney violated KRPC 3.4[c] by failing to appear on an order to show cause and by failing to produce information required by a subpoena).

Chief Judge Phillips' order establishes a rebuttable presumption that Jordan violated FRCP 11. Similarly, Judge Smith's July 20, 2020, order—sanctioning Jordan "'[f]or his repeated violations of [the] Court's Orders, including but not limited to the Court's Orders prohibiting Plaintiff's counsel from emailing Chambers staff and Clerk's Office staff'"—establishes a rebuttable presumption these transgressions occurred. And once again, Jordan did not come forward at the panel hearing with evidence to rebut these presumptions. He simply asserts he openly refused to comply with the contempt order, which alludes to the defense stated in KRPC 3.4. But nothing in the record establishes an open-refusal defense to this misconduct, so the panel's conclusion Jordan violated KRPC 3.4 remains clear.

Finally, KRPC 8.4(d) (2022 Kan. S. Ct. R. at 434) prohibits "conduct that is prejudicial to the administration of justice." Though not

specifically directed at the panel's KRPC 8.4(d) findings, Jordan contends "[n]o evidence or testimony established that any Jordan statement or court filing caused any quantifiable harm, injury or prejudice to the administration of justice or the rule of law." But we previously held that "[c]onduct requiring a court to unnecessarily consider frivolous issues obviously delays the proceedings and causes the lawyers' clients to incur unnecessary legal fees and other expenses. Such conduct can support finding that the lawyer violated KRPC 8.4(d)." *Huffman*, 315 Kan. at 683.

In addition, KRPC 8.4(g) "relates to fitness and may be violated in cases where other disciplinary rules are also violated. The specific violations charged and found by the evidence may adversely reflect on the lawyer's fitness to practice law." *In re Carson*, 268 Kan. 134, 138, 991 P.2d 896 (1999). And this court has recognized that criminal offenses "involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice" indicate a "lack of those characteristics relevant to law practice." *In re Hodge*, 307 Kan. 170, 229, 407 P.3d 613 (2017) (quoting KRPC 8.4, cmt. 2 [2017 Kan. S. Ct. R. 380]).

Here, the record shows Jordan repeatedly filed motions with frivolous assertions of dishonest and criminal conduct against judges and opposing counsel who denied Jordan access to the Powers e-mail. The hearing panel found this conduct "served no legitimate purpose other than to insult and harass the judges." The evidence further shows multiple courts, including the Western District Court of Missouri and the Eighth Circuit Court of Appeals, wasted judicial resources when considering and ruling on these motions and Jordan's meritless attacks on those rulings. In addition, each frivolous pleading contained statements impugning the integrity of the judges in whose courts they were filed. Moreover, the misconduct underlying these offenses implies dishonesty, while its repetitive nature, done with intent to badger judges into disclosing privileged documents, suggests thoughtful interference with the administration of justice.

We hold that clear and convincing evidence establishes Jordan violated KRPC 8.4(d) and (g).

Moving to the KRPC 8.2(a) violation, Jordan argues the Disciplinary Administrator failed to prove "any assertion by Jordan was false." KRPC 8.2(a) (2022 Kan. S. Ct. R. at 432) provides:

"A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

The rule's plain language prohibits either a false statement or one made with reckless disregard for the statement's truth. And in *In re Arnold*, 274 Kan. 761, 56 P.3d 259 (2002), the court upheld the imposition of discipline for a violation of KRPC 8.2(a) against a First Amendment challenge when the attorney wrote a letter to a judge stating "'[y]ou simply don't have what is required to decide the kind of issues that you were presented with in this case'" and "'[y]our absurdly fastidious insistence on decorum and demeanor mask an underlying incompetence.'" 274 Kan. at 765. The court reasoned,

"In this case, Arnold's behavior shows a complete lack of respect toward the judiciary. His style was sarcastic, insulting, and threatening and subjected him to the discipline that was entered. The remedy for a believed erroneous trial court ruling is appeal, not an intemperate writing faxed to the judge shortly after the ruling was made." 274 Kan. at 773.

Jordan made numerous accusations of lying "about the law" and the contents of the Powers e-mail; criminal concealment of evidence; and conspiracy to conceal evidence. He aimed these accusations at judges before whom he appeared, attorneys opposing his bids to obtain the Powers e-mail, the disciplinary panel, and the Disciplinary Administrator's office. The outlandish nature, abusive tone, frequency, and breadth of these accusations, and their seemingly indiscriminate application to anyone who opposes Jordan—including the Disciplinary Administrator and the hearing panel—render them incredible on their face.

The hearing panel found Jordan's statements violated KRPC 8.2(a), explaining that his accusations were "at the very least, made with reckless disregard for the truth or falsity of the qualifications or integrity of Judge Smith, Chief Judge Phillips, and the [8th Circuit] panel judges." In doing so, the hearing panel determined the Disciplinary Administrator was not required to prove Jordan's statements were false. Applying Supreme Court Rule 220(b), the panel concluded Jordan violated KRPC 8.2(a) based both on Chief Judge Phillips' finding that Jordan made "baseless allegations" that "he knew were false or, at

least, he acted with reckless disregard to their truth or falsity," and Jordan's failure to disprove the finding at the disciplinary hearing. And based on his disregard of the rule, the panel concluded he violated KRPC 8.2(a) because he had never read an unredacted version of the Powers e-mail, so his assertions that "these judges lied about Powers' email, concealed evidence, and committed crimes" had to have been made with reckless disregard to their truth or falsity.

In arguing clear and convincing evidence supported the panel's KRPC 8.2(a) finding, the Disciplinary Administrator points out that "[t]hroughout the disciplinary process" Jordan "'failed to provide even "one scintilla of proof of such wrongdoing, through exhibits, witnesses, or his own testimony."'" (Quoting *In re Landrith*, 280 Kan. 619, 639, 124 P.3d 467 [2005].) It also points out Chief Judge Phillips found respondent violated Missouri rule 4-8.2, which the panel viewed as mirroring the language of KRPC 8.2(a), and so the burden shifted to Jordan to disprove that finding under Rule 220.

We hold that clear and convincing evidence establishes a KRPC 8.2(a) violation. Unlike the respondent in *In re Pyle*, 283 Kan. 807, 156 P.3d 1231 (2007), Jordan did not offer evidence tending to show any factual basis for his allegations. They rest instead on his mere supposition that the Powers e-mail is not subject to attorney-client privilege, which is contrary to multiple courts' rulings. He failed to come forward with evidence to support the claims when confronted with Judge Smith's show cause order, culminating in Chief Judge Phillips' ruling that the claims were baseless and made with at least reckless disregard for their falsity. And Jordan refuses to even confirm or deny that he has ever seen the e-mail. Worse yet, in one instance, Jordan twisted Judge Smith's recognition of judicial authority and discretion into a "blatantly deceitful declaration[] of his intent to defraud" and "openly declar[ing] his intent to decide this case fraudulently." Indeed, this statement by itself can be considered false on its face.

Unlike the respondents in both *Pyle* and *In re Huffman*, 315 Kan. 641, 509 P.3d 1253 (2022), Jordan did not offer the panel a plausible interpretation under which his assertions may fall within the realm of legitimate criticism. He repeatedly made what he represented as concrete factual allegations that judges lied and committed various specific federal crimes, and he did so with reckless disregard for the statements' truth or falsity. Cf. *In re Eckelman*, 282 Kan. 415, 422, 144 P.3d 713

(2006) (holding attorney crossed line of justified criticism by accusing judge of improper communication with jurors with reckless disregard for assertion's falsity).

Consistent with this court's caselaw applying KRPC 8.2(a), we hold the evidence supports a finding that Jordan violated KRPC 8.2(a).

APPROPRIATE DISCIPLINE

The remaining question is the appropriate discipline.

"In any given case, this court is not bound by the recommendations from the hearing panel or the Disciplinary Administrator. 'Each disciplinary sanction is based on the specific facts and circumstances of the violations and the aggravating and mitigating circumstances presented in the case.' 'Because each case is unique, past sanctions provide little guidance.' [Citations omitted.]" *Hodge*, 307 Kan. at 230.

The court generally looks to the American Bar Association Standards for Imposing Lawyer Sanctions to aid in determining discipline. That framework considers "four factors in determining punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors." 307 Kan. at 231.

The Panel found Jordan intentionally violated his duty to the legal system and legal profession and, in doing so, caused actual injury to both. It additionally found his misconduct was aggravated by the facts that he had substantial experience in the practice of law; engaged in a pattern of misconduct comprising multiple KRPC violations; refused to acknowledge the wrongful nature of his conduct; engaged in bad-faith tactics during the disciplinary process; and engaged in deceptive practices during the disciplinary process. When the panel referenced his contempt sanctions and 8th Circuit disbarment as other penalties for his misconduct, it noted there was no evidence the contempt sanctions were paid. It recommends disbarment. Before this court, the Disciplinary Administrator agrees.

We hold disbarment is the appropriate discipline. We base this determination on ABA Standards 6.12 (suspension appropriate when false statements knowingly submitted to court, causing potential injury to party or legal proceeding, or potentially adverse effect on legal proceeding); 6.22 (suspension appropriate when knowing violation of court order or rule causes potential injury to client or party, or potential

interference with legal proceeding); and 7.2 (suspension appropriate with knowing conduct violating duty owed as a professional causes injury or potential injury to a client, the public, or the legal system). Adding to our consideration are the aggravating and mitigating factors found by the panel that we hold are supported by clear and convincing evidence.

## CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Jack R.T. Jordan be and he is hereby disbarred from the practice of law in the state of Kansas, effective on the filing of this opinion, in accordance with Kansas Supreme Court Rule 225(a)(1) (2022 Kan. S. Ct. R. at 281).

IT IS FURTHER ORDERED that the Office of Judicial Administration strike the name of Jack R.T. Jordan from the roll of attorneys licensed to practice law in Kansas.

IT IS FURTHER ORDERED that Jordan comply with Kansas Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292).

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