REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 317, No. 1
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JUSTICES AND OFFICERS OF THE KANSAS
SUPREME COURT

———

CHIEF JUSTICE:

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

JUSTICES:

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

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Disciplinary Administrator ..... GAYLE B. LARKIN

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2023-RL-007

Rules Relating to District Courts

The court amends the attached Supreme Court Rule 1203, effective the date of this order.

Dated this 24h day of February 2023.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 1203

MUNICIPAL COURT REPORTING

(a) **Duty to Provide Information and Reports.** A municipal court must timely provide information and reports in the manner and form prescribed by the Supreme Court or judicial administrator.

(b) **Compliance; Judge.** Compliance with this rule rests solely on the municipal court judge.

(c) **Standard Operating Procedures.** The judicial administrator is authorized to adopt standard operating procedures for the collection of information and reports from municipal courts. In developing the procedures, the judicial administrator may consult with municipal court judges and the Supreme Court liaison justice. The procedures may include the following:

(1) specifying forms to be used; and
(2) setting deadlines for submission of information and reports.

(d) **Annual Caseload Report.** In addition to any other information and reports submitted under this rule, each municipal court must provide an annual caseload report in the manner and form prescribed by the judicial administrator.

(1) A municipal court must file an annual caseload report if the court existed in the municipality for any part of the reporting period.
(2) A municipal court must file an annual caseload report even if no cases were filed during the reporting period.

(e) **Compilation; Publication.** The judicial administrator will compile information and publish reports as directed by the Supreme Court.

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PETITIONS FOR REVIEW OF DECISIONS OF THE COURT OF APPEALS 317 Kan. No. 1

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In re Care and Treatment of Merryfield	123,949	Denied	01/31/2023	Unpublished
In re Care and Treatment of Ritchie	124,773	Denied	02/07/2023	Unpublished
In re K.M.	124,825	Denied	02/07/2023	Unpublished
In re K.R.	125,054	Denied	02/08/2023	Unpublished
In re Marriage of Holliday	124,116	Granted	01/20/2023	Unpublished
In re Marriage of Shafer	124,529	Granted	01/19/2023	Unpublished
In re Parentage of R.R.	123,833	Granted	01/19/2023	Unpublished
King v. State	124,241	Denied	01/31/2023	Unpublished
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State v. Hopkins	123,161	Denied	01/31/2023	Unpublished
State v. Jackson	122,822	Denied	01/31/2023	Unpublished
State v. Kerrigan	123,862	Granted	01/19/2023	Unpublished
State v. Mullens	123,110	Denied	02/21/2023	Unpublished
State v. Reed	123,718	Denied	02/17/2023	Unpublished
State v. Shafer	120,802	Denied	01/31/2023	Unpublished
State v. Solton	123,927	Denied	01/31/2023	Unpublished
State v. Stieb	123,620	Denied	02/17/2023	Unpublished
State v. Straughter	124,058	Denied	02/17/2023	Unpublished
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State v. Wilson	122,824	Denied	01/31/2023	Unpublished

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No. 122,810

KELLY ROE, *Appellee*, v. PHILLIPS COUNTY HOSPITAL, *Appellant*.

(522 P.3d 277)

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*Appellate Review of District Court's Grant of Summary Judgment Is De Novo.* When the parties agree that the facts are undisputed, an appellate court reviews a district court's decision to grant summary judgment de novo.

2. STATUTES—*Interpretation of Statute—Plain and Unambiguous Language Requires Court Consider Intent of Legislature.* In interpreting a statute, courts begin with its plain language. When a statute is plain and unambiguous, the court must give effect to the intention of the Legislature as expressed, rather than determine what the law should or should not be. The court need not apply its canons of statutory construction or consult legislative history if a statute is plain and unambiguous.

3. SAME—*Language of Statute Is Clear—Courts Consider Provisions of Act in Pari Materia to Reconcile.* Even when the language of a statute is clear, courts still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible.

4. OPEN RECORDS ACT—*Statute Requires Public Agency to Provide Record in Format in Which It Maintains the Record.* The plain language of K.S.A. 45-219(a) requires a public agency, upon request, to provide a copy of a public record in the format in which it maintains that record.

Review of the judgment of the Court of Appeals in an unpublished opinion filed February 11, 2022. Appeal from Phillips District Court; PRESTON A. PRATT, judge. Opinion filed January 6, 2023. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed, and the case is remanded.

Quentin M. Templeton, of Forbes Law Group, LLC, of Overland Park, argued the cause, and *Keynen J. (K.J.) Wall*, *Frankie J. Forbes*, and *Russell J. Keller*, of the same firm, and *John F. McClymont,* of McClymont Law Office, PA, of Norton, were with him on the briefs for appellant.

Maxwell E. Kautsch, of Kautsch Law L.L.C., of Lawrence, argued the cause and was on the brief for appellee, and *Kelly Roe*, appellee pro se, was on the pro se brief.

Maxwell E. Kautsch, of Kautsch Law L.L.C., of Lawrence, was on the brief of amici curiae Kansas Press Association, Inc., Kansas Association of Broadcasters, Inc., Kansas Sunshine Coalition for Open Government, Inc., Kansas Institute for Government Transparency, Inc., and Lex Lumina, LLC.

The opinion of the court was delivered by

WILSON, J.: This interlocutory appeal after summary judgment poses a single question of law: when a person requests an electronic copy of a public electronic record under the Kansas Open Records Act, must a public agency provide that copy in electronic format? The answer is "yes."

FACTS AND PROCEDURAL BACKGROUND

Because this case reaches us on an interlocutory appeal from the district court's grant of partial summary judgment, the salient facts are uncontroverted. As set forth by the district court, the relevant facts are as follows:

> "1. [Phillips County] Hospital is a 'public agency' within the meaning of K.S.A. 45-217 and is therefore subject to KORA.
>
> "2. On [various dates] Roe made written requests under KORA for copies of records made, maintained, kept, or in the possession of Hospital, including copies of existing electronic records in their native format.
>
> . . . .
>
> "4. Hospital's employees use computer programs, such as Microsoft Word, PowerPoint, and Excel to create (i.e., make) electronic files.
>
> "5. . . . Hospital does not claim it is incapable of producing the requested electronic records in the format(s) in which each was made, maintained, kept, or in the possession of Hospital.
>
> . . . .
>
> "9. Individual cells in the Excel spreadsheets Hospital creates may include formulas."

Phillips County Hospital refused to produce for Roe the requested electronic records in native (i.e., "electronic") format but expressed willingness to provide copies of the electronic records in hard copy (i.e., paper) format.

In response, Roe complained several times to the Kansas Attorney General's office about Hospital's position. In a letter addressing Roe's complaints, the AG's Open Government Enforcement Unit (OGEU) concluded that "'KORA contains no language requiring records be provided in their native format,' and 'a public agency retains the discretion to determine the format in which the records are produced.'" While acknowledging that attorney general opinions are not legally binding, we note the OGEU's response reached a conclusion generally different than those expressed in previous AG opinions, including Att'y Gen. Op. Nos. 88-152 ("any person has the right to obtain a computerized voter registration list in computer format if the public agency has the capability of providing the record in that format"), 89-106 ("Computerized public information must be provided in the form requested if the district has the capability of producing that form."), 95-64 (same), and 2009-14 (referencing county's "requirements under KORA to provide access to records in any format available for a requestor").

Roe also filed a petition in district court to enforce her KORA rights. Ultimately, both Roe and Hospital submitted competing motions for summary judgment, though the district court struck Hospital's motion because of its late filing. In its order, the district court granted partial summary judgment to Roe. After reviewing KORA and several AG opinions, the district court concluded: "While true that KORA does not specifically say copies must be produced in electronic format, that is implied." The court thus ordered Hospital to provide Roe with electronic copies of the records, as she requested, with certain exceptions not relevant to our analysis.

On appeal, a panel of the Court of Appeals reversed the district court. The panel reasoned that KORA was silent on the question of format in which a record is produced on request. It held "there is no plain statutory language which requires a public agency to produce electronic public records in the format of the requester's choice—such as a native-based electronic format—if the agency has the capability of producing the records in that format." *Roe v. Phillips County Hospital*, No. 122,810, 2022 WL 414402, at *5 (Kan. App. 2022) (unpublished opinion). The panel

read K.S.A. 2020 Supp. 45-221(a)(16) and K.S.A. 45-219(g) to conclude that "while an agency may produce electronic records in response to an open records request, there is no *mandatory* language requiring a public agency to provide copies of electronic documents in their native-based electronic formats upon request." 2022 WL 414402, at *5. The panel also considered the definition of "copies" to conclude that hard copies of electronic records would satisfy Hospital's duty to provide "copies" under KORA. 2022 WL 414402, at *6-7.

The panel held that KORA gives an agency discretion over how it provides records and "the Legislature did not authorize the requestor to have control over the original records or copying process but afforded the responsibility of determining the manner and method of reproduction to the public agency." *Roe*, 2022 WL 414402, at *8. The panel thus concluded that the district court erred, although it also remanded the matter to the district court for the parties to better argue the question of metadata, noting the parties' agreement "that no expert testimony was presented . . . regarding the production of different computer formats or metadata." 2022 WL 414402, at *10.

Judge Cline wrote separately to argue that electronic records fit the definition of "public record" in K.S.A. 2020 Supp. 45-217(g). *Roe*, 2022 WL 414402, at *15 (Cline, J., concurring). And while Judge Cline believed that Roe could not "dictate" the format in which Hospital produced its records, she would remand "with directions that the Hospital must satisfy the district court that its proposed format of production (a paper copy) includes the relevant electronic information associated with the public records (like metadata and spreadsheet formulas), so long as KORA's other provisions are satisfied and no exception exists." 2022 WL 414402, at *15 (Cline, J., concurring).

Roe petitioned for review of the panel's determination that KORA does not require a public agency to provide copies of electronic public records in the requested electronic format, even if the agency has the capability to do so. She did not challenge the panel's other holdings, which involved a claim of attorney-client privilege. *Roe*, 2022 WL 414402, at *11-15. This court granted review on her sole issue.

ANALYSIS

The question before us is whether KORA requires a public agency to provide someone with requested electronic copies of public electronic records. We conclude that the plain language of the relevant statutes, when read together, supports the existence of such a duty.

Standard of review

When the parties agree that the facts are undisputed, an appellate court reviews a district court's decision to grant summary judgment de novo. E.g., *First Sec. Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021); *N. Nat. Gas Co. v. ONEOK Field Servs. Co., LLC*, 310 Kan. 644, 650, 448 P.3d 383 (2019). We likewise review issues of statutory interpretation de novo, as with other questions of law. E.g., *State v. Scheuerman*, 314 Kan. 583, 587, 502 P.3d 502, *cert. denied* 143 S. Ct. 403 (2022).

"'It is a fundamental rule of statutory constructions, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. [Citations omitted.]'" *Wichita Eagle & Beacon Pub. Co. v. Simmons*, 274 Kan. 194, 214, 50 P.3d 66 (2002) (quoting *In re Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 [1998]).

When a statute is plain and unambiguous, "the court need not resort to canons of statutory construction or legislative history." *State v. Wells*, 296 Kan. 65, 83, 290 P.3d 590 (2012). On the other hand, "if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity." *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 601, 478 P.3d 776 (2021).

We recently clarified that "even when the language of the statute is clear, we must still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible." *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). Put another way, "[W]hen interpreting a statute, we

do not consider isolated parts alone, but all relevant parts together." 316 Kan. at 230. Thus, we may consider a statute *in pari materia* even *if* the statute appears to be "plain and unambiguous" as well as to "provide substance and meaning to a court's plain language interpretation of a statute." 316 Kan. at 224.

Although it does not impact our analysis here, we also briefly note that KORA itself presents another wrinkle in statutory construction: "It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy." K.S.A. 45-216(a). The parties dispute whether this mandate for liberal construction applies solely to statutes impacting the right of inspection, or to other KORA rights generally. But we need not resolve this disagreement because KORA's statutory mandates are plainly stated for our purposes here.

Discussion

We begin with the first sentence of K.S.A. 45-219(a): "Any person may make abstracts or obtain copies of any public record to which such person has access under this act." Public agencies and public records are both defined in K.S.A. 2020 Supp. 45-217. The parties agree Hospital is a public agency and the records requested—at least, those that are the subject of Roe's petition for review—are public records to which Roe has access under the act. There is no question that Hospital possesses the requested electronic records and can produce them in electronic format, and Hospital does not claim any exemption preventing their disclosure. The parties' only dispute, then, centers on what KORA means when it speaks of "copies."

As every actor here thus far has identified, KORA does not define "copies." But because courts ordinarily give plain words their commonly understood meaning, the panel cited these definitions to divine the meaning of "copies":

"Black's Law Dictionary defines 'copy' as '[a]n imitation or reproduction of an original.' Black's Law Dictionary 423 (11th ed. 2019). Similarly, the Webster's dictionary defines a 'copy' as 'a thing made just like another; imitation of an original; full reproduction or transcription.' Webster's New World College Dictionary 328 (5th ed. 2014). It is apparent that the common usage and plain meaning

of the term 'copies' allows for reproductions which may involve numerous formats or mediums. Employing these dictionary definitions, we are persuaded that, provided the public agency delivers an accurate reproduction of the original electronic records to the requester, KORA's requirement that a copy of the public record must be provided is satisfied. " *Roe*, 2022 WL 414402, at *6.

We agree with the panel's underlying logic to this extent: the plain meaning of "copy" denotes duplication with essentially perfect fidelity, or what the panel called an "accurate reproduction." 2022 WL 414402, at *7. But to confirm the validity of the panel's application of this logic to electronic records, we must also consider the meaning of "public records," to which the term "copies" applies in K.S.A. 45-219(a). On this point, KORA clarifies that "'[p]ublic record' means any recorded information, *regardless of form, characteristics or location*, which is made, maintained or kept by or is in the possession of: (A) Any public agency." (Emphasis added.) K.S.A. 2020 Supp. 45-217(g)(1).

This means an agency cannot split a public record into its constituent parts: all recorded information within a record *is* the record, and thus must be disclosed unless specifically exempted by KORA. If a member of the public submits a KORA request for a "copy" of a noncopyrighted video, for example, a copy of only the video's audio component constitutes only a part of the requested record. Put another way, the record itself includes not only the information it contains, but also the form in which the information is stored. The form itself is a secondary kind of information that is also public. KORA does not contemplate government agencies divorcing form from raw data or information. Thus, KORA obliges the agency to faithfully duplicate the public record in *all* its respects—"regardless of form, characteristics or location." K.S.A. 2020 Supp. 45-217 (g)(1).

Consider a hypothetical handwritten paper document created and maintained by a public agency. This handwritten document qualifies as a "public record" and is subject to KORA's provisions on inspection and copying unless exempted by some other provision of KORA, such as K.S.A. 45-219(a) or 45-221(a). An accurate reproduction (i.e., copy) of a paper record must, itself, be paper, and thus KORA mandates duplication on paper; a photocopy, for instance, would satisfy the agency's duty to provide a copy. This is not to say, and indeed we do *not* say, that the agency could

not provide information from the paper record in another format *if requested*, but KORA sets the absolute floor for an agency's obligations: if it maintains "recorded information" in a given format, a "copy" must mirror that format.

Further, what if the agency were to digitize—scan and electronically store—that paper record? Our court has long recognized that KORA's definition of "public records" encompasses computer files and other electronic records. Cf. *Wichita Eagle & Beacon Pub. Co.*, 274 Kan. at 210 ("[A]ny nonexempt document, computer file, or tape recording in the possession of [a public agency] is subject to public disclosure under KORA."); *State ex rel. Stephan v. Harder*, 230 Kan. 573, 583, 641 P.2d 366 (1982) (Under the open records statute that preceded KORA this court stated, "[C]omputer usage has mushroomed and . . . in many instances the only record maintained is that stored within the computer. We hold that the computer tapes described herein are 'official public records.'"). Consequently, K.S.A. 2020 Supp. 45-217(g)(1)'s emphasis on "any recorded information, regardless of form, characteristics or location" reveals that an agency's act of digitizing a paper record creates a *new* public record separate from the first—not only because the essential characteristics of an electronic record are unique to that record, but also because the very act of digitizing the record creates *new* "recorded information."

As a result, this new digital public record would be *independently* subject to KORA's inspection and copying provisions. For a copy of an electronic record to maintain perfect fidelity with the original, it must *also* be provided electronically, just as KORA mandates that a copy of a paper record must also be on paper.

While the panel correctly determined that the plain meaning of "copies" "allows for reproductions which may involve numerous formats or mediums," it missed the critical implication that any "accurate reproduction" of a public record must mirror the content *of* that record, unless specifically exempted. See *Roe*, 2022 WL 414402, at *6. Here, if we focus on just an Excel spreadsheet, it can have embedded components that include at least some formulas. Such formulas provide information to show more than just numbers in a cell, but also how those numbers are generated. Hardcopies simply will not work to reproduce accurately such an

integrated animal. Plainly, hard copies do not "embed" anything. The only accurate reproduction of an electronic file is a copy of the electronic file, which can easily be provided by, for example, email or thumb drive.

We thus reverse the panel's decision and affirm that of the district court. Roe has requested electronic copies of public records stored electronically. Hospital does not claim that these records are exempt from disclosure. Therefore, under the plain language of KORA, Hospital must provide copies of these records in the format it stores them.

CONCLUSION

The judgment of the Court of Appeals panel is reversed, and the judgment of the district court granting partial summary judgment to Roe is affirmed. We remand the matter to the district court for further proceedings in a manner consistent with this opinion.

WALL, J., not participating.

No. 125,622

In the Matter of ISAAC HENRY MARKS SR., *Respondent*.

(522 P.3d 789)

ORIGINAL PROCEEDING IN DISCIPLINE

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

Original proceeding in discipline. Opinion filed January 13, 2023. One-year suspension.

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

Isaac Henry Marks Sr., respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Isaac Henry Marks Sr., of Calverton, Maryland, who was admitted to practice law in Kansas in October 1987. He also is a licensed attorney in both Maryland and the District of Columbia, where he regularly practiced law for many years.

On May 4, 2022, the Disciplinary Administrator's office filed a formal complaint against Marks alleging violations of the Kansas Rules of Professional Conduct. This complaint stemmed from disciplinary actions against Marks for his conduct while working as a trustee in the District of Columbia in 2018. The District of Columbia Court of Appeals suspended his law license for a period of one year on June 24, 2021. He then failed to notify the Maryland bar of the District of Columbia discipline. This led to indefinite suspension of his Maryland license on November 15, 2021, for a minimum of one year. The Maryland license suspension was made effective to coincide with a previous order of temporary suspension dated September 13, 2021.

The parties entered into a summary submission agreement under Supreme Court Rule 223 (2022 Kan. S. Ct. R. at 278) (summary submission is "[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken"). Marks admitted he violated D.C. Rules of Professional Conduct 1.1(a), 1.3(a), (b)(1), and (c), 1.15(a),

1.15(c), 8.4(c), and 8.4(d). The Kansas Rules of Professional Conduct he violated were KRPC 1.1 (2022 Kan. S. Ct. R. at 327) (competence), KRPC 1.3 (2022 Kan. S. Ct. R. at 331) (diligence), KRPC 1.15(a) and (b) (2022 Kan. S. Ct. R. at 372) (safekeeping property), KRPC 8.4(c) (2022 Kan. S. Ct. R. at 434) (dishonesty), KRPC 8.4(d) (2022 Kan. S. Ct. R. at 434) (engage in conduct prejudicial to the administration of justice), Supreme Court Rule 210(c) (2022 Kan. S. Ct. R. at 263) (duty to report), and Supreme Court Rule 221(b) (2022 Kan. S. Ct. R. at 276) (discipline imposed in another jurisdiction).

Before us, the parties stipulate that Marks violated KRPC 1.1, 1.3, 1.15(a), 1.15(b), 8.4(c), 8.4(d), Supreme Court Rule 210(c), and Supreme Court Rule 221(b). They jointly recommend a one-year suspension to run concurrent with the Maryland suspension effective September 13, 2021. The parties also recommend Marks undergo a reinstatement hearing under Supreme Court Rule 232(e) (2022 Kan. S. Ct. R. at 293) after both his District of Columbia and Maryland licenses are reinstated.

At the hearing before this court, the parties advised Marks' District of Columbia license is now reinstated, while reinstatement in Maryland remained pending. We also note his Kansas attorney registration is administratively suspended for failing to comply with registration requirements.

FACTUAL AND PROCEDURAL BACKGROUND

We quote from the summary submission:

"*Findings of Fact: The petitioner and respondent stipulate and agree that respondent engaged in the . . . misconduct as follows:*

. . . .

"District of Columbia Discipline

"5. In June 2018, the District of Columbia Office of Disciplinary Counsel instituted disciplinary proceedings against respondent relating to his conduct while acting as trustee of a trust. Highly summarized, respondent: (1) failed to provide required accountings; (2) failed to marshal and maintain trust assets; (3) negligently misappropriated trust funds; and (4) made knowing misrepresentations to a court regarding his actions and inactions as trustee.

"6. After the conclusion of a September 2019 evidentiary hearing where respondent appeared and was represented by counsel, the hearing committee that presided over the hearing issued a report in June 2020, concluding that clear and convincing evidence established that respondent violated the following D.C. Rules of Professional Conduct: 1.1(a) (failure to competently represent a client); 1.3(a), (b)(1), and (c) (failure to zealously represent client, seek the client's lawful objectives and act promptly); Rule 1.15(a) (commingling and misappropriation of client funds and failure to keep proper records); Rule 1.15(c) (failure to notify and deliver client funds); Rule 8.4(c) (engaging in conduct involving dishonesty); and Rule 8.4(d) (engaging in conduct that seriously interferes with the administration of justice).

"7. The conduct proscribed by the D.C. Rules of Professional Conduct in paragraph 6, above, [is] substantially similar to the conduct proscribed by Kansas Rules of Professional Conduct: 1.1, 1.3, 1.15, and 8.4.

"8. Subsequently, the D.C. Bar's Board of Professional Responsibility (D.C. Board) issued its Report and Recommendation on April 14, 2021, affirming the findings and conclusions, on narrower grounds, of the hearing committee and recommended that respondent's law license be suspended for one year with reinstatement contingent on the completion of specified continuing legal education. Specifically, the D.C. Board found by clear and convincing evidence the respondent violated:

"a. D.C. Rules of Professional Conduct 1.1(a) (failure to competently represent a client)[,] 1.3(a), (b)(1), and (c) (failure to zealously represent client, seek the client's lawful objectives and act promptly) as the respondent '. . . did not: (1) provide an accounting for the Trust in October 2011 and 2012, as required by the Trust and the District of Columbia Uniform Trust Code' . . . '(2) find safe living accommodations for the Trust Beneficiary . . . [and] (3) pay property taxes for the house in 2011 or the first half of 2012'. 'The Board agrees with the Hearing Committee that these actions, or failures to act, by Respondent, constitute a failure to provide competent representation and demonstrated a lack of diligence, zeal, and reasonable promptness in furtherance of the Trust's objectives and thus violated Rules 1.1(a) and 1.3(a) and (c).'

"b. D.C. Rules of Professional Conduct 1.3(b)(1) '. . . by failing to maintain a habitable property and by failing to pay property taxes' '[I]t was still [respondent's] responsibility to provide for Beneficiary by other means.' 'Respondent knew as early as 2010 that Beneficiary was unable to live by herself and that the house was becoming "uninhabitable", yet he still did nothing to find alternative housing. In this way, Respondent intentionally failed to fulfill the objectives of the Trust, in violation of Rule 1.3(b)(1).' 'Respondent's neglect of his obligation to pay taxes on the property was intentional as well.' 'Despite receiving these documents, Respondent failed to pay property taxes in 2011 or the first half

of 2012.' 'We find this failure was intentional, in violation of Rule 1[.]3(b)(1).'

"c. D.C. Rules of Professional Conduct 1.15(a)[.] 'The record establishes that Respondent withdrew $1,750 from the Trust account and used it for unauthorized personal purposes.' 'Respondent committed misappropriation negligently, in violation of Rule 1.15(a)'.

"d. D.C. Rules of Professional Conduct 1.15(c)[.] 'The record shows that Respondent allowed two Social Security checks to sit in the Trust account between late 2009 and May 2013 without providing the money to Beneficiary, using it for her benefit, or trying to resolve his apparent concern that the government might reclaim the funds.' 'Therefore, the Board agrees that Respondent failed to promptly deliver funds to Beneficiary, in violation of Rule 1.15(c).'

"e. D.C. Rules of Professional Conduct 8.4(c)[.] 'The Board finds that Respondent violated Rule 8.4(c) on two occasions, and that he did so with dishonest intent on both occasions: when he accused Ms. Walker of (1) never requesting an accounting, and (2) refusing to provide property tax statements.'

"f. D.C. Rules of Professional Conduct 8.4(d)[.] 'Here, Respondent's conduct was "improper" in several respects arising from his overall failure to properly administer the Trust. These failures bore on the judicial process, and adversely impacted that process, because the probate court had to hold two hearings in April 2013 and appoint an Auditor-Master in order to correct Respondent's mistakes.' 'Therefore, the Board agrees with the Hearing Committee that Respondent violated Rule 8.4(d).'

"9. Respondent did not take exceptions to [the] D.C. Board Report and Recommendation. Ultimately, the D.C. Court of Appeals issued an order of discipline on June 24, 2021, imposing the D.C. Board's recommended sanction upon respondent.

"a. DC Bar Rule XI § 14(f) provides that, unless otherwise directed, respondent's order of suspension became 'effective thirty days after entry.'

"b. Within ten days after the effective date of the order of suspension, respondent was required to file an affidavit with the DC Court and DC Board that he had complied with the DC requirements of [*sic*] to notify clients, adverse parties and opposing counsel of his suspension.

"c. The DC Court of Appeals has held that the date of suspension from the practice of law 'is not deemed to have begun for reinstatement purposes' until the required affidavit is filed.

"d. Respondent filed the required affidavit on August 6, 2021[,] and is eligible for reinstatement to the DC Bar 'without further proceedings' after August 6, 2022.

"10. On June 24, 2021, the D.C. Office of Disciplinary Counsel notified the Kansas Office of Disciplinary Administrator (ODA) of the respondent's suspension by forwarding a copy of the D.C. Court of Appeal's order of suspension.

"11. The ODA docketed the matter for investigation (DA13,733) and asked respondent to provide a response. The ODA received written responses from the respondent on July 31, 2021, and August 2, 2021, indicating that he did not plan to challenge the order of suspension and had no further information or documents to offer.

"Maryland Discipline

"12. On August 27, 2021, the Attorney Grievance Commission of Maryland filed a petition for reciprocal discipline. Although the petition for reciprocal discipline included an allegation that respondent failed to notify the Maryland bar counsel of the discipline imposed in the District of Columbia on June 24, 2022 as required by Maryland rules of professional conduct, by email, dated July 2, 2021, Lydia E. Lawless, Bar Counsel for the Maryland Attorney Grievance Commission, acknowledged to respondent that she was 'in receipt of the Order of the District of Columbia Court of Appeals suspending [respondent] from the practice of law in the District of Columbia'.

"13. On August 31, 2021, the Court of Appeals of Maryland issued a Show Cause Order.

"14. On September 13, 2021, the Court of Appeals of Maryland issued a temporary suspension.

"15. On November 15, 2021, a Joint Petition for Indefinite Suspension with the Right to Petition for Reinstatement in One Year resulted in the indefinite suspension of the respondent's Maryland law license. Respondent was suspended effective September 13, 2021[,] and is eligible to petition for reinstatement on September 13, 2022.

"16. Respondent failed to report the Maryland temporary suspension or indefinite suspension to the Kansas disciplinary administrator's office as required by Rule 210(c) (2022 Kan. S. Ct. R. at 263) and Rule 221(b) (2022 Kan. S. Ct. R. at 276).

"*Conclusions of Law: The petitioner and respondent stipulate and agree there is clear and convincing evidence that respondent violated the following Kansas Supreme Court Rules and Kansas Rules of Professional Conduct, respondent engaged in misconduct as follows:*

"17. Rule 221(c)(1) provides:

'Reciprocal Discipline. When the licensing authority of another jurisdiction disciplines an attorney for a violation of the rules governing the legal profession in that jurisdiction, for the purpose of a disciplinary board proceeding under these rules, the following provisions apply.

(1) If the determination of the violation was based on clear and convincing evidence, the determination is conclusive evidence of the misconduct constituting the violation of these rules.'

"a. In this case, the District of Columbia Board of Professional Responsibility found by clear and convincing evidence that respondent violated their rules of professional conduct Rule 1.1(a) (failure to competently represent a client); Rule 1.3(a), (b)(1), and (c) (failure to zealously represent client, seek the client's lawful objectives and act promptly); Rule 1.15(a) (commingling and misappropriation of client funds and failure to keep proper records); Rule 1.15(c) (failure to notify and deliver client funds); Rule 8.4(c) (engaging in conduct involving dishonesty); and Rule 8.4(d) (engaging in conduct that seriously interferes with the administration of justice). The District of Columbia Court of Appeals adopted the Board report and imposed discipline.

"18. Kansas Rule of Professional Conduct 1.1 (competence). In this case, the respondent's failure to provide an accounting for the Trust in October 2011 and 2012, failure to find safe living accommodations for the Trust Beneficiary, and failure to pay property taxes for the house in 2011 or the first half of 2012 violated D.C. and Kansas rules of professional conduct related to competence.

"19. Kansas Rule of Professional Conduct 1.3 (diligence). In this case, the respondent's failure to provide an accounting for the Trust in October 2011 and 2012, failure to find safe living accommodations for the Trust Beneficiary, and failure to pay property taxes for the house in 2011 or the first half of 2012. Additionally, his failure to maintain a habitable property and failure to pay property taxes violated D.C. and Kansas rules of professional conduct related to diligence.

"20. Kansas Rule of Professional Conduct 1.15(a) (safekeeping property). In this case, the respondent's withdrawal of $1,750 from the Trust account and using it for unauthorized personal purpose violated D.C. and Kansas rules of professional conduct related to comingling or misappropriation of property.

"21. Kansas Rule of Professional Conduct 1.15(b) is substantially similar to D.C. Rule of Professional Conduct 1.15(c).

"KRPC 1.15

. . . [.]

'(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person

any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.'

"D.C. Rule of Professional Conduct 1.15

. . . [.]

'(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.'

"a. In this case, the respondent allowed two Social Security checks to sit in the Trust account between 2009 and May 2013 without providing the money to the beneficiary, using it for her benefit, or trying to resolve his apparent concern that the government might reclaim the funds which violated D.C. Rule 1.15(c) and KRPC1.15(b) related to failure to notify and deliver client funds.

"22. Kansas Rule of Professional Conduct 8.4(c) (dishonesty)[.] In this case, the respondent accused Ms. Walker of (1) never requesting an accounting, and (2) refusing to provide property tax statements which were deliberately false statements that violated D.C. and Kansas rules of professional conduct related to dishonest conduct.

"23. Kansas Rule of Professional Conduct 8.4(d) (prejudicial to administration of justice)[.] In this case, the respondent's failure to properly administer the Trust caused the probate court to hold two hearings in April 2013 and appoint an Auditor-Master in order to correct the respondent's mistakes which violated D.C. and Kansas rules of professional conduct related to the administration of justice.

"24. Rule 210(c) provides that a respondent has a duty to report misconduct to the disciplinary administrator. In this case, the respondent failed to report the Maryland temporary suspension or indefinite suspension to the Kansas disciplinary administrator's office as required.

"25. Rule 221(b) provides:

'Duty to Report Discipline. When the licensing authority of another jurisdiction disciplines an attorney for a violation of the rules governing the legal profession in that jurisdiction or refers an attorney to the attorney diversion program or comparable program in that jurisdiction, the attorney must notify the disciplinary administrator in writing of the discipline or referral no later than 14 days after the discipline is imposed or the referral is made.'

"a. In this case, the respondent failed to report the Maryland temporary suspension or indefinite suspension to the Kansas disciplinary administrator's office as required.

"Applicable Aggravating and Mitigating Circumstances:

"26. Aggravating Circumstances:

"a. Multiple offenses: In this case, the respondent violated multiple rules including KRPC 1.1, 1.3, 1.15, and 8.4. Additionally, the respondent violated Kansas Rule of Professional Conduct (KRPC) 210 and KRPC 221 when he failed to report the Maryland temporary suspension or indefinite suspension to the Kansas disciplinary administrator.

"27. Mitigating Circumstances:

"a. Absence of a prior disciplinary record: In this case, the respondent does not have a prior disciplinary record.

"b. Cooperation: In this case, the respondent acknowledged his transgressions in his initial written response to the investigator.

"c. Respondent took steps to rectify the harm caused by his actions and did not seek or obtain personal profit from his misconduct.

"d. Character witnesses attested to the many ways in which Respondent has acted with kindness and decency over the years, and that Respondent is respected not just in the legal community, but in his religious and social community.

"28. Neutral Factors:

"a. Experience in the practice of law. The respondent was licensed to practice law in Kansas since 1987; however, the respondent has never practiced law in Kansas and his license status has been inactive since 1998.

"Recommended Discipline:

"29. The parties jointly recommend a one-year suspension to run concurrent with the Maryland suspension effective September 13, 2021, with the requirement that respondent undergo a reinstatement hearing pursuant to Supreme Court Rule 232 after both D.C. and Maryland licenses have been reinstated. Respondent's suspension concurrent with Maryland is appropriate since the purpose of the Kansas Rules of Professional Conduct 'is not punishment, but to protect the public from incompetent or unscrupulous attorneys, maintain the integrity of the profession, and protect the administration of justice from reproach.' *See In re Daugherty*, 285 Kan. 1143, 1154 (Kan. 2008), *citing In re Twohey*, 191 Ill. 2d 75, 727 N.E.2d 1028 (2000).

"a. A retroactive suspension is appropriate since Respondent has or will have served a one-year suspension in the District of Columbia and

Maryland, respectively, which accomplish the purpose of Kansas Rules of Professional Conduct to protect the public, maintain the integrity of the profession and protect the administration of justice from reproach.

"b. Several mitigating and neutral factors in support of respondent's misconduct are set forth in paragraphs 27 and 28, above.

"c. Respondent is required to have a Rule 232 Reinstatement hearing.

"Other Stipulations:

"30. The respondent waives his right to a hearing on the formal complaint as provided in Supreme Court Rule 222(c).

"31. The petitioner and respondent agree that no exceptions to the findings of fact and conclusions of law will be taken.

"32. The complainant in this matter is deemed to be the disciplinary authority for the District of Columbia. Notice of the Summary Submission will be provided to the complainant, and they will be given 21 days to provide the disciplinary administrator with their position regarding the agreement as provided in Supreme Court Rule 223(d).

"33. The respondent understands and agrees that pursuant to Supreme Court Rule 223(f), this Summary Submission agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendations.

"34. The respondent also understands and agrees that after entering into this Summary Submission Agreement he will be required to appear before the Kansas Supreme Court for oral argument under Supreme Court Rule 228(i).

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

"36. A copy of the Summary Submission will be provided to the Board Chair as required by Supreme Court Rule 223(e)."

DISCUSSION

Generally, in a disciplinary proceeding, this court considers the evidence, the panel's findings, and the parties' arguments to determine 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 Foster*, 292 Kan.

940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). "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).

Marks had adequate notice of the formal complaint, to which he filed an answer. He also had adequate notice of the hearing before the panel but waived that hearing after entering into the summary submission agreement. This agreement includes the parties' understanding that no exception to the findings of facts and conclusions of law would be taken. The chair of the Kansas Board for Discipline of Attorneys approved the summary submission and cancelled a hearing under Rule 223(e)(2). As such, the factual findings contained in the summary submission are deemed admitted. See Supreme Court Rule 228(g)(1) (2022 Kan. S. Ct. R. at 288).

We adopt the findings and conclusions in the summary submission, which taken together with the parties' stipulations establish by clear and convincing evidence that his conduct violated KRPC 1.1, 1.3, 1.15(a)-(b), 8.4(c)-(d), Rule 210(c), and Rule 221(b). The remaining issue is the appropriate discipline.

An agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Rule 223(f). The same is true about conditions for reinstatement. The parties jointly recommend Marks' license to practice law be suspended for one year to run concurrent with the Maryland suspension that was made effective as of September 13, 2021. They also agree Marks should undergo a reinstatement hearing under Supreme Court Rule 232(e) (2022 Kan. S. Ct. R. at 293) after both his Maryland and District of Columbia licenses are reinstated.

We hold Marks should be suspended for a period of one year to run concurrent with the Maryland suspension still in effect as of the hearing before our court. He may petition for reinstatement under Rule 232(b) after reinstatement of both his Maryland and District of Columbia licenses. His petition for reinstatement in Kansas must be accompanied by supporting documentation of reinstatements in Maryland and the District of Columbia. We will

not require a reinstatement hearing unless the Disciplinary Administrator moves for one. See Rule 232(d). Marks also will need to fully address his administrative suspension in Kansas by the time of any petition for reinstatement.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Isaac Henry Marks Sr. be and he is hereby disciplined with a one-year suspension in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281). This suspension will run concurrent with the Maryland suspension. We further order as a condition of reinstatement of his Kansas license that Marks show his Maryland and District of Columbia law licenses are reinstated.

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

No. 120,566

STATE OF KANSAS, *Appellee*, v. JUSTIN BURKE ECKERT, *Appellant*.

(522 P.3d 796)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Multiplicity—Charging a Single Offense in Several Counts of Complaint—Prohibited by Double Jeopardy Clause and Section 10*. Multiplicity is the charging of a single offense in several counts of a complaint or information. The principal danger of multiplicity is that it creates the potential for multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

2. SAME—*Multiplicity Questions—Appellate Review.* Questions involving multiplicity are questions of law subject to unlimited appellate review.

3. SAME—*Claims of Multiplicity—Two Components to Inquiry*. When analyzing claims of multiplicity, the overarching inquiry is whether the convictions are for the same offense. There are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one?

4. SAME—*Multiplicity Claims—Double Jeopardy Violation—Test for Determination*. When analyzing whether sentences relating to two convictions that arise from unitary conduct result in a double jeopardy violation, the test to be applied depends on whether the convictions arose from the same statute or multiple statutes. If the double jeopardy issue arises from convictions for multiple violations of a single statute, the unit of prosecution test is applied. If the double jeopardy issue arises from multiple convictions of different statutes, the strict-elements test is applied.

5. CRIMINAL LAW—*Determination of Appropriate Unit of Prosecution—Statutory Definition of the Crime—Nature of the Prohibited Conduct Is Key*. The statutory definition of the crime determines what the Legislature intended as the allowable unit of prosecution. There can be only one conviction for each allowable unit of prosecution. The determination of the appropriate unit of prosecution is not necessarily dependent on whether there is a single physical action or a single victim. Rather, the key is the nature of the conduct proscribed.

6. STATUTES—*Statutory Construction—Intent of Legislature Governs*. 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,

a court begins with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, a 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, a court may consult canons of construction to resolve the ambiguity.

7. CRIMINAL LAW—*Unit of Prosecution Is Ambiguous in K.S.A. 2016 Supp. 21-5709(b)—Application of Traditional Canons of Statutory Construction*. K.S.A. 2016 Supp. 21-5709(b) is ambiguous regarding the unit of prosecution, so application of traditional canons of statutory construction is necessary to discern its meaning.

8. STATUTES—*Construction by Courts—Avoid Unreasonable Results*. Courts must construe a statute to avoid unreasonable or absurd results.

9. SAME—*Rule of Lenity—Application When Criminal Statute Is Ambiguous*. The rule of lenity is a canon of statutory construction applied when a criminal statute is ambiguous to construe the uncertain language in the accused's favor.

10. CRIMINAL LAW—*Application of Traditional Canon of Statutory Construction to Statute—Intent of Legislature to Tie Single Unit of Prosecution to Multiple Items of Paraphernalia*. Applying traditional canons of statutory construction to K.S.A. 2016 Supp. 21-5709(b), we hold the Legislature intended to tie a single unit of prosecution to multiple items of paraphernalia in indeterminate numbers.

Review of the judgment of the Court of Appeals in an unpublished opinion filed March 4, 2022. Appeal from Miami District Court; AMY L. HARTH, judge. Opinion filed January 20, 2023. Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed. Judgment of the district court is affirmed in part and reversed in part.

Kai Tate Mann, of Kansas Appellate Defender Office, argued the cause, and was on the briefs for appellant.

Elizabeth Sweeney-Reeder, county attorney, argued the cause, and *Rebecca S. Silvermintz*, assistant county attorney, *Jason A. Vigil*, assistant county attorney, and *Derek Schmidt*, attorney general, were with her on the briefs for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: A jury convicted Justin Eckert of 8 counts of felony possession of drug paraphernalia under K.S.A. 2016 Supp. 21-5709(b)(1) and 17 counts of misdemeanor possession of

drug paraphernalia under K.S.A. 2016 Supp. 21-5709(b)(2). Eckert appealed, arguing his convictions within each statutory subsection were multiplicitous because they relied on multiple items of paraphernalia used for the same purpose as part of a unitary course of conduct. A Court of Appeals panel agreed, finding, at a minimum, K.S.A. 2020 Supp. 21-5709(b) is ambiguous because the term "drug paraphernalia" can be either singular or plural and therefore must be construed in Eckert's favor under the rule of lenity. Alternatively, the panel held the plain language of the statute supports finding one unit of prosecution based on Eckert's intent for possessing drug paraphernalia, not the quantity of paraphernalia possessed. As a result of its holding, the panel reversed 7 of the felony possession convictions and 16 of the misdemeanor possession convictions. *State v. Eckert*, No. 120,566, 2022 WL 628660, at *10, 13 (Kan. App. 2022) (unpublished opinion).

On the State's petition for review, we affirm the Court of Appeals' conclusion that the Legislature intended the term "drug paraphernalia" as used in K.S.A. 2016 Supp. 21-5709(b) to be tied to a single unit of prosecution and that Eckert's drug paraphernalia possession convictions within each statutory subsection of K.S.A. 2016 Supp. 21-5709(b) were multiplicitous. As explained below, however, we reach this result through a different path than the Court of Appeals.

RELEVANT FACTS

In December 2016, Amber Dial reported to the Miami County Sheriff's Office that her boyfriend, Eckert, had beaten her. As a result of these beatings, Dial sustained a head gash that required several staples, three broken ribs, a swollen black eye, multiple bruises all over her body, and a busted lip. Dial testified that Eckert also threatened her at some point with a knife by placing the knife up close to the front of her neck.

The day after Dial spoke with law enforcement, officers executed a search warrant at Eckert's home. During the search, officers found a tent, 9 grown marijuana plants, and more than 25 drug paraphernalia objects, including a propane tank and a blower.

The State charged Eckert with aggravated kidnapping, attempted second degree murder, aggravated battery, aggravated assault with a deadly weapon, criminal threat, cultivating marijuana, and intending to use/possess drug paraphernalia. The State later amended the information to include 28 other counts of possession of paraphernalia with intent to manufacture/plant/cultivate controlled substances. Specifically, the State charged Eckert with eight felony counts of possessing drug paraphernalia to manufacture, cultivate, and plant marijuana based on possession of propane, a blower, water jugs, lights, fans, a tent, a ventilation system, and a pump. K.S.A. 2016 Supp. 21-5709(b)(1) (felony possession). The State also charged Eckert with 21 misdemeanor counts of possessing drug paraphernalia to store marijuana and to introduce marijuana into the human body based on possession of 2 bongs, rolling papers, 10 pipes, a roach clip and 3 storage containers. K.S.A. 2016 Supp. 21-5709(b)(2) (misdemeanor possession).

Before trial, the district court dismissed four of the misdemeanor drug paraphernalia charges. A jury ultimately found Eckert guilty of all remaining charges, except the attempted second-degree murder charge. The court sentenced Eckert to a controlling prison sentence of 362 months and 36 months' postrelease supervision. For each felony drug paraphernalia possession conviction, the court sentenced Eckert to 11 months' imprisonment to run concurrent to all other sentences.

On direct appeal, Eckert raised several trial and sentencing issues. Relevant here, he claimed (1) his convictions for possessing drug paraphernalia were multiplicitous and (2) there was insufficient evidence to support two of his drug paraphernalia convictions: the blower and the propane. A Court of Appeals panel agreed with Eckert on the multiplicity issue, finding the evidence supported a single conviction for felony drug paraphernalia possession under K.S.A. 2016 Supp. 21-5709(b)(1) and a single conviction for misdemeanor drug paraphernalia possession under K.S.A. 2016 Supp. 21-5709(b)(2). The panel reversed the remaining 23 drug paraphernalia possession convictions and vacated the sentences for those convictions. As a result of its decision, the panel did not reach the sufficiency issue. *Eckert*, 2022 WL 628660, at *10, 13.

Eckert and the State filed competing petitions for review. We denied Eckert's petition but granted the State's cross-petition for review and Eckert's conditional cross-petition for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

The State argues the panel erred when it found Eckert's possession of drug paraphernalia convictions were multiplicitous. If we find the panel erred on the multiplicity issue, Eckert argues in his cross-petition that the State presented insufficient evidence to support the propane tank and blower as drug paraphernalia.

"[M]ultiplicity is the charging of a single offense in several counts of a complaint or information." *State v. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 (2009); *State v. Schoonover*, 281 Kan. 453, 475, 133 P.3d 48 (2006). "The principal danger of multiplicity is that it creates the potential for multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights." *Thompson*, 287 Kan. at 244. Questions involving multiplicity are questions of law subject to unlimited appellate review. *Schoonover*, 281 Kan. at 462.

When analyzing claims of multiplicity,

> "the overarching inquiry is whether the convictions are for the same offense. There are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one?" *Schoonover*, 281 Kan. at 496.

The State concedes all the drug paraphernalia possession convictions arose from the same conduct, as each item was part of the marijuana farm. Thus, our focus is on the second component of the inquiry: whether the conduct constituted one or more offenses by statutory definition. In making this inquiry, the test to be applied depends on whether the convictions arose from the same statute or multiple statutes. If the double jeopardy issue arises

from convictions for multiple violations of a single statute, the unit of prosecution test is applied. If the double jeopardy issue arises from multiple convictions of different statutes, the strict-elements test is applied. *Schoonover*, 281 Kan. at 497.

Because Eckert's 25 drug paraphernalia convictions are for multiple violations of a single statute, we answer the second question by applying the unit of prosecution test. See *Schoonover*, 281 Kan. at 497-98. Under the unit of prosecution test, "the statutory definition of the crime determines what the Legislature intended as the allowable unit of prosecution. There can be only one conviction for each allowable unit of prosecution." 281 Kan. at 497-98. "The determination of the appropriate unit of prosecution is not necessarily dependent upon whether there is a single physical action or a single victim. Rather, the key is the nature of the conduct proscribed." 281 Kan. at 472.

Our analysis necessarily begins with the language of K.S.A. 2016 Supp. 21-5709(b):

> "(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:
>
> (1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or
>
> (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." K.S.A. 2016 Supp. 21-5709(b)(1), (2).

The State argued, and the Court of Appeals held, that the Legislature intended charges under subsection (b)(1) to be a separate unit of prosecution from charges under subsection (b)(2). This conclusion tracks the express language in the statute, which differentiates the nature of the conduct proscribed under subsection (b)(1) (felony convictions for cultivating a controlled substance) from the nature of the conduct proscribed under subsection (b)(2) (misdemeanor convictions for storing a controlled substance). Eckert does not challenge this holding.

Relevant to the issue presented in the State's petition for review, however, the panel found the statutory language within each subsection is ambiguous regarding the nature of the conduct proscribed because the term "drug paraphernalia" can be construed as

either a singular or a plural noun. Finding the nature of the conduct, and thus the unit of prosecution, to be ambiguous, the panel held it must be construed in Eckert's favor under the rule of lenity. Alternatively, the panel held "the plain language of the statute supports finding that the unit of prosecution is based on Eckert's intent for possessing the drug paraphernalia, not the quantity of paraphernalia he possessed." *Eckert*, 2022 WL 628660, at *10.

In its petition for review, the State argues the panel erred in finding the language within each subsection of K.S.A. 2016 Supp. 21-5709(b) ambiguous regarding the nature of the conduct proscribed. The State claims the plain language of the applicable statute clearly and unambiguously reflects the Legislature's intent to consider each of the 25 individual drug paraphernalia items possessed by Eckert separate and independent units of prosecution. In the State's view, the phrase "*any* drug paraphernalia" in the statute shows that the Legislature clearly intended multiple units of prosecution for each individual item of drug paraphernalia possessed.

The State's claim requires us to interpret K.S.A. 2016 Supp. 21-5709(b). Statutory interpretation is a question of law subject to de novo review. See *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

"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.]" 312 Kan. at 600-01.

The State relies on *State v. Booton*, No. 113,612, 2016 WL 4161344, at *10 (Kan. App. 2016) (unpublished opinion), to support its claim that the plain language of the statute reflects the Legislature's intent to consider each of the 25 individual drug paraphernalia items possessed by Eckert separate and independent units of prosecution. There, a jury convicted a defendant of three separate counts of drug paraphernalia possession based on possessing a glass pipe, baggies, and a digital scale. The panel analyzed several prior cases and concluded the term "any" allowed for multiple prosecutions when there were multiple paraphernalia

items. 2016 WL 4161344, at *8-10; see *State v. Hulsey*, No. 109,095, 2014 WL 4627486, at *11-12 (Kan. App. 2014) (unpublished opinion) (holding that using "any" in statute criminalizing child pornography supported separate convictions for multiple images), *rev. denied* 302 Kan. 1015 (2015); *State v. Odegbaro*, No. 108,493, 2014 WL 2589707, at *9 (Kan. App. 2014) (unpublished opinion) (the same was true for a statute criminalizing making a false information), *rev. denied* 302 Kan. 1018 (2015); *State v. Odell*, No. 105,311, 2013 WL 310335, at *8 (Kan. App. 2013) (unpublished opinion) (holding that a statute criminalizing traffic in contraband at a correctional institution supported separate convictions for multiple charges).

Although not stated explicitly, the *Booton* holding—and the State's reliance on it—is grounded in an implicit finding that the plain and unambiguous language in K.S.A. 2016 Supp. 21-5709(b) reflects the Legislature intended the term "paraphernalia" to be a singular noun. According to the State, deciding whether the term "paraphernalia" is singular or plural is critical to the outcome here. If we construe the term "paraphernalia" as singular, as the State argues, we reasonably could conclude the Legislature intended to tie a single unit of prosecution to possession of any single *paraphernalia item*. If, however, we construe the term "paraphernalia" as plural, we then could reasonably conclude the Legislature intended to tie a single unit of prosecution to either possession of any single *paraphernalia item* or possession of any number of *paraphernalia items*.

In construing K.S.A. 2016 Supp. 21-5709(b), we begin with its plain language, giving common words their ordinary meaning. But in construing the plain language of the statute of conviction, we also must construe the definitional statute applicable to all crimes involving controlled substances, including the drug paraphernalia possession crimes here. See *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022) ("[E]ven when the language of the statute is clear, we must still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible.").

The definitional statute defines "drug paraphernalia" to mean "*all equipment* and materials of any kind that are used . . . in . . .

cultivating, growing . . . producing, processing, preparing . . . or otherwise introducing into the human body a controlled substance and in violation of this act." (Emphasis added.) K.S.A. 2021 Supp. 21-5701(f).

In terms of grammar and ordinary usage, the word paraphernalia is designated as a noncount or mass noun. See Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/paraphernalia (paraphernalia is an uncountable noun); Oxford Learners Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/paraphernalia?q=paraphernalia (same); Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/paraphernalia (same); Britannica Dictionary, https://www.britannica.com/dictionary/paraphernalia (same).

Like the word paraphernalia, the word equipment also is designated as a noncount or mass noun in ordinary usage as well. See Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/equipment (equipment is an uncountable noun); Oxford Learners Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/equipment?q=equipment (same); https://www.macmillandictionary.com/us/dictionary/american/equipment (same); Britannica Dictionary, https://www.britannica.com/dictionary/equipment (same); Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/equipment (same).

So what is a noncount or mass noun? One well-known dictionary defines it as "a noun that denotes a homogeneous substance or a concept without subdivisions and that in English is preceded in indefinite singular constructions by *some* rather than *a* or *an*." The definition gives examples of "sand" and "water" as mass nouns. Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/mass%20noun. Bryan Garner describes it as a noun which, in some contexts, is neither singular nor plural, but instead is an "aggregation" which is "taken as an indeterminate

whole." Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* 22 (2016). The Writing Center at George Mason University puts it this way: "Noncount nouns are the nouns that cannot be counted, and they do not make a distinction between singular and plural forms. Although these nouns may refer to large quantities of things, they act like singular nouns grammatically." https://writingcenter.gmu.edu/writing-resources/grammar-style/count-vs-noncount-nouns.

Adding more ambiguity to the mix, the Merriam-Webster Online Dictionary designates the word "paraphernalia" as a noun "plural in form but singular or plural in construction." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/paraphernalia. This designation refers to a circumstance when a noun that is plural in form takes a singular verb in sentence construction. An example of this is the word "news." Although plural, when used in a sentence we say, "the news is good today" and not "the news are good today." See also American Heritage Online Dictionary, https://ahdictionary.com/word/search.html?q=paraphernalia (designating "paraphernalia" as a plural noun used with a singular or a plural verb); Collins Online Dictionary, https://www.collinsdictionary.com/us/dictionary/english/paraphernalia (noting that paraphernalia is sometimes used with a singular verb and sometimes used with a plural verb).

Based on the plain language of the substantive and definitional statute, and giving common words their ordinary meaning, we conclude the term drug paraphernalia as used in K.S.A. 2016 Supp. 21-5709(b) is an uncounted, mass noun that does not make a distinction between singular and plural forms. For this reason, we cannot discern from the plain language of the statute whether the Legislature intended one unit of prosecution for each separate single item of paraphernalia or one unit of prosecution for multiple items of paraphernalia in indeterminate numbers. Because we find the language of the statute ambiguous as to the unit of prosecution, we employ rules of statutory construction. See *State v. Arnett*, 307 Kan. 648, 653, 413 P.3d 787 (2018) ("If the language of the statute is unclear or ambiguous," the court may turn "to canons of statutory construction, consult legislative history, or consider other

background information to ascertain the statute's meaning."). We find two statutory construction tools helpful here: (1) construing statutes to avoid unreasonable or absurd results and (2) construing ambiguous criminal statutes in favor of the accused (rule of lenity).

Unreasonable or absurd results

A court "must construe a statute to avoid unreasonable or absurd results." *Arnett*, 307 Kan. at 654. We presume the Legislature "does not intend to enact useless or meaningless legislation. . . . Equally fundamental is the rule of statutory interpretation that courts are to avoid absurd or unreasonable results." *State v. Frierson*, 298 Kan. 1005, 1013, 319 P.3d 515 (2014).

Under the State's unit of prosecution argument, a defendant could be charged separately for each item of paraphernalia possessed. When asked at oral argument whether a defendant could be charged with 1,000 separate counts of drug paraphernalia possession based on the use or possession with intent to use 1,000 separate plastic baggies to store a controlled substance, the State decisively answered in the affirmative but noted it likely would use prosecutorial discretion to decide whether to charge all 1,000 counts.

Although the question at oral argument was a hypothetical one, the facts here present a good illustration of unreasonable and absurd results if we adopt the State's argument. Two of Eckert's felony convictions result from possession of a propane tank and a blower. When found by law enforcement, the propane tank was connected to the blower to make a heater. The State charged two felony counts—one based on possession of the propane tank and one based on possession of the blower—when it just as reasonably could have charged one felony count based on possession of a heater. In contrast, consider Eckert's felony conviction resulting from possession of fans. A photograph introduced at trial showed law enforcement discovered multiple fans in the grow room. Although the State alleged Eckert to be in possession of more than one fan, the State charged only one felony count based on possession of "fans."

The same goes for the misdemeanor charges. Three of Eckert's misdemeanor convictions result from three separate empty storage containers. The State charged three misdemeanor counts based on possession of the three individual empty containers when it just as reasonably could have charged one misdemeanor count based on possession of empty storage containers. On the other hand, one of Eckert's misdemeanor convictions resulted from possession of rolling papers. Given it was charged in the plural, we reasonably assume Eckert possessed more than one rolling paper. Although the State alleged Eckert to be in possession of more than one rolling paper, the State charged only one misdemeanor count based on possession of rolling papers.

The State's interpretation of K.S.A. 2016 Supp. 21-5709(b) means it has the unfettered discretion to file as many or as few drug paraphernalia possession charges as it wants based on how it arbitrarily groups or separates items. As seen from the examples above, construing the statute in this way produces unreasonable, absurd, and arbitrary results.

Rule of lenity

When faced with ambiguity about whether the Legislature intended one unit of prosecution for each separate single item of paraphernalia or one unit of prosecution for multiple items of paraphernalia in indeterminate numbers, this court applies the rule of lenity. The rule of lenity provides that "'[a]ny reasonable doubt about the meaning [of a criminal statute] is decided in favor of anyone subjected to the criminal statute.'" *State v. Williams*, 303 Kan 750, 760, 368 P.3d 1065 (2016). Here, the rule of lenity overcomes the ambiguity of the statute and supports Eckert's contention that the Legislature intended to tie a single unit of prosecution to multiple items of paraphernalia in indeterminate numbers. See *State v. Coman*, 294 Kan. 84, 97, 273 P.3d 701 (2012) ("If . . . there are two reasonable and sensible interpretations of a criminal statute, the rule of lenity requires the court to interpret its meaning in favor of the accused.").

CONCLUSION

The term "drug paraphernalia" in K.S.A. 2016 Supp. 21-5709(b)(1) and (b)(2) is ambiguous regarding the unit of prosecution within each subsection. Applying canons of traditional statutory construction, we conclude the Legislature intended to tie a

single unit of prosecution to multiple items of paraphernalia in indeterminate numbers. We therefore affirm the panel's finding of multiplicity and its decision to reverse all but one felony possession conviction and all but one misdemeanor possession conviction. Given this disposition, we need not address Eckert's claim of insufficient evidence supporting his felony convictions of possession of the propane tank and blower.

The judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed. The judgment of the district court is affirmed in part and reversed in part.

No. 123,684

NANCY GRANADOS, Individually, as Heir-at-Law of Francisco Granados, Decedent, and as Class Representative of All Heirs-at-Law of Francisco Granados, Decedent, *Appellee/Cross-appellant*, v. JOHN WILSON, *Defendant*, and KEY INSURANCE COMPANY, *Appellant/Cross-appellee.*

(523 P.3d 501)

SYLLABUS BY THE COURT

1. GARNISHMENT—*Appeal from Garnishment Award—Appellate Review.* On appeal from a garnishment award, an appellate court conducts a mixed review of law and fact. Under that framework, an appellate court reviews the district court's legal conclusions independently, with no required deference to the district court. But review of the district court's factual findings is deferential. The appellate court must accept those findings if they are supported by substantial competent evidence.

2. INSURANCE—*Third-Party Liability Claims—Insurer Owes Two Legal Duties to Its Insured—Duty to Act with Reasonable Care and Duty to Act in Good Faith.* Under established Kansas precedent, an insurer owes its insured two legal duties when handling third-party liability claims against the insured: the duty to act with reasonable care and the duty to act in good faith. These two legal duties are implied contractual terms incorporated into liability insurance policies in our state.

3. SAME—*Insurer's Duty to Its Insured in Kansas—Failure to Fulfill Contractual Duties Results in Action for Breach of Contract—Four Elements.* An insurer's failure to fulfill its implied contractual duties to act with reasonable care and in good faith gives rise to an action for breach of contract, rather than an action in tort, because an insurance policy is typically a contract. Even so, Kansas law applies tort concepts to evaluate whether an insurer has breached the implied contractual terms to act with reasonable care and in good faith. Thus, plaintiffs asserting such claims must prove four well-known elements: a duty owed to the plaintiff; a breach of that duty; causation between the breach of duty and the injury to the plaintiff; and damages suffered by the plaintiff.

4. SAME—*Insured's Duty to Act with Reasonable Care or Duty to Act in Good Faith—Question for Trier of Fact*. Generally, a court commits legal error by articulating the insurer's implied contractual duty to act with reasonable care or the implied contractual duty to act in good faith in a more particularized, fact-specific manner because it conflates the question of duty, a question of law, with the question of breach, a question typically reserved for the trier of fact.

5. SAME—*Liability for Judgment Exceeding Coverage Limits—Requirement of Causal Link between Insurer's Breach of Duty and Excess Judgment*. For an insurer to be liable for a judgment exceeding the coverage limits under the policy of insurance, there must be a causal link between the insurer's breach of duty and the excess judgment.

6. APPEAL AND ERROR—*Failure to Meet Burden of Production—Remand not Appropriate Remedy*. When a party fails to meet its burden of production and persuasion, remand is not generally an appropriate remedy.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 10, 505 P.3d 794 (2022). Appeal from Wyandotte District Court; BILL KLAPPER, judge. Opinion filed January 27, 2023. Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded with directions.

James P. Maloney, of Foland, Wickens, Roper, Hofer & Crawford, P.C., of Kansas City, Missouri, argued the cause, and *Kevin D. Brooks*, of the same firm, and *James D. Oliver*, of Foulston Siefkin, LLP, of Overland Park, were with him on the briefs for appellant/cross-appellee.

Michael W. Blanton, of Gerash Steiner Blanton P.C., of Evergreen, Colorado, argued the cause, and *Jared A. Rose*, of The Law Office of Jared A. Rose, of Kansas City, Missouri, was with him on the briefs for appellee/cross-appellant.

Richard L. Budden, of Shamberg, Johnson & Bergman, Chtd., of Kansas City, Missouri, and *Jakob Provo* and *James R. Howell*, of Prochaska, Howell & Prochaska LLC, of Wichita, were on the brief for amicus curiae Kansas Trial Lawyers Association.

Cynthia J. Sheppeard, of Goodell Stratton Edmonds & Palmer LLP, of Topeka, was on the brief for amicus curiae Kansas Association of Defense Counsel.

The opinion of the court was delivered by

WALL, J.: This garnishment action arises from tragic circumstances. In October 2017, John Wilson was driving inebriated and ran a red light, striking another car and killing the driver. The driver's wife, Nancy Granados, brought a wrongful-death lawsuit against Wilson, and the district court entered a judgment against Wilson for $3,353,777.52.

To collect on that judgment, Granados filed a garnishment action seeking payment from Key Insurance Company under the automobile liability insurance policy it had issued to Wilson. Under that policy, Key limited its coverage for bodily injuries caused by Wilson to $25,000 per person or $50,000 in the aggregate. Despite

these policy limits, Granados alleged Key's negligent and bad-faith handling of Wilson's claim rendered it liable for the entire judgment. After conducting a bench trial, the district court agreed with Granados and entered judgment against Key for $3,481,901.29.

But on appeal, a panel of the Court of Appeals reversed the district court's judgment. The parties ask us to resolve two issues central to the panel's holding: (1) whether an insurer has a legal duty to settle with an injured third-party before that party has formally demanded compensation for injury; and (2) whether Granados proved that Key's negligence and bad faith caused the excess judgment against Wilson.

As to the first question, we reject the framing of the issue below. We decline the invitation to define an insurer's legal duties more narrowly, or in a more particularized manner, than established under our precedent. And under that precedent, insurers do not have a discrete legal duty to settle. Rather, when handling claims against its insureds, insurers have an implied contractual duty to act in good faith and to act with reasonable care under the circumstances. Whether specific acts or omissions related to the insurer's investigation, evaluation, communication, or settlement strategy breach either of these two legal duties is a question typically reserved for the trier of fact. By trying to define the contours of an insurer's purported "duty to settle" under Kansas law, the panel transformed a question of fact into a question of law, thereby invading the province of the fact-finder.

When a court applies an incorrect legal standard or framework, we often remand the case so the court can apply the correct one. But such a remand would be futile here because, as to the second question, we hold Granados failed to meet her burden to prove that Key's handling of the claim caused the judgment exceeding policy limits. Whether an insurer's conduct was the proximate or legal cause of the judgment is a question of fact. And as an appellate court, we typically defer to the district court's findings on such matters. But our deference is not absolute—a district court's findings must be supported by substantial competent evidence. The record before us contains no evidentiary support for the district court's finding that Key's conduct caused the excess judgment against Wilson. And because causation is an essential

element of Granados' claim against Key, we affirm the panel's decision, albeit under a different rationale, and remand the matter to the district court to enter judgment for Key.

FACTS AND PROCEDURAL BACKGROUND

The facts relevant to the issues before our court occurred after Key learned of the October 2017 crash that killed Granados' husband. Thus, we do not focus on the circumstances leading to the crash. Suffice it to say there is no dispute Wilson was at fault.

Wilson notified Key about the crash the day after it happened. Based on this notice, Granados was identified as a claimant in Key's claim management system. This notice also triggered Key's claim liability review. As part of that review, Key obtained the police report, which revealed Wilson had run the light and appeared to be under the influence of alcohol or drugs or both. Thus, Key concluded Wilson was at fault and damages would exceed the $25,000 per-person coverage limit for bodily injuries under the automobile liability policy.

But Key never informed Wilson that it had reached that conclusion. It never contacted Granados to discuss settlement. Nor did it inform Wilson he would be responsible for any judgment exceeding policy limits if the case did not settle within those limits. Key eventually closed its claim file, believing Granados would not pursue any claim against Wilson.

In June 2018, about eight months after the accident, Granados filed a wrongful-death suit against Wilson. Key learned of the suit in early July. Three weeks later, it offered to settle Granados' claim against Wilson for the $25,000 policy limit. But Granados rejected that offer, explaining Key's failure to offer the policy limit pre-suit constituted negligence and bad faith because insurers have a duty to promptly begin settlement negotiations when liability is clear and damages exceed policy limits. Whether insurers have a discrete legal duty under Kansas law to initiate settlement negotiations would come to frame much of the ensuing litigation, including the issues before our court.

After rejecting Key's settlement offer, the parties entered a "Settlement Agreement and Covenant not to Execute." Under that agreement, Granados promised not to execute on any judgment

she obtained against Wilson in the wrongful-death action. In exchange, Wilson assigned to Granados any claims he had against Key under the automobile liability insurance policy. Following a September 2019 bench trial in the wrongful-death action, the district court entered judgment for Granados and against Wilson for nearly $4.5 million. The district court later granted a joint motion to amend the judgment, reducing the judgment amount to $3,353,777.52.

Several months later, Granados tried to collect on that judgment by filing a garnishment action against Key in Wyandotte County District Court. Standing in the shoes of Wilson in that garnishment action, Granados alleged Key had breached several implied contractual duties that it owed to Wilson. Granados alleged Key breached its duty to investigate the claim, its duty to evaluate the claim and consider the insured's interests, its duty to communicate the results of the investigation and evaluation to the insured, and its duty to negotiate a settlement. Granados argued these discrete legal duties, implicit in the automobile liability policy, required Key to contact Granados before the wrongful death suit was filed and settle for policy limits. Granados alleged she would have accepted that offer to avoid hiring a lawyer and suing. Thus, Granados claimed Key's breach of these implied contractual duties caused the judgment exceeding the $25,000 policy limit.

Both parties moved for summary judgment. Consistent with Granados' framing of the case, the summary-judgment filings focused on the scope of an insurer's discrete legal duties under Kansas law. The district court denied both motions and set the case for trial.

The matter proceeded to a two-day bench trial in November 2020. While several people testified, the testimony from two witnesses is particularly relevant to our analysis. First, Granados testified that before she engaged counsel and filed the wrongful death suit, she would have settled within policy limits, even if it were only $2,000 or $5,000, to avoid taking the case to trial and paying attorney fees. Second, a Key employee testified that many injured third parties never pursue recovery and about two-thirds (66%) of potential bodily-injury claimants never receive any payment from Key.

The district court issued its ruling from the bench. As the Court of Appeals panel observed, the "district court's comments about the case were somewhat meandering, and the court did not delineate explicit findings of fact and conclusions of law." *Granados v. Wilson*, 62 Kan. App. 2d 10, 17, 505 P.3d 794 (2022). That said, the district court's comments established several relevant findings, including: (1) Granados was a credible witness and would have settled for the $25,000 policy limit if Key had pursued settlement pre-suit; (2) it was reasonable under the circumstances for Key not to initiate settlement, so Key did not have a duty to do so; (3) Key breached its duty to communicate the results of its evaluation to Wilson and advise him of his personal liability for a judgment exceeding the policy limits; and (4) Key's breach of its duty to communicate with Wilson caused the excess judgment. Based on those findings, the district court entered judgment for Granados in the amount of $3,481,901.29.

Both parties sought review at the Court of Appeals. In Key's appeal, it argued Granados had failed to present evidence showing that Key's failure to communicate with Wilson had caused the excess judgment against him. In Granados' cross-appeal, she objected to the district court's ruling on Key's duty to settle. She claimed Key—like all insurers faced with clear liability and damages exceeding policy limits—had a duty to initiate settlement negotiations and its breach of this duty exposed Wilson to the excess judgment.

A panel of the Court of Appeals reversed the district court's judgment for Granados and remanded the matter with directions to enter judgment for Key. The panel first held that reversal was warranted because, after reviewing the record, it was clear that "the excess judgment was more the result of [Granados'] actions after the lawsuit was filed, rather than Key's conduct before the lawsuit was filed." 62 Kan. App. 2d at 39. The panel then considered whether Key had a legal duty to settle. It affirmed the district court on that point, holding that in the context of third-party claims, insurers have no legal duty to begin negotiations before the injured third party has filed a claim. 62 Kan. App. 2d at 39-49.

Following the panel's decision, we granted Granados' petition for review. We heard oral argument from the parties in October

2022. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

Granados raises two challenges to the decision of the Court of Appeals panel. First, she contends the panel concocted a new rule of law by holding that an insurer's duty to settle with an injured third party is not triggered until the third party has filed a claim. Granados argues an insurer's duties—including the duty to settle—begin once the insurer has notice of the claim. Second, Granados contends the panel improperly disregarded the district court's factual findings when it found that her conduct, not Key's breach of duty, had caused the excess judgment against Wilson. Key defends the panel's holdings.

And in an amicus brief, the Kansas Association of Defense Counsel urges us to affirm the panel's holding that the purported duty to settle does not begin until a third party has made a claim against the insured. In another amicus brief, the Kansas Trial Lawyers Association urges us to reverse the panel's decision and hold that the insurer's duty to settle arises when the injury occurs.

To resolve these issues, we first explain the legal standard appellate courts use when reviewing an appeal from a garnishment order. Second, we identify the two implied contractual duties insurers owe their insureds and carefully distinguish questions of legal duty from those related to a breach of such duty. Third, we evaluate the panel's holding, ultimately concluding the panel applied an incorrect legal framework. Finally, we address the question of causation and explain why it is appropriate for our court to resolve this appeal without a remand to the panel.

I. *On Appeal from a Garnishment Order, We Defer to the District Court's Factual Findings but Review Legal Conclusions Independently*

On appeal from a garnishment award, an appellate court conducts a mixed review of law and fact. *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019). Under that framework, an appellate court reviews the district court's legal conclusions independently, with no required deference to the district court. But our review of

the district court's factual findings is deferential. We must accept those findings if they are supported by substantial competent evidence. Substantial competent evidence is relevant evidence that a reasonable person might accept as supporting a conclusion. 309 Kan. at 190-91. When making that determination, an appellate court must not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. 309 Kan. at 190-91.

This case requires us to review both legal conclusions and factual findings. The legal conclusions before us are those related to the legal duties that insurers owe to their insureds. See *Montgomery v. Saleh*, 311 Kan. 649, 653, 466 P.3d 902 (2020) ("Whether a duty exists is a question of law."). When we review those conclusions, we need not defer to the conclusions of the district court or panel. The factual findings before us are those related to Key's breach of its legal duties and the cause of the excess judgment against Wilson. See 311 Kan. at 655-56, 659 ("[W]hether [a] duty has been breached" and "[w]hether a causal connection exists between a breached duty and the plaintiffs' injuries" are questions of fact.). When we review those findings, we defer to the district court so long as substantial competent evidence supports its findings.

II. *When Handling Claims Against the Insured, Insurers Owe the Insured an Implied Contractual Duty of Reasonable Care and an Implied Contractual Duty to Act in Good Faith; Whether an Insurer Has Breached Those Duties Is a Question for the Trier of Fact to Determine Under the Specific Circumstances of Each Case*

Legal duties can arise by express contractual provision, by statute, or by court-made common law. *Wicina v. Strecker*, 242 Kan. 278, 286, 747 P.2d 167 (1987). Here, we are concerned with Key's court-made, common-law duties. Under our established precedent, these legal duties are incorporated into Kansas liability insurance policies as implied contractual terms. To be sure, Wilson's insurance policy imposes various express contractual duties on both him and Key. See *Aves v. Shah*, 258 Kan. 506, 511, 906

P.2d 642 (1995) ("In Kansas, insurance policies are typically considered contracts."). And the Legislature has also imposed legal duties on insurers by statute. See, e.g., K.S.A. 40-2404(9) (identifying duties of the insurer related to claims-settlement process). But Granados has asserted no claim arising from an alleged breach of an express contractual or statutory duty that Key owed Wilson. Thus, our focus is on the implied contractual duties that Kansas courts have read into liability insurance contracts and applied to insurers operating in this state.

The leading decision establishing the implied contractual duties of an insurer when handling third-party claims against the insured is *Bollinger v. Nuss*, 202 Kan. 326, 449 P.2d 502 (1969). There, our court recognized that a conflict of interest between the insurer and the insured arises when there is a claim that exceeds the coverage limits in the policy. The conflict arises because the insurer is interested in minimizing the amount paid while the insured is interested in preventing personal liability by keeping recovery within policy limits, regardless of the merits of the claim:

> "The provisions of the policy requiring the insurer to defend also encompass the negotiation of any settlement prior to trial. When a claim is made against the insured for an amount in excess of the policy coverage, the insurer's obligation to defend creates a conflict of interest on its part. On the one hand, its interests lie in minimizing the amount to be paid; on the other, the insured's interests, which the insurer is supposedly defending, lie in keeping recovery within policy limits, so that he will suffer no personal financial loss." 202 Kan. at 336.

To resolve that conflict of interest, *Bollinger* held that an insurer has two legal duties in handling claims against its insured: the duty to act with reasonable care and the duty to act in good faith. 202 Kan. at 332-33. An insurer breaching either duty may expose itself to liability beyond the policy limits in the insurance contract. 202 Kan. at 332-33. Since *Bollinger*, Kansas courts and federal courts applying Kansas law have continued to recognize these two, broad implied contractual duties set out in that decision. See, e.g., *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 261 Kan. 806, 845, 934 P.2d 65 (1997); *Castoreno v. Western Indemnity Co., Inc.*, 213 Kan. 103, 109, 515 P.2d 789 (1973); *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 660 (10th Cir. 2007); *Ins.*

Co. of North America v. Medical Protective Co., 768 F.2d 315, 321 (10th Cir. 1985).

That said, courts have not always described an insurer's implied contractual duties in broad terms, which has created some confusion here about whether insurers owe more particularized, fact-specific duties. For example, in *Blann v. Rogers*, 22 F. Supp. 3d 1169, 1178-80 (D. Kan. 2014), a case that Granados frequently cited in the district court and the Court of Appeals, the United States District Court for the District of Kansas asserted that insurers owe four narrower implied contractual duties under the umbrella of good faith and reasonable care: (1) to investigate; (2) to evaluate and consider the interests of the insured; (3) to communicate with the insured; and (4) to negotiate settlement. The parties, panel, and amici have assumed that Kansas law recognizes such particularized duties, which has led them to analyze whether a yet narrower implied contractual duty exists: must an insurer explore settlement with an injured third party who has not yet sued or otherwise conveyed that they intend to pursue recovery from the insured? See *Granados*, 62 Kan. App. 2d at 39-49.

This framing of the issue reflects a recent tendency—which we noted in *Reardon v. King*, 310 Kan. 897, 904, 452 P.3d 849 (2019)—to characterize the legal duty in "ever narrower and more particularized ways." The problem with that approach is that "duty rules are not meant to be fact specific. Rather, they are to set broadly applicable guidelines for public behavior." 310 Kan. at 904 (citing Cardi, *Purging Foreseeability*, 58 Vand. L. Rev. 739, 754 [2005]). When duties are framed narrowly and in a particularized fashion, the element of legal duty is conflated with the element of breach. As a result, this narrow, fact-specific framing of the insurer's implied contractual duties invades the province of the fact-finder. 310 Kan. at 904-05.

The existence of a duty is a question of law, but whether specific conduct satisfies or breaches that duty is a question of fact. *Montgomery*, 311 Kan. at 655-56, 659. And our court has long recognized that the trier of fact must decide whether the specific conduct in any given case breaches a broadly applicable legal duty. See, e.g., *W. & W. Rld. Co. v. Davis*, 37 Kan. 743, 749, 16 P. 78 (1887) ("'The natural instinct of self-preservation ordinarily

will lead to the employment of all the precaution[s] which the situation suggests to an individual; and whether they are such as would occur to or be adopted by men of ordinary care and prudence, must necessarily, in most cases, be left to the jury. The intelligence and judgment, as well as the experience, of twelve [jurors], must settle a question of that character as one of fact, and not of law.'") (quoting *Weber v. Railroad Co.*, 58 N.Y. 451, 456 [1874]).

Reardon cautions against defining general legal duties in a more fact-specific, discrete manner in tort cases. And this rationale applies equally to Granados' breach of contract claims against Key in this garnishment action. Granted, a plaintiff seeking damages from an insurer based on its failure to act with reasonable care or in good faith must bring a breach-of-contract claim, not a tort claim, because an insurance policy is typically a contract. *Aves*, 258 Kan. at 511. And we have held that an insurer's broad legal duties to act with reasonable care and in good faith are implied contractual terms incorporated into liability insurance policies issued in our state. *Gilley v. Farmer*, 207 Kan. 536, 543, 485 P.2d 1284 (1971); *Glen v. Fleming*, 247 Kan. 296, 311, 799 P.2d 79 (1990). Even so, we apply tort concepts to evaluate whether an insurer has breached the implied contractual terms to act with reasonable care and in good faith. See *Glenn*, 247 Kan. at 313 ("We have adopted, in our development of the substantive case law, the principle that the insurer's duties are contractually based and then approved a tort standard of care for determining when the contract duty has been breached."). Thus, plaintiffs asserting such claims must prove four well-known elements: a duty owed to the plaintiff; a breach of that duty; causation between the breach of duty and the injury to the plaintiff; and damages suffered by the plaintiff. See *Shirley v. Glass*, 297 Kan. 888, 894, 308 P.3d 1 (2013) (setting out four elements of a negligence tort claim).

Because the existence of a legal duty is a question of law while breach, causation, and damages are questions of fact, the court's primary role in these cases is to articulate the legal duty the fact-finder must apply to the facts. *Reardon*, 310 Kan. at 903. *Bollinger* did just that and articulated two broad duties that an insurer owes when handling claims against the insured: reasonable care and

good faith. 202 Kan. at 332-33. By defining those duties broadly, *Bollinger* reserved the question of breach for the trier of fact to decide under the specific circumstances of each case. See 202 Kan. at 338 ("In the final analysis, the question of liability depends upon the circumstances of the particular case and must be determined by taking into account the various factors present, rather than on the basis of any general statement or definition.").

And to assist the trier of fact in that determination, *Bollinger* even identified several factors that may be relevant to the factual inquiry:

"'[T]he following factors should be considered: (1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement; (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer.'" 202 Kan. at 338 (quoting *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 689, 319 P.2d 69 [1957]).

Whether any of these factors have been established is, again, a question of fact reserved for the fact-finder. *Medical Protective Co.*, 768 F.2d at 321.

The bottom line is that under Kansas law, whether certain conduct satisfies or breaches the implied contractual duties of reasonable care and good faith is a question reserved for the trier of fact (usually a jury). And federal courts, relying on *Bollinger*, have also emphasized that point, though not always consistently. See *Wade*, 483 F.3d at 670 (applying *Bollinger* factors to assess whether evidence supported breach of legal duties); *Medical Protective Co.*, 768 F.2d at 321("[T]he question of liability depends upon the circumstances of the particular case and must be determined by taking into account the various factors present, rather than on the basis of any general statement or definition."); but see *Blann*, 22 F. Supp. 3d at 1178 (applying particularized and discrete legal duties). With that framework in mind, we now turn to the panel's holding addressing an insurer's purported duty to settle.

III. *Because the Only Implied Contractual Duties Insurers Owe when Handling Claims Against the Insured Are the Broad Duties of Reasonable Care and Good Faith, the Panel Erred by Recognizing and Defining the Parameters of a Particularized Legal Duty to Settle with Third-Party Claimants*

Granados cross-appealed to the Court of Appeals on the issue of Key's purported legal duty to settle. She argued to the panel, as she had to the district court, that Kansas law imposes four specific duties on an insurer under the umbrella of reasonable care and good faith, including the legal duty to negotiate settlement. More specifically, Granados contended insurers have a legal duty to pursue settlement with an injured third party on behalf of the insured whenever liability is reasonably clear and damages exceed policy limits, even if the third party has yet to demand compensation.

After carefully reviewing the Kansas and federal cases Granados and Key cited, the panel affirmed the district court's ruling that Key did not have to initiate settlement negotiations under the circumstances. But the panel's holding was not limited to the specific circumstances of this case. Instead, the panel held, as a matter of law, that "an insurer owes no affirmative duty to initiate settlement negotiations with a third party before the third party makes a claim for damages." *Granados*, 62 Kan. App. 2d at 49.

Under the *Bollinger* framework discussed above, we conclude the panel committed legal error by defining the scope of a narrower, fact-specific legal duty to settle under the umbrella of reasonable care and good faith. Under Kansas law, when handling claims against the insured, an insurer has no implied contractual duty to settle. Nor does it have implied contractual duties to investigate or to communicate with the insured, as Granados has suggested based on her reading of *Blann*. See 22 F. Supp. 3d at 1178 (identifying particularized and discrete legal duties of insurers).

Rather, our established precedent makes clear that insurers have an implied contractual duty to act with reasonable care and in good faith when handling claims against the insured. A failure to properly investigate or evaluate claims, communicate with the insured, or settle with the injured party may (or may not) breach those duties, just as other specific facts may (or may not) constitute a breach. But those are fact questions to be decided by the

trier of fact under the many circumstances that may give rise to an excess-judgment claim against an insurer. See *Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.*, 228 Kan. 532, 539, 618 P.2d 1195 (1980) (under facts of the case, whether reasonable care and good faith required the insurer to settle was a question of fact for the jury to determine in an action brought for bad faith and negligence). All of which is to say, it is error to characterize an insurer's implied contractual duties more narrowly than pronounced in *Bollinger*.

We addressed a similar error in *Reardon*. There, the client of a trust company filed a negligence action against the company based on the conduct of one of its employees, a licensed attorney employed as a trust officer. Although company policy prohibited the employee from practicing law, the employee represented the client in legal matters during his employment. And, in his capacity as trust officer, the employee transferred funds from the client's trust account to pay his flat rate legal fee of $5,000 per month. The client's negligence action sought to impose direct liability on the trust company for breaching the common-law duty that employers owe to third parties who encounter their employees. At trial, the district court instructed the jury on several negligence theories, including negligent failure to supervise the employee and negligent failure to train the employee. These instructions defined the company's legal duty in a fact-specific, particularized manner, and the articulation of the legal duty in these instructions was narrower than the general legal duty established at common law. The jury found the company liable for negligent training.

On appeal, we held the jury instructions had misstated Kansas law by recognizing "specific, discrete duties 'to train' and 'to supervise.'" *Reardon*, 310 Kan. at 904. "Employers in Kansas do not have a duty to third parties to train or to supervise their employees," we held. 310 Kan. at 904-05. Instead, they have a broad duty to use "reasonable care under the circumstances to prevent harm to third parties caused by its employees when those employees are acting within the scope of their employment." 310 Kan. at 904. Whether specific conduct relating to the training or supervision of an employee satisfies or breaches that broad duty is a question of fact properly reserved for the trier of fact. 310 Kan. at 904-05.

The same rationale applies here. *Bollinger* established that an insurer owes its insureds an implied contractual duty to act with reasonable care and in good faith when handling claims. The insurer does not have a specific, discrete legal duty to settle (or to investigate, evaluate, or communicate). An insurer's specific conduct surrounding settlement strategy may (or may not) breach the insurer's general legal duties, but that determination is for the fact-finder to make under all the circumstances of each case. By holding that insurers owe no legal duty to explore settlement with an injured third party before that person demands compensation, the panel effectively recast a question of fact into a question of law for the court to decide in every case. In doing so, the panel conflated the element of legal duty (a question of law) with the element of breach (a question of fact), thereby invading the traditional province of the fact-finder. See *Marshall v. Burger King Corporation*, 222 Ill. 2d 422, 443-44, 856 N.E.2d 1048 (2006) ("It is inadvisable for courts to conflate the concepts of duty and breach in this manner. Courts could, after all, 'state an infinite number of duties if they spoke in highly particular terms,' and while particularized statements of duty may be comprehensible, 'they use the term duty to state conclusions about the facts of particular cases, not as a general standard.' 1 D. Dobbs, Torts § 226, at 577 [2001]. . . . Thus, the issue in this case is not whether defendants had a duty to install protective poles, or a duty to prevent a car from entering the restaurant, or some such other fact-specific formulation. Because of the special relationship between defendants and the decedent, they owed the decedent a duty of reasonable care. The issue is whether, in light of the particular circumstances of this case, defendants breached that duty.").

The panel here was not alone in that error. In *Roberts v. Printup*, 422 F.3d 1211, 1215-16 (10th Cir. 2005), a panel of the United States Court of Appeals for the Tenth Circuit reached a similar conclusion. *Printup* held that an insurance company owes no duty to initiate settlement negotiations prior to a claim being made. But that holding, like the holding of the panel here, is founded on the erroneous premise that Kansas law recognizes and incorporates more narrow, discrete, and fact-specific legal duties under the umbrella of good faith and reasonable care. *Printup*'s

holding also improperly focused its inquiry on the conduct of the injured third party, rather than the conflict of interest between the insurer and the insured. See *Rector v. Husted*, 214 Kan. 230, 239, 519 P.2d 634 (1974) (whether an insurer's duties require an attempt to settle is not contingent on a claimant's offer to settle); *Bollinger*, 202 Kan. at 336. Whether the injured party has demanded compensation or filed a claim with the insurer may be a fact relevant to deciding whether the insurer breached its implied contractual duties of reasonable care and good faith. But that inquiry is reserved for the trier of fact.

Granted, if the duties of reasonable care and good faith do not, under any set of circumstances, require an insurer to explore settlement before a third-party files a claim or demands compensation, then a court could declare that principle as a matter of law. See *Deal v. Bowman*, 286 Kan. 853, 859, 188 P.3d 941 (2008) (breach becomes a legal question for the court "'*when the facts are such that reasonable* [persons] *must draw the same conclusion*'"). But we hesitate to conclude that the implied contractual duties of reasonable care and good faith *never* require such conduct.

Take the following hypothetical scenario, for example. A company insures a driver involved in an automobile accident. And a third-party passenger who is related to the insured-driver is severely injured in the crash. The insured reports the loss under the notice-of-claim provision of the insurance policy, and the insurer's investigation reveals that the insured is at fault and the third party's damages clearly exceed policy limits. Moreover, based on the familial relationship with the injured third party, the insured knows the passenger plans to consult an attorney in three weeks. But the insured also knows the passenger would settle within policy limits before consulting the attorney because of an urgent financial obligation. And the insured shares this information with the insurer.

Under this hypothetical, both the insurer and insured know liability is clear and the claim filed by the insured exceeds policy limits, creating a conflict of interest that requires the insurer to exercise reasonable care and to act in good faith. See *Bollinger*, 202 Kan. at 336 (The rationale for the common-law duties of reasonable care and good faith is to address the conflict of interest that exists when a claim exceeds policy limits.). They also know the claim can be settled within policy limits if they act quickly, even though the third party has not made formal

demand. We cannot conclude, as a matter of law, that the insurer could never breach the duties of reasonable care and good faith by failing to explore settlement under these (or any other possible set of) circumstances simply because the third party has not yet made a formal demand. See, e.g., Keeton and Widiss, Insurance Law § 7.8(c), 889-90 (1988) ("In most circumstances the insurer, having reserved to itself the right to control the defense and the decision
whether to agree to a settlement, should be obligated to explore the possibility of a settlement even in the absence of actions by the third-party or an express request by the insured.").

Even here, Wilson reported the accident to Key in compliance with the notice-of-claim provision in the contract of insurance. Based on that report, Key designated Granados as a claimant in its system and initiated its claim-handling procedures. Key conducted a liability review and determined Wilson was at fault and that damages would exceed policy limits. This conclusion suggests a conflict of interest existed between the parties, arising from Key's desire to minimize any payment under the policy of insurance and Wilson's desire to settle within policy limits.

As these examples show, whether an insurer has breached the implied contractual duties of reasonable care and good faith is a fact-intensive inquiry. We cannot conclude that in every case, regardless of the circumstances, the duties of reasonable care and good faith never require an insurer to explore settlement before the injured third party makes a formal demand for payment or otherwise pursues a claim. See Ostrager & Newman, *Handbook on Insurance Coverage Disputes*, § 12.05[b], at 979 (20th ed. 2020) (collecting cases explaining that "[w]hether an insurer has acted in bad faith in failing to settle is generally held to be a question of fact"). Thus, we hold the panel erred by defining, as a matter of law, the contours of an insurer's purported duty to settle.

IV. *Although the Panel Applied the Incorrect Legal Standard, We Need Not Remand the Matter for the Panel to Apply the Correct One*

In the previous section, we held the panel committed legal error by defining the contours of an insurer's discrete, fact-specific duty to settle with third-party claimants. Kansas law recognizes

only the broad duties of reasonable care and good faith in this context, and it is error to try to define an insurer's implied contractual duties more narrowly. When a lower court applies the wrong legal standard, we often remand for it to apply the correct one. See, e.g., *State v. Herring*, 312 Kan. 192, 202, 474 P.3d 285 (2020) ("We reverse the panel's decision and remand the case to the district court with directions to reassess the first *Edgar* factor under the lackluster advocacy standard . . . ."); *Littlejohn v. State*, 310 Kan. 439, 446, 447 P.3d 375 (2019) ("[T]he Court of Appeals applied the wrong standard in determining whether the district court erred in summarily denying Littlejohn's 60-1507 motion as being an abuse of remedy. . . . We remand to the Court of Appeals to apply the correct standard.").

But remand is not required here for two reasons. First, the district court did not conflate the factual question of breach with the legal question of duty. Instead, it held Key to the general implied contractual duties established in *Bollinger*—reasonable care and good faith. The district court found that Key did *not* breach its duty of reasonable care or good faith under the circumstances by failing to begin settlement discussions with Granados. And this finding is supported by substantial competent evidence. Second, although the district court found that Key breached its implied contractual duty of reasonable care and good faith by failing to communicate with Wilson, Granados failed to prove this omission caused the excess judgment. And the district court's causation findings to the contrary are *not* supported by substantial competent evidence. We address these points in turn.

A. *The District Court's Ruling Did Not Conflate the Question of Duty with the Question of Breach*

Granados' framing of her claim in the district court conflated the factual question of breach with the legal question of duty. Even so, a careful reading of the district court's rulings on summary judgment and at trial confirms it did not do the same.

In ruling on the cross motions for summary judgment from the bench, the district court identified the legal duties implicit in Kansas liability insurance contracts, explaining that "in all cases that arise under contract of insurance" an insurer owes the insured a

"good faith duty, a reasonable man standard, a requirement that one acts in such a manner to protect the interest of the insured." The court then made findings about the breach of these implied contractual duties of reasonable care and good faith. It found Granados' evidence created a genuine issue of material fact as to whether good faith and reasonable care required Key to investigate and evaluate the claim and communicate the risks of an excess judgment to Wilson. But the district court also found that reasonable care and good faith did not require Key to settle with Granados under the circumstances.

But ambiguity remained after summary judgment. Although the district court's bench ruling seemed to foreclose Granados' "failure to settle" claim, the journal entry merely denied both parties' motions for summary judgment. If the district court had dismissed that theory of liability against Key, it should have granted Key's summary judgment motion, in part, and denied it, in part. Thus, it is unclear whether the district court made a definitive ruling at summary judgment on Key's "failure to initiate settlement" theory of liability.

After the bench trial, the district court again made findings from the bench related to Granados' "failure to initiate settlement" theory. The court found Key did not contact Granados to explore settlement because it believed she, like many other potential claimants, would never pursue recovery. While such a practice "might turn some people's stomach," the district court found it was "a magnificent strategy" and "sound business judgment." Based on these findings, the district court concluded Key did not breach the duty of reasonable care or good faith by failing to settle with Granados.

Neither party challenges these factual findings on appeal. See *Montgomery*, 311 Kan. at 655-56 (breach of duty is a question of fact). And they are supported by substantial competent evidence. Key's employee testified that many injured parties never pursue recovery and 66% of potential bodily injury claimants never receive any payment under the insurance policy. And Key had no evidence suggesting Granados intended to pursue a claim. In short, the district court identified and held Key to the implied contractual duties established in *Bollinger*. And it made findings of

fact supporting its conclusion that Key did not breach the duty of reasonable care or act in bad faith by failing to explore settlement here. Thus, despite the panel's legal error, Granados is not entitled to judgment on its "failure to settle" theory for the reasons set forth in the district court's *uncontested* findings, which supported its conclusion that Key did not breach any legal duty by failing to initiate settlement under the circumstances.

B. *Substantial Competent Evidence Does Not Support the District Court's Finding of Causation*

To prevail on her claim against Key, Granados had to prove a causal link between the insurer's conduct and the excess judgment. See *Hawkins v. Dennis*, 258 Kan. 329, 347, 905 P.2d 678 (1995); *Gruber v. Estate of Marshall*, 59 Kan. App. 2d 297, 315, 482 P.3d 612 (2021), *rev. denied* 313 Kan. 1040 (2021). In this garnishment action, Granados stands in the shoes of Wilson. See *Geer*, 309 Kan. at 191. Thus, Granados had the burden to prove by a preponderance of evidence that Key's breach of its implied contractual duties was the proximate cause of the excess judgment against Wilson. See *Williams v. C-U-Out Bail Bonds*, 310 Kan. 775, 788, 450 P.3d 330 (2019) (noting that in any negligence action, the plaintiff must prove causation by a preponderance of the evidence).

> "There are two components of proximate cause: causation in fact and legal causation. To establish causation in fact, a plaintiff must prove a cause-and-effect relationship between a defendant's conduct and the plaintiff's loss by presenting sufficient evidence from which a jury can conclude that more likely than not, but for defendant's conduct, the plaintiff's injuries would not have occurred. To prove legal causation, the plaintiff must show it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that the result of that conduct and contributing causes was foreseeable." *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 623, 345 P.3d 281 (2015).

The district court found Key had breached its implied contractual duties only by failing to advise Wilson of the risks and consequences of a judgment exceeding the policy limits. And because the district court granted judgment for Granados, it necessarily (though implicitly) found Key's failure to communicate with Wilson had caused the excess judgment against him. See *In re Guardianship and Conservatorship of B.H.*, 309 Kan. 1097, 1108, 442

P.3d 457 (2019) ("When no objection is made, this court presumes the district court found all facts necessary to support its judgment.").

Causation is a question of fact. *Montgomery*, 311 Kan. at 659. And under our standard of review, we defer to the district court's causation findings if they are supported by substantial competent evidence. See *Geer*, 309 Kan. at 190-91. When making that determination, an appellate court must not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. 309 Kan. at 191.

Based on our review of the record, we hold that the district court's causation findings are not supported by substantial competent evidence. To establish causation, Granados had to show that, but for Key's failure to communicate with Wilson, a judgment exceeding policy limits would not have been entered against him. *Drouhard-Nordhus*, 301 Kan. at 623.

At trial, Granados testified that she would have settled within policy limits had Key made such an offer before she hired a lawyer and filed her wrongful death action against Wilson. The district court found Granados' testimony credible, and we defer to this credibility determination on appeal.

But there is no evidence to suggest Key would have settled with Granados but for its failure to advise Wilson that he was personally obligated to pay any judgment exceeding policy limits. Neither party presented testimony from Wilson or his personal representative at trial. Thus, we simply do not know how Wilson would have responded if Key had advised him of this potential excess judgment liability. There is no evidence Wilson would have instructed Key to contact Granados to negotiate a settlement within policy limits. We acknowledge that it is possible, perhaps even likely, Wilson would have insisted on a pre-suit settlement, but that conclusion requires speculation and has no evidentiary basis in the record. Nor is there any evidence suggesting Key had to heed such an instruction or directive from Wilson. Likewise, there is no evidence that Wilson, upon being informed of his potential exposure, would have engaged independent, conflict-free counsel to negotiate a pre-suit settlement within policy limits. Thus, Granados failed to establish causation, and the district court

findings to the contrary are not supported by substantial competent evidence.

The Court of Appeals panel likewise concluded that Granados failed to establish causation. While we agree with the panel's conclusion, we depart from its reasoning. Rather than review the district court's finding for substantial competent evidence, as the standard of review demands, the panel found that "the record reflects that the excess judgment was more the result of [Granados'] actions after the lawsuit was filed, rather than Key's conduct before the lawsuit was filed." *Granados*, 62 Kan. App. 2d at 39. And in reaching that conclusion, the panel discounted Granados' testimony, finding that her "argument that she reasonably rejected the post-suit policy-limit settlement offer because of the fees she incurred by filing the lawsuit is unpersuasive." 62 Kan. App. 2d at 37. The panel's reasoning does not follow our well-established standard of review. When an appellate court reviews a district court's findings of fact, it must not substitute its own judgment of the facts and assessment of witness credibility for that of the district court, even when it reasonably finds witness testimony "unpersuasive." See *Khalil-Alsalaami v. State*, 313 Kan. 472, 476, 486 P.3d 1216 (2021).

Even so, we may affirm the decision of a Court of Appeals panel when we agree with its conclusion but depart from its reasoning. See *State v. Williams*, 311 Kan. 88, 91, 456 P.3d 540 (2020) (affirming Court of Appeals as right for the wrong reason). Here, we disagree with the panel's reasoning because it deviates from the applicable standard of review. But we agree with the panel's conclusion because Granados failed to carry her burden to prove causation and the district court's findings to the contrary are not supported by substantial competent evidence.

Thus, we affirm the panel's decision to reverse the judgment for Granados and remand the matter to the district court with instructions to enter judgment for Key. See *State v. Dailey*, 314 Kan. 276, 279, 497 P.3d 1153 (2021) (holding that party bearing the burden of production and persuasion not entitled to remand for new trial after failing to sustain its burden of proof—"its case should ordinarily have to stand or fall on the record it makes the

first time around") (quoting *United States v. Dickler*, 64 F.3d 818, 832 [3d Cir. 1995]).

Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded with directions.

BILES, J., not participating.

No. 123,637

STATE OF KANSAS, *Appellee*, v. DUSTIN WILLIAM EUGENE BILBREY, *Appellant*.

(523 P.3d 1078)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Withdrawal of Plea Before Sentencing for Good Cause*. Before sentencing, a defendant may withdraw his or her plea for good cause shown.

2. SAME—*Withdrawal of Plea—Determination Whether Good Cause—Three Factors*. When determining whether a defendant has demonstrated good cause, district courts generally look to the following three factors: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made.

3. SAME—*District Court's Denial of Motion to Withdraw Plea—Abuse of Discretion Appellate Review*. We review a district court's decision to deny a motion to withdraw a guilty or no contest plea for an abuse of discretion. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would take the view adopted by the district court; (2) it is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) it is based on an error of fact, i.e., substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.

4. SAME—*Withdrawal of Plea—Competence of Counsel Considered under First Factor under* State v. Edgar—*Post-Sentencing Standard and Pre-Sentencing Legal Standard*. The applicable legal standard when considering the competence of counsel for purposes of withdrawing a plea under the first factor under *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006), is well established. When a defendant moves to withdraw a plea after sentencing, a trial court must use the Sixth Amendment constitutional ineffective assistance standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to consider whether the defendant was represented by competent counsel. But when the same motion is made before sentencing, a lower standard of lackluster advocacy may constitute good cause to support the presentence withdrawal of a plea.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 15, 2022. Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed February 10, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

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

Natalie Chalmers, assistant solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: Before sentencing, Dustin William Eugene Bilbrey moved to withdraw his no contest pleas to aggravated robbery, conspiracy to commit robbery, burglary, and arson. Bilbrey argued withdrawal of his pleas was warranted by good cause because (1) defense counsel was incompetent by refusing to provide Bilbrey with all available video discovery and (2) the State coerced Bilbrey into entering a plea agreement by threatening to prosecute his brother on prior drug charges. Finding Bilbrey failed to establish good cause to withdraw his pleas, the district court denied Bilbrey's motion and sentenced him to prison. A Court of Appeals panel affirmed.

On review, Bilbrey challenges the panel's ruling, arguing the district court abused its discretion by committing legal and factual errors in denying his motion. We disagree. First, the district court applied the correct legal standard in reviewing Bilbrey's claim that his attorney was not competent. Second, we find substantial competent evidence supports the district court's factual determination underlying its decision that Bilbrey's plea was not coerced. Thus, we affirm the panel's decision finding the district court did not abuse its discretion in denying Bilbrey's motion to withdraw his pleas.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2019, the State charged Bilbrey with aggravated robbery, aggravated assault, and battery. The State later amended the complaint to include eight additional charges: conspiracy to commit aggravated robbery, aggravated robbery, conspiracy to commit robbery, aggravated battery, burglary of a motor vehicle, theft, conspiracy to commit burglary of a motor vehicle, and arson.

The district court appointed attorney John Sheahon to represent Bilbrey. Through Sheahon, Bilbrey waived his right to a preliminary hearing, pleaded not guilty to all charges, and moved to suppress statements he made to law enforcement in June 2019.

At a hearing on Bilbrey's suppression motion in November 2019, Sheahon advised the court that the State had offered Bilbrey a plea agreement with a 138-month prison sentence, but Bilbrey had refused the offer against counsel's advice. Speaking on his own behalf at the hearing, Bilbrey told the court he had not yet seen all the evidence against him despite asking Sheahon for months to see it. Bilbrey said he did not "have all the information to make a decision" on whether to accept a plea deal and felt it was unfair to ask him to do so when he had not yet seen most of the video evidence or read witness statements the State had provided to Sheahon in discovery. After the State said it would leave the plea offer open, Bilbrey agreed to a continuance to allow for additional time to review the discovery with Sheahon.

In January 2020, the parties again appeared before the district court on the suppression motion. The prosecutor summarized the parties' ongoing unsuccessful efforts to reach a plea agreement. Bilbrey acknowledged to the court that Sheahon had advised him to accept the State's most recent plea offer of 111 months, but explained he rejected it because he still had not seen all the discovery, which included videos of the vehicle burglary and two of the three robberies. Bilbrey advised the court he wanted to personally see all the evidence against him before deciding whether to accept the plea agreement. For his part, Sheahon advised the court that he had given Bilbrey a box of discovery with everything but the videos, explaining he did not include the videos because there was no way for Bilbrey to watch them in jail. Sheahon further explained, however, that he had viewed the videos and described their contents to Bilbrey. When Bilbrey asked whether he had a right to personally watch the videos, the district court replied that it did not know of any such right.

The case proceeded to a jury trial in March 2020. On the morning trial was set to begin, the parties again entered plea negotiations and eventually reached an agreement on the charges Bilbrey would plead to and the maximum prison sentence he would serve. In a handwritten addition to the plea agreement, the parties also agreed the State would not charge Bilbrey's brother with methamphetamine possession stemming from a May 2019 incident.

Consistent with the plea agreement, Bilbrey pleaded no contest to aggravated robbery, conspiracy to commit robbery, burglary of a motor vehicle, and arson. The State dismissed the remaining charges with prejudice. The parties jointly recommended a prison sentence of 111 months with Bilbrey free to seek a dispositional departure to probation and drug treatment. During the plea colloquy, Bilbrey advised the district court he had read, signed, and understood the tender of plea document; he had sufficient time to discuss his case with his attorney; he had sufficient time to discuss and consider the plea agreement; he was not under the influence of alcohol or drugs; he was making a clear, informed, and voluntary decision to plead; and he read and understood the charges he was pleading to, the rights he was giving up by entering the pleas, and the sentence he faced for each charge. Bilbrey denied he had been treated unfairly or had otherwise been pressured, threatened, or intimidated to enter the pleas. Bilbrey responded affirmatively when the district court asked if he was satisfied with Sheahon's legal assistance and advice.

In June 2020, before sentencing, Bilbrey moved pro se to withdraw his pleas. Relevant here, Bilbrey argued Sheahon's representation "fell below a reasonable standard of objectiveness" by failing to show him all the video evidence. Bilbrey also claimed the State coerced him to enter into a plea agreement by threatening to incarcerate his brother. The district court allowed Sheahon to withdraw, appointed new counsel, and scheduled the motion for an evidentiary hearing. At the evidentiary hearing, the district court heard testimony from Bilbrey, Sheahon, and prosecutor Brock Abbey.

Bilbrey testified he had not seen all the State's evidence and Sheahon only reviewed one video with him. On cross-examination, however, Bilbrey admitted he personally reviewed police reports describing the contents of all the videos.

Bilbrey also testified that, on the morning of trial, Abbey threatened to arrest or file an arrest warrant for his brother if Bilbrey did not take the plea deal. Bilbrey said he did not advise the court of his concerns at the plea hearing because everything was moving fast, and he was scared his brother would be arrested.

Sheahon testified he received 10 to 15 videos in discovery and showed Bilbrey one of them. But Sheahon also said he watched all the videos and discussed their contents with Bilbrey. According to Sheahon, he discussed plea options with Bilbrey during every meeting, including the night before trial. Sheahon said Bilbrey initiated the meeting with Abbey on the morning of trial to discuss a potential plea deal, and during that meeting the parties discussed Bilbrey's brother being charged if Bilbrey did not plead. Sheahon understood Bilbrey to be concerned that his choices would impact his brother's life and that he did not want his brother to be charged with any crimes. Sheahon denied that Abbey ever threatened Bilbrey or that Bilbrey ever complained he felt threatened or coerced by Abbey.

Abbey testified about his office's ongoing plea negotiations with Bilbrey. On the morning of trial, Abbey said Sheahon asked him to speak with Bilbrey and explain the State's position that it would not agree to a sentence of less than 111 months. Abbey did not recall the parties discussing his brother's potential drug charges until that meeting. Abbey said he first learned about Bilbrey's request that his brother not be charged when he reviewed Bilbrey's June 2019 statements to law enforcement, which he did in preparation for the suppression hearing. Abbey requested a charging affidavit for Bilbrey's brother a week before trial, which would have included charges for possession of methamphetamine and drug paraphernalia. Abbey did not remember who initiated the conversation about his brother's outstanding drug offenses at the meeting on the morning of trial. Instead, Abbey tied the issue back to Bilbrey's statements during his 2019 police interview, where there is no dispute that Bilbrey expressly asked law enforcement not to prosecute his brother for the drug offenses. Abbey denied threatening or intimidating Bilbrey.

After considering the above testimony and argument from counsel, the district court denied Bilbrey's motion to withdraw his pleas. Citing K.S.A. 2018 Supp. 22-3210(d)(1) and the three nonexclusive factors set forth in *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006), the court held Bilbrey failed to show good cause to withdraw his pleas. The court found Bilbrey was represented by competent counsel; he failed to show he was misled, coerced,

mistreated, or unfairly taken advantage of; and his pleas were fairly and understandingly made.

At sentencing, the district court denied Bilbrey's renewed motion to withdraw his pleas and his motion for a dispositional departure. The court imposed a controlling 111-month prison sentence with 36 months of postrelease supervision.

On direct appeal, Bilbrey argued the district court abused its discretion in denying his motion to withdraw his pleas. A Court of Appeals panel affirmed, holding substantial competent evidence supported the district court's factual finding that the State had not coerced Bilbrey into taking a plea. The panel also determined the district court did not err in finding Bilbrey was represented by competent counsel. See *State v. Bilbrey*, No. 123,637, 2022 WL 1123540, at *5-8 (Kan. App. 2022) (unpublished opinion).

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

ANALYSIS

We begin our analysis with the controlling principles of law governing withdrawal of pleas. Before sentencing, a defendant may withdraw his or her plea for "good cause shown." K.S.A. 2021 Supp. 22-3210(d)(1). When determining whether a defendant has demonstrated good cause, district courts generally look to the following three factors, commonly referred to as the *Edgar* factors: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020). These factors should not be applied mechanically and to the exclusion of other factors. *State v. Fritz*, 299 Kan. 153, 154, 321 P.3d 763 (2014). While the *Edgar* factors establish "viable benchmarks" for the district court when exercising its discretion, "it is important to note that courts 'should not ignore other [non-*Edgar*] factors impacting a plea withdrawal that

might exist in a particular case.'" *Frazier*, 311 Kan. at 381 (quoting *State v. Shaefer*, 305 Kan. 581, Syl. ¶ 2, 588, 385 P.3d 918 [2016]). To the extent the district court's exercise of discretion is informed by findings of fact, appellate courts will not reweigh evidence or reassess witness credibility. *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018).

Having set forth the controlling law, we turn to the applicable standard of appellate review. We review a district court's decision to deny a motion to withdraw a guilty or no contest plea for an abuse of discretion. *Frazier*, 311 Kan. at 381. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would take the view adopted by the district court; (2) it is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) it is based on an error of fact, i.e., substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Bilbrey bears the burden to prove the district court erred in denying the motion. See *State v. Hutto*, 313 Kan. 741, 745, 490 P.3d 43 (2021).

In his petition for eview, Bilbrey claims the district court abused its discretion in denying his motion to withdraw pleas by relying on errors of law and errors of fact in applying the *Edgar* factors. We address each of his claims in turn.

Abuse of discretion based on an error of law

Bilbrey argues the district court abused its discretion by applying the wrong legal standard to determine he had competent counsel under the first *Edgar* factor. Although Bilbrey made many complaints about Sheahon's representation in his motion to withdraw his pleas, the argument before us is limited to Sheahon's failure to show him all the video evidence. In rejecting this specific claim of error, the district court concluded Sheahon's representation was competent:

"As to the sixth allegation, the defendant alleges, essentially, that counsel failed to obtain and show him full discovery. The defendant testified that he asked multiple times to see the evidence, including videotapes and body cams. Mr. Sheahon testified that he received and reviewed 10 to 15 videos in the case. The defendant did ask him multiple times to watch the videos.

"Mr. Sheahon discussed with the defendant the content of the videos and police report. The defendant acknowledged he did watch the video of the incident involving the robbery at the truck stop, which showed him with the defendant. The defendant acknowledged that he was told what happened at the Shady Lady was on video. The defendant testified that he reviewed the typed police reports involving the investigations. The defendant watched one video, including his statements to deputies at the hearing on the motion to suppress.

"The Court found Mr. Sheahon's testimony that he reviewed the videos and discussed them with the defendant to be credible. As Mr. Sheahon personally viewed the videotapes and discussed the contents with the defendant, and the defendant acknowledged that he reviewed the police reports, the Court finds the defendant was, the defendant was sufficiently advised of the contents of the videotapes and the evidence in the case.

"*The Court is not aware of any statute or caselaw that requires defense counsel to provide the defendant with the videos to personally view*. After considering the defendant's claim and the evidence presented at the hearing, the Court finds that this factor favors the State and a finding that the defendant was represented by competent counsel." (Emphasis added.)

Bilbrey claims the italicized language in the court's comment set forth above indicates the district court applied the wrong legal standard to determine he had competent counsel under the first *Edgar* factor. Specifically, he argues the district court improperly used the constitutional ineffective assistance of counsel standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to determine the competency of counsel under the first *Edgar* factor instead of the lesser standard of lackluster advocacy. See *State v. Aguilar*, 290 Kan. 506, 513, 231 P.3d 563 (2010) ("Merely lackluster advocacy . . . may be plenty to support the first *Edgar* factor and thus statutory good cause for presentence withdrawal of a plea.").

The applicable legal standard when considering the competence of counsel for purposes of withdrawing a plea under the first *Edgar* factor is well established. When a defendant moves to withdraw a plea after sentencing, a trial court must use the Sixth Amendment constitutional ineffective assistance standard under *Strickland* to consider whether the defendant was represented by competent counsel. *Aguilar*, 290 Kan. at 512-13. But when the same motion is made before sentencing, a lower standard of lackluster advocacy may constitute good cause to support the presentence withdrawal of a plea:

"[I]t may be logical and fair to equate the K.S.A. 22-3210(d) manifest injustice standard governing a post-sentence plea withdrawal motion to the high burden imposed on a constitutional claim of ineffective assistance. [Citations omitted.] . . . [T]he plain language of the statute—'for good cause shown *and within the discretion of the court*'—should not be ignored. A district court has no discretion to fail to remedy a constitutional violation.

"It is neither logical nor fair to equate the lesser K.S.A. 22-3210(d) good cause standard governing a presentence plea withdrawal motion to the high constitutional burden. The *Edgar* factors do not transform the lower good cause standard of the statute's plain language into a constitutional gauntlet. Merely lackluster advocacy . . . may be plenty to support the first *Edgar* factor and thus statutory good cause for presentence withdrawal of a plea." *Aguilar*, 290 Kan. at 513.

Although "no caselaw supplies an exact meaning of lackluster advocacy," the dictionary definition of "'lackluster'" means "'lacking energy or vitality; boring, unimaginative, etc.'" *State v. Herring*, 312 Kan. 192, 201, 474 P.3d 285 (2020).

Bilbrey's argument centers on the district court's comment that it was "not aware of any statute or caselaw that requires defense counsel to provide the defendant with the videos to personally view." He claims the court's comment, along with its failure to expressly use the words "lackluster advocacy" on the record when ruling on the first *Edgar* factor, strongly suggests the court improperly applied the *Strickland* constitutional standard in deciding whether he had shown good cause to withdraw his pleas. Bilbrey cites *Herring* in support of his claim.

In *Herring*, the district court denied the defendant's presentence motion to withdraw his plea. The court expressly applied *Strickland* when considering the first *Edgar* factor. On direct appeal, the Court of Appeals found the district court erred by using the *Strickland* test instead of the less stringent lackluster advocacy standard specified by *Aguilar*. But the panel held the error was harmless because, on appellate review, the record conclusively showed counsel's representation was "'far from lackluster.'" 312 Kan. at 197.

On review, this court reversed the panel's decision, holding the district court's improper use of the *Strickland* standard was not amenable to a harmless error analysis because it is the role of the district court, not the appellate court, to apply the lackluster advocacy standard and determine counsel's competence under the good

cause statutory requirement. Thus, we remanded the case to the district court with directions to reassess the first *Edgar* factor under the lackluster advocacy standard. *Herring*, 312 Kan. at 199-200, 202. In concluding remand was warranted, we explained:

"Although we emphasize that we do not express any opinion on the merits of Herring's plea withdrawal motion, this record at least shows circumstances that might be fairly characterized as 'lackluster' advocacy, such as [counsel] not letting Herring review the surveillance recordings until the court ordered him to do so; or not listening to the jail call recording until the first morning of trial despite having received it the week before. A reviewing court may think it understands how a district court should view these circumstances, but it cannot know for sure until the lower court does the analysis. The district court must decide first whether these facts, taken in consideration with the rest of Herring's case, amount to good cause under the lackluster advocacy standard." 312 Kan. at 201.

As in *Herring*, the first question to ask here is whether the district court applied the wrong legal standard under the first *Edgar* factor. Bilbrey correctly points out that, like in *Herring*, the district court here did not expressly use the words "lackluster advocacy" on the record in ruling on his motion. But, as the panel below recognized, our caselaw does not require the court to expressly use the words "lackluster advocacy" on the record in ruling on a motion to withdraw plea under the first *Edgar* factor. *Bilbrey*, 2022 WL 1123540, at *6. When, as here, a defendant files a presentence motion to withdraw a plea based on ineffective assistance of counsel, the court need only evaluate whether counsel's representation was competent. See *Aguilar*, 290 Kan. at 513-14; *Edgar*, 281 Kan. at 36.

And the district court did just that. There is no indication here the court erroneously applied a heightened constitutional standard for Bilbrey to meet. Contrary to Bilbrey's argument, the court's brief comment on Bilbrey's failure to cite authority requiring defense counsel to allow defendants to personally view videos does not suggest the court improperly applied the *Strickland* constitutional standard in deciding whether he had shown good cause to withdraw his pleas. And unlike *Herring*, the court did not cite *Strickland* or otherwise reference the constitutional standard for ineffective assistance of counsel. Rather, the court cited and applied the *Edgar* factors in ruling on Bilbrey's motion, including the first *Edgar* factor regarding attorney competence. The court

addressed each of Bilbrey's claims and concluded Sheahon was competent in his representation. Specific to the video evidence, the court found credible Sheahon's testimony that he discussed with Bilbrey the contents of all the videos and police reports. The court also noted Bilbrey's testimony that (1) he had seen one of the videos, (2) Sheahon advised him of the contents of the other videos, and (3) he had reviewed the police reports describing the substance of all the videos.

In sum, the district court applied the correct legal standard and thus did not abuse its discretion in reviewing and ultimately denying Bilbrey's motion to withdraw plea under the first *Edgar* factor.

Abuse of discretion based on an error of fact

In support of his good cause argument to sustain his motion to withdraw plea, Bilbrey relied on the second *Edgar* factor to argue the State coerced him into entering the plea agreement by threatening to prosecute his brother on prior drug charges. In denying Bilbrey's motion to withdraw on this point, the district court held, in relevant part,

"As to the claim that he felt threatened by Mr. Abbey on the morning of the trial, the Court finds that the defendant told his attorney he wanted to personally speak to Mr. Abbey to confirm the offer of 111 months was the best offer. As the defendant requested, Mr. Abbey went to meet with the defendant in the holding cell, with Mr. Sheahon present. The meeting lasted five to 10 minutes.

"*At that meeting with Mr. Abbey and Mr. Sheahon, the defendant requested that his brother not be charged*. Mr. Abbey had discovered in preparation for the hearing on defendant's motion to suppress that defendant's brother had not been charged, but could be charged. Mr. Abbey had already requested a charging affidavit from the police department relating to defendant's brother's involvement.

"Mr. Abbey advised the defendant that if he went to trial, his request that his brother not be charged would not be honored. . . .

"During the plea colloquy, the defendant was specifically asked whether he felt pressured, threatened, or intimidated into entering into the plea agreement. He was asked whether he felt he was treated unfairly. The defendant answered, No, to these questions.

"The Court finds the defendant has failed to show that he was misled, coerced, mistreated, or unfairly taken advantage of by either his attorney or the State." (Emphasis added.)

Bilbrey challenges the district court's italicized finding above as factually erroneous and unsupported by the record. Specifically, he argues there is no evidence to support a finding that, on the morning of trial, he asked the prosecutor not to bring criminal charges against his brother. Through a series of speculations and suppositions based on

this alleged factual error, Bilbrey contends the district court would have found the State coerced him into entering the plea agreement by threatening to prosecute his brother on prior drug charges.

Putting aside the speculation and supposition, we turn to the narrow finding made by the district court alleged by Bilbrey to be factually erroneous and unsupported by the record: on the morning of trial, Bilbrey asked the prosecutor not to bring criminal charges against his brother. Our task is to decide whether this finding is supported by evidence in the record. Based on the following excerpt from the motion to withdraw plea transcript, we conclude the court's finding is supported by substantial competent evidence:

"Q. (BY MR. ALLEN) During the negotiations you were having with Mr. Sheahon on Mr. Bilbrey's behalf, were other parties being impacted by those negotiations, specifically Mr. Bilbrey's brother and the codefendant?

"A. [BY ABBEY] I don't remember a discussion with Mr. Sheahon regarding the defendant's brother until the morning of trial. *I was aware of Mr. Bilbrey's request that his brother not be charged*, and I came upon that information, preparing for the motion to suppress, listening to the videotape of his interview and the transcript and the police reports of it. That's really how I initially became aware that his brother hadn't been charged and could possibly be charged, was in that preparation.

"Q. Okay. So I want to jump forward then to the morning of the trial. Who initiated the conversation regarding the status of his brother, if the trial was to proceed?

"A. I remember a discussion about it. I don't remember who initiated that topic.

"Q. During that discussion—obviously, it included Mr. Bilbrey's brother and the charges—what do you recall telling Mr. Bilbrey regarding if he chose to exercise his right to go to trial?

"A. *That his request that his brother wouldn't be charged wouldn't be honored*, that I had requested—I believe I told him I had requested a charging affidavit to charge his brother. And I'm basing that recollection on that I reviewed my own phone records and found a call and text with Rachel Larson. The text said, Can I have a minute to talk to you? And then the phone record said there was several minutes, 6 to 10 maybe, of a phone conversation. And I remember it was at that time on March 3rd that I asked her to send over a charging affidavit.

"Q. And the trial date?

"A. Was March 11th, the same day as the plea.

"Q. So a week before you had started contemplating issuing charges for Mr. Bilbrey's brother?

"A. Yes."

Having concluded the district court's finding is supported by substantial competent evidence, Bilbrey's claim of factual error fails and we find no abuse of discretion in the court's decision to

deny Bilbrey's motion to withdraw plea based on his allegations of coercion.

CONCLUSION

The district court applied the correct legal standard in reviewing Bilbrey's claim of attorney incompetence. And substantial competent evidence supports the court's determination that Bilbrey's plea was not coerced. As a result, the district court did not abuse its discretion in concluding Bilbrey failed to establish good cause to withdraw his pleas.

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

No. 125,500

In the Matter of MITCHELL J. SPENCER, *Respondent*.

(524 P.3d 57)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Published censure.*

Original proceeding in discipline. Opinion filed February 10, 2023. Published censure.

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

John E. Rapp, of Hinkle Law Firm LLC, of Wichita, and *Mitchell J. Spencer*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Mitchell J. Spencer, of Wichita, Kansas. Spencer received his license to practice law in Kansas in September 2017. Spencer also is a licensed attorney in Missouri, admitted in 2020.

On April 19, 2022, the Office of the Disciplinary Administrator (ODA) filed a formal complaint against Spencer alleging violations of the Kansas Rules of Professional Conduct. The complaint was filed after the ODA received a copy of a charging document filed by the Office of the Kansas Attorney General against the respondent in a misdemeanor traffic case. Spencer filed a timely answer to the formal complaint and participated in the investigation.

On July 7, 2022, the parties entered into a summary submission agreement under Supreme Court Rule 223 (2022 Kan. S. Ct. R. at 278) (summary submission is "[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken"). In the summary submission agreement, the Disciplinary Administrator and Spencer stipulate and agree that Spencer violated the following Kansas Rules of Professional Conduct:

- KRPC 8.4(c) (2022 Kan. S. Ct. R. at 434) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and
- KRPC 8.4(g) (2022 Kan. S. Ct. R. at 435) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law).

Before us, the parties jointly recommend the respondent's license to practice law be suspended for a period of 90 days, that the suspension be stayed, and that the respondent be placed on probation for one year.

FACTUAL AND PROCEDURAL BACKGROUND

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

"*Findings of Fact*

. . . .

"8.During the evening of October 7, 2019, respondent played golf with his mother at the golf club in Wellington, Kansas—the county seat of Sumner County. They rented a golf cart from the club.

"9. Around 7:00 p.m., after respondent and his mother were finished playing golf, respondent dropped his mother off at her car and drove the rented golf cart through the club's parking lot to return it to the golf cart shed. Respondent's mother followed from a distance in her car.

"10. While driving the golf cart through the parking lot, respondent drove into the rear end of an unoccupied 1995 Chevrolet pickup truck that was parked in the lot. Respondent was looking at his cellular phone at the time of the collision.

"11. Surveillance video from the golf club shows that the golf cart collided into the back of the truck. The collision caused damage to [the] golf cart (cracked and scuffed the cart's body) and the truck (scuffed the rear bumper and broke off a piece of the bumper's plastic trim).

"12. As a result of the collision, the cart became wedged onto the truck's rear bumper. Respondent attempted to dislodge the cart by putting the cart in reverse and backing it up. When that failed, respondent got out of the cart and lifted and pushed against the front of the cart for several seconds, eventually succeeding in dislodging the cart from the truck's rear bumper.

"13. Once respondent dislodged the cart, he backed the cart away and then drove forward, stopping at the rear of the truck. In the video, the respondent appears to briefly inspect the back of the truck. He then gets out of the cart to pick up a piece of plastic from the ground. (The surveillance video shows that the piece of plastic broke off from the truck's rear bumper during the collision.) After picking up the plastic piece, the respondent returns to the cart and drives the cart forward to the golf cart shed, followed by respondent's mother in her car.

"14. After parking the golf cart at the shed, respondent got into his mother's car and left the golf club. At the time, respondent was aware that the accident had caused damage to both the truck and the golf cart.

"15. When respondent left the golf club, he was not aware that anyone was still working at the golf club. Regardless, prior to leaving, respondent did not attempt to notify anyone regarding the accident.

"16. L.S., an employee at the golf club, was working in the golf cart shed at the time of the accident. He heard the collision and saw respondent dislodge the cart from the truck. L.S. watched respondent return the cart to the shed and then leave the club.

"17. L.S. looked at the golf cart that respondent had left at the shed and noticed the damage to the cart.

"18. That evening, L.S. told B.S., an employee of the club who owned the truck with his father, S.S., that respondent had collided into the truck with the golf cart.

"19. Three days later, on October 10, 2019, B.S. saw respondent at the golf club. According to a statement B.S. provided to the Wellington Police Department (WPD), B.S. asked respondent whether he had hit his truck with the golf cart. Respondent said yes, explained that he was on his phone when he had hit the truck, and apologized.

"20. During the conversation, B.S. may have indicated to respondent that the damage the truck sustained from the collision was not much and that 'everything was fine.'

"21. On October 13, 2019, B.H., the director of the golf club, filed a police report about the incident with the WPD.

"22. On October 16, 2019—nine days after the collision—respondent sent a Facebook message to B.H., stating: 'Hey man; did you have any damage on a golf cart the other day? I already talked to [B.S.] about it the other day and he had said everything was fine.'

"23. B.H. did not respond to respondent's message.

"24. As part of the WPD's investigation into the collision, S.S. provided the WPD with a repair estimate for the truck's rear bumper ($29.59 to replace the

broken trim and $90 in labor). B.H. provided an estimate of $700 to repair the damage to the golf cart.

"25. On October 23, 2019, WPD Police Chief Tracy Heath interviewed respondent about the collision. During the interview, respondent said that he was on his phone at the time he collided into the truck. Respondent told Heath that he did not report the accident because he did not see any damage caused by the collision. He also repeatedly said that he spoke to B.S. and that B.S. told him everything was fine. Respondent said that he took B.S.'s response as meaning there was no damage done to his truck. Respondent said that he had also messaged B.H. about the accident but did not get a response.

"26. Chief Heath questioned respondent about his belief that the collision caused no damage when surveillance video clearly showed respondent picking up debris from the collision. After initially stating that he did not remember what he picked up, respondent said that it might have been a piece of plastic but claimed he did not know where the piece of plastic came from. Respondent reiterated that he did not report the accident because he did not see that the collision caused any damage. But, respondent said that because he was now informed there was damage, he wanted to report the accident.

"27. Heath issued a citation to respondent for violating K.S.A. 8-1605, duty of driver upon damaging unattended vehicle or other property, a class C misdemeanor.

"28. Wellington city prosecutor Shawn DeJarnett dismissed the traffic citation and referred respondent's traffic case to the Kansas Attorney General's (AG's) Office for prosecution. In June 2020, the AG's Office instituted a traffic case against respondent in Sumner County District Court, Case No. 2020-TR-1251.

"29. Prior to the AG's Office filing the traffic case, respondent paid S.S. and the golf club the estimates they obtained for repairing the damage to the truck and golf cart, respectfully.

"30. In July 2020, attorney Michael Brown forwarded a copy of the complaint filed in Case No. 2020-TR-1251 to the Office of the Disciplinary Administrator (ODA). The ODA docketed the matter for investigation and asked the respondent to provide a response.

"31. In his response, respondent stated:

'I did not do anything unethical regarding the golf cart. I was texting while I was driving a golf cart and ran into an old pickup around 8pm at night when I was leaving the golf course on October 7, 2019. That is almost a year ago. No one was at the golf course. The only damage to the truck was a broken plastic piece that cost $20 to fix. I was able to figure out whose vehicle it was by the next day and had a discussion with [B.S.], the owner of the truck, and he told me not to worry about it and that everything was fine. He also worked at the golf course at the time so I thought that was also informing the golf course as well.

Just to be safe, a few days later I sent a facebook [*sic*] message to [B.H.], the manager of the golf course, that said "Hey man; did you have any damage on a golf cart the other day? I already talked to [B.S.] about it the other day and he had said everything was fine." It was not until at least a week if not more time later that I was informed law enforcement was involved. I tried to take care of everything responsibly. [B.S.] and his father [S.S.] informed law enforcement that they did not want to have charges filed against me.'

"32. In his response, respondent failed to acknowledge that the damage he caused to B.S.'s truck cost over $100 to repair. Furthermore, he failed to acknowledge that he had caused damage to the golf cart and that it cost $700 to repair. The complaint did not refer to the amount of damage to either vehicle.

"33. Concluding his response, respondent stated:

'In summary, I did not do anything unethical and I am no longer a prosecutor in Sumner County. The only damage to the truck was $20. Before I was aware law enforcement was involved, I was able to have an in-person conversation with [B.S.] about the damage to his truck, and he told me not to worry about it. I also contacted the manager of the golf course before I was aware law enforcement was involved. I also paid all restitution for both the truck and the golf cart before a case was ever filed by the attorney general.'

"34. In 2020, respondent left the Sumner County Attorney's Office and entered private practice in Wichita.

"35. On October 20, 2020, respondent entered into a diversion agreement in Case No. 2020-TR-1251 for violating K.S.A. 8-1605. In the diversion agreement, respondent stipulated to the following facts:

'I was the driver of a vehicle on or about October 7, 2019, in Sumner County, Kansas which collided with another vehicle that resulted in damage to property that was not my own and that I failed to either immediately stop and locate and notify the property owner or attach securely in a conspicuous place on the other vehicle the notice required by K.S.A. 8-1605; and

'I further stipulate to any police reports, witness statements, video and/or photographs, or any other evidence under Wellington Police Department Case Number 19-1985 and agree that they shall be admitted into evidence without further foundation in the event of revocation.'

"36. Respondent successfully completed diversion, and Case No. 2020-TR-1251 was dismissed with prejudice.

"37. On September 25, 2021, respondent provided a supplemental response to the complaint. In his supplemental response, respondent stated:

'First, I would like to apologize for my prior response. I was under the misunderstanding I was supposed to be defending myself and that simply accepting responsibility was not an option. Instead of taking responsibility for my actions, I mistakenly and wrongly took the opportunity to focus my response on small town politics and issues with Mr. Brown. I now wish I would have sought the advice of counsel at that time to help me understand that this can be a productive and interactive process to make sure the circumstances and situation does not recur. I take this process very seriously. I pride myself on my honesty and integrity and apologize for my misunderstanding and missteps.

. . . .

'I admit that I drove the golf cart and wedged it underneath the bumper of [B.S.'s] truck while I was texting and driving the golf cart approximately two years ago. I take responsibility for those actions. At the time of the incident, I did not think anyone was at the Wellington Golf Course to speak with. Nonetheless, I should have addressed the situation at that time. I have learned from that mistake and I apologize.

. . . .

'Again, I apologize for any miscommunication and any missteps along the way, and I apologize for those whom I have made this process difficult. I now realize that I was wrong in multiple respects in handling the incident at issue. I should have immediately addressed the situation following the wreck, and I should have ensured that I spoke with all individuals affected by my actions and not made assumptions. [] I take full responsibility for all of my actions, and I am open for discussions and making a plan to make sure something like this does not happen in the future.'

"*Conclusions of Law*

"38. Under Rule 223(b)(1), the respondent admits that he engaged in misconduct. Under Rule 2[2]3(b)(2)(C), the disciplinary administrator and the respondent stipulate that the findings of fact stated above constitute clear and convincing evidence of violations of the following rules:

"KRPC 8.4(c) (engaging in conduct involving dishonesty)

"39. KRPC 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty. The respondent violated KRPC 8.4(c) during his interview with Police Chief Heath by falsely stating that he was not aware that his accident at the golf club had caused any damage to either the truck or the golf cart.

"KRPC 8.4(g) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law)

"40. KRPC 8.4(g) states that it is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law. The respondent violated KRPC 8.4(g) when he left the golf club without attempting to notify anyone of the accident, knowing that the accident had caused damage to the truck and the golf cart.

"*Aggravating and Mitigating Factors*

"41. Under Rule 223(b)(2)(D), the disciplinary administrator and the respondent stipulate that the following aggravating and mitigating factors are applicable in this case:

"Aggravating Factors

"42. *Dishonest or Selfish Motive.* Respondent had a dishonest motive when he left the golf club without attempting to report the accident to the golf club or the owner of the truck. Respondent left the golf club, knowing that he caused damage to the golf cart and the truck. Respondent nonetheless told Police Chief Heath that he was not aware that the accident had caused damage to either the golf cart or the truck.

"43. *Engaging in Deceptive Practices During the Disciplinary Process*. Respondent engaged in deceptive practices when he submitted his initial response to the disciplinary complaint. Respondent's initial response failed to acknowledge the full extent of the damage the collision caused to the golf cart and truck. Furthermore, respondent gave the impression in his response that he had timely notified B.S. and B.H. of the accident. The investigation disclosed that B.S. approached respondent at the golf club three days after the accident to ask him about his involvement. The investigation also disclosed that respondent waited nine days after the accident to send a Facebook message to B.H., asking about the damage to the golf cart. These communications did occur, however, prior to law enforcement contacting respondent regarding the accident.

"Mitigating Factors

"44. *Absence of a Prior Disciplinary Record.* Respondent has no prior disciplinary record.

"45. *Personal or Emotional Problems if Such Misfortunes have Contributed to a [sic] Violations of the Kansas Rules of Professional Conduct*. As detailed in Dr. Parker's report . . . , respondent suffers from an anxiety disorder that contributed to respondent's 'maladaptive response' to the accident. As Dr. Parker states in his report:

'Unfortunately, his response to ignore (denial) the matter started a snowball of stressful events that Mitch continued to reflexively respond to with additional denial defense mechanisms. He may have minimized and obfuscated matters to investigators out of his reflexive use of denial as a defense mechanism to protect

himself from the guilt/shame for not living up to his own unreasonably high standards of himself—which served to make matters worse.

'Based on the psychological testing results, it appears that Mitch holds himself to very high standards of performance and resorts to denial as a psychological defense mechanism. When someone holds themselves to very high standards and they fail to meet their own standards, anxiety and shame are generated. Under normal circumstances, this would have led Mitch to have seen his actions of texting while driving a golf cart and hitting a pickup as significant failure to uphold the very high personal, performance and ethical standards of conduct he had set for himself. But, being the Assistant City Prosecutor who had filed ethics complaints on two other attorneys, this would have heightened his awareness of his failure and that personal shock of failing to meet his own standards led to the panicked deployment of denial out of which he parked the cart and went home—an uncharacteristic behavior. Even though he eventually calmed and attempted to resolve the matter with the pickup owner and golf course, the ongoing fallout from the incident created additional anxiety that Mitch responded to with further denial mechanisms which served to only overly complicate what should have been a very simple matter in the beginning.'

Dr. Parker recommended that respondent attend short-term counseling to (1) 'develop stress and anxiety management skills to give him additional psychological defense tools other than denial'; and (2) 'develop more reasonable standards and expectations of himself.'

"46. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct.* Though there was some delay in notifying B.S. and B.H. regarding the accident, respondent paid for the damage his accident caused to the truck and golf cart prior to being charged in Sumner County District Court for violating K.S.A. 8-1605.

"47. *Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings*. Once formal disciplinary proceedings were instituted against respondent, he fully cooperated in the process and willingly entered into this summary submission agreement, stipulating to facts and rule violations.

"48. *Inexperience in the Practice of Law.* At the time respondent engaged in the underlying conduct, he had been practicing law for approximately two years.

"49. *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.* Respondent has submitted numerous letters from colleagues in support of his character and reputation as a talented and hard-working attorney. Respondent received the Samuel E. Hooper Award from the University of Oklahoma College of Law on March 9, 2017. It is awarded to a law student with a reputation for candor and integrity.

"50. *Imposition of Other Penalties or Sanctions.* As a result of failing to report the accident, respondent was charged with a violation of K.S.A. 8-1605. He entered into a diversion agreement and successfully completed diversion, resulting in the charge being dismissed with prejudice.

"51. *Remorse.* Respondent has expressed genuine remorse for engaging in the conduct that led to a disciplinary complaint being filed against him.

"*Recommendation for Discipline*

"52. Under Rule 223(b)(3), the disciplinary administrator and respondent jointly recommend that the Supreme Court suspend the respondent's license to practice law for a period of 90 days, that the suspension be stayed, and that respondent be placed on probation for one year.

"53. The conditions of probation are outlined in Respondent's Proposed Probation Plan, found in Volume I of the record.

"54. Respondent will comply with Supreme Court Rule 227(f) (2022 Kan. S. Ct. R. at 283) prior to oral argument before the Supreme Court.

. . . .

"*Waiver of Hearing on the Formal Complaint*

"62. Under Rule 223(b)(4), the disciplinary administrator and the respondent hereby waive the hearing on the formal complaint.

"*Statement of No Exceptions*

"63. Under Rule 223(b)(5), the disciplinary administrator and the respondent agree that no exceptions to the findings of fact and conclusions of law will be taken in this case.

"*Additional Acknowledgments*

"64. The disciplinary administrator and the respondent understand and agree that if the summary submission agreement is rejected by the Board chair, under Rule 223(e)(3), the hearing on the formal complaint will proceed under Rule 222 (2022 Kan. S. Ct. R. at 277).

"65. The disciplinary administrator and the respondent understand and agree that if the summary submission agreement is approved by the Board chair, under Rule 223(e)(2), the hearing on the formal complaint will be canceled and the case will be docketed with the Supreme Court under Rule 228 (2022 Kan. S. Ct. R. at 287).

"66. The disciplinary administrator and respondent further understand and agree that the summary submission agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

"67. Finally, the disciplinary administrator and the respondent agree that the summary submission agreement may be exchanged and executed by electronic transmission and that electronic signatures will be deemed to be original signatures."

DISCUSSION

In a disciplinary proceeding, this court generally considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281) (a misconduct finding must be established by clear and convincing evidence). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009).

The Disciplinary Administrator provided the respondent with adequate notice of the formal complaint. The Disciplinary Administrator also provided the respondent with adequate notice of the hearing before the panel, but he waived that hearing after entering into the summary submission agreement. Under Rule 223, a summary submission agreement

"must be in writing and contain the following:
(1) an admission that the respondent engaged in the misconduct;
(2) a stipulation as to the following:
(A) the contents of the record;
(B) the findings of fact;
(C) the conclusions of law, including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and
(D) any applicable aggravating and mitigating factors;
(3) a recommendation for discipline;
(4) a waiver of the hearing on the formal complaint; and
(5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken." Supreme Court Rule 223(b) (2022 Kan. S. Ct. R. at 278).

The Kansas Board for Discipline of Attorneys approved the summary submission and canceled a hearing under Rule

223(e)(2). As a result, the factual findings in the summary submission are admitted. See Supreme Court Rule 228(g)(1) (2022 Kan. S. Ct. R. at 288) ("If the respondent files a statement . . . that the respondent will not file an exception . . . , the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.").

The summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 8.4(c) and KRPC 8.4(g). We adopt the findings and conclusions set forth by the parties in the summary submission.

The remaining issue is deciding the appropriate discipline. The parties jointly recommend a 90-day suspension of Spencer's law license with the suspension being stayed while the respondent is placed on probation for one year. An agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Supreme Court Rule 223(f). After careful consideration, we find the lesser sanction of published censure is appropriate under the circumstances here. A minority of the court would impose the jointly agreed to recommended discipline of a 90-day suspension with the suspension being stayed while the respondent is placed on probation for one year.

Although not in the summary submission, counsel for both parties presented information at oral argument about the negotiation process and the legal basis for their decision to jointly recommend stayed suspension with a one-year probation. ODA counsel provided a summary of the negotiation process in opening argument. The respondent's attorney initially approached ODA counsel about the possibility of a published censure. ODA counsel responded that the misconduct warranted more than a published censure because—at the time of the misconduct—the respondent was a prosecutor and should be held to a higher standard of ethical conduct than an attorney who is not a prosecutor. With that said, ODA counsel communicated to the respondent's counsel that he believed the respondent should be able to continue practicing law, which is how the parties ultimately came to agree on a suspended suspension with a plan of probation.

For his part, the respondent's counsel agreed it was appropriate to hold the respondent to a higher standard of professional conduct because the respondent was a prosecutor when the misconduct occurred. The court pushed back, asking respondent's counsel to cite authority for the legal proposition that prosecutors are held to a higher standard of professionalism than non-prosecutors under the rules of professional conduct. Respondent's counsel deferred the question. At that point, ODA counsel returned to the podium for rebuttal and advised the court that the higher standard of professionalism for prosecutors comes from this court's caselaw. ODA counsel cited *In re Holste*, 302 Kan. 880, 889, 358 P.3d 850 (2015), and the cases cited therein to support this higher standard.

We have reviewed the cases relied on by ODA counsel and find them factually distinguishable. Unlike the facts presented here, the prosecutors in those cases engaged in misconduct *while acting in the scope of their official prosecutorial duties*. And the cases cited appear to have some legal infirmities as well. In order to flush out those infirmities, we begin with the two Kansas Rules of Professional Conduct relied on in these cases—KRPC 3.8 and KRPC 8.4—keeping in mind that "[i]nterpretation of the Kansas Rules of Professional Conduct is a question of law over which this court has unlimited review." *In re Bryan*, 275 Kan. 202, 211, 61 P.3d 641 (2003).

KRPC 3.8

We begin with KRPC 3.8 (2022 Kan. S. Ct. R. at 401), which bears the title "Special Responsibilities of a Prosecutor" and imposes the following enumerated responsibilities on prosecutors in criminal cases while they are acting in the scope of their official prosecutorial duties:

"The prosecutor in a criminal case shall:

"(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

"(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

"(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

"(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

"(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

"(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."

While prosecutors are also subject to the ethics rules governing all lawyers (such as the duty of candor to the court, confidentiality, conflicts of interest, and so on), KRPC 3.8 imposes "special" responsibilities on prosecutors since certain tasks are unique to the prosecutor's office. See KRPC 3.8, Comment [1] (2022 Kan. S. Ct. R. at 401) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). Whether the special responsibilities imposed by KRPC 3.8 should be characterized as *additional* standards of ethical conduct unique to prosecutors or *heightened* standards of ethical conduct for prosecutors is an issue never addressed by this court. We find it unnecessary to decide the issue here because KRPC 3.8 is inapplicable under the facts presented. Specifically, the language of KRPC 3.8 and the comments appended to the rule make clear that the enumerated special responsibilities imposed on prosecutors in criminal cases *apply only when the prosecutors are acting in the scope of their official prosecutorial duties*. Although the respondent was employed as a prosecutor at

the time of the misconduct here, there is no dispute between the parties that his misconduct occurred in his private life, outside the scope of his official prosecutorial duties.

KRPC 8.4

Many of the cases cited by ODA counsel relied on Comment [4] of KRPC 8.4 as the basis for the legal proposition that prosecutors—as lawyers holding public office—are held to a higher duty of ethical conduct than a non-prosecutor. KRPC 8.4 bears the title "Misconduct" and governs an attorney's responsibility to maintain the integrity of the profession, whether the attorney is acting in a personal capacity or acting within the scope of official prosecutorial duties. Compare KRPC 3.8 (setting forth attorney's responsibilities in enumerated circumstances, all of which necessarily occur within the scope of official prosecutorial duties). Importantly, the cases do not cite to the substantive language of Rule 8.4, but instead rely on the language of Comment [4] (2022 Kan. S. Ct. R. at 435) to support imposing a heightened duty of ethical conduct for prosecutors:

> "[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

As noted above, each case cited by ODA counsel that relied on Comment [4] to hold prosecutors to a heightened duty of ethical conduct involved prosecutors acting in the scope of their official prosecutorial duties. But Comment [4] is inapplicable to a prosecutor acting in the scope of official prosecutorial duties because non-lawyer citizens cannot hold the public office of prosecutor. See Comment [4] ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens.").

Reading Comment [4] in its entirety persuades us that the comment was intended to apply to public office positions that (1) impose a duty of public trust and (2) can be held by both lawyers and non-lawyers. Examples of these positions include state senator, state board of education member, county commissioner,

mayor, and sheriff. An attorney holding public office assumes legal responsibilities beyond those of non-attorney citizens holding public office because an attorney's "abuse of public office" suggests an inability to fulfill the professional role of an attorney. The comment goes on to compare an attorney's abuse of public trust to a private attorney's "abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

In this case, we already have found clear and convincing evidence that the respondent violated

- KRPC 8.4(c) (engaging in conduct involving dishonesty) during his interview with Police Chief Tracy Heath by falsely stating that he was not aware that his accident at the golf club had caused any damage to either the truck or the golf cart; and
- KRPC 8.4(g) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law) when he left the golf club without attempting to notify anyone of the accident, knowing that the accident had caused damage to the truck and the golf cart.

The public office held by the respondent was assistant county prosecutor. But the respondent's misconduct did not occur in the scope of executing his official duties of public office, so he cannot be said to have abused his public office as specified in Comment [4]. And even if his misconduct had occurred in the scope of executing his official duties of public office, Comment [4] would not apply because the legal responsibility for attorneys is enhanced as compared to non-attorney citizens, who cannot hold the public office of prosecutor in the first place. See KRPC 8.4, Comment [4] ("Lawyers holding public office assume legal responsibilities going beyond those of other [non-lawyer] citizens.").

In sum, and because the respondent's violations of KRPC 8.4(c) and (g) did not occur while he was acting within the scope of his official prosecutorial duties, we hold that neither KRPC 3.8 nor Comment [4] imposed a heightened duty of ethical conduct on the respondent for his misconduct. Our holding in this regard is

critical to deciding the appropriate discipline here because, when asked by the court, ODA counsel expressly acknowledged that in deciding to reject a joint recommendation of published censure in favor of a stayed suspension with one year of probation, ODA counsel applied a higher standard of ethical conduct to the respondent because he was a prosecutor at the time of the misconduct as opposed to a non-prosecutor. We find ODA counsel's application of the higher standard of ethical conduct for prosecutors under the facts of this case to be legal error, without support in the law.

In deciding the proper discipline without applying a higher standard of ethical conduct, we consider the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions ("Standards"). We already have set forth the duty violated, the lawyer's mental state, the injury caused by the lawyer's misconduct, and the aggravating and mitigating factors to which the parties stipulated in the summary submission agreement. In addition to those factors, we consider the following Standards:

> "5.1 Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> "5.11 Disbarment is generally appropriate when:
>
> "(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
>
> "(b) a lawyer engages in any other intentional conduct involving dishonesty,fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> "5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

> "5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
>
> "5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law."

The parties agree, and clear and convincing evidence establishes, the respondent committed a misdemeanor that involved dishonesty, fraud, deceit, or misrepresentation which adversely reflected on his fitness to practice law but did not seriously adversely reflect on his fitness to practice law. Thus, we hold published censure is an appropriate sanction. A minority of the court would impose the jointly agreed to recommended discipline of a 90-day suspension with the suspension being stayed while the respondent is placed on probation for one year.

We assess the costs of these proceedings to the respondent and order this opinion be published in the official Kansas Reports.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Mitchell J. Spencer is disciplined by published censure to be published in accordance with Supreme Court Rule 225(a)(5) (2022 Kan. S. Ct. R. at 281) for violations of KRPC 8.4(c) and 8.4(g).

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

No. 108,648

In the Matter of MARK ALLEN GALLOWAY, *Petitioner.*

(524 P.3d 416)

ORDER OF REINSTATEMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Order of Reinstatement.*

On January 11, 2013, this court suspended Mark Allen Galloway's license to practice law in Kansas for a period of two years. The court ordered that prior to its consideration of any petition for reinstatement, Galloway undergo a full reinstatement hearing. See *In re Galloway,* 296 Kan. 406, 413-14*,* 293 P.3d 696 (2013); see also Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) (formerly Rule 219) (procedure for reinstatement after suspension).

On July 19, 2022, Galloway filed a petition for reinstatement. Upon finding sufficient time had passed for reconsideration of the suspension, the court remanded the matter for further investigation by the Disciplinary Administrator and a reinstatement hearing.

On December 13, 2022, a hearing panel of the Kansas Board for Discipline of Attorneys conducted a hearing on Galloway's petition for reinstatement. On January 11, 2023, this court received the hearing panel's Reinstatement Final Hearing Report. The hearing panel recommends that the court grant Galloway's petition for reinstatement, subject to three years' supervised probation under the terms and conditions of the proposed probation plan with the added requirement that Galloway contact KALAP for an evaluation for services and that he follow all of KALAP's recommendations. After careful consideration of the record, the court accepts and adopts the findings and recommendations of the hearing panel.

The court grants Galloway's petition for reinstatement, orders Galloway's license to practice law in Kansas reinstated, and orders him to serve a term of three years of supervised probation according to the conditions set out in the final hearing report. Galloway's probation will continue until this court specifically discharges

him. See Supreme Court Rule 227(g), (h) (2023 Kan. S. Ct. R. at 284-85) (procedure for discharge upon successful completion of probation).

The court further orders Galloway to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education requirements. See Supreme Court Rule 812 (2023 Kan. S. Ct. R. at 609) (outlining CLE requirements following reinstatement). The court directs that once OJA receives proof of Galloway's completion of these conditions, it add Galloway's name to the roster of attorneys actively engaged in the practice of law in Kansas.

Finally, the court orders the publication of this order in the official Kansas Reports and the assessment of all costs herein to Galloway.

Dated this 21st day of February 2023.

State v. Lowry

No. 121,914

STATE OF KANSAS, *Appellee*, v. JOSEPH P. LOWRY, *Appellant*.

(524 P.3d 416)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions—Lesser Included Offense Instruction Must Be Legally and Factually Appropriate*. Even if a lesser included offense instruction is legally appropriate, it must also be factually appropriate. A trial judge's failure to give a lesser included offense instruction is not error if the instruction falls short on either or both the factual and legal appropriateness requirements.

2. SAME—*Jury Instructions—Determination Whether Voluntary Manslaughter Instruction Is Factually Appropriate*. A voluntary manslaughter instruction is factually appropriate only if some evidence, viewed in a light most favorable to the defendant, shows an adequate provocation that deprives a reasonable person of self-control and causes that person to act out of passion, rather than reason. A sudden quarrel, or any unforeseen angry altercation, can fall into the definition of heat of passion and thus be sufficient provocation. But ongoing and protracted interactions do not usually provide factual support for a voluntary manslaughter instruction.

3. SAME—*Admission of Gruesome Photographs—Error to Admit if Only to Inflame Jury—Determination Whether Risk of undue Prejudice Outweighs Its Probative Value—Appellate Review*. A trial judge errs by admitting gruesome photographs that only inflame the jury. But gruesome photographs are not automatically inadmissible. Indeed, gruesome crimes result in gruesome photographs. Faced with an objection, rather than automatically admit or deny admission of a gruesome photograph, a trial judge must weigh whether the photograph presents a risk of undue prejudice that substantially outweighs its probative value. On appeal, appellate court's review a trial judge's assessment for an abuse of discretion, often asking whether the judge adopted a ruling no reasonable person would make.

4. CRIMINAL LAW—*Compulsion Defense—Application—Instruction Not Warranted When Coercion Not Continuous*. Under a compulsion defense, a person is not guilty of a crime other than murder or voluntary manslaughter because of conduct the person performs under the compulsion or threat of the imminent infliction of death or great bodily harm. The defense applies only if such person reasonably believes that death or great bodily harm will be inflicted upon such person or upon such person's spouse, parent, child, brother, or sister if such person does not perform such conduct. The coercion or duress must be present, imminent, and impending and cannot be invoked by someone who had a reasonable opportunity to avoid doing the thing, or to escape. Additionally, a compulsion defense instruction is not warranted when the coercion is not continuous.

5. TRIAL—*Cumulative Error Rule—Application*. Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. The cumulative error rule does not apply if there are no errors or only a single error.

Appeal from Shawnee District Court; MARK S. BRAUN, judge. Opinion filed February 24, 2023. Affirmed.

Shawna R. Miller, of Miller Law Office, LLC, of Holton, argued the cause and was on the brief for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: Joseph Lowry challenges his convictions arising from the murders of three individuals over a period of several hours in a Topeka home. On direct appeal following a jury trial, Lowry argues the trial judge erred by not giving a jury instruction on voluntary manslaughter as a lesser included offense of first-degree premeditated murder, admitting crime scene and autopsy photographs, and not giving a jury instruction on the compulsion defense. He contends any of these errors is alone enough to require us to reverse his convictions. If we disagree on that point, he asserts these errors cumulatively cause such prejudice as to justify reversal.

We reject all of Lowry's arguments. As to his first and third issues, neither a voluntary manslaughter instruction nor an instruction on the compulsion defense were factually appropriate, and thus the trial judge did not err in declining Lowry's requests for these instructions. And the judge did not abuse his discretion in determining the objected-to photographs were relevant, probative, and not unduly prejudicial. Finding no error, we affirm Lowry's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

All three murders occurred in the Topeka home of Kora Liles. Liles lived there with Lowry, her sister, and others. Liles' house was a place where people would gather to hang out and use drugs.

On the evening of the murders two groups gathered, one on the main level of the house and another in the basement where Liles' sister lived. The makeup of each group changed throughout the evening and into the night.

Lowry and others who took part in or witnessed the murders were part of the main level gathering. Joseph Krahn was at the house for a while, left, and returned. Krahn strangled or suffocated each of the three murder victims. Krahn came to Liles' house with Richard Folsom, who witnessed some of the crimes. Liles' ex-husband Brian Flowers was also present during part of the events.

The basement gathering included one of the murder victims, Nicole Fisher, who had come to visit Liles' sister. Sometime after Fisher arrived, Liles' sister and others in the basement left the house for the evening while Fisher remained as she made calls to find a ride. She eventually found her ride when friends contacted another murder victim, Matthew Leavitt, and he agreed to pick up Fisher. Leavitt instructed that Fisher needed to go outside to wait because he did not want to enter Liles' house. Liles had recently accused Leavitt of raping her and had told Lowry and others of her accusation. On Leavitt's way to get Fisher, he picked up his friend, Shane Mays, who would survive the events that led to the murder of his friend.

Leavitt and Mays parked near Liles' house just as Krahn and Folsom left the main level gathering. As Folsom was walking toward his car, Lowry ran by Folsom and warned Folsom to leave if he did not want to be involved. Krahn and Folsom left.

Lowry, who had been joined by Liles' ex-husband Flowers, continued toward Leavitt's car. Lowry and Flowers pointed guns at Leavitt and Mays and forced them out of the car. Lowry drove Leavitt's car away. The car was later found in the Kansas River. While Lowry drove away, Flowers held Leavitt and Mays at gunpoint and, following Liles' directions, forced the two into the basement with Fisher.

Lowry eventually returned to Liles' house, and he again threatened Leavitt and Mays with a gun. Lowry asked Leavitt whether "he wanted the bullet in his head or in his chest because he [was] going to die there" that night. Lowry accused Leavitt of

being a rapist. Leavitt denied this, but Liles told the others that Leavitt had raped her.

Flowers and Liles went upstairs and took Mays with them. Lowry followed, forcing Leavitt and Fisher upstairs at gunpoint. By this time, Krahn had returned. Lowry, Krahn, and the others forced Mays, Leavitt, and Fisher to sit on a couch.

Lowry, Liles, and Krahn began smoking meth and talking about what they planned to do. Mays distinctly heard Liles say, "[T]hey all have to die." Mays and Leavitt began pleading for their lives; this annoyed Krahn who threatened them.

While this was going on in the house, Folsom, who had driven Krahn back to the house, remained in his car. He saw Luke Davis—who would become the third murder victim—walking nearby. Folsom called out to warn Davis not to go into the house. Davis ignored Folsom's warning and knocked on the door. Lowry and Krahn answered the door and pulled Davis inside. Davis was forced to sit with Leavitt, Fisher, and Mays. Later, Folsom grew tired of waiting outside and came into the house. He took a seat in another room from the others, but he could see the captives.

At about 4 a.m., Lowry left the house to purchase ponchos, bandanas, and zip ties. He returned, and at some point, Liles turned on music and asked Leavitt, Mays, and Davis to dance. They did not want to, but Liles threatened them with a gun and told them to take off their shirts and dance. Lowry grabbed Mays by the throat, threatened him with a tire iron, and told him to stop looking at Liles.

Fisher was fidgeting and talking a lot; Krahn and Lowry became annoyed because she did not comply with their orders to be quiet. Krahn told Lowry, Liles, and Flowers to put on latex gloves. Krahn pulled Fisher off the couch, bound her hands behind her back using the zip ties Lowry had purchased, and put her in a swivel chair. Krahn told Lowry to bring him a trash bag. Krahn put the bag over Fisher's head and began suffocating her.

After a few seconds, Lowry told Krahn to stop so Liles could leave the house to establish an alibi and "go be on camera somewhere." Lowry tried to get Liles to eat a cigarette so she would have to go to the hospital. She refused, so they decided she should go to Walmart, where she shopped for clothes.

After she left, Lowry and Krahn bound Davis' wrists with zip ties and forced him into the chair. Krahn placed a plastic bag over Davis' head, but Davis broke free and ran for the door where Krahn tackled him. Krahn and Lowry wrestled with Davis. During the struggle, Krahn's knife fell on the floor; Lowry grabbed the knife and stabbed Davis. Krahn grabbed an electrical cord from a nearby fan and strangled Davis with it until Davis died.

Krahn and Lowry turned their attention to Fisher. They told her to sit in the swivel chair. Krahn told Mays he was "up" and handed Mays a trash bag. In an earlier conversation, Liles had said Mays could live if Mays killed his friend. Mays began to suffocate Fisher with the trash bag, but after about 30 seconds let go. Krahn stepped in and suffocated Fisher with the trash bag until she died.

Krahn and Lowry turned to Leavitt, who pleaded for his life and offered money. Krahn told Mays this was his last chance and handed Mays another trash bag. Mays put the trash bag over Leavitt's head but failed to tighten it. Krahn became irritated and took over. Leavitt broke free and struggled with Krahn and Lowry. Eventually Krahn was able to get his legs around Leavitt's neck, and he strangled Leavitt to death.

Sometime during these events, Flowers left the house. Folsom also left the house after the three victims were dead. But he did not go to police because he feared Krahn, who had threatened to kill anyone who talked.

Krahn and Lowry decided not to kill Mays but told him to help clean and move the bodies to the basement. Liles returned to the house and was told of the events; Liles simply nodded. Eventually, Lowry, Liles, Krahn, and Mays drove away.

Later, Mays and Liles separately went to police and reported the murders, after which Lowry was arrested and charged.

A jury convicted Lowry of two counts of first-degree premeditated murder for Davis' and Leavitt's murders, two alternative counts of felony murder for those murders, and one count of first-degree felony murder for Fisher's murder. The jury also convicted him of three counts of aggravated kidnapping, one count of aggravated assault, and one count of aggravated robbery.

Lowry timely appealed to this court, which has jurisdiction of the appeal. See K.S.A. 60-2101(b) (Supreme Court jurisdiction

over direct appeals governed by K.S.A. 2022 Supp. 22-3601); K.S.A. 2022 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court); K.S.A. 2022 Supp. 21-5402(b) (first-degree murder is off-grid person felony).

ANALYSIS

On appeal, Lowry raises four issues but establishes no error. We thus affirm Lowry's convictions.

ISSUE I: LESSER INCLUDED OFFENSE INSTRUCTION NOT FACTUALLY WARRANTED

Lowry first argues that he and Krahn reacted to a sudden quarrel that started when Davis broke free and ran for the door. Lowry contends this sudden quarrel warranted a voluntary manslaughter instruction as a lesser included offense of first-degree murder of Davis.

Lowry first made this argument during the jury instruction conference at trial. Then, and now on appeal, Lowry and the State agree that voluntary manslaughter is a lesser included offense of first-degree premeditated murder and is therefore legally appropriate. *State v. Bernhardt*, 304 Kan. 460, 475, 372 P.3d 1161 (2016); PIK Crim. 4th 69.010 (2022 Supp.). But even if a lesser included offense instruction is legally appropriate, it must also be factually appropriate. A trial judge's failure to give a lesser included offense instruction is not error if the instruction falls short on either or both the factual and legal appropriateness requirements.

State v. Uk, 311 Kan. 393, 397-98, 461 P.3d 32 (2020) (discussing four step analysis of jury instruction claims of error set out in *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 [2012], of reviewability, factual appropriateness, legal appropriateness, and reversibility); see *State v. Becker*, 311 Kan. 176, 183, 459 P.3d 173 (2020).

An inquiry about factual appropriateness of a lesser included offense instruction begins with consideration of what the jury must find to convict the defendant of the lesser included offense—

here, voluntary manslaughter. As relevant to the parties' arguments, K.S.A. 2022 Supp. 21-5404 defines the elements of voluntary manslaughter as "knowingly killing a human being . . . upon sudden quarrel or in the heat of passion." Applying those requirements, factual appropriateness for a voluntary manslaughter instruction requires some evidence, viewed in a light most favorable to the defendant, of an adequate provocation that deprives a reasonable person of self-control and causes that person to act out of passion, rather than reason. *Uk*, 311 Kan. at 397-98. A sudden quarrel, or any unforeseen angry altercation, can fall into the definition of heat of passion and thus be sufficient provocation. *Bernhardt*, 304 Kan. at 476 (citing *State v. Johnson*, 290 Kan. 1038, 1048, 236 P.3d 517 [2010]). But ongoing and protracted interactions do not usually provide factual support for a voluntary manslaughter instruction. See *State v. Wade*, 295 Kan. 916, 925, 287 P.3d 237 (2012) (heat of passion is taking action upon impulse and without reflection); *State v. Henson*, 287 Kan. 574, 583, 197 P.3d 456 (2008) (act of violence separated from the provocation is evidence of calculation rather than passion).

Lowry argues a sudden quarrel evolved during Davis' struggle to escape. He contends this physical struggle between Davis and Krahn prompted Lowry to "assist Krahn and . . . ultimately angered Krahn to the point where he strangled and killed Davis." But this ignores the requirement that a quarrel be sudden and unforeseen.

Our cases emphasize these requirements. For example, in *Uk*, the defendant argued he was provoked by a sudden argument with the victim, but other evidence showed that the arguments had been ongoing between the defendant and the victim. Under these circumstances we held a voluntary manslaughter instruction was not appropriate. 311 Kan. at 398-99. Likewise, in *Bernhardt*, the defendant's claim that he was provoked because his girlfriend slapped him was found insufficient to warrant a voluntary manslaughter instruction because evidence of the defendant's excessive brutality and ongoing conduct undermined his sudden quarrel and heat of passion arguments. 304 Kan. at 477.

Like the conduct at issue in *Uk* and *Bernhardt*, Davis' actions were part of a protracted altercation and were foreseeable. Krahn

had placed a plastic bag over Davis' head and Lowry and Krahn restrained him. Together they attempted to kill him. When Davis tried to escape being murdered, he did not start a sudden quarrel. Rather, he took the foreseeable step of defending himself from strangulation or suffocation—acts of violence Lowry and Krahn had initiated. See *State v. Gallegos*, 313 Kan. 262, 270, 485 P.3d 622 (2021) (voluntary manslaughter lesser included offense instruction not factually appropriate, evidence that defendant strangled victim with shoelace, which took several minutes, revealed a level of calculation not consistent with a sudden quarrel).

Davis' attempts to counter Krahn and Lowry's aggression were not an adequate provocation or the type of sudden quarrel that justifies a voluntary manslaughter instruction. The evidence, even when viewed in the light most favorable to Lowry, thus does not show a legally sufficient provocation that would make a voluntary manslaughter instruction factually appropriate. See *Becker*, 311 Kan. at 183 (factual appropriateness determination requires examining sufficiency of evidence in light most favorable to defendant). The trial judge did not err in declining Lowry's request to give the voluntary manslaughter instruction.

ISSUE II: CRIME SCENE AND AUTOPSY PHOTOGRAPHS ADMISSIBLE

Before trial, Lowry filed a pretrial motion in limine objecting to photographs, arguing they were unduly prejudicial. The motion was general and did not address specific photographs. Even so, during a pretrial hearing on the matter, the trial judge addressed all photographs the State planned to introduce. After a thorough discussion, the judge held the photographs were relevant to the type of injuries, the cause of death, and the events that happened in the house that evening. He also held that any prejudicial effect was outweighed by the probative value.

The judge later issued a written memorandum order in which he described each photograph and its probative value. Although the judge recognized that some photographs "are indeed gruesome," he recognized there is a need to show gruesome photographs in some cases, especially a murder case. The judge added that the photographs would help educate the jurors and would assist them in determining the cause and manner of death of each

victim. He ultimately held the photographs were not unduly prejudicial but were relevant and probative.

During trial, Lowry renewed his pretrial objection with another broad objection made during a conference between defense counsel, the State, and the judge. He argued the photographs were cumulative, repetitious, and unduly prejudicial. The prosecutor conceded that defendant preserved the objections for review. The judge overruled the objections, repeating his rationale from the pretrial ruling. All autopsy photographs were referenced by the medical examiner during his testimony. And crime scene photographs were used by witnesses to describe the crime scene.

Against that backdrop, we review Lowry's arguments that the photographs were unduly prejudicial. Despite Lowry's attempt to have us focus on the gruesome nature of the photographs, something the trial judge acknowledged, our first analytical decision is determining whether the photographs are relevant, not whether they are gruesome. *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66 (2022) (discussing two-prong test of relevance: [1] materiality, reviewed de novo and [2] probativeness, reviewed for abuse of discretion).

Here, the judge explained the relevance of each photograph. As to the post-mortem photographs of the three murder victims, which Lowry focuses on in his appellate brief, he noted they depict the extent of injury resulting from Lowry and Krahn fighting and strangling Davis and Leavitt and suffocating Fisher. The photos were referenced by the medical examiner in his testimony about the victims' injuries and manner of death and were relevant to prove material facts and various elements, such as premeditation. See 314 Kan. at 534 (discussing cases recognizing relevance of photographs illustrating the nature and extent of wounds and corroborating testimony of witnesses, including pathologist opining about cause of death); *State v. Rodriguez*, 295 Kan. 1146, 1157, 289 P.3d 85 (2012) ("Although [photographs] may sometimes be gruesome, autopsy photographs that assist a pathologist in explaining the cause of death are relevant and admissible.").

Our de novo review of the photographs confirms the depictions of the crime scene and of the victims and their injuries were

material. And we find no abuse of discretion in the trial judge's assessment that the photographs were probative.

At the next step of analysis, we review the trial judge's determination that the risk of undue prejudice does not outweigh the probative value of the evidence. When making that review, we recognize a trial judge errs by admitting gruesome photographs that *only* inflame the jury. *Alfaro-Valleda*, 314 Kan. at 535. But gruesome photographs are not automatically inadmissible. Indeed, "'[g]ruesome crimes result in gruesome photographs.'" 314 Kan. at 536 (quoting *State v. Green*, 274 Kan. 145, 148, 48 P.3d 1276 [2002]). Faced with an objection, rather than automatically admit or deny admission of a gruesome photograph, a trial judge must weigh whether the photograph presents a risk of undue prejudice that substantially outweighs its probative value. 314 Kan. at 535. On appeal, we review the judge's assessment for an abuse of discretion, often asking whether the judge adopted a ruling no reasonable person would make. 314 Kan. at 533-34 (explaining abuse of discretion standard); 314 Kan. at 535-36 (applying standard to prejudice versus probative analysis).

As we recently noted, "judges regularly admit gruesome photographs in murder cases . . . [a]nd we regularly hold no abuse of discretion occurred in admitting them." 314 Kan. at 536 (citing *State v. Morris*, 311 Kan. 483, 494-96, 463 P.3d 417 [2020] [detailing many photographs showing decedent, his injuries, decomposition, and animal damage to the decedent's body]; *State v. Seba*, 305 Kan. 185, 213-15, 380 P.3d 209 (2016) [holding no abuse of discretion in trial court's admission of photograph showing trajectory of bullet through decedent's brain and photographs of decedent's deceased fetus]).

These photographs present yet another situation where we find no abuse of discretion. The trial judge analyzed each photograph. And while Lowry argues the prejudicial impact was compounded by the cumulative nature of some photographs, witnesses, including the pathologist, used the photos to explain their testimony. Each photograph served a purpose other than to inflame the jury. Thus, the trial judge did not abuse his discretion in determining the potential prejudice did not outweigh the probative value of admitting the photographs. The trial judge did not err.

ISSUE III: COMPULSION DEFENSE INSTRUCTION NOT FACTUALLY APPROPRIATE

At trial, Lowry requested a jury instruction on compulsion based on threats made by Krahn against the other participants. Under the compulsion defense,

"[a] person is not guilty of a crime other than murder or voluntary manslaughter by reason of conduct which such person performs under the compulsion or threat of the imminent infliction of death or great bodily harm, if such person reasonably believes that death or great bodily harm will be inflicted upon such person or upon such person's spouse, parent, child, brother or sister if such person does not perform such conduct." K.S.A. 2022 Supp. 21-5206(a).

The coercion or duress must be present, imminent, and impending and cannot be invoked by someone who had a reasonable opportunity to avoid doing the thing, or to escape. Additionally, a compulsion defense instruction is not warranted when the coercion is not continuous. See *State v. Dupree*, 304 Kan. 377, 398-99, 373 P.3d 811 (2016); *State v. Anderson*, 287 Kan. 325, 337-38, 197 P.3d 409 (2008) (compulsion may not be invoked by one who had opportunity to withdraw or avoid the act); *State v. Dunn*, 243 Kan. 414, 421-22, 758 P.2d 718 (1988) (crimes committed two weeks after threats did not warrant compulsion instruction).

State v. Hutto, 313 Kan. 741, 490 P.3d 43 (2021), illustrates these points in the context of a compulsion argument analogous to Lowry's. There, the defendant was a participant, along with several other people, in two murders. The defendant argued the physically violent and manipulative actions of the group's de facto leader warranted a compulsion instruction as a defense to felony-murder charges. But the evidence showed that the events unfolded over several days, and no evidence showed the defendant could not escape or contact law enforcement. "Hutto may have been manipulated into committing murder, but he was not acting under statutory compulsion when he committed the murders." 313 Kan. at 749.

Applying those principles, the trial judge denied Lowry's request for a jury instruction on the defense after finding no evidence showed a continuous and ongoing threat and finding that Lowry had opportunities to leave. We find no error in that determination. The evidence showed the events occurred over many

hours during which Lowry left the house to hide Leavitt's car and to go shopping. This revealed he was free to extract himself from the situation if he so desired. And others did so; Liles, Flowers, and Folsom left as it became clear people would be or had been murdered. Like them, Lowry was free to come and go without hindrance, even if afraid of Krahn.

Simply put, the evidence does not show a continuous, ongoing threat against Lowry that would support a compulsion instruction. Rather, it shows that Lowry had several opportunities throughout the evening to avoid or escape the situation. A jury instruction for compulsion was not factually appropriate, and the trial judge did not err in declining to give the instruction.

ISSUE IV: NO CUMULATIVE ERROR

Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. *Alfaro-Valleda*, 314 Kan. at 551. The cumulative error rule does not apply if there are no errors or only a single error. *Gallegos*, 313 Kan. at 277.

Here, we have no error and thus no error to accumulate.

CONCLUSION

We hold Lowry's arguments do not warrant reversal. We affirm his convictions.

Affirmed.

WILSON, J., not participating.

No. 123,807

STATE OF KANSAS, *Appellee*, v. TYLER D. DECK, *Appellant*.

(525 P.3d 329)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Defective Complaint Claim—Not Properly Raised in Motion to Correct Illegal Sentence.* Defective complaint claims are not properly raised in a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 1, 2022. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed March 10, 2023. Judgment of the Court of Appeals affirming in part and vacating the sentence in part and remanding with directions is affirmed on the issue subject to review. Judgment of the district court is affirmed on the issue subject to review.

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

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

PER CURIAM: Tyler D. Deck pled guilty to attempted unintentional second-degree murder as part of a broader plea agreement. The district court sentenced him to 41 months in prison for that offense. He now claims the court did not have subject matter jurisdiction to impose that sentence because our caselaw has characterized the crime he pled guilty to as "logically impossible" to commit. See *State v. Shannon*, 258 Kan. 425, 428-29, 905 P.2d 649 (1995) (noting the Kansas attempt statute requires specific intent to commit the crime charged and one cannot intend to commit an unintentional crime). The district court refused to vacate the sentence when Deck moved to correct it under K.S.A. 2020 Supp. 22-3504. A Court of Appeals panel agreed with the lower court, although it remanded the case to correct a minor journal entry mistake. *State v. Deck*, No. 123,807, 2022 WL 983628, at *5-6 (Kan. App. 2022) (unpublished opinion). We granted review to consider Deck's subject matter jurisdiction challenge to his sentence. We reject his arguments and affirm.

Unlike *Shannon*, in which the defendant on direct appeal argued for giving a jury instruction on attempted unintentional second-degree murder as a lesser included offense, Deck's chosen procedural vehicle is a motion under K.S.A. 22-3504 to correct what he labels an illegal sentence stemming from an allegedly defective criminal complaint. And we have long held defective complaint claims are not properly challenged through such a motion on that basis. See *State v. Ross*, 315 Kan. 804, Syl. ¶ 2, 511 P.3d 290 (2022) ("Defective complaint claims are not properly raised in a motion to correct an illegal sentence under K.S.A. 22-3504."); *State v. Robertson*, 309 Kan. 602, Syl. ¶ 1, 439 P.3d 898 (2019) ("A motion to correct illegal sentence filed under K.S.A. 2018 Supp. 22-3504 that alleges a defect in the charging document does not give a court jurisdiction to reverse a conviction that has become a final judgment."). We adhere to that caselaw in rejecting Deck's efforts here.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, the State charged Deck with multiple crimes in two separate cases. For our purposes, the relevant portion of the original charging document stated:

"COUNT FOUR
"AS TO TYLER D. DECK
"and on or about the 6th day of September, 2014 A.D., in the County of Sedgwick, and State of Kansas, one TYLER D. DECK did commit any overt act, to-wit: shot a firearm eight (8) times at C.A.B. hitting him at least once, toward the perpetration of a crime, to-wit: Murder in the Second Degree, as defined by K.S.A. 21-5403(a)(2), and the said TYLER D. DECK intended to commit such crime but failed in the perpetration thereof or was prevented or intercepted in executing such crime;
"OR IN THE ALTERNATIVE
"COUNT FIVE
"AS TO TYLER D. DECK
"and on or about the 6th day of September, 2014 A.D., in the County of Sedgwick, and State of Kansas, one TYLER D. DECK did then and there unlawfully and knowingly cause great bodily harm to another person or disfigurement of another person, to-wit: C.A.B."

The statutory reference in count four to K.S.A. 2014 Supp. 21-5403(a)(2) provides: "Murder in the second degree is the killing of a human being committed . . . unintentionally but recklessly

under circumstances manifesting extreme indifference to the value of human life."

The State later amended this charging document to delete the alternative language between Deck's count four and count five. This left the attempted unintentional second-degree murder charge in count four standing apart from the aggravated battery alleged in count five. The amended complaint made no other relevant changes.

Deck entered into a global plea agreement in both cases to exchange his guilty pleas to attempted intentional second-degree murder, as well as count four's attempted unintentional second-degree murder, for the State's agreement to dismiss the remaining charges. The district court accepted the pleas and imposed concurrent 233-month and 41-month prison terms, respectively. The journal entry of judgment, however, mistakenly listed the attempted unintentional second-degree murder offense as a level three felony with a 59-month prison term.

In 2020, Deck filed a pro se motion to correct an illegal sentence under K.S.A. 2020 Supp. 22-3504, challenging the attempted unintentional second-degree murder conviction. He claimed that under *Shannon* the amended complaint failed to charge a recognized Kansas crime. In his view, this meant the State could not have invoked the district court's subject matter jurisdiction to prosecute him for what he said was an unrecognized crime. And without jurisdiction, he continued, the court could not accept his guilty plea or sentence him for the attempted unintentional second-degree murder conviction. He asked the court to vacate both the conviction and its attendant sentence. He later revised the motion to limit relief to just vacating his sentence.

The district court summarily denied the motion, without reaching the merits, explaining:

"Once a sentence is imposed a trial court does not have authority to address the validity of defendant's sentence in the criminal case other than through a motion to correct illegal sentence . . . . Despite entitling the motion as a 'Motion to Correct Illegal Sentence', it is not legally such. . . . A defendant may not collaterally attack a conviction through a motion to correct illegal sentence . . . . [E]ven if this court had jurisdiction the motion lacks merit."

Deck appealed and refined his arguments to rely on *State v. Dunn*, 304 Kan. 773, 811, 375 P.3d 332 (2016), in which the court held charging documents need only allege facts constituting a Kansas offense committed by the defendant. He claimed that since the facts alleged in count four did not constitute an "actual" Kansas crime, any charging document alleging those facts was jurisdictionally defective. He maintained that because the statutory definition of "illegal sentence" is one imposed by a court without jurisdiction, his sentence was illegal. He also sought to revive a challenge to the underlying conviction.

In the alternative, Deck asked the panel to remand the case to the district court with instructions to issue a nunc pro tunc order correcting the mistaken journal entry that specified a 59-month prison term, rather than the 41 months pronounced. See *State v. Juiliano*, 315 Kan. 76, 84, 504 P.3d 399 (2022) ("[I]f there is a discrepancy between the pronounced sentence and the written journal entry, our court has held that the pronounced sentence controls."). The State agreed with this alternative relief.

The panel rejected Deck's jurisdictional defect claim but accepted the uncontroverted alternative relief to correct the 59-month notation in the journal entry on remand. *Deck*, 2022 WL 983628, at *5-6. Deck petitioned this court for review solely on the sentencing jurisdiction issue, which we granted. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

DISCUSSION

Subject matter jurisdiction is the court's power to hear and decide a particular type of action. Its existence cannot be waived, and its nonexistence can be challenged at any time. *Dunn*, 304 Kan. at 784. The Kansas Constitution's article 3, section 6(b) provides: "The district courts shall have such jurisdiction in their respective districts as may be provided by law." K.S.A. 20-301 vests district courts with "general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law." And K.S.A. 22-2601 gives district courts "exclusive jurisdiction to try

all cases of felony and other criminal cases arising under the statutes of the state of Kansas."

A sentence is illegal if it is "[i]mposed by a court without jurisdiction," which is not waivable. K.S.A. 2022 Supp. 22-3504(c)(1). "The court may correct an illegal sentence at any time while the defendant is serving such sentence." K.S.A. 2022 Supp. 22-3504(a). Put more simply, just because Deck pled guilty to count four does not mean he waived any jurisdictional challenge against his sentence associated with his conviction on that count. See *State v. Brown*, 299 Kan. 1021, 1030, 327 P.3d 1002 (2014) (subject matter jurisdiction cannot be conferred by consent, waiver, estoppel).

An appellate court exercises unlimited review over jurisdictional matters, and when that analysis involves statutory interpretation, the court employs de novo review. See *State v. Jackson*, 314 Kan. 178, 179-80, 496 P.3d 533 (2021) (whether a sentence is illegal is a legal question subject to unlimited review); *State v. Smith*, 311 Kan. 109, 111, 456 P.3d 1004 (2020) (applying a de novo analysis to a statutory interpretation question); *Dunn*, 304 Kan. at 784 (whether subject matter jurisdiction exists is a legal question subject to unlimited review).

Deck's claim must fail because our courts have consistently held that a motion to correct an illegal sentence cannot be the procedural mechanism to challenge a defective complaint, which is his real grievance, even though he creatively focuses his requested relief on the resulting prison sentence that is its by-product. It is worth discussing the controlling caselaw in a bit more detail.

In *State v. Nash*, 281 Kan. 600, 601, 133 P.3d 836 (2006), the defendant attacked his conviction for aggravated robbery claiming it stemmed from a defective complaint because of the way the crime was charged. The court rejected this criticism without considering the alleged flaws. See 281 Kan. at 602 ("In essence, the defendant is seeking to use the correction of an illegal sentence statute as the vehicle for a collateral attack on a conviction. Such relief is not available under K.S.A. 22-3504."). The next year, and relying on *Nash*, the court again rejected an illegal sentence claim based, in part, on errors alleged in the criminal complaint. See *State v. Hoge*, 283 Kan. 219, 226, 150 P.3d 905 (2007) ("Relief is

not available to Hoge under K.S.A. 22-3504 for the type of defects he alleges in the complaint."). And this prohibition continued the next year in *State v. Deal*, 286 Kan. 528, 186 P.3d 735 (2008), when Deal argued the criminal complaint under which he was convicted was jurisdictionally defective because he claimed it added elements not required by the first-degree murder statute. The court rejected this and four related contentions attacking the complaint, noting: "Simply put, Deal does not attack his sentence: he merely challenges his conviction." 286 Kan. at 530.

Following *Deal*, our court has consistently viewed disputes advanced through K.S.A 22-3504 motions about a criminal complaint's potential defects as inappropriate collateral attacks on the conviction itself, not the sentence. *State v. Sims*, 294 Kan. 821, 825, 280 P.3d 780 (2012); see also *State v. Trotter*, 296 Kan. 898, 904, 295 P.3d 1039 (2013) ("To overturn the sentence because of a defect in the complaint, Trotter must obtain a reversal of his conviction, and a motion to correct an illegal sentence cannot be used as a vehicle for a collateral attack on a conviction."); *Robertson*, 309 Kan. 602, Syl. ¶ 1 (following *Trotter*); *Ross*, 315 Kan. 804, Syl. ¶ 2 (following *Robertson*).

To be sure, this court has recognized instances when both a conviction and sentence can be challenged through a motion under K.S.A. 22-3504, but those have never been in the context of claimed deficiencies in the complaint. For example, in *State v. Davis*, 281 Kan. 169, 130 P.3d 69 (2006), the court reversed both when the defendant argued a district court's failure to conduct a competency evaluation deprived it of jurisdiction to conduct a sentencing—and all other phases of the prosecution—because state law mandated proceedings must be suspended once counsel requests the evaluation and the court finds reason to believe the defendant is incompetent. Similarly, in *State v. Breedlove*, 285 Kan. 1006, 179 P.3d 1115 (2008), a motion to correct illegal sentence led to reversal of a juvenile defendant's convictions and vacating of his sentences because the State failed to first begin juvenile proceedings before trying him as an adult. 285 Kan. at 1016-17.

But these examples are not collateral attacks on the underlying conviction disguised as challenges to the resulting sentence as we have here. We hold Deck's motion to correct an illegal sentence

under K.S.A. 22-3504 falls into the collateral attack category long recognized as inappropriate for this statutory procedure. We affirm the lower courts on the issue subject to our review.

Affirmed.

* * *

BILES, J., concurring: I concur in the result but write separately to suggest a better rationale. In Deck's case, we must decide whether the district court had subject matter jurisdiction to sentence him for attempted unintentional second-degree murder, which our precedent has already labeled a "logically impossible" crime in another context. *State v. Shannon*, 258 Kan. 425, 428-29, 905 P.2d 649 (1995); see also *State v. Gentry*, 310 Kan. 715, 732, 449 P.3d 429 (2019) (reaffirming *Shannon*; reasoning it "is a logical impossibility—a person cannot intend to kill while not intending to kill").

In *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016), the court held that for a charging document to be statutorily sufficient, it

> "need only show that a case has been filed in the correct court, *e.g.*, the district court rather than municipal court; show that the court has territorial jurisdiction over the crime alleged; and *allege facts that, if proved beyond a reasonable doubt, would constitute a Kansas crime committed by the defendant*." (Emphasis added.) 304 Kan. at 811.

Deck presents a straightforward question asking whether the State's complaint satisfied *Dunn*'s third requirement. In other words, we just need to decide whether the charging document alleged facts constituting "a Kansas crime committed by the defendant" as the italicized language in *Dunn* reflects. And I believe it did.

K.S.A. 22-3201(b) reads: "The complaint, information or indictment shall be a plain and concise written statement of the *essential facts constituting the crime* charged, which complaint, information or indictment, drawn in the language of the statute, shall be deemed sufficient." (Emphasis added.) The same subsection provides that a charging document "shall state for each count the official or customary citation of the statute . . . which the defendant is alleged to have violated," and even if "[e]rror in the citation or its omission" occurs, such an error or omission "shall be not

ground for dismissal of [the prosecution] or for reversal of a conviction if the error or omission did not prejudice the defendant." K.S.A. 22-3201(b). And subsection (e) allows a court to "permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced." K.S.A. 22-3201(e).

As the *Dunn* court reasoned, "K.S.A. 22-3201 indicate[s] that a court is not automatically deprived of subject matter jurisdiction by a defect in a charging document." *Dunn*, 304 Kan. at 791. And it explained the statute "allows a prosecution to be continued in spite of an error or omission in the required citation to the provision of law alleged to be violated, unless a defendant has suffered prejudice." 304 Kan. at 791.

Deck argues the State's charge of attempted unintentional second-degree murder fails to satisfy *Dunn*'s third requirement since it did not allege a recognized crime in Kansas. He relies on *Shannon* and *Gentry*, but those cases dealt with a court's statutory obligation to give lesser included offense instructions. See K.S.A. 2022 Supp. 22-3414(3) (requiring courts to instruct when there is some evidence reasonably justifying a conviction of some lesser included crime as provided by K.S.A. 21-5109[b]). And unlike *Shannon* and *Gentry*, the question is whether *charging* such a crime as was done here deprived the district court of subject matter jurisdiction over the crime he ultimately pled to.

Deck repeatedly characterizes count four as a nonexistent crime, but its constituent elements really do exist within the Kansas Criminal Code. Starting with K.S.A. 2022 Supp. 21-5301(a), it defines "attempt" as "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." And K.S.A. 2022 Supp. 21-5403(a)(2) defines "[m]urder in the second degree" as "the killing of a human being committed . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." Both the attempt crime and the unintentional second-degree murder crime reside in state law, so the facts recited in count four

alleging attempted unintentional second-degree murder constitute criminal behavior violating our criminal code.

Granted, one logically cannot commit an attempted unintentional killing, but the governing statute for criminal complaints merely requires alleging *a* crime's essential facts. K.S.A. 22-3201; see K.S.A. 2022 Supp. 22-2202(i); *Dunn*, 304 Kan. at 790. And while this may seem counterintuitive, the question as Deck has framed it is not his conviction's validity—it is simply whether the district court had the judicial power to hear and decide a particular type of action, which here is a criminal proceeding. I would hold the answer is yes in this case.

As *Dunn* clarifies: "Kansas charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases; the Kansas Constitution does." *Dunn*, 304 Kan. 773, Syl. ¶ 1. A charging document simply needs to: (1) show the case was filed in the correct court, e.g., a district court rather than a municipal court; (2) show the court has territorial jurisdiction over the crime alleged; and (3) allege facts that, if proved beyond a reasonable doubt, would constitute a Kansas crime committed by the defendant. 304 Kan. 773, Syl. ¶ 2; see K.S.A. 22-3201. Here, the State made a statutorily sufficient showing by charging Deck with facts constituting the crime of unintentional second-degree murder and the crime of attempt. His global plea agreement, which resolved several charges in two separate criminal cases, came later and is unaffected by the *Shannon* line of cases about lesser included offense instructions.

As the *Dunn* court explained,

> "Because all crimes are statutorily defined, this is a statute-informed inquiry. The legislature's definition of the crime charged must be compared to the State's factual allegations of the defendant's intention and action. If those factual allegations, proved beyond a reasonable doubt, would justify a verdict of guilty, then the charging document is statutorily sufficient. If the charging document is instead statutorily insufficient, then the State has failed to properly *invoke* the subject matter jurisdiction of the court, and an appropriate remedy must be fashioned. The problem is not a substantive absence of jurisdiction; it is a procedural failure to demonstrate its existence. The availability of a remedy is key. Statutory infirmity does not inevitably fail to bestow subject matter jurisdiction or deprive the court of jurisdiction or destroy jurisdiction. See K.S.A. 22-3502 (arrest of judgment available if charging document does not charge crime *or* court without jurisdiction)." *Dunn*, 304 Kan. at 812.

Unlike my colleagues, I would not reject Deck's challenge as procedurally infirm under K.S.A. 2022 Supp. 22-3504. After all, subsection (c)(1) defines an "illegal sentence" as one "[i]mposed by a court without jurisdiction." That is what he claims, and he tailored his motion to just that question and made its target his sentence. I would hold the problem for Deck is not his procedural vehicle, but the facts stated in count four. Those facts satisfy *Dunn*'s third requirement, so the district court had subject matter jurisdiction.

WILSON, J., joins the foregoing concurring opinion.

Nos. 125,505
125,506
125,507

STATE OF KANSAS, *Appellee*, V. NATHANIEL TURNER III, *Appellant*.

(525 P.3d 326)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Journal Entry of Judgment—Correction by Nunc Pro Tunc Order.* A journal entry of judgment may be corrected at any time by a nunc pro tunc order, which is appropriate for correcting arithmetic or clerical errors arising from oversight or omission. If there is no arithmetic or clerical error arising from oversight or omission, a nunc pro tunc order is not appropriate.

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Opinion filed March 10, 2023. Affirmed.

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

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

The opinion of the court was delivered by

STANDRIDGE, J.: In 1992, Nathaniel Turner III pled no contest to multiple felonies in three separate cases. He currently is serving an aggregated sentence of 80 years to life in prison. In the years following his convictions, Turner unsuccessfully challenged his sentence in various ways. In his most recent challenge, Turner moved for an order nunc pro tunc to correct his sentencing journal entries, claiming they are at odds with the actual sentence he is serving. He argued the journal entries should be amended to reflect either (1) the individual sentences imposed by the district court or (2) an aggregated sentence imposed by the court rather than the Kansas Department of Corrections (KDOC). After the district court denied Turner's motion, he directly appealed to this court.

Nunc pro tunc orders are used to correct arithmetic or clerical errors. The Court of Appeals previously affirmed the KDOC's calculation of Turner's 80-years-to-life aggregated sentence. Since

the KDOC's calculation of his aggregate sentence reflects the sentence imposed by the district court, there is no arithmetic or clerical error to correct. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1992, the district court sentenced Turner for eight felony convictions in three cases. In case 92 CR 11, the district court imposed concurrent sentences of 5 to 20 years for one count of robbery and one count of aggravated burglary. In case 92 CR 16, the court imposed four consecutive sentences of 15 years to life for one count of rape, one count of aggravated criminal sodomy, and two counts of aggravated robbery. In case 92 CR 90, the court imposed a sentence of 5 to 20 years for one count of robbery to run concurrent with a sentence of 15 years to life for one count of aggravated robbery. The court ordered Turner to serve the sentences in each case consecutively. We affirmed Turner's sentences in *State v. Turner*, No. 69,638, unpublished opinion filed April 15, 1994.

In 2011, Turner petitioned for habeas corpus relief under K.S.A. 60-1501. He claimed the KDOC impermissibly aggregated his sentences to a controlling term of 80 years to life with parole eligibility possible after 40 years subject to the amount of good time credits earned. Turner argued he was entitled to a conditional release date. The district court denied Turner's petition, and the Court of Appeals affirmed. See *Turner v. McKune*, No. 108,428, 2013 WL 2936140, at *1, 4 (Kan. App. 2013) (unpublished opinion).

In 2016, Turner filed a second K.S.A. 60-1501 petition, alleging he was denied due process when the KDOC deprived him of 10 years' presumed earned good time credit in calculating his conditional release date for his sentence in case 92 CR 11. After the district court dismissed the petition, the Court of Appeals affirmed. See *Turner v. State*, No. 118,932, 2019 WL 325218, at *1, 3 (Kan. App. 2019) (unpublished opinion). Turner unsuccessfully sought relief on these same grounds in the Kansas federal district court. See *Turner v. Peterson*, No. 20-3095-SAC, 2021 WL 699841, at *1-2 (D. Kan. 2021).

In 2021, Turner filed the motion that is the subject of the present appeal, titled "Request for Nunc Pro Tunc Order to Effectuate Compliance With K.S.A. 22-3426." In the motion, filed in all three cases, Turner claimed his aggregated sentence of 80 years to life differed from the sentence imposed by the district court. As a result, Turner argued the sentencing journal entries did not comply with K.S.A. 2021 Supp. 22-3426 because the KDOC, rather than the court, aggregated his sentence. Turner asked the district court to amend the sentencing journal entries to explicitly reflect the actual sentence imposed.

The district court denied Turner's request for amendment, holding that the sentences reflected in the journal entries were correct and noting the previous decisions that upheld the KDOC's aggregation of Turner's sentence. The court later denied Turner's motion to alter or amend its ruling.

Turner directly appealed the district court's decision in each case to this court. We granted Turner's motion to consolidate the cases for appeal.

Jurisdiction is proper. See K.S.A. 2022 Supp. 22-3601(b)(3) (direct appeals to Supreme Court allowed for life sentence crimes); K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2022 Supp. 22-3601).

ANALYSIS

Turner argues the district court erred in denying his motion to amend the sentencing journal entries. Turner claims, as he did below, that the KDOC's aggregation of his sentences is at odds with the sentences imposed by the district court. As a result, he asks for a nunc pro tunc order amending the journal entries to accurately reflect the sentence he is serving.

A journal entry of judgment may be corrected at any time by a nunc pro tunc order, which is appropriate for correcting arithmetic or clerical errors arising from oversight or omission. See K.S.A. 2022 Supp. 22-3504(b); *State v. Potts*, 304 Kan. 687, 708, 374 P.3d 639 (2016). Whether a nunc pro tunc order is required here necessarily involves the interpretation of Kansas statutes and administrative regulations. Such interpretation presents a question

of law over which appellate courts have unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

We begin with a review of the relevant Kansas statutes and administrative regulations. At Turner's sentencing, the district court imposed consecutive indeterminate sentences in each of his three cases. K.S.A. 1991 Supp. 21-4608(6), the statute in effect at the time of Turner's crimes, sets forth the rules for calculating the time to be served on concurrent and consecutive sentences. Applicable here, K.S.A. 1991 Supp. 21-4608(6)(c) provides for the method of calculating the time to be served on multiple consecutive indeterminate sentences:

"When indeterminate terms imposed on the same date are to be served consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to the sum of all maximum terms."

The KDOC regulations provide additional guidance on this sentence computation, defining "'[c]onsecutive sentence'" as "a series of two or more sentences imposed by the court in which the minimum terms and the maximum terms, respectively, are to be aggregated." K.A.R. 44-6-101(n) (1992). The KDOC regulations define "'[a]ggregated controlling sentence'" as

"a controlling sentence composed of two or more sentences. An aggregated controlling sentence has a minimum term consisting of the sum of the minimum terms and a maximum term consisting of the sum of the maximum terms." K.A.R. 44-6-101(j) (1992).

The district court sentenced Turner to the following controlling consecutive sentences: (1) 5 to 20 years in case 92 CR 11, (2) four consecutive terms of 15 years to life in case 92 CR 16, and (3) 15 years to life in case 92 CR 90. The KDOC then applied the law cited above to calculate Turner's aggregated controlling sentence by adding the sum of each minimum term (5+15+15+15+15+15) to arrive at the aggregate minimum and adding the sum of each maximum term (20 years + 5 life terms) to arrive at the aggregate maximum, a sum of 80 years to life. See K.A.R. 44-6-106(a) (providing KDOC with authority to interpret court documents "to the extent necessary to execute the sentence and commitment").

Turner argues that by calculating his sentence in this way, the KDOC improperly modified his sentence by combining the individual sentences into one, thus creating a higher minimum term for each. Turner suggests that the resulting aggregate sentence violates K.S.A. 2022 Supp. 22-3426(a), which he claims "requires particularity in any given sentence in a single case, and in essence, creates a finality to that sentence." Noting he already has served the minimum terms of some of his individual sentences, as well as the maximum 20-year sentence in case 92 CR 11, Turner complains that the KDOC's aggregation under K.S.A. 1991 Supp. 21-4608(6)(c) "delegitimizes the integrity of the discrete sentence for each case" because it means that no individual sentence is considered served until all three are served. Given this alleged conflict between the sentence imposed by the district court and the KDOC's aggregation of that sentence, Turner seeks clarification of the actual sentence he is serving. To that end, he requests amendment of the sentencing journal entries to reflect the discrete nature of each sentence or, in the alternative, a court-ordered aggregation of his sentences.

Turner's argument, while framed as a request for amendment of the journal entries by nunc pro tunc order, is merely another attempt to challenge the legality of his sentence. The Court of Appeals previously affirmed the KDOC's calculation of Turner's 80-years-to-life aggregated sentence. See *Turner*, 2013 WL 2936140, at *1, 3-4 (finding Turner's controlling sentence was 80 years to life and holding completion of first sentence did not entitle him to recalculation of sentence term); *Turner*, 2019 WL 325218, at *3 (same). Thus, it may be considered the law of the case. The law-of-the-case doctrine is "a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so." *State v. Collier*, 263 Kan. 629, Syl. ¶ 2, 952 P.2d 1326 (1998). "Ordinarily, under the law of the case doctrine, once an issue is decided by the court, it should not be relitigated or reconsidered unless it is clearly erroneous or would cause manifest injustice." 263 Kan. 629, Syl. ¶ 3.

The KDOC's aggregation of Turner's sentence is not clearly erroneous. As confirmed by the Court of Appeals and reviewed in

detail above, the KDOC properly calculated Turner's aggregate sentence as 80 years to life, in compliance with the relevant statutory and regulatory authority. And contrary to Turner's reading of K.S.A. 2022 Supp. 22-3426(a), there is no conflict with K.S.A. 1991 Supp. 21-4608(6)(c). K.S.A. 2022 Supp. 22-3426(a) addresses the record of a district court's judgment or sentence and sets forth the requirements for the form and content of the court's journal entry. It does not apply to the KDOC's aggregation of Turner's sentence. Turner makes no manifest injustice argument, and, given the KDOC's proper aggregation of his sentence, none exists.

The KDOC's calculation of Turner's aggregate sentence reflects the sentence imposed by the district court. As a result, there is no arithmetic or clerical error to correct. See K.S.A. 2022 Supp. 22-3504(b); *Potts*, 304 Kan. at 708. The district court did not err in denying Turner's request for a nunc pro tunc order.

Affirmed.

No. 125,292

In the Matter of TERRENCE J. MALONE, *Petitioner.*

(525 P.3d 335)

ORDER OF REINSTATEMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Reinstatement.*

On October 14, 2022, this court suspended Terrence J. Malone's license to practice law in Kansas for a period of 90 days. The court did not order Malone undergo a full reinstatement hearing prior to its consideration of any petition for reinstatement. See *In re Malone,* 316 Kan. 488*,* 518 P.3d 406 (2022); see also Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) (procedure for reinstatement after suspension).

On January 20, 2023, Malone filed a petition for reinstatement. The Office of the Disciplinary Administrator (ODA) responded that it could not certify that Malone had fully complied with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292), or that Malone should be reinstated to the practice of law. Accordingly, the ODA moved for a reinstatement hearing under Rule 232(d)(2) (2023 Kan. S. Ct. R. at 294). Malone responded that he does not object to a reinstatement hearing, but he asked the court to set time limits for the reinstatement proceedings.

After careful consideration of the record, the court denies the ODA's motion for a reinstatement hearing and notes Malone's response. While the ODA's cited concerns may be grounds for a new disciplinary complaint, the court finds them insufficient to necessitate a reinstatement hearing.

The court grants Malone's petition for reinstatement and orders Malone's license to practice law in Kansas reinstated.

The court further orders Malone to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education requirements. See Supreme Court Rule 812 (2023 Kan. S. Ct. R. at 609) (outlining CLE requirements following reinstatement). The court directs that once the OJA receives proof of Malone's completion

of these conditions, the OJA must add Malone's name to the roster of attorneys actively engaged in the practice of law in Kansas.

Finally, the court orders the publication of this order in the official Kansas Reports and the assessment of all costs herein to Malone.

Dated this 14th day of March 2023.

BILES and STANDRIDGE, JJ., not participating.