REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:
SARA R. STRATTON

Advance Sheets, Volume 317, No. 3
Opinions filed in April – June 2023

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JUSTICES AND OFFICERS OF THE KANSAS
SUPREME COURT

———

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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
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Disciplinary Administrator ..... GAYLE B. LARKIN

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2023-RL-052

Rules Relating to Judicial Conduct

The court amends the attached Supreme Court Rule 650, effective the date of this order.

Dated this 22nd day of June 2023.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 650

JUDICIAL ETHICS ADVISORY PANEL

(a) **Purpose.** The judicial ethics advisory panel advises a Kansas judge as defined in Rule 603 seeking an opinion on whether an intended, future course of conduct complies with the Code of Judicial Conduct.

(b) **Members; Terms.** The Supreme Court expands the panel from three members to five members. The court will appoint five retired justices or judges to serve on the panel for the following terms.

(1) **Inaugural Term.** The Supreme Court will appoint the two members added during the expansion for an inaugural 1-year term. Under subsection (b)(2), these two members may serve three more consecutive 4-year terms.

(2) **Terms.** Other than the inaugural term under subsection (b)(1), the Supreme Court will appoint each member for a 4-year term. No member may serve more than three consecutive 4-year terms, except that a member initially appointed to serve an unexpired term created by a vacancy may serve three more consecutive 4-year terms.

(3) **Vacancy.** The Supreme Court will appoint a new member to fill a vacancy occurring during a term, and the new member will serve the unexpired term of the previous member. A vacancy will occur when a member no longer meets the qualifications for the appointment.

(c) **Chair; Meetings.** The Supreme Court will designate one member as chair of the panel. The panel will meet as needed and when scheduled by the chair.

(d) **Quorum.** A quorum of members must be present for the panel to act. Three members constitute a quorum.

(e) **Reimbursement; Compensation.** The Supreme Court will reimburse a member for actual and necessary expenses incurred in the discharge of official duties and will determine compensation for each member.

(f) **Request.** A judge must submit a request for a judicial ethics advisory opinion to the clerk of the appellate courts. The clerk will forward a request that meets the requirements of this rule to the panel and will disclose the identity of the judge to the panel. Only a person subject to Rule 601B et seq. may submit a request.

(g) **Request Requirements.** A request for an advisory opinion must relate to prospective conduct only. The clerk of the appellate courts will not accept or refer a request that does not contain the following:

(1) a detailed statement of the facts pertaining to the intended conduct;

(2) a clear and concise question of judicial ethics; and

(3) a concise memorandum setting forth the judge's own research and conclusions concerning the question.

(h) **Advisory Opinion Content.** In an advisory opinion, the panel will only address whether an intended, future course of conduct violates the Code of Judicial Conduct and provide an application of the Code to the factual situation presented. The panel must not address issues of law or the ethical propriety of past or present conduct. The panel must not disclose the identity of the requesting judge in the opinion.

(i) **Distribution; Retention.** The clerk of the appellate courts will provide a copy of an advisory opinion to the chief justice, the Commission on Judicial Conduct, the requesting judge, and the Supreme Court Law Library. The clerk will keep the original opinion in a permanent file.

(j) **Discipline.** The Commission on Judicial Conduct will consider the fact that a judge requested and relied on an advisory opinion when disposing of a complaint and when determining whether to recommend that the Supreme Court discipline the judge. The panel's advisory opinion is not binding on the Commission on Judicial Conduct or the Supreme Court.

[**History:** Am. effective March 6, 1984; Am. effective November 17, 1987; Am. (f) effective May 11, 1995; Am. (b) and (f) effective May 1, 1999; Am. effective August 31, 2015; Am. effective June 22, 2023.]

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PETITIONS FOR REVIEW OF DECISIONS OF THE COURT OF APPEALS 317 Kan. No. 3

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American Warrior, Inc. v. Board of Finney County Comm'rs	124,998	Granted	06/23/2023	63 Kan. App. 2d 123
Bates v. State	124,550	Denied	05/05/2023	Unpublished
Bell v. State	124,447	Denied	06/27/2023	Unpublished
In re K.D.	125,042	Denied	06/28/2023	Unpublished
In re Marriage of Obembe and Grammatikopoulou	124,097	Denied	06/28/2023	Unpublished
Jennings v. Shauck	123,495	Granted	06/23/2023	Unpublished
League of Women Voters of Kansas v. Schwab	125,084	Granted	06/23/2023	63 Kan. App. 2d 187
Miller v. Hutchinson Regional Med. Center	124,357	Denied	05/05/2023	63 Kan. App. 2d 57
Moore v. Moore	122,944	Denied	05/05/2023	Unpublished
Robinson v. State	122,089	Denied	06/23/2023	Unpublished
State v. Anderson	124,727	Denied	05/05/2023	Unpublished
State v. Bailey	125,065	Denied	05/05/2023	Unpublished
State v. Blackmon	123,988	Denied	05/05/2023	Unpublished
State v. Cline	125,410	Denied	06/28/2023	63 Kan. App. 2d 167
State v. Daniels	124,626	Granted	06/28/2023	Unpublished
State v. Dempsey	124,627	Denied	06/27/2023	Unpublished
State v. Doll	124,147	Denied	05/05/2023	Unpublished
State v. Dupree	123,837	Denied	06/27/2023	Unpublished
State v. Eismann	124,664	Denied	05/05/2023	Unpublished
State v. Elias	124,387	Denied	05/05/2023	Unpublished
State v. Ford	124,236	Granted	06/23/2023	Unpublished
State v. Guebara	120,994	Granted	06/23/2023	Unpublished
State v. Jackson	124,540	Denied	05/05/2023	Unpublished
State v. Jarmon	124,558	Denied	06/27/2023	Unpublished
State v. Jones	124,174	Granted	06/29/2023	Unpublished
State v. Martin	124,607	Granted	06/23/2023	Unpublished
State v. McBride	124,645	Denied	05/05/2023	Unpublished
State v. Ninh	122,782	Granted	06/23/2023	63 Kan. App. 2d 91
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State v. Ransdell	124,628	Denied	06/27/2023	Unpublished
State v. Redmon	123,811	Denied	06/27/2023	Unpublished
State v. Rush	124,150	Denied	05/05/2023	Unpublished
State v. Vano	124,232	Denied	06/28/2023	Unpublished
State v. Winter	124,172	Denied	05/05/2023	Unpublished
Surface Companies, Inc. v. Pishny Real Estate Services	124,512	Denied	06/27/2023	Unpublished
Sweeney v. Kansas Dept. of Revenue	124,409	Denied	05/05/2023	Unpublished

Title	Docket Number	Disposition	Date	Reported Below
U.S. Energy Exploration Corp. v. Directional Drilling Systems	123,885	Denied	05/05/2023	Unpublished
Wells v. Kansas Corporation Comm'n	124,743	Denied	06/27/2023	Unpublished
Wells v. Kansas Corporation Comm'n	124,916	Denied	06/27/2023	Unpublished
Wells v. Kansas Corporation Comm'n	124,606	Denied	06/27/2023	Unpublished
Wiedemann v. Pi Kappa Phi Fraternity	124,251	Denied	05/05/2023	62 Kan. App. 2d 704
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ADMINISTRATIVE LAW:

Act Provides Remedy to Appeal Relocation Benefits—Procedure. K.S.A. 58-3509(a) of the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act, K.S.A. 58-3501 et seq., provides a comprehensive remedy for vindicating the statutory right to relocation benefits and assistance. K.S.A. 58-3509(a) allows a displaced person to appeal to the state, agency, or political subdivision within 60 days of the initial determination of relocation benefits. If such an appeal is made, an independent hearing examiner shall be appointed by the condemning authority within 10 days and a determination of the appeal made within 60 days. After administrative review is complete, any party wishing to appeal the ruling of the hearing examiner may do so by filing a written notice of appeal with the clerk of the district court within 30 days of the hearing examiner's decision. Any such appeal to the district court shall be a trial de novo only on the issue of relocation benefits.
Kansas Fire and Safety Equipment v. City of Topeka 418*

Administrative Agency -- Subject Matter Jurisdiction Derived from Statutes. An administrative agency derives subject matter jurisdiction over a matter from statutes. *Fisher v. Kansas Dept. of Revenue* 119

Statute Provides Party Must Exhaust Administrative Remedies before Appealing Relocation Benefits and Assistance to District Court. A party must exhaust their administrative remedies under K.S.A. 58-3509(a) before appealing a hearing examiner's ruling on the issue of relocation benefits and assistance to the district court. The failure to exhaust such administrative remedies deprives the district court of subject matter jurisdiction.
Kansas Fire and Safety Equipment v. City of Topeka 418*

APPEAL AND ERROR:

Clerical Mistakes May Be Corrected by Court at Any Time. Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.
State v. Redick 146

District Court's Review of Workability of Restitution Plan—Appellate Review. An appellate court reviews a district court's decision on the workability of a restitution plan for an abuse of discretion. The party asserting error has the burden of showing an abuse of discretion. *State v. Taylor* 364*

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. *Granados v. Wilson* 34

Invited Error Doctrine—Application. The invited error doctrine does not bar an appellant from raising an issue on appeal when he or she merely acceded to—but

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did not affirmatively request—the error. The doctrine applies only when a defendant actively pursues and induces the court to make the error.
State v. Smith ……...…….. 130

New Claims Cannot Be Raised on Appeal. A defendant cannot raise new claims for the first time on appeal unless an exception applies.
Shelton-Jenkins v. State ……..…… 141

Party Must Seek Review to Preserve Issue on Appeal. A party aggrieved by a Court of Appeals' decision on a particular issue must seek review to preserve that issue for Kansas Supreme Court review.
State v. Slusser ……..…….. 174

Sufficiency of Evidence Challenge to Conviction – Appellate Review. When a defendant challenges sufficiency of the evidence supporting a conviction, an appellate court looks at all the evidence in the light most favorable to the prosecution to decide whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In this process, the reviewing court must not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Spencer* ……..……... 295

ATTORNEY AND CLIENT:

Claim of Ineffective Assistance of Counsel—Proof of Deprivation of Right to Counsel. A defendant claiming ineffective assistance of counsel to warrant setting aside a plea under K.S.A. 2022 Supp. 22-3210(d)(2) must demonstrate counsel's performance deprived the defendant of his or her Sixth Amendment right to counsel. *Shelton-Jenkins v. State* ……...…..… 141

Disciplinary Proceeding—Disbarment. Attorney charged in a formal complaint by the Disciplinary Administrator, with violations of KRPC 1.15 (safekeeping property) and 1.16.(declining or terminating representation), voluntarily surrendered his license to practice law in Kansas. *In re Angst* ……..…….. 282

——. Attorney charged with multiple violations of KRPCs in a formal complaint filed by the Disciplinary Administrator, voluntarily surrendered his license to practice law in Kansas. In a letter signed March 27, 2023, Costello voluntarily surrendered his license to practice law under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). *In re Costello* ……..…..…. 149

— Indefinite Suspension. Respondent was ordered indefinitely suspended due to the unauthorized practice of law following a prior suspension of his license. Respondent entered into a Summary Agreement in which he admitted various violations of the KRPCs and stipulated to findings of fact by the disciplinary panel. The Supreme Court ordered Respondent's license be indefinitely suspended. *In re Ayesh* ……..... 405*

— One Hundred Eighty-day Suspension. Attorney is suspended from the practice of law in Kansas for 180 days for violating KRPCs that related to his mishandling of the transfer of a mineral interest title. Respondent did not dispute the findings or recommendations of the disciplinary hearing

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panel or the Disciplinary Administrator. The Supreme Court suspended the respondent for 180 days. *In re Eland* 315*

— **One-year Suspension**. Attorney entered into a summary submission agreement under Supreme Court Rule 223, stipulating that he violated KRPCs 1.1, 1.3, 1.15(a) and (b), 8.4(c) and (d), Rule 210(c), and Rule 221(b). Attorney is disciplined by a one-year suspension, to run concurrent with his suspension in the state of Maryland. The Supreme Court further orders as a condition of reinstatement of his Kansas license that attorney show that his Maryland and District of Columbia law licenses have been reinstated. *In re Marks* 10

——. Attorney is suspended for one year from the practice of law in the state of Kansas, in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. R. at 281), for violations of KRPC 1.15 (safekeeping property), 8.4(c) (professional misconduct), and Rule 210 (duty to cooperate). Respondent will be required to undergo a reinstatement hearing. *In re McVey* 266

— **Order of Reinstatement**. Attorney petitioned for reinstatement of his license to practice law in Kansas after a two-year suspension in 2013. Following a reinstatement hearing, attorney is reinstated, subject to a term of three years of supervised probation. *In re Galloway* 87

— **Published censure**. Attorney Mitchell Spencer committed a misdemeanor that involved dishonesty, fraud, deceit, or misrepresentation which adversely reflected on his fitness to practice law, but the Kansas Supreme Court held it did not seriously adversely reflect on his fitness to practice law. 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. The court held published censure to be an appropriate sanction. *In re Spencer* 70

— **Reinstatement**. Attorney suspended for 90 days in October 2022, files motion for reinstatement. Disciplinary Administrator moved for reinstatement hearing, but Kansas Supreme Court denied motion for hearing, and granted Malone's reinstatement, and ordered his license to be reinstated when CLE and attorney registration fees are in compliance. *In re Malone* 117

— **Three-month Suspension, Stayed Pending Successful Completion of Two-year Period of Probation**. Respondent is suspended for three months from the practice of law in Kansas, which is stayed pending successful completion of two-year period of probation for violations of KRPC 3.4(c), 4.4(a), 8.4(a), (d), and (g). *In re Barnds* 378*

CIVIL PROCEDURE:

Action for Wrongful Conviction and Imprisonment—Statutory Application. K.S.A. 2022 Supp. 60-5004(d)(2)'s use of the phrase "convicted, imprisoned and released from custody" refers to the imprisonment for which a claimant is seeking compensation, rather than some other, unrelated imprisonment. *In re Wrongful Conviction of Bell* 334*

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Moot Case—Actual Controversy has Ended. A case is moot when the actual controversy has ended and the only judgment that could be entered would be ineffectual for any purpose and would not impact any of the parties' rights. *Sierra Club v. Stanek* 358*

COURTS:

Appellate Review of Cases Decided on Documents and Stipulated Facts. Appellate courts need not defer to the district court when reviewing cases decided on documents and stipulated facts.
In re Marvin S. Robinson Charitable Trust 492*

Courts Exercise Judicial Review Only in Actual Case or Controversy—Requirement of Standing. While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *State v. Strong* 197

Kansas Supreme Court has Power to Take Actions Necessary for the Administration of Justice. The Kansas Supreme Court has the inherent power to take actions reasonably necessary for the administration of justice, provided the exercise of that power in no way contravenes or is inconsistent with the substantive statutory law. *State v. Steinert* 342*

CRIMINAL LAW:

Absent Illegal Sentence Claim—Lack of Jurisdiction by Appellate Court to Review Agreement Approved by Sentencing Court. Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court lacks jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the sentencing court approves on the record. *State v. Johnson* 458*

Aggravated Arson Charge—No Double Jeopardy Violation When Convicted on Multiple Counts. A defendant charged with aggravated arson committed under K.S.A. 2022 Supp. 21-5812(b)(1)—that is, arson committed upon a property in which there is a person—does not suffer a double jeopardy violation when convicted on multiple counts arising from damage by fire to separate apartments, each with a person inside.
State v. Buchanan 443*

Application of Traditional Canon of Statutory Construction to Statute—Intent of Legislature to Tie Single Unit of Prosecution to Multiple

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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. *State v. Eckert* 21

Challenge to Constitutional Validity of Waiver— Outside Definition of Illegal Sentence. A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence, overruling *State v. Duncan*, 291 Kan. 467, 472-73, 243 P.3d 338 (2010). *State v. Johnson* 458*

Challenge to Restitution Order—Burden of Proof on Defendant to Show Restitution Is Unworkable. When a defendant challenges the workability of restitution, the burden of proof lies with the defendant to show compelling circumstances that would render restitution unworkable, either in whole or in part. To sustain that burden, defendants must generally present evidence of their inability to pay when the financial obligation is due. *State v. Taylor* 364*

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? *State v. Eckert* 21

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. *State v. Lowry* 89

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. *State v. Deck* 101

Defendant's Incriminating Statements to Law Enforcement – Conditions Considered in Determining Voluntariness of Statement. A defendant's incriminating statements to law enforcement are not involuntary simply because the defendant was tired or under the influence of drugs. Any

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such condition must have rendered the defendant confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent.
State v. Spencer ……..… 295

— Determination of Voluntariness – Two-Step Standard of Review. An appellate court reviews a district court's determinations about the voluntariness of a defendant's incriminating statements to law enforcement by using a two-step standard of review. First, the appellate court decides whether substantial competent evidence supports the factual underpinnings of the district court's decision. Second, the reviewing court views the district court's ultimate legal conclusion drawn from those facts de novo. In this process, the appellate court must not reweigh evidence or reassess witness credibility. *State v. Spencer* ……..……..…… 295

— State's Burden of Proof. When challenged, the State must prove a defendant voluntarily made incriminating statements to law enforcement by a preponderance of the evidence based on the totality of the circumstances involved. *State v. Spencer* ……..……..…… 295

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. *State v. Eckert* ……. 21

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. *State v. Bilbrey* ……..……. 57

Illegal-Sentence Claim May Be Raised First Time on Appeal. A challenge to the classification of a prior conviction and the resulting criminal-history score presents an illegal-sentence claim that may be raised for the first time on appeal.
State v. Steinert ……..……..…….. 342*

Motion to Correct Illegal Sentence—File on Direct Appeal. A defendant may file a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504(a) in an appellate court while on direct appeal. *State v. Steinert* ……...…..…….. 342*

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New Rule for Conducting Criminal Prosecutions—Application. A new rule for conducting criminal prosecutions is to be applied to all cases pending on direct review or not yet final. *State v. Steinert* 342*

Restitution Statute—Order Imposing Restitution Is the Rule—Finding that Restitution Is Unworkable Is the Exception. Kansas' criminal restitution statute makes clear that an order imposing restitution is the rule and a finding that restitution is unworkable is the exception. *State v. Taylor* 364*

Restitution Statute Provides Sentencing Court Shall Order Restitution for Damage or Loss Caused by Crime—Restitution Due Immediately—Exceptions. Kansas' criminal restitution statute, K.S.A. 2022 Supp. 21-6604(b)(1), provides that a sentencing court shall order restitution, including damage or loss caused by the defendant's crime. Such restitution shall be due immediately unless: (1) the sentencing court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (2) the sentencing court finds compelling circumstances that would render restitution unworkable, either in whole or in part.
State v. Taylor 364*

Sentencing—Classification of Prior Out-of-State Felony under Statute. Under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii), a prior out-of-state felony must be classified as a nonperson felony if the elements of the out-of-state offense do not require proof of any of the circumstances listed in subsections (B)(i) or (ii).
State v. Busch 308*

— Presentencing Investigation Report May be Considered Regarding Offender's Criminal History. Under K.S.A. 2021 Supp. 21-6814(b), a presentence investigation report may be considered at sentencing by the district court to determine whether the State's burden of proof has been satisfied regarding an offender's criminal history. *State v. Busch* 308*

— Sentencing Court Retains Jurisdiction to Correct Illegal Sentence or Clerical Error. Under K.S.A. 2022 Supp. 21-6820(i), a sentencing court retains jurisdiction to correct an illegal sentence or clerical error under K.S.A. 22-3504 irrespective of a defendant's appeal. *State v. Steinert* 342*

— Unsworn Responses May Be Considered by District Court. While sworn testimony may be more credible than unsworn responses, a district court is not precluded from considering—and even relying on—the responses it has elicited at sentencing. *State v. Taylor* 364*

Successive Motion to Correct Illegal Sentence—Application of Res Judicata. Res judicata bars a defendant from raising the same claim in a second or successive motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504, unless subsequent developments in the law shine new light on the original question of whether the sentence was illegal when pronounced. *State v. Moncla* 413*

— Party has Burden of Proof to Show Subsequent Development in Law. A party filing a successive motion to correct an illegal sentence bears a threshold

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burden to prove that a subsequent development in the law undermines the earlier merits determination. A successive motion that merely seeks a second bite at the illegal sentence apple is susceptible to dismissal according to our longstanding, common-law preclusionary rules. *State v. Moncla* ……...…….. 413*

*S***ufficiency of Evidence Challenge—Appellate Review**. When the sufficiency of the evidence is challenged in a criminal case, appellate courts review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility.
State v. Buchanan …….. 443*

Untimely Motion for New Trial—May Be Summarily Denied if Determined that Movant Not Entitled to Relief. A district court judge may summarily deny an untimely motion for new trial based on dissatisfaction with counsel without appointing counsel if the judge determines from the motion, files, and records that the movant is not entitled to relief.
State v. Buchanan …….. 443*

DIVORCE:

Division of Retirement Account—Judgment Subject to Dormancy If Qualifies as Final Determination of Parties' Interests. A district court's division of a retirement account in a divorce proceeding constitutes a judgment subject to dormancy under K.S.A. 2022 Supp. 60-2403 when the division order qualifies under K.S.A. 2022 Supp. 60-254(a) as a final determination of the parties' interests in the marital estate. *In re Marriage of Holliday* …… 469*

— *In re Marriage of Shafer* ……..…… 481*

K.S.A. 60-260 Not Applicable When Movant Requests to Clarify Original Property Division Order. The relief from judgment statute, K.S.A. 2022 Supp. 60-260, is not applicable when a movant merely requests to clarify the original property division order that does not require any substantive change to the order. *In re Marriage of Shafer* …..…… 481*

Statutory Tolling Provision Prevents Division of Interests in KPERS Retirement Account Until Benefits are Payable. K.S.A. 2022 Supp. 60-2403(c)'s tolling provision prevents a divorce decree dividing the parties' interests in a retirement account with the Kansas Public Employee Retirement System from becoming dormant until benefits become payable to the plan member. *In re Marriage of Holliday* ……..…….. 469*

EMINENT DOMAIN:

Eminent Domain Procedure Act Limits Judicial Review in Appeals to Just Compensation under Statute. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits the scope of judicial review in eminent-domain

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appeals to the issue of just compensation as defined by K.S.A. 26-513. Relocation benefits are not a component of just compensation under K.S.A. 26-513. *Kansas Fire and Safety Equipment v. City of Topeka* ……..… 418*

Failure to Obtain Jury Trial Waiver before Stipulation—Appellate Review. A district court's failure to obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime is reviewed for constitutional harmless error. *State v. Bentley* ……..…. 222

First-degree Murder – Premeditation – Proof Established by Direct or Circumstantial Evidence. As an element of first-degree murder, premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. It need not be proved by direct evidence. It can also be established by circumstantial evidence, provided any inferences made from that evidence are reasonable. *State v. Spencer* ……..……..…. 295

Guilt-based Defense Utilized by Defendant's Counsel—Courts Considers if Defense Was Deficient Performance and Prejudicial. When there is no indication a defendant objected to a guilt-based defense, a court considers whether counsel's decision to utilize such a defense was deficient performance and prejudicial under the circumstances. There is no general requirement that counsel first obtain express approval from the defendant. *State v. Bentley* ……..…..…. 222

Illegal-Sentence Claim May Be Raised First Time on Appeal. A challenge to the classification of a prior conviction and the resulting criminal-history score presents an illegal-sentence claim that may be raised for the first time on appeal. *State v. Steinert* ……...…… 342*

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. *State v. Turner* ……...…….. 111

Motion to Correct Illegal Sentence—File on Direct Appeal. A defendant may file a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504(a) in an appellate court while on direct appeal. *State v. Steinert* …….. 342*

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. *State v. Eckert* ……..……...…. 21

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

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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. *State v. Eckert* 21

Multiplicity Questions—Appellate Review. Questions involving multiplicity are questions of law subject to unlimited appellate review. *State v. Eckert* 21

New Rule for Conducting Criminal Prosecutions—Application. A new rule for conducting criminal prosecutions is to be applied to all cases pending on direct review or not yet final. *State v. Steinert* 342*

No Alternative Means of Committing Computer Crime in K.S.A. 2022 Supp. 21-5839(a)(2). K.S.A. 2022 Supp. 21-5839(a)(2) does not contain alternative means of committing a computer crime because both clauses in K.S.A. 2022 Supp. 21-5839(a)(2) —executing a scheme "with the intent to defraud" and obtaining money "by means of false or fraudulent pretense or representation"—require an individual to engage in fraudulent behavior to induce a condition to facilitate theft. *State v. Smith* 130

No Implied Private Right of Action under K.S.A. 26-518. K.S.A. 26-518 does not create an implied private right of action allowing displaced persons to sue a condemning authority for relocation benefits and assistance in a civil cause of action filed directly in district court.
Kansas Fire and Safety Equipment v. City of Topeka 418*

Possession of Methamphetamine—Larger Amount Does Not Preclude Guilt for Possession of Smaller Amount under Statute. Possession of a larger amount of methamphetamine that could establish guilt under K.S.A. 2022 Supp. 21-5705(d)(3)(C) does not preclude guilt for possessing a smaller amount under K.S.A. 2022 Supp. 21-5705(d)(3)(A) or (B). *State v. Bentley* 222

Requirement of Sufficient Jury Trial Waiver before Stipulation to Element of Crime. A district court must obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime. *State v. Bentley* 222

Restitution Statute—Order Imposing Restitution Is the Rule—Finding that Restitution Is Unworkable Is the Exception. Kansas' criminal restitution statute makes clear that an order imposing restitution is the rule and a finding that restitution is unworkable is the exception. *State v. Taylor* ..... 364*.

Restitution Statute Provides Sentencing Court Shall Order Restitution for Damage or Loss Caused by Crime—Restitution Due Immediately—Exceptions. Kansas' criminal restitution statute, K.S.A. 2022 Supp. 21-6604(b)(1), provides that a sentencing court shall order restitution, including damage or loss caused by the defendant's crime. Such restitution shall be due immediately unless: (1) the sentencing court orders that the defend-

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ant be given a specified time to pay or be allowed to pay in specified installments; or (2) the sentencing court finds compelling circumstances that would render restitution unworkable, either in whole or in part.
State v. Taylor 364*

Sentencing—Appellate Review of Departure Sentence. An appellate court may affirm a departure sentence as long as one or more of the factors relied on by the sentencing court was substantial and compelling.
State v. Newman-Caddell 251

— **Application of Extreme Sexual Violence Departure Factor Not an Error**. A court does not err in applying the extreme sexual violence departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) when sentencing a defendant for an aggravated kidnapping involving a nonconsensual act of sexual intercourse or sodomy. *State v. Newman-Caddell* 251

— Classification of Prior Out-of-State Felony under Statute. Under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii), a prior out-of-state felony must be classified as a nonperson felony if the elements of the out-of-state offense do not require proof of any of the circumstances listed in subsections (B)(i) or (ii).
State v Busch 308*

— Determining Appropriate Amount of Restitution. The appropriate amount of restitution is that which compensates the victim for the actual damage or loss caused by the defendant's crime. Substantial competent evidence must support every restitution award. *State v. Smith* 130

— **Motion to Correct Illegal Sentence—Not Used for Constitutional Due Process Claim**. A motion to correct an illegal sentence may not be used to litigate a constitutional due process claim.
State v. Newman-Caddell 251

— Presentencing Investigation Report May be Considered Regarding Offender's Criminal History. Under K.S.A. 2021 Supp. 21-6814(b), a presentence investigation report may be considered at sentencing by the district court to determine whether the State's burden of proof has been satisfied regarding an offender's criminal history. *State v Busch* 308*

— **Scoring Pre-1993 Out-of-State Convictions in 2011**. In 2011, the law in Kansas required a district court to score pre-1993 out-of-state convictions according to the comparable Kansas offense. *State v. Johnson* 283

— Sentencing Court Retains Jurisdiction to Correct Illegal Sentence or Clerical Error. Under K.S.A. 2022 Supp. 21-6820(i), a sentencing court retains jurisdiction to correct an illegal sentence or clerical error under K.S.A. 22-3504 irrespective of a defendant's appeal. *State v. Steinert* 342*

— Unsworn Responses May Be Considered by District Court. While sworn testimony may be more credible than unsworn responses, a district court is not precluded from considering—and even relying on—the responses it has elicited at sentencing. *State v. Taylor* 364*

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Statute Provides Mandatory Presumption of Intent to Distribute if Possess Specific Quantities. K.S.A. 2022 Supp. 21-5705(e) provides a mandatory, albeit rebuttable, presumption of a defendant's intent to distribute when that defendant is found to have possessed specific quantities of a controlled substance. *State v. Strong* 197

Successive Motion to Correct Illegal Sentence—Application of Res Judicata. Res judicata bars a defendant from raising the same claim in a second or successive motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504, unless subsequent developments in the law shine new light on the original question of whether the sentence was illegal when pronounced. *State v. Moncla* 413*

— Party has Burden of Proof to Show Subsequent Development in Law. A party filing a successive motion to correct an illegal sentence bears a threshold burden to prove that a subsequent development in the law undermines the earlier merits determination. A successive motion that merely seeks a second bite at the illegal sentence apple is susceptible to dismissal according to our longstanding, common-law preclusionary rules.
State v. Moncla 413*

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.
State v. Eckert 21

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.
State v. Bilbrey 57

— 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.
State v. Bilbrey 57

Withdrawal of Plea Before Sentencing for Good Cause. Before sentencing, a defendant may withdraw his or her plea for good cause shown.
State v. Bilbrey 57

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EVIDENCE:

Inferences and Presumptions—Inference Is Conclusion Drawn from Facts—Presumption Is Rule of Law. There is a legally significant difference between inferences and presumptions. An inference is a conclusion rationally drawn from a proven fact or set of facts. In contrast, a presumption is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence. *State v. Slusser* 174

Presumptions. Because presumptions direct jurors to draw certain conclusions once the State has satisfied a certain evidentiary predicate, they have the potential to relieve the State of its burden to prove the defendant's guilt beyond a reasonable doubt and shift the burden onto the defendant to prove his or her innocence. *State v. Slusser* 174

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. *Granados v. Wilson* 34

INSURANCE:

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. *Granados v. Wilson* 34

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. *Granados v. Wilson* 34

Liability for Judgment Exceeding Coverage Limits—Requirement of Causal Link between Insurer's Breach of Duty and Excess Judgment. For an insurer

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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. *Granados v. Wilson* …… 34

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. *Granados v. Wilson* …… 34

JUDGMENTS:

Dormancy Period under Statute Does Not Run if Judgment is Stayed or Prohibited. The dormancy period under K.S.A. 2022 Supp. 60-2403(c) does not run "during any period in which the enforcement of the judgment by legal process is stayed or prohibited." *In re Marriage of Holliday* …469*

JURISDICTION:

Supreme Court has Jurisdiction in Appeals from Judgments Regarding Restitution in First-degree Murder Convictions. Under K.S.A. 60-2101(b) and K.S.A. 2022 Supp. 22-3601, the Kansas Supreme Court has jurisdiction over appeals from district court judgments upholding or reversing the validity of restitution orders imposed in first-degree murder convictions. *State v. Bailey* …….. 487*

MARRIAGE:

Common-law Marriage—Burden of Proof. The party asserting a common-law or consensual marriage bears the burden of proving the existence of the marriage.
In re Common-Law Marriage of Heidkamp and Ritter ……..…….. 125

— Elements. The essential elements of a common-law marriage in Kansas are: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public.
In re Common-Law Marriage of Heidkamp and Ritter ……..…..…... 125

Jurisdiction of Supreme Court—Determination of Common-law Marriage. The Kansas Supreme Court has jurisdiction to review a district court determination that a couple had a common-law marital relationship and to either approve or disapprove that determination.
In re Common-Law Marriage of Heidkamp and Ritter …..…..…….. 125

MOTOR VEHICLES:

Driving While License Suspended—Proof Notice Mailed to Last Known Address of Licensee—Proof of Receipt Not Required. In a prosecution under K.S.A. 8-262, for driving while one's license is suspended,

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the State must offer proof that a copy of the order of suspension, or written notice of that action, was mailed to the last known address of the licensee according to the division's records. The State does not have to prove the licensee actually received the notice, had actual knowledge of the revocation, or had specific intent to drive while the license was suspended.
State v. Bentley 222

KDR Granted Subject Matter Jurisdiction from K.S.A. 8-1002(f)—Suspension of Driving Privileges. The plain language of K.S.A. 8-1002(f) grants the Kansas Department of Revenue subject matter jurisdiction to review an officer's certification and notice of suspension upon receipt and, if it satisfies the requirements of K.S.A. 8-1002(a), to suspend an individual's driving privileges. If the certification and notice does not satisfy the requirements of K.S.A. 8-1002(a), the Kansas Department of Revenue must dismiss the administrative proceeding.
Fisher v. Kansas Dept. of Revenue 119

Subject Matter Jurisdiction of KDR Not Impaired by Officer's Error in Filling Out Information. An officer's error in filling out information required by K.S.A. 8-1002(d) on a certification and notice of suspension does not impair the Kansas Department of Revenue's subject matter jurisdiction.
Fisher v. Kansas Dept. of Revenue 119

Suspension of Driving License— Statutory Compliance if Defendant has Actual Knowledge. When a defendant has actual knowledge that his or her license has been suspended, the State is not required to present direct evidence that there has been compliance with K.S.A. 8-255(d).
State v. Bentley 222

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.
Roe v. Phillips County Hospital 1

STATUTES:

Challenge to Constitutionality of Statute—Judicial Review by Courts—Standing Is Requirement for Case-or-Controversy and Component of Court's Subject Matter Jurisdiction. While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a

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case-or-controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *State v. Martinez* ……..…….…. 151

Challenge to Constitutionality of Statute—Requirement of Standing. To have an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. A party has standing to challenge the constitutionality of a statute only when it directly affects the party's rights. *State v. Martinez* ……..……. 151

Constitutional Challenge to Statute—Party Must Have Standing. To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. Generally, if there is no constitutional defect in the application of the statute to a litigant, the litigant does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *State v. Strong* …….……..…. 197

Construction by Courts—Avoid Unreasonable Results. Courts must construe a statute to avoid unreasonable or absurd results. *State v. Eckert* ……...…. 21

Determination Whether Statute Implies Private Right of Action—Two-Part Test. Kansas courts generally follow a two-part test to determine whether a statute implies a private right of action. First, the party must show that the statute was designed to protect a specific group of people rather than to protect the general public. Second, the court must review legislative history to determine whether a private right of action was intended.
Kansas Fire and Safety Equipment v. City of Topeka …….……... 418*

Interpretation –Question of Law—Appellate Review. Statutory interpretation presents a question of law over which appellate courts have unlimited review.
State v. Steinert ……...…….. 342*

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. *Roe v. Phillips County Hospital* ……..…. 1

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.
Roe v. Phillips County Hospital ……..…….1

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. *State v. Eckert* ……. 21

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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. *State v. Eckert*...21

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. *Roe v. Phillips County Hospital* ……. 1

TRIAL:

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.
State v. Lowry ……..……89

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. *State v. Lowry* ……..……89

Effect of Trial Errors May Require Reversal of Conviction—Totality of Circumstances Must Establish Prejudice—Appellate Review of Cumulative Effect of Errors. The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establishes that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of the errors, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. If any of the errors being aggregated are constitutional, their effect must be harmless beyond a reasonable doubt. *State v. Martinez* ……..…….. 151

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Invited-Error Doctrine—Application—Appellate Review. The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. In determining whether the invited-error doctrine applies, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error. *State v. Martinez* ….....….. 151

— *State v. Slusser* ……..…… 174

Jury Instruction—Legally Appropriate Jury Instruction. To be legally appropriate, a jury instruction must fairly and accurately reflect the applicable law. *State v. Strong* ……..……..… 197

— When Legally Inappropriate. A jury instruction is legally inappropriate if it fails to accurately state the applicable law. *State v. Martinez* ……..…….. 151

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. *State v. Lowry* ……89

— Failure to Object to Instruction Does Not Trigger Invited-Error Doctrine. In the context of jury instructions, the mere failure to object to an instruction does not trigger the invited-error doctrine. And the doctrine does not automatically apply every time a party requests an instruction at trial but then, on appeal, claims the district court erred by giving it. But application of the doctrine is appropriate when the party proposing an instruction before trial could have ascertained the instructional error at that time. *State v. Slusser* ……..……..……..… 174

— Unpreserved Instructional Error—Appellate Review. An appellate court reviews an unpreserved instructional error for clear error. Under that standard, the party asserting error has the burden to firmly convince the appellate court that the jury would have reached a different verdict if the instructional error had not occurred. *State v. Martinez* ……...……... 151

Lesser Included Offense Instruction—Appellate Review. A lesser included offense instruction is factually appropriate if an appellate court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. *State v. Martinez* ……..……. 151

— 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

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lesser included offense instruction is not error if the instruction falls short on either or both the factual and legal appropriateness requirements. *State v. Lowry* ……...……89

— **Mandatory Rebuttable Presumption under Statute**. An instruction permitting the jury to infer a defendant intended to distribute drugs based on a certain amount of drugs in the defendant's possession is not legally appropriate because it does not reflect the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e). *State v. Bentley* ……..... 222

Prosecutor's Latitude in Closing Arguments. Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect the evidence presented at trial and accurately state the controlling law. But prosecutors step outside the bounds of proper argument if they lower the State's burden to prove the defendant's guilt beyond a reasonable doubt or shift the burden onto the defendant. *State v. Slusser* ……..……..…… 174

Review of Jury Question Submitted during Deliberations—Appellate Review. An appellate court reviews a district court's response to a question submitted by the jury during deliberations for abuse of discretion. A district court's response constitutes an abuse of discretion when it is objectively unreasonable or when the response includes an error of law or fact. *State v. Martinez* ……...…….. 151

Sufficiency of Evidence Review—Appellate Review. When reviewing the sufficiency of the evidence supporting a conviction, an appellate court reviews all the evidence in a light most favorable to the prosecution and decides whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. The court does not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Martinez* ……..…….. 151

TRUSTS:

Charitable Trust—Supreme Court has Subject Matter Jurisdiction to Review District Court Order Modifying Charitable Trust. The Kansas Supreme Court has subject matter jurisdiction to review an uncontested district court order retroactively modifying a charitable trust to decide whether the district court's order should be binding on federal tax authorities under *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). *In the Marvin S. Robinson Charitable Trust* …….. 492*

State v. Busch

No. 123,382

STATE OF KANSAS, *Appellee*, v. ALLEN LEE BUSCH, *Appellant*.

(528 P.3d 560)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Classification of Prior Out-of-State Felony under Statute.* Under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii), a prior out-of-state felony must be classified as a nonperson felony if the elements of the out-of-state offense do not require proof of any of the circumstances listed in subsections (B)(i) or (ii).

2. CRIMINAL LAW—*Sentencing—Presentencing Investigation Report May be Considered Regarding Offender's Criminal History.* Under K.S.A. 2021 Supp. 21-6814(b), a presentence investigation report may be considered at sentencing by the district court to determine whether the State's burden of proof has been satisfied regarding an offender's criminal history.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 22, 2022. Appeal from Seward District Court; CLINT B. PETERSON, judge. Opinion filed May 5, 2023. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part, and the case is remanded with directions.

Jennifer C. Roth, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Russell W. Hasenbank, county attorney, argued the cause, and *Derek Schmidt*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Allen Lee Busch claims that, as a result of errors in the classification of five of his prior out-of-state convictions, he is serving an illegal sentence. Under the new statutory test for the classification of prior crimes, we agree in part, although not precisely for the reason Busch articulates. For the reasons we will discuss, we affirm in part and reverse in part the decision of the Court of Appeals, affirm in part and vacate in part the judgment of the district court, and remand the matter to the district court for resentencing.

FACTS AND PROCEDURAL BACKGROUND

In 2019, the State charged Busch with one count each of possession of methamphetamine, possession of oxycodone, and possession

of drug paraphernalia. Busch pleaded no contest to possession of methamphetamine. In exchange, the State recommended probation and dismissed the remaining charges.

The State, the district court, and Busch's counsel all received copies of the court-ordered presentence investigation report (PSI) before sentencing. Among the 35 prior crimes listed in the report, the PSI documented the following adult person felonies: three instances of burglary in 1985, one instance of criminal trespass in 1989, and one instance of burglary third degree in 1995, all of which arose from convictions in New Jersey. In each of these, the PSI writer had added the term "residential" in parentheses behind the name of the offense.

At sentencing, neither party challenged any aspect of the PSI, and Busch himself agreed that he had a criminal history score of A. The district court granted a dispositional departure to probation for 18 months with an underlying 40-month prison sentence.

The State moved to revoke Busch's probation in June 2020, arguing that Busch had failed to report and had failed to refrain from possessing or consuming alcohol or illegal drugs. At a probation revocation hearing, Busch stipulated to these violations. The district court found that the violations were "significant" and ordered Busch to serve the rest of his underlying sentence. In its Journal Entry of Probation Revocation, the district court incorrectly noted that it revoked Busch's probation because he had "absconded." Busch then appealed.

On appeal, Busch argued that the State failed to prove his prior New Jersey convictions were person felonies, thus rendering his sentence illegal. *State v. Busch*, No. 123,382, 2022 WL 2904026, at *2 (Kan. App. 2022). He also claimed the district court abused its discretion by ordering him to serve his underlying sentence and pointed out an error in the district court's journal entry of probation revocation. 2022 WL 2904026, at *4-5. The panel rejected the first two arguments but agreed that the district court committed a clerical error by noting that Busch had "absconded" and remanded with directions to correct the error. 2022 WL 2904026, at *5. After reciting the text of the New Jersey burglary statute, the panel focused on K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(h) and K.S.A. 2019 Supp. 21-6814(b):

"K.S.A. 2019 Supp. 21-6814 addresses the legal bearing that PSI reports have on sentencing proceedings. Under that statute, 'the summary of the offender's criminal history prepared for the court by the state shall satisfy the state's burden of proof regarding an offender's criminal history unless the defendant objects in writing.' So, although the New Jersey statute at issue encompasses conduct broader than the person crime circumstance listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(h), the description of the offense on the PSI clarifies that Busch's conviction involved a residential burglary. K.S.A. 2019 Supp. 21-6814(b) does not distinguish between the 'statute' and 'description' columns on the criminal history worksheet; it covers the entire report. Again, Busch did not file a written objection to this description of his prior offense, so the State's description of the New Jersey burglary offense as a residential crime—which matches the corresponding person crime circumstance—satisfied its burden of proof.

"The same analysis applies to Busch's criminal trespass conviction. [Citations omitted.]" 2022 WL 2904026, at *4.

Bush petitioned for review of his illegal sentence and abuse of discretion claims. We granted review only as to his illegal sentence claim.

ANALYSIS

Bush advances two related arguments challenging the classification of his four previous New Jersey burglary convictions and his single New Jersey criminal trespass conviction. First, Bush argues that the court services officer's "residential" notation beside his New Jersey convictions on the PSI does not provide substantial competent evidence to support classifying these convictions as person felonies. Second, he claims that the panel's decision effectively permitted the district court to engage in unconstitutional factfinding, in violation of the Sixth Amendment to the United States Constitution.

Standard of review

"An appellate court reviews a district court's decision that the State met its burden to prove the classification of a prior conviction for substantial competent evidence." *State v. Corby*, 314 Kan. 794, 796, 502 P.3d 111 (2022). When a challenge to a criminal history score involves the interpretation of a statute, the court's review is unlimited. 314 Kan. at 796.

"'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.'

"An apparently clear statute may nevertheless manifest ambiguity when applied to the particular facts of a case. [Citations omitted.]" *State v. Scheuerman*, 314 Kan. 583, 587, 502 P.3d 502, *cert. denied* 143 S. Ct. 403 (2022).

Constitutional overlay

We begin with Busch's "constitutional" argument. We pause to note that, although Busch styles this claim as a "constitutional problem," a motion to correct an illegal sentence usually cannot encompass a constitutional challenge. E.g., *State v. R. H.*, 313 Kan. 699, 702, 490 P.3d 1157 (2021). In any event, Busch essentially argues that his sentence does not conform to K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(h)—an argument that, as we have clarified, is a challenge "to the statutory propriety of the classification at issue—albeit with a thick overlay of constitutional law." *State v. Dickey*, 305 Kan. 217, 221, 380 P.3d 230 (2016) (*Dickey II*). Consequently, Busch's argument remains a valid claim for a motion to correct an illegal sentence.

Busch's prior out-of-state burglary convictions were nonperson felonies.

We next review the relevant provisions of K.S.A. 2022 Supp. 21-6811(e):

"(e)(1) Out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history.

. . . .

(3) The state of Kansas shall classify the crime as person or nonperson.

. . .

(B) In designating a felony crime as person or nonperson, the felony crime shall be classified as follows:

(i) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a person felony if one or more of the following circumstances is present *as defined by the convicting jurisdiction in the elements of the out-of-state offense*:

. . . .

(h) entering or remaining within any residence, dwelling or habitation.

. . . .

(iii) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, *shall be classified as a nonperson felony if the elements of the offense do not require proof of any of the circumstances in subparagraph (B)(i) or (ii)*." (Emphases added.)

This statute clarifies that the appropriate classification for Busch's New Jersey crimes as person or nonperson felonies turns on the *elements* in New Jersey of each crime. The following statute defined the elements applicable to Busch's 1985, 1989, and 1995 burglary convictions:

"(a) . . . A person is guilty of burglary if, with purpose to commit an offense therein he:

(1) Enters a structure, or a separately secured or occupied portion thereof, unless the structure was at the time open to the public or the actor is licensed or privileged to enter; or

(2) Surreptitiously remains in a structure or a separately secured or occupied portion thereof knowing that he is not licensed or privileged to do so.

"(b) Grading. Burglary is a crime of the second degree if in the course of committing the offense, the actor:

(1) Purposely, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone; or

(2) Is armed with or displays what appear to be explosives or a deadly weapon.

"Otherwise burglary is a crime of the third degree. . . ." N.J. Stat. Ann. § 2C:18-2 (West 1981).

(This version remained in effect from 1981 to 1994. In January 1995, the New Jersey Legislature amended the statute to include entry into a "research facility," though this does not affect our analysis. 1995 N.J. Sess. Law Serv. ch. 20, § 3 [West].) Additionally, N.J. Stat. Ann. § 2C:18-1 (West 1981) defined "structure" at all relevant times to mean "any building, room, ship, vessel, car, vehicle or airplane, and also means any place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." Plainly, this definition of "structure" is far broader than the "residence, dwelling or habitation" criteria set forth in K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(h). The elements of the New Jersey crime are satisfied if a residence is burgled, but they are also satisfied if a car

is burgled. In other words, the elements do not *require* a residence to be burgled for a valid conviction of burglary.

K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii) clarifies our course when an out-of-state statute's definitions of a particular element may broadly encompass, but not *require*, proof of a particular fact or circumstance: "An out-of-state conviction . . . for the commission of a felony offense . . . shall be classified as a nonperson felony if the elements of the offense do not *require* proof of any of the circumstances in subparagraph (B)(i) [burglary of a "residence, dwelling, or habitation] or (ii) [not applicable]." (Emphasis added.) A close inspection of New Jersey's statute shows that no version of its elements of burglary *requires* proof that the enclosed structure burgled was a "residence, dwelling or habitation." Thus, the plain language of K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii) mandates that Busch's New Jersey burglary crimes must be scored as nonperson felonies. The panel erred by concluding otherwise, no matter if the State carried its burden of proof by showing that the *facts* surrounding Busch's prior burglaries involved residences.

Busch's prior out-of-state criminal trespass conviction was a person felony.

We next consider the defendant's New Jersey conviction for criminal trespass, designated on the PSI as a person felony. Preliminarily, we reject Busch's claim that the State failed to carry its burden of proof that this crime involved a residence because a court services officer—not the prosecutor—prepared the PSI. Although K.S.A. 2021 Supp. 21-6814(b) provides that "the summary of the offender's criminal history prepared for the court *by the state* shall satisfy the state's burden of proof regarding an offender's criminal history," K.S.A. 2022 Supp. 21-6813(a) directs the district court to "order the preparation of the presentence investigation report by the court services officer"—a report that includes a criminal history worksheet. (Emphasis added.) Despite the difference in the identity of the preparer, nothing in the statute suggests that a PSI prepared by a court services officer, instead of a separate summary prepared by the State, is required. Cf. *State v. Schow*, 287 Kan. 529, 537, 197 P.3d 825 (2008) (describing K.S.A. 21-4715, the predecessor of K.S.A. 21-6814, as "address[ing] the legal effect of the PSI report on the sentencing proceedings"). The PSI provided evidence

the district court could consider when determining whether the State had carried its burden of proof.

Unlike the burglary convictions, at least one version of the New Jersey criminal trespass statute contains an element involving dwellings:

"A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any structure, or separately secured or occupied portion thereof. An offense under this subsection is a crime of the fourth degree if it is committed in a dwelling. Otherwise it is a disorderly persons offense." N.J. Stat. Ann. § 2C:18-3(a) (West 1981).

Thus, the crime of criminal trespass could be properly scored as a person felony if the State carried its burden of proving that an element of "entering or remaining within any residence, dwelling or habitation" was present, as required by K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(h). As we have held, the State met this burden from its specific designation on the PSI that this conviction was for a residential criminal trespass, specifically, criminal trespass of the fourth degree. Thus, the district court was correct in scoring this crime for sentencing purposes as a person felony.

Defendant did not object to the summary of the New Jersey criminal trespass conviction as set forth on the PSI. Nor did he provide evidence at sentencing to refute that summary. The State thus carried its burden at sentencing to show this conviction should be scored as a person felony.

CONCLUSION

The district court erred when it scored Busch's burglary convictions as person felonies, but it correctly scored his criminal trespass conviction as a person felony. On remand for resentencing, we note that nothing in this opinion precludes Busch from objecting to the person felony designation of his prior criminal trespass conviction should he elect, in good faith, to do so.

We affirm in part and reverse in part the judgment of the Court of Appeals, affirm in part and vacate in part the judgment of the district court, and remand the matter for resentencing.

MODIFIED OPINION[1]

No. 125,879

In the Matter of KENNETH J. ELAND, *Respondent*.

(528 P.3d 983)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—One Hundred Eighty-day Suspension.*

Original proceeding in discipline. Original opinion filed April 28, 2023. Modified opinion filed May 12, 2023. One hundred eighty-day suspension.

Julia A. Hart, Deputy Disciplinary Administrator, argued the cause, and *Gayle Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

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

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Kenneth J. Eland, of Hoxie, an attorney admitted to the practice of law in Kansas in 1984.

The Disciplinary Administrator filed a formal complaint against Eland alleging violations of the Kansas Rules of Professional Conduct (KRPC). Eland answered and eventually stipulated to some violations and disputed others. After a hearing before a panel of the Kansas Board for Discipline of Attorneys, the panel issued a final hearing report on the formal complaint.

The hearing panel determined respondent had violated:

- Kansas Rules of Professional Conduct (KRPC) 1.1 (2023 Kan. S. Ct. R. at 327) (competence),
- KRPC 1.3 (2023 Kan. S. Ct. R. at 331) (diligence),
- KRPC 1.4(a) (2023 Kan. S. Ct. R. at 332) (communication),

[1]**REPORTER'S NOTE:** Opinion No. 125,879 was modified by the Supreme Court in response to Respondent's motion for modification filed on May 1, 2023. Language referring to KRPC 4.1 was deleted from pages 2, 27, and 28.

- KRPC 1.15(a) (2023 Kan. S. Ct. R. at 372) (safekeeping property),
- KRPC 1.16(d) (2023 Kan. S. Ct. R. at 378) (declining or terminating representation),
- KRPC 5.3(c)(2) (2023 Kan. S. Ct. R. at 408) (responsibilities regarding nonlawyer assistance),
- and KRPC 8.4(c) (2023 Kan. S. Ct. R. at 433) (misconduct).

Upon conclusion of the hearing, the panel made findings of fact and conclusions of law and recommended Eland be suspended from the practice of law for 180 days:

"*Findings of Fact*

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

"15. The respondent maintains a law practice in Hoxie, Kansas and also owns a real estate title insurance company named Eland Title, where the respondent serves as a licensed abstractor.

"16. The respondent's title insurance company has offices in Oakley, Colby, Hill City, Lawrence, and Hoxie, Kansas. The Hoxie office for Eland Title is in the same building as the respondent's law office.

"17. The respondent employed and paid both his title office and law office staff through the law office and not through Eland Title.

"18. In 2015, Farm & Ranch Realty, a real estate broker, hired Eland Title to prepare a title insurance commitment for the auction of real estate located in Gove County, Kansas. Farm & Ranch Realty also asked the respondent to provide an assessment of mineral interest ownership for the property, act as the closing agent for the sale of the real estate property, and provide the buyers with a mineral title opinion.

"19. The respondent testified that the mineral title opinion could only be prepared by him in his capacity as a lawyer, because Eland Title was not permitted by its underwriter to issue a title insurance policy for mineral interests severed from the surface rights. The way a buyer could ensure that they acquire good title to mineral interests is through a mineral title opinion.

"20. The Gove County property being auctioned by Farm & Ranch Realty was formerly owned by Enoch Nelson of Gove County, Kansas. Enoch Nelson previously owned the land in its entirety, including all surface and mineral interests. In 1947, Enoch Nelson transferred all surface land interest and a one-half (1/2) interest in the mineral rights to D. Laverne Webb.

"21. The D. Laverne Webb interest in the surface and mineral rights was transferred to other individuals over the following years. From the evidence, there appears to be no record that the one-half interest in the mineral rights reserved by Enoch Nelson was transferred to any other individual or entity.

"22. The one-half mineral interest transferred to D. Laverne Webb was designated during the formal hearing as having the following legal description:

'An undivided one half (1/2) mineral interest in the West Half (W/2) of the Southwest Quarter (SW/4) of Section Eight (8), Township Fourteen (14) South, Range Thirty-one (31) West of the 6th P.M., Gove County, Kansas.'

"23. On August 5, 2008, the District Court of Gove County, Kansas entered a Journal Entry of Foreclosure of a tax lien on the above-described one-half mineral interest.

"24. The one-half mineral interest previously owned by D. Laverne Webb was sold at Sheriff's sale and the Gove County Sheriff conveyed the half mineral interest via a 2009 Sheriff's Deed to W.R. and C.R., husband and wife as joint tenants and not as tenants in common. The Sheriff's Deed was executed and filed in April 2009.

"25. Sometime later, W.R. and C.R. transferred this one-half mineral interest to the Rebarchek Trust. At this point, the Rebarchek Trust owned most or all of the surface and mineral interests that Enoch Nelson transferred to D. Laverne Webb in 1947. The Rebarchek Trust (hereinafter 'seller') hired Farm & Ranch Realty to separate and sell the land at auction.

"26. The respondent viewed all of the parties to the 2015 real estate transaction, including the buyer, as his client.

"27. On August 13, 2015, Farm & Ranch Realty emailed Mark Samuelson, an employee of Eland Title, and asked Eland Title to provide a preliminary title commitment to the mineral interest for the Gove County property to be auctioned. Farm & Ranch Realty also asked Eland Title to determine whether the full mineral interest for this property was owned by one entity or divided up and owned by more than one entity.

"28. Mr. Samuelson had approximately ten years of experience researching land and mineral interests. He was not a licensed abstractor. Mr. Samuelson researched the land and mineral interests for the Gove County property at the Gove County Register of Deeds office and the Gove County District Court. Based on Eland Title's routine practice, the respondent said that Mr. Samuelson then would have brought any questions Mr. Samuelson had about what he discovered to the respondent. At the respondent's direction, Mr. Samuelson went to the Gove County Register of Deeds Office to research the property and informed the respondent of his findings.

"29. Mr. Samuelson located and copied the 2009 Sheriff's deed to the sellers. Mr. Samuelson also examined the District Court of Gove County probate records but could not locate a probate case for Enoch Nelson.

"30. On September 15, 2015, relying on a preliminary title opinion from the respondent, Farm & Ranch Realty auctioned the mineral interest associated with the property to the buyer.

"31. Eland Title prepared the closing settlement paperwork for the auction purchase. The buyer, DW Jayhawk, LLC, paid Eland Title $500.00 for the mineral title opinion. All other closing costs were split between the seller and buyer and paid to Eland Title.

"32. Closing occurred on October 21, 2015. On this same date, Eland Title paid to Eland Law Office the fees paid by the buyer and seller for closing, document preparation, and the mineral title opinion.

"33. The buyer was not provided the written mineral title opinion by the closing date. Despite this, the fees paid to Eland Law Office for the mineral title opinion were deposited into the firm's operating account instead of its trust account.

"34. Ultimately, the respondent did not provide the mineral title opinion to the buyers for this transaction until December 27, 2018.

"35. The respondent did, however, create and provide a Mineral Deed, whereby the seller purported to give 100% of the mineral interest in the property to the buyer.

"36. In spring 2016, the buyer contacted Eland Title and the seller concerned about whether they owned 100% of the mineral interest and asking for confirmation that the buyer did own 100%.

"37. Between May and August, 2016, the buyer and seller, through its attorney Steve Hirsh, sent emails and letters to the respondent's office expressing concern whether 100% of the mineral interest was transferred to the buyer. They requested confirmation from the respondent that the buyer owned 100% of the mineral interest.

"38. On August 11, 2016, the buyer demanded the respondent provide a written guarantee that the buyer owned 100% of the mineral interest. The respondent's employee, Meghann Gourley, replied to the buyer's email stating that the respondent was going to go over the documentation and would provide an answer by the following Monday.

"39. On August 12, 2016, Ms. Gourley emailed the seller and seller's attorney, stating that the respondent 'did not find any documents in our file that show anyone else owns any mineral interests.' Further, the email said, 'There are separate mineral statements going out, so we are going to go to Gove on Monday to check with the County Appraiser to see if they can shed any light on why there

are separate tax statements.' Ms. Gourley said she would be in touch with them the following week.

"40. On August 17, 2016, Ms. Gourley stated in an email to the seller and buyer that the respondent had 'finished reviewing all the mineral research pertaining to the minerals . . . [and] has determined that the minerals were 100% in tact [*sic*] when you purchased them and DW Jayhawk does own 100% of the minerals.' Ms. Gourley also stated that the respondent would get the mineral title opinion typed and emailed to the buyer as soon as it was ready.

"41. On September 5, 2017, the buyer emailed Ms. Gourley stating that the Gove County Assessor's Office showed nine (9) other people paying property taxes on the mineral interest that the respondent had stated were owned 100% by the buyer. The buyer again requested the written mineral opinion that it still had not received from the respondent.

"42. On the same date, the buyer sent a second email stating the buyer found information that Enoch Nelson had kept a one-half interest in the mineral rights in 1947.

"43. In spring 2018, Gove County told the buyer that the buyer owed taxes on half of the mineral interest because there were other owners of the other half.

"44. The buyer reached out to Farm & Ranch Realty asking again for assurance that the buyer owned 100% of the mineral interest. Farm & Ranch Realty responded on April 30, 2018: 'I actually visited with [Eland Title] on Thursday and they still stand by their opinion that the minerals you purchased are correct. There is one more item they are going to check on and then you will be receiving their title opinion stating the minerals are intact as you purchased.'

"45. On June 20, 2018, Farm & Ranch Realty emailed the buyer and stated that it had spoken with the respondent, that the respondent understood the buyer's question about ownership of the mineral interest, and that the respondent had researched the issue and would send a letter to the buyer with his findings. Farm & Ranch Realty further said that any legal fees required to take care of the matter would be at the respondent's expense.

"46. In autumn 2018, the buyer hired attorney Michael Andrusak to determine whether it owned 100% of the mineral interest purchased at the 2015 Farm & Ranch Realty auction.

"47. On December 6, 2018, Ms. Gourley sent an email to Mr. Samuelson that was dictated by the respondent and sent on the respondent's behalf. In the dictated email, the respondent told Mr. Samuelson that Mr. Samuelson's prior research did not show the heirs of Enoch Nelson. The respondent asked Mr. Samuelson to locate the probate action for Enoch Nelson's estate, including the journal entry and an inventory of the estate, and also real estate tax statements for the property to see who the county believed had an interest in the mineral rights. The respondent also asked for a copy of the Sheriff's Deed from the tax foreclosure sale of D. Laverne Webb's half mineral interest. Further, the email listed twenty

individuals with oil and gas leases covering the property in the chain of title. The respondent told Mr. Samuelson that this was a priority and needed to be completed as soon as possible.

"48. On December 7, 2018, the respondent dictated an email to the buyer wherein the respondent asserted again that the buyer owned 100% of the mineral interest. In the first draft email, the respondent acknowledged that there were 'a significant number of persons who have executed oil & gas leases on the property in the past and I would recommend going ahead and completing a Quiet Title Action to confirm fee title interest to you in the property.' The paragraph also stated that the respondent would complete that Quiet Title Action at his own expense. However, the respondent removed this language and directed his staff to send the email without the language about the oil and gas leases and the suggestion to complete a Quiet Title Action.

"49. In a December 14, 2018, emailed letter, Mr. Andrusak demanded the respondent provide the buyer with the mineral title opinion.

"50. On December 26, 2018, Mr. Andrusak provided the respondent with a release signed by the buyer to obtain the buyer's file from Eland Law Office. The respondent did not provide the file to Mr. Andrusak. On January 28, 2019, Mr. Andrusak traveled to the respondent's office to attempt to pick up the buyer's file. The respondent did not provide the file to Mr. Andrusak on that date either.

"51. On December 27, 2018, Mr. Andrusak received the requested mineral title opinion from the respondent. The title opinion dated October 22, 2015, stated, in part, 'I am of the opinion that merchantable fee simple title to the above described oil, gas and other minerals is vested as follows: DW Jayhawk, LLC subject to the requirements, exceptions, comments and observations hereinafter made.' The opinion listed no requirements, comments, or exceptions.

"52. While the opinion was dated October 22, 2015, the respondent acknowledged that he wrote it in 2018. The respondent stated it was his practice to always date the title opinion the same date that the deed is recorded.

"53. The respondent told the disciplinary investigator that the three-year delay in providing the opinion to the buyer was due to a backlog in his office. The respondent testified that ideally, a mineral interest title opinion should be provided within 30 days after closing the real estate transaction.

"54. While the respondent stated in the written mineral title opinion that he reviewed the abstract of the title, the respondent agreed that no abstract exists.

"55. On February 28, 2019, the law firm Depew, Gillen, Rathburn & McInteer conducted an independent title examination of the mineral interest at issue. This opinion concluded that, at best, the buyer owned one-half of the mineral interest.

"56. On June 28, 2019, Mr. Andrusak, on behalf of the buyer, filed a lawsuit against the respondent alleging malpractice and fraud regarding the real estate transaction. The lawsuit was ultimately settled.

"57. On August 21, 2020, the respondent was deposed by counsel for the buyer. During the deposition, counsel for the buyer asked the respondent, 'If you were explaining to a client, how would you explain what a mineral title opinion is?' The respondent answered, 'It is an attorney's opinion as to the ownership of minerals in, on, and under a particular piece of real estate.' The respondent agreed that a mineral title opinion will assess the defects that exist in the mineral title and how those defects could be cured so that the reader could assess the risks associated with the transaction. The respondent said he had experience writing mineral opinions since 1984.

"58. The respondent would expect the buyer to rely on the mineral title opinion he created to determine whether the seller was able to give the buyer clear title.

"59. Further, the respondent was asked, 'If you're looking at a chain of title and you see in the index that a particular tract seems to have a series of transactions involving people who you can't figure out—you can't see in the record, how they ever got any interest in the property to begin with, does that cause you to take note?' The respondent responded affirmatively and added, 'Well, I think what you're describing is a typical hole in the title . . . [a]nd there you're going to go to the District Court to see if you can clear up that hole in the title.'

"60. When asked about 1947 Enoch Nelson deed where Nelson transferred the surface and one-half mineral interest to D. Laverne Webb, reserving a one-half mineral interest for Nelson, the respondent said:

'A. It's a mineral reservation contained in the deed.
'Q. Why is that significant?
'A. Because that person could claim some right, title, or interest, in and to the minerals.
'Q. Did you follow a chain of title [*sic*] that reserved interest?
'A. Yes.
'Q. And where did it lead you?
'A. Nowhere.'

"61. The respondent agreed that there was no link connecting the half mineral interest reserved by Enoch Nelson to the sellers. The respondent testified about several factors that caused the respondent concern about what mineral interest was actually transferred to the buyer at the auction. Yet, the respondent said that he believed that the buyer purchased 100% of the mineral interest in the property.

"62. The respondent testified that he thought that the buyer could bring a quiet tile action against anyone who claimed an interest in the property, including

the oil and gas leaseholders, to resolve any issues with the chain of title. At one point, the following colloquy occurred:

'Q. Would you agree that an unrecorded deed from Enoch Nelson to somebody else would have conveyed a mineral interest?

'A. Yes.

'Q. And you're saying that any such mineral interest now belongs to DW Jayhawk?

'A. Yes.

'Q. And that's because it was somehow extinguished by the person who held it after Enoch Nelson; right?

'A. Yes.

'Q. What extinguished that? What event extinguished that interest?

'A. The deed from the sellers to DW Jayhawk.

'Q. Okay. So you're saying that because the seller, who didn't actually own it, said they were conveying it, that extinguished the interest in an unrecorded deed; right?

'A. You're putting words in my mouth, and I am not going to agree with those.

'Q. Did the seller to DW Jayhawk own the mineral interests?

'A. What's that?

'Q. Did the seller to DW Jayhawk own a hundred percent of the mineral interests?

'A. I believe they did.

'Q. How did the seller to DW Jayhawk acquire the portion of the mineral interests that had been reserved by Enoch Nelson in 1947?

'A. I don't have an answer to that.

'Q. Is it important to have an answer if you're going to get a title opinion?

'A. Sure.

'Q. And, all right. So why is—why do you hold the opinion, if you can't give an answer for why you hold the opinion?

'A. Because I think a quiet title action will resolve the issue.'

"63. The respondent offered no further explanation for the reason he held the opinion that the buyer owned 100% of the mineral interest or why a quiet title action would resolve the issue. Counsel for the buyer asked the respondent, 'your opinion comes from your expertise . . . [a]nd it comes from your legal training; right?' The respondent answered affirmatively.

"64. When asked whether he was 'familiar with the concept that in a quiet title action the plaintiff must rely on the strength of his own title and not the weakness of his adversary,' the respondent answered, 'No.'

"65. The respondent admitted that he did not tell the buyer that the respondent believed the one-half mineral interest reservation in Enoch Nelson could be resolved by a quiet title action. He acknowledged his December 6, 2018, draft email to the buyer where the respondent removed the language:

'There are a significant number of persons who have executed oil & gas leases on the property in the past and I would recommend going ahead and completing a Quiet Title Action to confirm the title interest to you in the property. I do not believe that should be at any expense to you since your mineral purchased [*sic*] was guaranteed in your contract of sale. Therefore, I would complete that Quiet Title Action on your behalf.'

"66. The respondent answered in the affirmative when asked, 'Do you still hold that opinion today, that the minerals were intact at the time of the closing on this property?'

"67. Counsel for the buyer asked the respondent in several different ways to provide a factual or legal basis for why the respondent believed the buyer owned 100% of the mineral interest. The only explanation the respondent gave was that was what he believed.

"68. The respondent also testified during the formal hearing in this disciplinary matter. The respondent testified that the buyer did not purchase 100% of the mineral interest and in fact only purchased 50% of the mineral interest. The respondent agreed that he had previously missed the mineral reservation of Enoch Nelson.

"69. The respondent said that he had never chained the title from beginning to end until after he received the mineral title opinion of the Depew, Rathman, Gillen and McInteer law firm. However, the respondent stated that he did review the Depew title opinion and conducted this beginning to end chain of title research prior to his deposition testimony in August 2020.

"*Conclusions of Law*

"70. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence), KRPC 1.3 (diligence), KRPC 1.4(a) (communication), KRPC 1.15(a) (safekeeping property), KRPC 1.16(d) (declining or terminating representation), KRPC 5.3(c)(2) (responsibilities regarding nonlawyer assistance), and KRPC 8.4(c) (misconduct), as detailed below.

"71. The disciplinary administrator alleged that the respondent also violated KRPC 4.1(a) (truthfulness in statements to others).

"72. The respondent did not properly research the chain of title despite many obvious red flags indicating other individuals claimed an interest in the mineral rights prior to offering an opinion that the seller could convey 100% of the mineral interest. However, the evidence stops short of establishing that the respondent violated KRPC 4.1(a).

"73. While, as discussed further below, the hearing panel concludes there is clear and convincing evidence that the respondent engaged in conduct involving misrepresentation by withholding information that would reveal his concerns about the chain of title to the mineral interest (See KRPC 8.4[c]), there is not clear and convincing evidence that the respondent 'knowingly . . . [made] a false statement of material fact or law to a third person.' KRPC 4.1(a).

"KRPC 1.1

"74. Lawyers must provide competent representation to their clients. KRPC 1.1. 'Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.' *Id.*

"75. The respondent did not provide competent representation to the parties to this real estate transaction. The respondent failed to provide legal knowledge, skill, thoroughness, and preparation reasonably necessary to offer an opinion regarding the mineral interest that the parties to the transaction could reasonably rely on.

"76. The respondent's August 12, 2020, deposition testimony shows that the respondent relied on no law or facts to support his assertion to the seller, buyer, and Farm & Ranch Realty that the seller owned and could convey the full mineral interest to the buyer. The respondent effectively admitted that his opinion was baseless.

"77. The respondent stipulated that he violated KRPC 1.1.

"78. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.1.

"KRPC 1.3

"79. Attorneys must act with reasonable diligence and promptness in representing their clients. *See* KRPC 1.3.

"80. The respondent failed to diligently and promptly represent the buyer, DW Jayhawk. The respondent testified that generally, a mineral title opinion should be provided within 30 days after a real estate transaction closes.

"81. Here, the respondent did not provide the mineral title opinion to the buyer for more than three years after closing.

"82. Further, the respondent failed to properly and diligently research the mineral title to the property, despite several clear indications that the sellers did not own 100% of the mineral interests, before providing assurances to the parties to the transaction that the seller could convey 100% of the mineral interests.

"83. The respondent stipulated that he violated KRPC 1.3.

"84. Because the respondent failed to act with reasonable diligence and promptness in representing his client, the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"85. KRPC 1.4(a) provides that '[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.' *Id.*

"86. In this case, the respondent violated KRPC 1.4(a) when he failed to respond to multiple requests from the buyer for information regarding the status of the mineral interest the buyer had purchased. The buyer spent three years trying to obtain confirmation from the respondent about the mineral interests and ultimately had to hire another attorney to obtain the information requested.

"87. Further, the respondent failed to communicate information that he knew about to the buyer that could affect the buyer's interest in the property, including the fact that multiple oil and gas leases executed by others on the property could present an issue for the buyer and that further legal action may be necessary to establish the buyer's rights.

"88. The respondent stipulated that he violated KRPC 1.4(a).

"89. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(a).

"KRPC 1.15

"90. Lawyers must properly safeguard and hold in a separate account the property of their clients and third persons. Unearned fees must be deposited into an attorney trust account. KRPC 1.15(a).

"91. KRPC 1.15(a) specifically provides that:

'(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.'

"92. In this case, the buyer paid Eland Title $500.00 (or, possibly as much as $1,000.00) for the written mineral title opinion and Eland Title paid this $500.00 (or $1,000.00) to Eland Law Office for the opinion on the date of closing, October 21, 2015.

"93. Eland Law Office deposited these funds into the firm operating account instead of its trust account that same day.

"94. The buyer was not provided the written mineral title opinion by October 21, 2015. As a result, the funds paid by the buyer [were] not earned on the date [they were] deposited into the Eland Law Office operating account.

"95. The respondent stipulated that he violated KRPC 1.15(a).

"96. Accordingly, the hearing panel concludes that the respondent failed to properly safeguard DW Jayhawk's property, in violation of KRPC 1.15(a).

"KRPC 1.16(d)

"97. KRPC 1.16 requires lawyers to take certain steps to protect clients after the representation has been terminated. Specifically, KRPC 1.16(d) provides:

'Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.'

"98. On December 14, 2018, Mr. Andrusak advised the respondent that he represented the buyer. On December 26, 2018, Mr. Andrusak provided the respondent with a release signed by the buyer to obtain the buyer's file from Eland Law Office. The respondent did not provide Mr. Andrusak with the buyer's file.

"99. On January 28, 2019, Mr. Andrusak traveled to the respondent's office to attempt to pick up the buyer's file. The respondent did not provide the buyer's file on this date either.

"100. The respondent violated KRPC 1.16(d) when he failed to return the buyer's file, which is the property of the buyer, to the buyer or the buyer's counsel.

"101. The respondent stipulated that he violated KRPC 1.16(d).

"102. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.16(d).

"KRPC 5.3(c)(2)

"103. With respect to a nonlawyer employed or retained by or associated with a lawyer:

'(c) [A] lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.'

"104. Attorneys in supervisory positions must properly supervise nonlawyer assistants. Here, the respondent failed to properly supervise his employees to ensure proper research was conducted to create a complete and accurate mineral title opinion. Further, the respondent failed to properly supervise his employees to ensure that accurate information was properly communicated between his office and his clients.

"105. The respondent stipulated that he violated KRPC 5.3(c)(2).

"106. Accordingly, the hearing panel concludes that the respondent violated KRPC 5.3(c)(2).

"KRPC 8.4(c)

"107. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c).

"108. It is clear from the evidence the respondent was aware that his office may have neglected issues in its research of the mineral interest. There were numerous red flags in the chain of title, including the unresolved issue of where the half reserved mineral interest of Enoch Nelson transferred after his death and why other individuals were paying taxes and executing oil and gas leases on the mineral interest in the property. Based on his expertise and experience in this area of the law, these facts should have, and as the respondent's testimony during the deposition revealed, did alert the respondent to the fact that the mineral title opinion may not be accurate.

"109. The evidence shows that the respondent was aware of these facts and questioned his own legal conclusion that the seller could transfer 100% of the mineral interest to the buyer.

"110. The respondent knowingly misrepresented the facts when he failed to advise the buyer of the concerns he saw that could lead to the conclusion that not all of the mineral interest was transferred to the buyer during the 2015 real estate sale.

"111. Further, by the time the respondent testified during his deposition, he knew there was some problem with the title but continued to insist that his mineral title opinion was 100% accurate. At the time of the formal hearing, this inconsistency was never fully explained by the respondent.

"112. As such, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

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

"114. *Duty Violated*. The respondent violated his duty to his clients and to the public.

"115. *Mental State*. The respondent knowingly violated certain duties and negligently violated other duties.

"116. *Injury*. As a result of the respondent's misconduct, the respondent caused the parties to the real estate transaction to be misled about matters that might impact the mineral interest being conveyed, when the respondent was hired for the purpose of providing a legal opinion on this issue. The respondent also caused the buyer to spend years, effort, and expense in paying an attorney to obtain its file and information from respondent and for a mineral title opinion from the Depew, Rathman, Gillen and McInteer Law Firm that it had already paid the respondent to provide. Further, the buyer purchased the mineral interest based on the respondent's representation that it was purchasing 100% of the mineral interest but may have obtained only up to one-half of the mineral interest.

"Aggravating and Mitigating Factors

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

"118. *Prior Disciplinary Offenses*. The respondent has been previously disciplined with informal admonition on two occasions. However, both prior informal admonitions were imposed more than twenty years ago, the first being in 1998 and the second in 2000. The hearing panel concludes that the two prior informal admonitions, which are so remote, are neither aggravating nor mitigating.

"119. *Dishonest or Selfish Motive*. The respondent spent a long time avoiding responsibility for resolving the mineral title issue and providing a written opinion. The hearing panel concludes that an apparent motivation for the respondent's delay was to avoid a negative impact on his pride and reputation in the title industry. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by selfishness.

"120. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct. The respondent repeatedly and consistently violated the Kansas Rules of Professional Conduct regarding this mineral title opinion over the course of more than three years.

"121. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.1 (competence), KRPC 1.3 (diligence), KRPC 1.4(a) (communication), KRPC 1.15(a) (safekeeping property), KRPC 1.16(d) (declining or terminating representation), KRPC 5.3(c)(2) (responsibilities regarding nonlawyer assistance), and KRPC 8.4(c) (misconduct). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"122. *Refusal to Acknowledge Wrongful Nature of Conduct*. The respondent has refused to acknowledge his misrepresentation and the harm that his con-

duct caused the parties to the real estate transaction, particularly the buyer. Accordingly, the hearing panel concludes that the respondent refused to acknowledge the wrongful nature of his conduct.

"123. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1984. At the time of the misconduct, the respondent had been practicing law for more than 30 years. Further, the respondent testified that he has significant experience in the practice of law doing title work and owns title company offices in five different cities in Kansas. The hearing panel concludes that the respondent has substantial experience in the practice of law and in the area of title work, specifically.

"124. *Refusal to Take Action to Mitigate Negative Consequences of Misconduct*. There were clear signs early on that the respondent's conclusions regarding the mineral interest were not supported. Yet, despite the respondent's substantial experience in the law and with performing title work, he refused to take feasible actions to cure the problem or even notify the parties to the transaction of the issues at a time when they could have been more easily rectified and the harm mitigated.

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

"126. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar of Sheridan County, Kansas and surrounding areas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by the testimony of former judge Robert Schmisseur, attorney Ronald Shalz, and several letters received by the hearing panel.

"127. *The Present and Past Attitude of the Attorney as Shown by His Cooperation During the Hearing and His Full and Free Acknowledgment of the Transgressions.* The respondent cooperated with the disciplinary process. Additionally, the respondent admitted many of the facts that gave rise to the violations and stipulated that he violated KRPC 1.1 (competence); KRPC 1.3 (diligence); KRPC 1.4(a) (communication); KRPC 1.15(a) (safekeeping property); KRPC 1.16(d) (declining or terminating representation); and KRPC 5.3(c)(2) (responsibilities regarding nonlawyer assistance).

"128. A factor which is neither aggravating nor mitigating is forced or compelled restitution. The respondent ultimately settled the lawsuit brought against him by the buyer and made payment to the buyer for damages. However, the hearing panel concludes that this fact is neither aggravating nor mitigating because the payment to the buyer was made years after the real estate closing time period and the buyer was forced to file a lawsuit to obtain it.

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

'4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.'

'4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'

'4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.'

'4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.'

'4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.'

'4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.'

'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.'

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

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

"*Recommendation of the Parties*

"130. The disciplinary administrator recommended that the respondent be suspended for a period of 180 days.

"131. The respondent recommended that he receive a public censure.

"*Discussion*

"132. The respondent initially acted negligently regarding this real estate transaction. Over time the respondent's conduct turned into a pattern of negligence and, ultimately, knowing misrepresentations of the facts to the parties to the transaction. The respondent's lack of competence in handling the matter, depositing the fees paid for the mineral title opinion into his firm operating account, and failure to turn the buyer's file over to new counsel in a timely manner appear to be a result of the respondent's negligence.

"133. The hearing panel concludes that the respondent did not intend to mislead the buyer or other parties to the transaction, but instead missed the issues with the mineral title initially and then believed any issue with title could be resolved with a quiet title action. However, the respondent's misconduct is serious and warrants suspension from the practice of law.

"134. The hearing panel recognizes that the Supreme Court 'bases each disciplinary sanction on the specific facts and circumstances of the violations and aggravating and mitigating circumstances presented in the case,' and 'while prior cases may have some bearing on the sanctions that the court elects to impose, those prior cases must give way to consideration of the unique circumstances that each individual case presents.' *In re Williams*, 302 Kan. 990, 1003, 362 P.3d 816 (2015).

"135. The hearing panel concludes that both the specific circumstances in this case as well as discipline imposed for similar conduct in prior attorney discipline cases warrant the discipline recommended below. *See In re Borich*, 316 Kan. 257, 514 P.3d 352 (2022) (attorney's knowing and negligent violation of rules including KRPC 1.1, 1.15, 1.16, and 8.4(c) warranted one-year suspension); *In re Winterberg*, 314 Kan. 486, 500 P.3d 535 (2021) (attorney's negligent and knowing violation of rules including KRPC 1.3, 1.4(a), and 8.4(c) resulted in six-month suspension); *In re Colvin*, 300 Kan. 864, 336 P.3d 823 (2014) (despite the serious nature of respondent's conduct, which included knowing misrepresentation, published censure was held appropriate).

"*Recommendation of the Hearing Panel*

"136. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of 180 days. The panel does not recommend that the respondent be required to undergo a reinstatement hearing pursuant to Rule 232. However, the hearing panel encourages the respondent to follow through with his testimony that he will formulate a plan to develop a division between his law office and title company and business practices to ensure the respondent complies with the rules of professional conduct.

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

DISCUSSION

In a disciplinary proceeding, we consider the evidence, the disciplinary panel's findings, and the parties' arguments and determine whether KRPC violations exist and, if they do, the appropriate discipline. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2023

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.'"'" 315 Kan. at 147.

Respondent Eland had adequate notice of the formal complaint, the hearing before the panel, and the hearing before this court. And he had the opportunity to present evidence at his hearing and argue before this court. He also had the opportunity to take exception to the hearing panel's findings in its final hearing report. He chose to take no exceptions, and we thus deem the panel's findings of fact admitted. Supreme Court Rule 228(g)(1), (2) (2023 Kan. S. Ct. R. at 287).

These admitted facts establish by clear and convincing evidence the charged misconduct in violation of:

- Kansas Rules of Professional Conduct (KRPC) 1.1 (2023 Kan. S. Ct. R. at 327) (competence),
- KRPC 1.3 (2023 Kan. S. Ct. R. at 331) (diligence),
- KRPC 1.4(a) (2023 Kan. S. Ct. R. at 332) (communication),
- KRPC 1.15(a) (2023 Kan. S. Ct. R. at 372) (safekeeping property),
- KRPC 1.16(d) (2023 Kan. S. Ct. R. at 378) (declining or terminating representation),
- KRPC 5.3(c)(2) (2023 Kan. S. Ct. R. at 408) (responsibilities regarding nonlawyer assistance),
- and KRPC 8.4(c) (2023 Kan. S. Ct. R. at 433) (misconduct).

The only issue left to be determined is the appropriate discipline. During oral arguments, both the Disciplinary Administrator's office and respondent Eland agreed the panel's recommendation of a 180-day suspension was appropriate discipline and that no reinstatement hearing under Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) was necessary. See Supreme Court Rule 232(d) (2023 Kan. S. Ct. R. at 294). This court is not bound by the recommendations made by the Disciplinary Administrator or the hearing panel, however. *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). That said, after considering the evidence presented,

the recommendations of the hearing panel, and the recommendations of the parties, we determine the recommended discipline is appropriate. We also agree that respondent Eland need not undergo a reinstatement hearing.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that, effective April 28, 2023, the date of the original opinion, the court suspends Kenneth J. Eland from the practice of law in the state of Kansas, for 180 days in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. at 281) for violating KRPC 1.1, 1.3, 1.4(a), 1.15(a), 1.16(d), 5.3(c)(2), and 8.4(c).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292) (notice to clients, opposing counsel, and courts following suspension or disbarment).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 232(b) when seeking reinstatement and that Rule 232(d) applies in that a reinstatement hearing is not required.

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.

WALL, J., not participating.

No. 125,600

In the Matter of the Wrongful Conviction of ERIC L. BELL.

(529 P.3d 153)

SYLLABUS BY THE COURT

CIVIL PROCEDURE—*Action for Wrongful Conviction and Imprisonment—Statutory Application.* K.S.A. 2022 Supp. 60-5004(d)(2)'s use of the phrase "convicted, imprisoned and released from custody" refers to the imprisonment for which a claimant is seeking compensation, rather than some other, unrelated imprisonment.

Appeal from Sedgwick District Court; DEBORAH HERNANDEZ MITCHELL, judge. Opinion filed May 19, 2023. Affirmed.

Larry G. Michel, of Kennedy Berkley, of Salina, was on the brief for appellant.

Kurtis K. Wiard, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Eric L. Bell directly appeals from the Sedgwick County District Court's dismissal of his K.S.A. 2021 Supp. 60-5004 wrongful conviction action for failure to state a claim on which relief can be granted under K.S.A. 2021 Supp. 60-212(b)(6). Bell argues that the district court erroneously concluded the statute of limitations barred his action. He claims entitlement to the application of both the statutory tolling provision in K.S.A. 60-515(a) and the doctrine of equitable tolling. We disagree and affirm the district court.

FACTS AND PROCEDURAL BACKGROUND

Bell's wrongful conviction claim arises from his 2004 convictions and imprisonment, described in his three previous appeals. *State v. Bell*, No. 93,153, 2005 WL 3030333 (Kan. App. 2005) (unpublished opinion) (*Bell I*); *Bell v. State*, No. 99,484, 2009 WL 454946 (Kan. App. 2009) (unpublished opinion) (*Bell II*); *Bell v. State*, 46 Kan. App. 2d 488, 263 P.3d 840 (2011) (*Bell III*). A summary sets the stage for the claims before us.

A jury found Bell guilty of one count each of rape and criminal restraint and four counts of domestic battery. *Bell I*, 2005 WL 3030333,

at *1. For these convictions, he was sentenced to 253 months in prison. Bell consistently maintained his innocence to these crimes.

A panel of the Kansas Court of Appeals affirmed Bell's convictions in *Bell I*. But Bell's subsequent K.S.A. 60-1507 action, which spanned both *Bell II* and *Bell III*, proved more successful. In 2011, a panel of the Kansas Court of Appeals reversed Bell's convictions based on juror misconduct. *Bell III*, 46 Kan. App. 2d at 489, 497. After the State declined to retry Bell, the district court dismissed his charges and ordered him released. According to Bell, his then-attorney told him he had no right to any compensation for this imprisonment.

Subsequent Developments

Bell was later convicted of unrelated charges. He was imprisoned in June 2018 and apparently remained incarcerated at all relevant times afterward.

On July 1, 2018, K.S.A. 2018 Supp. 60-5004 went into effect, creating a cause of action that allows "a person convicted and subsequently imprisoned for one or more crimes that such person did not commit" to seek damages from the state. K.S.A. 2018 Supp. 60-5004(a)-(b). K.S.A. 2018 Supp. 60-5004(d)(1) set forth a two-year statute of limitations, while K.S.A. 2018 Supp. 60-5004(d)(2) provided that "[a] claimant convicted, imprisoned and released from custody before July 1, 2018, must commence an action under this section no later than July 1, 2020."

Then came the COVID-19 global pandemic. Pertinent to Bell's potential cause of action for wrongful conviction, Kansas Supreme Court Administrative Order No. 2020-PR-016, effective March 18, 2020, suspended "all statutes of limitations and statutory time standards or deadlines applying to the conduct or processing of judicial proceedings" until further order. Paragraph (4) of Order 2020-PR-016. Later orders extended that suspension. Kansas Supreme Court Administrative Order No. 2020-PR-58, effective May 27, 2020; Kansas Supreme Court Administrative Order No. 2020-PR-101, effective September 15, 2020.

But on April 15, 2021, Administrative Order No. 2021-PR-020, effective March 30, 2021, lifted the suspension of most statutes of limitations—including K.S.A. 2020 Supp. 60-5004's statute of limitations.

When the suspension was lifted, application of the statutory deadline gave Bell until July 28, 2021, to file his case.

In October 2021, Bell asserts another inmate told him about a possible cause of action under K.S.A. 2021 Supp. 60-5004. Bell soon drafted a petition and a motion to file suit out of time, which he dated November 18, 2021, and which was filed with the clerk of the district court later that same month.

District Court Proceedings

The State moved to dismiss Bell's case, arguing among other things that Bell had failed to timely sue. Bell responded pro se to the State's motion; his counsel also responded. Bell's counsel argued that the statute of limitations was tolled under K.S.A. 60-515 and that the statute of limitations should be equitably tolled. Additionally, Bell's counsel argued that the extent of Bell's access to the courts under K.S.A. 60-515 constituted a question of fact, thus rendering the case inappropriate for dismissal under K.S.A. 2021 Supp. 60-212(b)(6). Bell himself argued that "the honest reason why [he] did not file a claim under K.S.A. 60-5004 [was] that [he] simply had absolutely no knowledge or information regarding its existence until October of 2021 & wasted absolutely NO time drafting & submitting [his] Motion To File A Claim Out of Time."

In a brief order, the district court granted the State's motion to dismiss because "the case was filed outside the statute of limitations." Bell then appealed.

ANALYSIS

Bell argues the district court incorrectly dismissed his suit for failure to state a claim because factual questions remain over the application of K.S.A. 60-515(a) and the doctrine of equitable tolling. Bell also claims that the "literal interpretation" of K.S.A. 2022 Supp. 60-5004(d)(2) establishes that the court erred in dismissing his claim. Bell raised all three arguments below, thus preserving them for review.

Standard of Review

When a district court dismisses an action under K.S.A. 2022 Supp. 60-212(b)(6) for failure to state a claim, an appellate court must "'determine whether, in the light most favorable to the plaintiff, and with

every doubt resolved in the plaintiff's favor, the petition states any valid claim for relief.'" *McCormick v. City of Lawrence*, 278 Kan. 797, 798, 104 P.3d 991 (2005). When such a dismissal is based on the interpretation of a statute, the court's review is de novo. 278 Kan. at 798.

Discussion

K.S.A. 2022 Supp. 60-5004(d)(1)-(2) establish the statute of limitations applicable to civil claims for wrongful conviction and imprisonment:

> "(d)(1) The suit, accompanied by a statement of the facts concerning the claim for damages, verified in the manner provided for the verification of complaints in the rules of civil procedure, shall be brought by the claimant within a period of two years after the: (A) Dismissal of the criminal charges against the claimant or finding of not guilty on retrial; or (B) grant of a pardon to the claimant.
>
> "(2) A claimant convicted, imprisoned and released from custody before July 1, 2018, must commence an action under this section no later than July 1, 2020."

We begin with Bell's argument over the interpretation of K.S.A. 2022 Supp. 60-5004(d)(2). While Bell admits that the language "convicted, imprisoned and released" "is probably based on the assumption that the incarceration in question is for the crime for which the defendant was wrongfully convicted," he points out that nothing in the statute confirms that assumption. Instead, Bell argues that, because he was in prison on July 1, 2018, on charges unrelated to his wrongful imprisonment claim, K.S.A. 2022 Supp. 60-5004(d)(2) "requires denial of the State's motion" to dismiss.

We disagree. To interpret K.S.A. 2022 Supp. 60-5004(d)(2) as Bell suggests would doom his claim, not save it. K.S.A. 2022 Supp. 60-5004 did not *exist* when Bell was released from prison for the underlying crime back in 2012; the cause of action, when the Legislature created it, only grandfathered individuals like him—that is, people *previously* "convicted, imprisoned and released from custody"—under K.S.A. 2022 Supp. 60-5004(d)(2). If K.S.A. 60-5004(d)(2) did not apply to Bell because he was imprisoned on July 1, 2018, on charges unrelated to his wrongful imprisonment claim, Bell's two-year deadline to file would have passed in 2014—four years before the statute was enacted. As this construction is absurd, it cannot reflect the Legislature's intent. E.g., *State v. Scheuerman*, 314 Kan. 583, 590, 502 P.3d 502, *cert.*

denied 143 S. Ct. 403 (2022). Instead, we construe K.S.A. 2022 Supp. 60-5004(d)(2)'s use of the phrase "convicted, imprisoned and released from custody" to refer to the wrongful imprisonment for which a claimant is seeking compensation, rather than some other, unrelated imprisonment. Because Bell had been convicted, imprisoned, and released from custody on the charges for which he now seeks compensation, his deadline to file was July 1, 2020, unless tolled by another provision of law.

We turn next to Bell's claims that the district court erred by not applying the tolling provision in K.S.A. 60-515(a) or the doctrine of equitable tolling to extend his time to file. Neither theory affords Bell relief.

K.S.A. 60-515(a) provides, in relevant part:

> "[I]f any person entitled to bring an action . . . at the time the cause of action accrued or at any time during the period the statute of limitations is running, is . . . imprisoned for a term less than such person's natural life, such person shall be entitled to bring such action within one year after the person's disability is removed, except that no such action shall be commenced by or on behalf of any person under the disability more than eight years after the time of the act giving rise to the cause of action.
>
> "Notwithstanding the foregoing provision, if a person imprisoned for any term has access to the court for purposes of bringing an action, such person shall not be deemed to be under legal disability."

Bell argues that the COVID-19 pandemic altered normal court function and limited Bell's ability "to access resources and interact with other prisoners, which was how he became aware of the change in the law." But Bell fails to show how those things affected his access to the *court* for the purpose of bringing an action.

While the effect of an alteration to normal court functioning might pose a question of fact on its own, Bell's own arguments undercut any such question. As Bell's pro se response to the motion to dismiss argues, "the honest reason why [he] did not file a claim under K.S.A. 60-5004 [was] that [he] simply had absolutely no knowledge or information regarding its existence until October of 2021 & wasted absolutely NO time drafting & submitting [his] Motion To File A Claim Out of Time." This assertion, combined with the fact that Bell filed suit while he was apparently incarcerated, undermines any claim that he lacked "access to the court for

purposes of bringing an action." Cf. *Hood v. Prisoner Health Services., Inc.*, 180 Fed. Appx. 21, 25 (10th Cir. 2006) (unpublished opinion) (noting that the plaintiff did not present "any facts tending to show that he lacked access to the courts [in fact, when this suit was ultimately filed, he remained in KDOC custody]").

Further, Bell's conclusory claim that the COVID-19 protocols affected his "access" of any kind ignores that he was in prison for roughly 21 months *before* the advent of the COVID-19 pandemic. In other words, Bell had about 21 months to sue before any COVID-19-related protocols went into effect.

When the suspension of the statute of limitations was lifted, Bell still had about three months under the black letter of the statute to file. That time clearly expired without a filing. Thus, we perceive no unresolved question of fact as to K.S.A. 60-515(a)'s tolling provision.

We finally turn to the doctrine of equitable tolling. Under certain circumstances, "[e]quitable estoppel can be applied to bar a party from relying on the defense of the statute of limitations." *Rockers v. Kansas Turnpike Authority*, 268 Kan. 110, 116, 991 P.2d 889 (1999). The burden is on the party claiming application of the doctrine.

> "'A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts.'" *Rockers v. Kansas Turnpike Authority*, 268 Kan. at 116 (quoting *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.,* 221 Kan. 523, 527, 561 P.2d 792 [1977]).

Each element of equitable estoppel must be proved or the claim fails. *Rockers*, 268 Kan. at 116.

Interpreting federal law, the United States Supreme Court has recognized "that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" *Holland v. Florida.*, 560 U.S. 631, 645-46, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Under this framework, if a statute of limitations is subject to equitable tolling, "a 'petitioner' is 'entitled to equitable tolling' only if *he* shows '(1) that he has

been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." (Emphasis added.). 560 U.S. at 649.

Assuming without deciding that the statute of limitations in K.S.A. 2022 Supp. 60-5004 is subject to equitable tolling, we again find no lingering question of fact needing resolution. As both *Rockers* and *Holland* clarify, Bell bears the burden of presenting and proving his claim. Under *Rockers*, that requires proof of State inducement by action or silence, reliance upon such action or silence, and prejudice. Under the *Holland* framework, Bell would need to prove diligent pursuit of his rights and an extraordinary circumstance that prevented him from timely filing his claim. As we have already noted, Bell's pro se filings before the district court clarify that ignorance of the law alone delayed his lawsuit. And "mere ignorance of the law is not a basis for equitable tolling of a statute of limitations, even for pro se prisoners." *State v. Fox*, 310 Kan. 939, 943, 453 P.3d 329 (2019).

Federal courts have explored more thoroughly the effect of COVID-19 on equitable tolling. See generally Downey, *Extraordinary Circumstances and Extraordinary Writs: Equitable Tolling During the Covid-19 Pandemic and Beyond*, 27 Berkeley J. Crim. L. 31 (2022). The Tenth Circuit recently concluded that a pro se prisoner was not entitled to equitable tolling in the COVID-19 era based on limited access to a law library when he failed to show that he had been "pursuing his rights diligently throughout the one-year window, including before the COVID-19 restrictions went into place." *Donald v. Pruitt*, 853 Fed. Appx. 230, 234 (10th Cir. 2021) (unpublished opinion) (citing several similar COVID-19-era cases in accord). Pre-COVID cases generally reached similar outcomes. E.g., *Jones v. Taylor*, 484 Fed. Appx. 241, 242 (10th Cir. 2012) (unpublished opinion) ("Ordinarily, however, neither ignorance of the law nor limited access to materials and legal assistance supports a claim of equitable tolling."). And while "a complete denial of access to materials at a critical time may justify equitable tolling," this justification evaporates when a prisoner also could have acted at times when there was no such denial. *Jones*, 484 Fed. Appx. at 243.

As with his claim under K.S.A. 60-515(a), Bell's 21 months of imprisonment *before* the COVID-19 pandemic undermine his argument that COVID-19 protocols prevented him from filing his action. And Bell's own statements reveal that he filed late not because his access to the courts was impaired, but because he did not know about the new cause of action set forth in K.S.A. 2022 Supp. 60-5004. This ignorance of the law poses no question of fact for a court to address.

Thus, because Bell has not asserted the existence of any specific facts that would support the application of equitable tolling, he has failed to show that the district court erred by failing to apply the doctrine to his claim. Under the circumstances, the district court correctly dismissed Bell's case for failure to state a claim.

CONCLUSION

We affirm the district court's dismissal of Bell's case for failure to state a claim.

Affirmed.

No. 122,418

STATE OF KANSAS, *Appellee*, v. JUSTIN W. STEINERT, *Appellant.*

(529 P.3d 778)

SYLLABUS BY THE COURT

1. STATUTES—*Interpretation –Question of Law—Appellate Review*. Statutory interpretation presents a question of law over which appellate courts have unlimited review.

2. CRIMINAL LAW—*Motion to Correct Illegal Sentence—File on Direct Appeal*. A defendant may file a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504(a) in an appellate court while on direct appeal.

3. SAME—*Illegal-Sentence Claim May Be Raised First Time on Appeal*. A challenge to the classification of a prior conviction and the resulting criminal-history score presents an illegal-sentence claim that may be raised for the first time on appeal.

4. SAME—*New Rule for Conducting Criminal Prosecutions—Application*. A new rule for conducting criminal prosecutions is to be applied to all cases pending on direct review or not yet final.

5. SAME—*Sentencing—Sentencing Court Retains Jurisdiction to Correct Illegal Sentence or Clerical Error.* Under K.S.A. 2022 Supp. 21-6820(i), a sentencing court retains jurisdiction to correct an illegal sentence or clerical error under K.S.A. 22-3504 irrespective of a defendant's appeal.

6. COURTS—*Kansas Supreme Court has Power to Take Actions Necessary for the Administration of Justice.* The Kansas Supreme Court has the inherent power to take actions reasonably necessary for the administration of justice, provided the exercise of that power in no way contravenes or is inconsistent with the substantive statutory law.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 24, 2022. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed May 26, 2023. Judgment of the Court of Appeals denying the motion to correct illegal sentence is reversed, and the case is remanded to the district court with directions.

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

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

The opinion of the court was delivered by

WALL, J.: Under the Kansas Sentencing Guidelines Act, the presumptive sentence for most felonies is derived from the severity level of the offense and the defendant's criminal history, which is reflected in a criminal-history score. See K.S.A. 2022 Supp. 21-6804 and 21-6805. A separate statute, K.S.A. 2022 Supp. 22-3504, provides that a sentence is illegal and may be corrected "at any time" if it fails to conform to these and other "applicable statutory provision[s]." Kansas appellate courts commonly review challenges at the intersection of these statutes when defendants claim their criminal-history score is inaccurate, rendering their sentence illegal.

This case presents such a challenge. After receiving a 71-month prison sentence for crimes he committed in Wichita, Justin W. Steinert appealed his sentence to the Court of Appeals, arguing that he should have been sentenced using a lower criminal-history score. But what makes this case unique is that Steinert filed his motion to correct an illegal sentence in the appellate court, not the district court. And, while his direct appeal was pending, the Legislature added procedures governing criminal-history challenges raised for the first time on appeal. See L. 2022, ch. 73, sec. 4; K.S.A. 2022 Supp. 21-6814.

A panel of the Court of Appeals held that a motion to correct an illegal sentence could not be filed in the appellate court. And it further suggested that the preservation rule—which generally requires issues first be raised at the district court to preserve them for appellate court review—gave the panel discretion to deny review of Steinert's claim. Even so, the panel reached the merits of Steinert's challenge, reasoning that the preservation rule is subject to exceptions. The panel then proceeded to deny Steinert's claim on the merits.

Steinert petitioned our court for review, arguing (1) the panel erred in holding that an illegal-sentence motion cannot be filed in an appellate court, and (2) he was entitled to a remand hearing on the motion under K.S.A. 2022 Supp. 22-3504. He also argued the recent statutory amendment reflected in K.S.A. 2022 Supp. 21-6814(d) applies to his case. And under that amendment, he can submit a journal entry to the appellate courts showing that his 2016 Arkansas misdemeanor conviction should not have factored into his criminal-history score. The panel declined to apply this statutory amendment and refused to consider the purported journal entry.

We agree with some of Steinert's arguments challenging the panel's decision. First, under our established precedent, appellate courts have subject matter jurisdiction over an illegal sentence motion raised for the first time on direct appeal, and such claims are not subject to the preservation rule. Second, the recent statutory amendment reflected in K.S.A. 2022 Supp. 21-6814(d) applies to Steinert's appeal because changes in the law generally apply to cases, like Steinert's, that are pending on direct review.

Even so, under the facts and unique procedural posture of this case, prudence dictates that our court exercise judicial restraint by (1) not deciding whether Steinert may submit the Arkansas journal entry in support of his claim, and (2) not reaching the merits of his illegal-sentence motion. For one, there is a factual dispute about whether the document Steinert submitted is, in fact, a journal entry. Also, at oral argument, the parties offered differing interpretations of the 2022 amendment to K.S.A. 21-6814(d). But they did not brief these questions of statutory interpretation. Nor did the panel address them.

Given these unique circumstances, we conclude the district court is better positioned to resolve the parties' factual dispute and to determine whether Steinert's criminal history score was calculated improperly, rendering his sentence illegal. Under another recent statutory amendment reflected in K.S.A. 2022 Supp. 21-6820(i), the district court has concurrent jurisdiction to hear Steinert's illegal-sentence claim. And we have the inherent power to take actions reasonably necessary for the administration of justice, including the power to decide which forum should exercise its concurrent jurisdiction to resolve Steinert's illegal sentence motion.

Thus, we reverse the panel's holding denying Steinert's illegal-sentence motion and remand that claim to the district court to exercise its concurrent jurisdiction consistent with this opinion.

FACTS AND PROCEDURAL BACKGROUND

In November 2018, the State charged Steinert with several offenses, including kidnapping. Steinert had allegedly forced a teenager into his house at gunpoint and then coerced the teenager into taking scales and a container of marijuana to sell on Steinert's behalf. Steinert and the State worked out an agreement that allowed him to enter an *Alford* plea, named for the 1970 Supreme Court case that permits a

defendant to plead guilty to an offense under a claim of innocence. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). In exchange for Steinert's plea, the State agreed to dismiss the kidnapping charge and amend an aggravated-assault charge to one count of aggravated robbery. The district court then found Steinert guilty of aggravated robbery and the remaining charges—contributing to a child's misconduct, distribution of marijuana, and possession of paraphernalia to distribute or manufacture.

A presentence investigation report (PSI) prepared after Steinert's *Alford* plea calculated his criminal-history score as H, the second lowest score, based on two adult nonperson misdemeanor convictions. One of those convictions was a 2016 Arkansas conviction in Cleburne County District Court. The PSI described the offense as "Theft/Shoplifting" and listed Ark. Code Ann. § 5-36-116 as the violated statute. At sentencing, Steinert agreed the PSI was accurate and that his criminal-history score was H. The district court imposed a controlling 71-month sentence, and Steinert timely appealed to the Court of Appeals.

While drafting Steinert's brief, appellate counsel obtained a purported copy of the journal entry from the 2016 Arkansas conviction. That document listed the violated statute alternately as Ark. Code Ann. § 5-36-116 (the same statute listed on the PSI) and Ark. Code Ann. § 5-36-102—"Theft/shoplifting" (which was not listed on the PSI). The space identifying Steinert's attorney in the matter was also left blank. Appellate counsel believed those discrepancies could support an illegal-sentence claim, so he sought to introduce the journal entry into the Court of Appeals proceedings. The State objected to each of Steinert's attempts to do so.

First, Steinert attached the journal entry to his appellate brief. Then, he moved to add the journal entry to the appellate record under Supreme Court Rule 3.02(d)(4) (2022 Kan. S. Ct. R. at 21). Chief Judge Arnold-Burger denied that motion, finding that the journal entry "[w]as not part of the record below" and that Steinert's request "d[id] not comply with rule 3.01." Finally, Steinert filed a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504 in the Court of Appeals, again attaching the journal entry.

That illegal-sentence motion repeated two of the arguments Steinert had made in his appellate brief. First, Steinert argued the Arkansas journal entry did not establish his crime of conviction, so it was impossible to determine whether a comparable Kansas offense existed. See K.S.A. 2022 Supp. 21-6811(e)(2)(B) (out-of-state misdemeanor convictions may be used to calculate a criminal history score only if there is a comparable Kansas offense). Second, Steinert argued the journal entry showed he had not been represented by counsel. See *State v. Youngblood*, 288 Kan. 659, Syl. ¶ 3, 206 P.3d 518 (2009) (uncounseled misdemeanor convictions generally cannot be used to enhance a sentence in a different case).

But Steinert's motion did more than just rehash the illegal-sentence arguments from his appellate brief. Steinert requested the Court of Appeals remand to the district court under K.S.A. 2021 Supp. 22-3504(a), which provides that a "defendant shall have a right to a hearing" on an illegal-sentence motion "[u]nless the motion and the files and records of the case conclusively show that the defendant is entitled to no relief." As Steinert explained, remand to the district court was necessary because he bore the burden of proving a criminal-history error on appeal under K.S.A. 2022 Supp. 21-6814(c), but he had been prevented from introducing into the appellate proceedings the Arkansas journal entry essential to proving his claim. See K.S.A. 2022 Supp. 21-6814(c) ("If the offender later challenges such offender's criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of the evidence."). Although Steinert did not cite *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986), the procedure he proposed was like the one set out in that case for addressing ineffective assistance of counsel claims raised on direct appeal. See 239 Kan. 117, Syl. ¶ 2 ("When appellate counsel in a criminal case desires to raise the issue of ineffective assistance of counsel and that issue has never been ruled upon by the trial court, defendant may seek a remand of the case to the trial court for an initial determination of the issue.").

The Court of Appeals panel denied relief. *State v. Steinert*, No. 122,418, 2022 WL 2286921, at *5, 11 (Kan. App. 2022) (unpublished opinion). The panel held that a defendant may not file a

K.S.A. 22-3504 motion in an appellate court. It reasoned: "To say that an illegal sentence may be corrected 'at any time' does not mean that one may file that motion 'in any court.' We are a court of review, not a fact-finding court." 2022 WL 2286921, at *5. It also held that the Arkansas journal entry was not part of the appellate record, and without the benefit of that document, Steinert had not met his burden to show that his criminal-history score was incorrect. 2022 WL 2286921, at *5. The panel also rejected the other challenges Steinert had raised in his appellate brief, but those issues are not before us.

One week after the panel issued its opinion, a statutory amendment establishing procedures for challenging criminal history for the first time on appeal went into effect. See L. 2022, ch. 73, § 4, eff. July 1, 2022. The text of the amendment provides:

> "(d) If an offender raises a challenge to the offender's criminal history for the first time on appeal, the offender shall have the burden of designating a record that shows prejudicial error. . . . In designating a record that shows prejudicial error, the offender may provide the appellate court with journal entries of the challenged criminal history that were not originally attached to the criminal history worksheet." K.S.A. 2022 Supp. 21-6814(d).

On the same day the amendment became effective, Steinert asked the panel to reconsider or modify its decision. In Steinert's view, the amendment applied retroactively and required the panel to consider the Arkansas journal entry when evaluating the merits of his illegal-sentence claims. The panel denied Steinert's request without analysis.

Steinert then petitioned our court for review, and we agreed to review two issues: (1) whether the panel had erred when it denied Steinert's K.S.A. 22-3504 motion on the grounds that illegal-sentence motions cannot be filed in appellate courts; and (2) whether the 2022 amendment to K.S.A. 21-6814 applied to Steinert's appeal.

While Steinert's petition for review was pending, he also filed a motion in our court to introduce the Arkansas journal entry. He cited the recent statutory amendment as support for his motion. In response, the State insisted that the document Steinert attached to his motion was not a journal entry. Steinert filed an affidavit as-

serting otherwise from an employee of the Arkansas county's district court. We took the motion under advisement. Neither party filed a supplemental brief. We held oral argument in this matter on February 3, 2023. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

Steinert advances two arguments. First, he contends the panel erred by denying his K.S.A. 22-3504 motion. He claims a defend*an*t may file that type of motion in an appellate court and that K.S.A. 2022 Supp. 22-3504 establishes a *Van Cleave*-like procedure for a remand hearing on an illegal-sentence claim. Second, he argues K.S.A. 2022 Supp. 21-6814(d) applies to his case and allows him to submit the Arkansas journal entry to the appellate courts. In his view, that journal entry shows his criminal-history score was wrongly calculated, rendering his sentence illegal. We address each argument in turn.

I. *Kansas Law Permits a Defendant to File a Motion to Correct an Illegal Sentence in an Appellate Court on Direct Appeal, but the Question of Remand Is Governed by K.S.A. 2022 Supp. 21-6814(d), not K.S.A. 2022 Supp. 22-3504(a)*

The panel held that K.S.A. 22-3504 prohibits a defendant from filing an illegal-sentence motion in an appellate court. *Steinert*, 2022 WL 2286921, at *5. Steinert argues that holding conflicts with our decision in *State v. Keel*, 302 Kan. 560, 571, 357 P.3d 251 (2015). He also claims he is entitled to a remand hearing in the district court under K.S.A. 2022 Supp. 22-3504(a), which states that a "defendant shall have a right to a hearing" on an illegal sentence motion "[u]nless the motion and the files and records of the case conclusively show that the defendant is entitled to no relief." In Steinert's view, the Arkansas journal entry at least raises questions about his crime of conviction and whether he was represented by counsel, so it has not been *conclusively* shown that he is entitled to no relief.

Resolving these issues requires us to interpret K.S.A. 2022 Supp. 22-3504. Statutory interpretation presents a question of law over which we have unlimited review. Thus, we need not defer to the panel's conclusions. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

To resolve Steinert's first issue on appeal, we consider whether the panel erred by holding that a defendant cannot file a motion to correct an illegal sentence in the appellate courts while on direct appeal. Then, we address Steinert's argument that remand is governed by, and authorized under, K.S.A. 2022 Supp. 22-3504(a).

A. *Kansas Law Permits a Defendant to File a Motion to Correct an Illegal Sentence in an Appellate Court on Direct Appeal*

We agree with the first part of Steinert's argument: the panel's holding that a defendant may not file a K.S.A. 22-3504 motion in the appellate courts on direct appeal conflicts with our precedent. In *Keel*, which the panel did not address, a defendant filed a K.S.A. 22-3504 motion in our court after we had granted his petition for review on other issues raised in his direct appeal. Citing K.S.A. 22-3504(1)—which authorized a court to correct an illegal sentence "at any time"—we held that the defendant's motion was properly before our court. *Keel*, 302 Kan. at 571. That holding was a corollary to *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015), decided a few months before *Keel*. In *Dickey*, we held that because K.S.A. 22-3504(1) authorized a court to correct an illegal sentence "at any time," a challenge to the classification of a prior conviction and the resulting criminal-history score could be raised for the first time on appeal because it presented an illegal-sentence claim. 301 Kan. 1018, Syl. ¶¶ 1, 3. Based on those precedents, we conclude that the panel erred.

Further, we take issue with the panel's suggestion that both subject matter jurisdiction and the preservation rule would ordinarily preclude review of Steinert's illegal-sentence motion raised on direct appeal. After describing Steinert's challenge to his criminal history, the panel indicated that statutory limits to appellate

jurisdiction would ordinarily preclude review because Steinert entered an *Alford* plea and received a presumptive sentence. *Steinert*, 2022 WL 2286921, at * 2; see also K.S.A. 2022 Supp. 22-3602(a) (limiting jurisdiction to review an appeal from a judgment of conviction upon a guilty or no contest plea); K.S.A. 2022 Supp. 21-6820(c) (foreclosing appellate review of a presumptive sentence for the crime or any sentence resulting from an agreement between the State and the defendant approved on the record).

And because Steinert failed to first raise his illegal sentence claim before the district court, the panel also suggested the preservation rule could have foreclosed review of Steinert's motion. 2022 WL 2286921, at * 2; see *State v. Keys*, 315 Kan. 690, 696, 510 P.3d 706 (2022) ("Generally, issues not raised before the district court cannot be raised on appeal."). But citing *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020), and asserting that our court "liberally construes the laws in this context," the panel purported to use its discretion to reach the merits of Steinert's challenge. *Steinert*, 2022 WL 2286921, at * 2.

We disagree with the panel's jurisdictional analysis. First, jurisdiction is not a prudential doctrine. So, if the panel believed it lacked subject matter jurisdiction to review Steinert's illegal sentence claim, then it should not have proceeded to the merits. *In re Estate of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151 (2020) ("[O]nce a Court of Appeals panel concludes jurisdiction is lacking, the better practice is not to proceed to opine about the merits of the issues.").

Second, and more important, we have held that appellate jurisdiction over an illegal sentence motion is inherent in K.S.A. 22-3504's language authorizing a court to correct an illegal sentence "at any time." See *State v. Clark*, 313 Kan. 556, 568, 486 P.3d 591 (2021); *State v. McCroy*, 313 Kan. 531, 535-36, 486 P.3d 618 (2021). As noted, our precedent further establishes that the exercise of this appellate jurisdiction is proper even when a defendant raises the illegal sentence motion for the first time on direct appeal. See *Keel*, 302 Kan. at 571. And we have also held that K.S.A. 22-3504 grants appellate courts subject matter jurisdiction over illegal sentence claims, even when (1) the sentence is the result of a plea agreement approved by the district court on the record; or

(2) the sentence is within the presumptive sentence for the crime. See *State v. Jones*, 293 Kan. 757, 761, 268 P.3d 491 (2012) (appellate jurisdiction proper under K.S.A. 22-3504 even though sentence was the result of plea); see also *State v. Morningstar*, 299 Kan. 1236, Syl. ¶ 1, 329 P.3d 1093 (2014) (Appellate courts have jurisdiction to determine whether district court had statutory authority to impose a consecutive sentence even when a defendant receives a presumptive sentence, which is generally not appealable.).

Finally, as discussed below, the Legislature amended K.S.A. 21-6814 in 2022 to establish procedures governing a criminal-history challenge raised for the first time on appeal. K.S.A. 2022 Supp. 21-6814(d). This amendment presumes the existence of appellate court jurisdiction over such challenges. And here, Steinert's criminal-history challenge serves as the foundation for his illegal sentence motion.

We also take issue with the panel's analysis of the preservation rule in the context of an illegal-sentence motion. First, the panel's reliance on *Gray* is misplaced. There, the defendant argued for the first time on appeal that the identical-offense doctrine applied to his first-degree murder conviction. *Gray*, 311 Kan. at 169; see also *State v. Thompson*, 287 Kan. 238, Syl. ¶ 3, 200 P.3d 22 (2009) (when two or more offenses are identical, a person may be sentenced only to the least severe punishment prescribed for any of them). We acknowledged our three well-established exceptions to the preservation rule—see *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015)—but then made the discretionary decision not to reach the merits. See *Gray*, 311 Kan. at 170 ("The decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, we have no obligation to do so. [Citations omitted.]"). The preservation rule applied because the defendant in *Gray* did not raise an illegal-sentence claim. Steinert, on the other hand, did. See *Dickey*, 301 Kan. 1018, Syl. ¶¶ 1, 3 (A challenge to the classification of a prior conviction and the resulting criminal-history score presents an illegal-sentence claim.). And our precedent firmly establishes that a defendant may raise an illegal-sentence claim for the first time on appeal, notwithstanding general rules of

issue preservation. See 301 Kan. 1018, Syl. ¶ 1; see also *State v. Eubanks*, 316 Kan. 355, 360, 516 P.3d 116 (2022); *State v. Juliano*, 315 Kan. 76, 79-80, 504 P.3d 399 (2022) (citing *State v. Sartin*, 310 Kan. 367, 375, 446 P.3d 1068 [2019]; *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 [2019]). Thus, we disagree with the panel's suggestion that it could have made a discretionary decision to apply the preservation rule to deny Steinert's criminal-history challenge.

B. *The Legal Standard for Remand Is Governed by K.S.A. 2022 Supp. 21-6814(d), not K.S.A. 2022 Supp. 22-3504*

Even so, we disagree with the second part of Steinert's argument—that K.S.A. 2022 Supp. 22-3504 establishes a *Van Cleave*-like procedure for illegal-sentence claims. As we have explained, Steinert grounds his argument in the statutory text. Under K.S.A. 2022 Supp. 22-3504(a), a "defendant shall have a right to a hearing" on an illegal-sentence motion "[u]nless the motion and the files and records of the case conclusively show that the defendant is entitled to no relief." In Steinert's view, the Arkansas journal entry raises a question about whether the conviction should have factored into his criminal-history score, so it cannot be said that the documents of his case conclusively show he is entitled to no relief. Thus, he argues K.S.A. 2022 Supp. 22-3504 entitles him to a remand for a hearing on his motion.

While Steinert's textual argument has some appeal, his interpretation of K.S.A. 2022 Supp. 22-3504 is untenable given the 2022 amendment to K.S.A. 21-6814. Under that amendment, when an offender raises a criminal-history challenge for the first time on appeal, "the offender may provide the appellate court with journal entries of the challenged criminal history," and "[t]he court may remand the case if there is a reasonable question as to whether prejudicial error exists." K.S.A. 2022 Supp. 21-6814(d). In other words, the 2022 amendment to K.S.A. 21-6814 specifically addresses the issue of remand in cases in which a defendant raises a criminal-history challenge for the first time on appeal. And as established in the analysis of Issue II below, the amendment applies to Steinert's challenge even though it became effective a week after the panel's decision.

Thus, even if K.S.A. 2022 Supp. 22-3504(a) could be construed as addressing remand to the district court, K.S.A. 2022 Supp. 21-6814(d) would control as the more specific statute. See *In re Tax Exemption Application of Mental Health Ass'n of the Heartland*, 289 Kan. 1209, 1215, 221 P.3d 580 (2009) (a specific statute controls over a general statute); *Bruce v. Kelly*, 316 Kan. 218, 255, 514 P.3d 1007 (2022) ("[W]hen statutory provisions are in conflict, the more specific provision generally prevails."). K.S.A. 2022 Supp. 22-3504 does not address remand specifically, only a right to a hearing generally. Nor is the statute limited to instances when an illegal-sentence claim is raised for the first time on appeal. K.S.A. 2022 Supp. 21-6814(d), on the other hand, provides a standard for remand precisely in the situation this case presents: Steinert has challenged his criminal history for the first time on appeal and provided the appellate court with a purported journal entry of the challenged criminal history.

Thus, when a criminal-history challenge is raised for the first time on appeal, the legal standard for remand is governed by K.S.A. 2022 Supp. 21-6814(d), rather than K.S.A. 2022 Supp. 22-3504(a).

II. *The 2022 Amendment to K.S.A. 21-6814 Applies Because It Became Effective While Steinert's Direct Appeal Was Pending; but Under the Circumstances, the Contested Legal and Factual Issues Should First Be Resolved in the District Court, Which Has Concurrent Jurisdiction Under K.S.A. 2022 Supp. 21-6820(i).*

As noted, Steinert's several attempts to introduce the Arkansas journal entry into the Court of Appeals proceedings were consistently rebuffed. And when Steinert asked the panel to reconsider or modify its decision based on K.S.A. 2022 Supp. 21-6814(d), the panel denied his motion without analysis.

Now before our court, Steinert continues to insist that K.S.A. 2022 Supp. 21-6814 allows him to submit the Arkansas journal entry to the appellate courts. Under subsection (d) of that statute, an offender who, like Steinert, challenges criminal history for the first time on appeal "may provide the appellate court with journal entries of the challenged criminal history that were not originally

attached to the criminal history worksheet." K.S.A. 2022 Supp. 21-6814(d). Steinert acknowledges the statute came into effect after the Court of Appeals panel denied him relief, but he argues that it nonetheless applies because it is procedural and remedial. See *White v. State*, 308 Kan. 491, 499, 421 P.3d 718 (2018) (statutory amendments that are "procedural or remedial" may be applied retroactively).

Pressed at oral argument on the relief he seeks, Steinert asked us to reach the merits of his illegal-sentence claim and to consider the Arkansas journal entry when doing so. Steinert believes the journal entry can support two, independent illegal-sentence claims. He bases his first illegal-sentence claim on K.S.A. 2022 Supp. 21-6811, which governs the calculation of criminal-history scores. Under one of its provisions, K.S.A. 2022 Supp. 21-6811(e)(2)(B), an out-of-state misdemeanor "shall not be used in classifying the offender's criminal history" if "Kansas does not have a comparable offense." Steinert points out that the purported journal entry alternately lists two Arkansas statutes, Ark. Code Ann. § 5-36-102 and Ark. Code Ann. § 5-36-116, as the statutes he violated. According to Steinert, neither statute provides the elements of a criminal offense, so it is unclear what Arkansas offense Steinert was convicted of, let alone whether a comparable Kansas offense exists.

Steinert then relies on *Youngblood* for his second illegal-sentence claim. There, we held that, because a "person accused of a misdemeanor has a Sixth Amendment right to counsel if the sentence to be imposed upon conviction includes a term of imprisonment," an uncounseled misdemeanor conviction cannot be used to later calculate criminal history unless the person properly waived that right. *Youngblood*, 288 Kan. 659, Syl. ¶¶ 2, 3. Steinert draws our attention to the blank space where the purported journal entry should have identified the attorney representing him. He contends this omission shows he was not represented by counsel, so the conviction should not have factored into his criminal-history score.

In response, the State insists the document Steinert has provided is not a journal entry but a "record of actions," which merely summarizes the important events in the Arkansas proceedings.

And, of course, the State disputes the merits of Steinert's illegal-sentence claims.

We agree with Steinert that K.S.A. 2022 Supp. 21-6814(d) applies to his claim, but not for the same reason he articulates. Steinert contends the amendment applies retroactively because it is procedural and remedial. But "new rules for conducting criminal prosecutions generally apply to cases pending on direct review or not yet final." *State v. Thurber*, 308 Kan. 140, 225, 420 P.3d 389 (2018). And K.S.A. 2022 Supp. 21-6814 became effective while Steinert's direct appeal was pending. Thus, a court's reliance on the statutory amendment does not constitute a retroactive application of the law.

Though we agree K.S.A. 2022 Supp. 21-6814(d) applies to Steinert's direct appeal, that conclusion does not resolve the issues in this case. We have already noted that there is a factual dispute as to whether the document Steinert submitted is, in fact, a journal entry. But it has also become clear that the parties hold differing views regarding the proper interpretation of K.S.A. 2022 Supp. 21-6814(d). For example, the statute allows both the defendant and State to "provide the appellate court with journal entries" that address the defendant's criminal history challenge. K.S.A. 2022 Supp. 21-6814(d). But does that mean a party may submit out-of-state journal entries? And may the parties submit only journal entries? If so, can the court consider and rely on the affidavit Steinert submitted to our court? The statute also permits the appellate court to "take judicial notice of such journal entries, complaints, plea agreements, jury instructions and verdict forms for Kansas convictions when determining whether prejudicial error exists." K.S.A. 2022 Supp. 21-6814(d). Does that language prevent the appellate court from taking judicial notice of similar documents from out-of-state convictions? And what does it mean for there to be "a reasonable question as to whether prejudicial error exists," which is the statutory standard for remand to the district court? K.S.A. 2022 Supp. 21-6814(d).

To decide whether the documents Steinert submitted are properly before the court, and to reach the merits of Steinert's challenges to the calculation of his criminal-history, an appellate court must resolve these outstanding factual and legal questions. But the parties did not brief the questions related to the proper statutory interpretation of K.S.A. 2022 Supp. 21-6814(d), in part, because they did not take shape

until oral argument. And the panel did not address the statutory amendment in its opinion. We hesitate to resolve disputed interpretations of a newly amended statute without the benefit of the parties' briefing or the analysis of the panel.

Given these circumstances, we conclude the district court is better positioned to resolve the claims in Steinert's illegal-sentence motion. Under a newly enacted provision of K.S.A. 21-6820, the district court—in this case, the Sedgwick County District Court—has concurrent jurisdiction over Steinert's illegal-sentence claims. See K.S.A. 2022 Supp. 21-6820(i) ("The sentencing court shall retain authority irrespective of any appeal to correct an illegal sentence or clerical error pursuant to K.S.A. 22-3504."). And that amendment applies for the same reason the 2022 amendment to K.S.A. 21-6814 applies—the statutory amendment became effective while Steinert's direct appeal was pending. See 308 Kan. at 225 (changes in the law, including statutory amendments, generally apply on direct appeal).

Our court has the inherent power to take actions "'reasonably necessary for the administration of justice, provided these powers in no way contravene or are inconsistent with the substantive statutory law.'" *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 419, 197 P.3d 370 (2008); see also Kan. Const. art. 3, § 1 ("The supreme court shall have general administrative authority over all courts in this state."). When, as here, the Legislature has granted district courts concurrent jurisdiction, we have inherent authority to decide which forum should exercise that jurisdiction. And such decision-making is wholly consistent with the concurrent jurisdictional scheme the Legislature contemplated in K.S.A. 2022 Supp. 21-6820(i). For the reasons outlined above, we conclude that the district court is best positioned to adjudicate the parties' fact disputes and to resolve the legal question of whether Steinert's criminal history score deviates from the applicable statutes, rendering his sentence illegal. And we reserve for another day the various questions related to the proper interpretation of K.S.A. 2022 Supp. 21-6814(d).

CONCLUSION

For the reasons outlined in this opinion, we reverse the panel's holding denying Steinert's illegal-sentence claim and remand that issue to the district court to exercise its concurrent jurisdiction consistent

with this opinion. We deny, as moot, Steinert's motion to add the Arkansas journal entry before our court.

Judgment of the Court of Appeals denying the motion to correct illegal sentence is reversed, and the case is remanded to the district court with directions.

No. 123,023

SIERRA CLUB, *Petitioner/Appellee*, v. JANET STANEK, in her Official Capacity as Secretary of the Kansas Department of Health and Environment, and the DEPARTMENT OF HEALTH AND ENVIRONMENT, an Agency of the State of Kansas, *Respondents/Appellees*, and HUSKY HOGS, L.L.C., PRAIRIE DOG PORK L.L.C., ROLLING HILLS PORK, L.L.C., and STILLWATER SWINE, L.L.C., *Intervenors/Appellants.*

(529 P.3d 1271)

SYLLABUS BY THE COURT

CIVIL PROCEDURE—*Moot Case—Actual Controversy has Ended*. A case is moot when the actual controversy has ended and the only judgment that could be entered would be ineffectual for any purpose and would not impact any of the parties' rights.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 1, 2022. Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed June 2, 2023. Judgment of the Court of Appeals reversing the district court is reversed, and the appeal is dismissed.

Clayton J. Kaiser, of Foulston Siefkin LLP, of Wichita, argued the cause, and *Gary L. Ayers* and *David M. Traster*, of the same firm, were with him on the briefs for intervenors/appellants.

Timothy J. Laughlin, of Schoonover & Moriarty, LLC, of Olathe, argued the cause, and *Robert V. Eye*, of Robert V. Eye Law Office, LLC, of Lawrence, was with him on the briefs for petitioner/appellee.

Arthur S. Chalmers, assistant attorney general, argued the cause, and *M.J. Willoughby*, assistant attorney general, and *Derek Schmidt*, attorney general, were with him on the briefs for respondents/ appellees.

The opinion of the court was delivered by

STEGALL, J.: Sierra Club challenges permits issued by the Kansas Department of Health and Environment in 2017 and 2018 to four different swine confined animal feeding operations, sometimes referred to as CAFOs. Because current circumstances have rendered Sierra Club's legal challenges moot, we dismiss the case.

Husky Hogs, L.L.C. owned a swine facility in Phillips County, Kansas, which burned down in June of 2017. Soon after, Husky Hogs formulated a plan to rebuild and expand the swine operation. An important limit on any CAFO is found in K.S.A.

65-1,180—which establishes minimum setbacks from surface water:

> "(a) The department shall not approve a permit for construction of a new swine facility or expansion of an existing swine facility unless the swine waste management system for the facility:
>
> . . . .
>
> (3) . . . is located: (A) Not less than 500 feet from any surface water if the facility has an animal unit capacity of 3,725 or more; (B) not less than 250 feet from any surface water if the facility has an animal unit capacity of 1,000 to 3,724; or (C) not less than 100 feet from any surface water if the facility has an animal unit capacity of under 1,000."

Because the Husky Hogs' facility, in its pre-fire configuration, was located 250 feet from Prairie Dog Creek, it was limited to a maximum of 3,724 animal units. Given this reality and their desire to carry more animal units, the rebuild planners formed a new limited liability corporation named Prairie Dog Pork, L.L.C. Husky Hogs and other landowners then executed a quitclaim deed granting Prairie Dog Pork a portion of the Husky Hogs' property. Then, in 2017, each L.L.C., separately and independently, applied for and was ultimately granted a permit from KDHE. These 2017 permits were valid through December 10, 2022.

Sierra Club protested, publicly commented on, and opposed KDHE's decision at every opportunity, arguing that Husky Hogs and Prairie Dog Pork were not legally "separate facilities" and therefore any permits allowing the two facilities to carry an aggregate of more than 3,724 animal units would violate the statutory setback requirements.

At about that time, the same group of landowners had also created two additional L.L.C.s in order to further grow their carrying capacities. They formed C & J Swine L.L.C. (doing business as Rolling Hills Pork, L.L.C.) and Stillwater Swine, L.L.C. These L.L.C.s were created to operate CAFOs in Norton County and—similar to Husky Hogs and Prairie Dog Pork—they were located on adjoining land within 250 feet of surface water. Rolling Hills Pork and Stillwater Swine also applied for and were ultimately given permits from KDHE. These 2018 Permits were valid through April 26, 2023, and May 24, 2023. Sierra Club again protested, publicly commented on, and opposed KDHE's decision at every appropriate administrative step, arguing that the CAFOs

were not legally "separate facilities," and therefore the permits would violate the setback requirements for land carrying more than 3,724 animal units.

After the issuance of the 2017 and 2018 permits, Sierra Club filed this lawsuit. Relevant to today's decision, Sierra Club alleged the permits issued by KDHE to the four CAFOs violated the surface water setback requirements of K.S.A. 65-1,180. In 2019, Sierra Club prevailed in the district court. Noticing the obvious gamesmanship the CAFOs had undertaken to avoid the setback requirements, the district court held that because the CAFOs were self-contained in two geographic areas (one in Phillips County and one in Norton County) with contiguous borders, the 2017 and 2018 permits were unlawful. Which is to say that even though the CAFOs were distinct legal entities, they were effectively only one CAFO on each geographic footprint. The district court's ruling was bolstered considerably by one of KDHE's then-existing regulations which stated that CAFO facilities would not be considered separate facilities if they shared a common property line. See K.A.R. 28-18a-4(d) (2008 Supp.). The district court remanded the matter to KDHE and the CAFOs appealed.

While the appeal from the district court's decision was pending, three critical changes occurred. First, the CAFOs deeded small strips of land across each geographic footprint to third-party L.L.C.s. In other words, they removed the shared property line to avoid the legal impact of K.A.R. 28-18a-4(d) (2008 Supp.). In 2021, KDHE also amended K.A.R. 28-18a-4(d) to remove any reference to a "contiguous ownership boundary." Following the amendment, the regulation only required separate CAFOs to have separate waste management systems. And finally, in light of the district court's ruling and the work-arounds described above, the CAFOs sought new permits in lieu of the 2017 and 2018 permits. So, in 2021, KDHE issued to the CAFOs four brand new permits which reflected both the new legal descriptions of the four facilities at issue as well as describing the newly required separate waste management systems.

Nonetheless, Sierra Club continued to defend the appeal on the grounds that the 2017 and 2018 permits were unlawful—while at the same time the CAFOs were arguing that Sierra Club lacked

standing to bring its claims in the first place. In this factual and procedural posture, the case reached the Court of Appeals. The Court of Appeals panel ended up agreeing with the CAFOs on the question of associational standing. As such, the Court of Appeals remanded the case to the district court with directions to dismiss the KJRA petition and "reinstate" the 2017 and 2018 permits (which were no longer operational). *Sierra Club v. Stanek*, No. 123,023, 2022 WL 983563, at *1 (Kan. App. 2022) (unpublished opinion).

Critically, along the way to its standing determination, the Court of Appeals ruled the case was not moot:

> "KDHE has failed to clearly and convincingly show '"the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights."' [*State v. Roat*,] 311 Kan. at 592. For these reasons, we find the issues on this appeal are not moot." 2022 WL 983563, at *13.

This was error.

The Kansas case-or-controversy requirement insists that Kansas courts do not consider moot questions. See *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). A case is considered moot when a court determines that "'it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.'" *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439 (2020). Mootness can occur when, over the course of litigation, something changes that renders any judicial decision ineffectual to impact the rights and interests of the parties before it. 311 Kan. at 596. Kansas courts do not render advisory opinions. *State v. Cheever*, 306 Kan. 760, 786, 402 P.3d 1126 (2017) ("Because the Kansas Constitution's framework 'limit[s] the judicial power to actual cases and controversies,' Kansas courts do not have the power to give advisory opinions."), *abrogated on other grounds by State v. Boothby*, 310 Kan. 619, 448 P.3d 416 (2019); *NEA-Topeka, Inc. v. U.S.D. No. 501*, 227 Kan. 529, 532, 608 P.2d 920 (1980) (A "court is without constitutional authority to render advisory opinions," because "[s]uch an opinion would go beyond the limits of determining an actual case or controversy and would violate the doctrine of separation of powers.").

Here, no party has challenged or disputed the ongoing validity of the 2021 permits. All parties agree that the CAFOs currently operate under the 2021 permits and that the 2017 and 2018 permits are inoperative. And yet, the only issues on appeal concern the 2017 and 2018 permits. Further, at oral argument before this court, the CAFOs clearly took the position that they are not asking us for the symbolic reinstatement of the 2017 and 2018 permits to allow them the option of removing the strips of land inserted between the facilities. The Court of Appeals improperly clouded the doctrine of mootness with its own notions of fundamental fairness when it observed that not addressing the merits of the dispute over the 2017 and 2018 permits would

> "deprive Permittees of their opportunity to seek reinstatement of their original permits. While it is true that Permittees managed to avoid the consequences of the district court's unfavorable interpretation of K.A.R. 28-18a-4(d) by inserting a buffer between their facilities, that solution should not cost Permittees the right to appeal their permits for adjacent facilities. And while Permittees could avoid the district court's interpretation of K.A.R. 28-18a-4(d) by reapplying for a permit now that the new regulation is in effect, they should not have to apply for a new or modified permit if they are already entitled to the permits as originally issued." *Sierra Club*, 2022 WL 983563, at *12.

There may be limited exceptions to our mootness doctrines. For example, we have discussed the possibility of considering the merits of issues capable of repetition or presenting concerns of public importance. *Roat*, 311 Kan. at 585-90. But see *Roat*, 311 Kan. at 603-04 (Stegall, J., concurring) (endorsing a jurisdictional approach to mootness, suggesting that when a case or controversy has ended, a court's jurisdiction and a party's standing, must also end); *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 888-98, 179 P.3d 366 (2008) (there is no live case or controversy when an issue is moot); *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 109-10, 815 P.2d 89 (1991) (mootness is a jurisdictional consideration); *Graves v. State Board of Pharmacy*, 188 Kan. 194, 197, 362 P.2d 66 (1961) (A trial court "had no authority to enter any judgment other than a dismissal of the action" when an issue was moot.).

But setting aside thornier questions of jurisdiction and allowing that certain exceptions to the mootness doctrine may exist, we are confident that a sense of unfairness to the prevailing party is

not one of them. The CAFOs do not get to have their valid 2021 permits and their advisory opinion too. Courts in Kansas do not have the power to correct abstract or theoretical wrongs, only real ones. And any wrongs Sierra Club may have suffered due to the 2017 and 2018 permits, it will continue to suffer under the 2021 permits regardless of anything we might say in this case.

Instead, the parties may litigate their actual dispute in other cases and administrative forums involving the operational 2021 permits (and potential successor permits). These venues are where the live controversy now resides. Any suggestion to the contrary merely encourages walking-dead arguments which "try to put flesh onto the skeleton of a hypothetical . . . claim." *Roat*, 311 Kan. at 597.

In sum, the only question pending before both the district court and the Court of Appeals was the validity of the 2017 and 2018 permits. But the CAFOs are no longer operating under the 2017 and 2018 permits—and they were not when the case was before the Court of Appeals. By then, the legal boundaries of the CAFOs were not even the same as the boundaries described in the 2017 and 2018 permits. On top of that, the legal grounding of the district court ruling under review had substantively changed. Simply put, there was no longer any actual controversy concerning the 2017 and 2018 permits. There may have been an abstract argument about them, but that is not sufficient to establish an actual controversy affecting the parties' rights. Indeed, regardless of what any court might say about the 2017 and 2018 permits, the CAFOs would be legally entitled to continue operations under the current status quo pursuant to their legally obtained and, at least in this case, unchallenged 2021 permits.

The judgment of the Court of Appeals is reversed, and the appeal is dismissed as moot.

State v. Taylor

No. 123,005

STATE OF KANSAS, *Appellee*, v. EDROY D. TAYLOR JR., *Appellant*.

(530 P.3d 431)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Restitution Statute Provides Sentencing Court Shall Order Restitution for Damage or Loss Caused by Crime—Restitution Due Immediately—Exceptions*. Kansas' criminal restitution statute, K.S.A. 2022 Supp. 21-6604(b)(1), provides that a sentencing court shall order restitution, including damage or loss caused by the defendant's crime. Such restitution shall be due immediately unless: (1) the sentencing court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (2) the sentencing court finds compelling circumstances that would render restitution unworkable, either in whole or in part.

2. SAME—*Restitution Statute—Order Imposing Restitution Is the Rule—Finding that Restitution Is Unworkable Is the Exception.* Kansas' criminal restitution statute makes clear that an order imposing restitution is the rule and a finding that restitution is unworkable is the exception.

3. SAME—*Challenge to Restitution Order—Burden of Proof on Defendant to Show Restitution Is Unworkable*. When a defendant challenges the workability of restitution, the burden of proof lies with the defendant to show compelling circumstances that would render restitution unworkable, either in whole or in part. To sustain that burden, defendants must generally present evidence of their inability to pay when the financial obligation is due.

4. APPEAL AND ERROR—*District Court's Review of Workability of Restitution Plan—Appellate Review.* An appellate court reviews a district court's decision on the workability of a restitution plan for an abuse of discretion. The party asserting error has the burden of showing an abuse of discretion.

5. CRIMINAL LAW—*Sentencing—Unsworn Responses May Be Considered by District Court.* While sworn testimony may be more credible than unsworn responses, a district court is not precluded from considering—and even relying on—the responses it has elicited at sentencing.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 27, 2021. Appeal from Shawnee District Court; JASON GEIER, judge. Opinion filed June 9, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Caroline M. Zuschek, of Capital Appellate Defender Office, argued the cause and was on the brief for appellant.

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

The opinion of the court was delivered by

WALL, J.: Edroy D. Taylor Jr. appeals the decision of a Court of Appeals panel upholding a restitution plan imposed by the district court after Taylor pleaded guilty to aggravated robbery of a vehicle. Under the district court's plan, Taylor owes nearly $2,000 in restitution, payable in monthly installments of $15 while he serves a 100-month prison sentence. Taylor does not challenge the total restitution amount. Instead, he argues the payment plan is unworkable because there is no evidence showing that he could make the $15 monthly payments while in prison.

But Kansas statutes provide that restitution shall be imposed and due immediately in criminal cases, unless the district court orders installment payments or finds compelling circumstances that would render restitution unworkable, in whole or part. In other words, restitution is the rule and unworkability is the exception.

Thus, the burden is on Taylor to come forward with evidence showing compelling circumstances that would render the $15 monthly payment plan unworkable. Although Taylor told the district court he lacked substantial assets at the time of sentencing, he presented no evidence showing that he would be unable to make his $15 monthly payments while incarcerated. We therefore hold that Taylor has not met his burden to prove the restitution plan unworkable, and we affirm the panel's decision.

FACTS AND PROCEDURAL HISTORY

In March 2020, Taylor pleaded guilty to aggravated burglary of a vehicle as part of a plea agreement with the State. In exchange for that guilty plea, the State dismissed two other felonies and a misdemeanor. The facts underlying those offenses are not relevant to this appeal. The only dispute here is about the workability of the district court's restitution plan.

Based on Taylor's criminal history score and the severity of the crime, Taylor's presumptive sentence under the Kansas Sentencing Guidelines Act was between 114 and 128 months in

prison. See K.S.A. 2019 Supp. 21-6804(a). But Taylor asked the district court to depart from the presumptive sentence and impose a shorter prison term. At a sentencing hearing, the district court granted Taylor's motion and imposed a 100-month prison sentence. See K.S.A. 2022 Supp. 21-6815(a) (Authorizing a court to impose a departure sentence for "substantial and compelling reasons.").

After announcing Taylor's prison term, the district court addressed restitution. The court ordered $1,954.36 in restitution payable to the victim and then asked defense counsel if she wanted to address Taylor's ability to pay. Defense counsel asked the court to waive attorney fees and all other fees except restitution, which she said were substantial and would be difficult to pay. After questioning Taylor directly, the court found that Taylor had minor children he was financially responsible for and that he lacked substantial assets.

The court then solicited recommendations on a payment plan from the parties. Defense counsel asked to delay restitution payments until Taylor was released from prison because payments during incarceration were "totally unworkable." The State disagreed and argued that if Taylor could pay about $20 per month while in prison, restitution would be complete by the time he finished his 100-month sentence—though the State conceded that it did not know if such a plan was "feasible or doable." When given an opportunity to respond, defense counsel declined. The court ordered Taylor to pay restitution in installments of $15 per month starting the next month.

But the next day, Taylor moved to amend the restitution plan. He again asked for restitution to start upon his release from prison, arguing that there was "no conceivable way" the plan was workable given his prison sentence and his present lack of resources. In response, the State suggested that Taylor could earn money in prison. The district court denied Taylor's motion, finding that the evidence showed only that Taylor could not pay restitution in full at sentencing, not that he would be unable to make limited income while incarcerated and apply that income towards his monthly payments.

On appeal to a panel of the Court of Appeals, Taylor argued the district court had abused its discretion in formulating the payment plan. In Taylor's view, because no evidence showed he could pay restitution while incarcerated, the district court's decision had turned on a factual error. See *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021) (A judicial action based on a factual error is an abuse of discretion.). The panel disagreed and upheld the payment plan, emphasizing that under Kansas law, the burden was on Taylor to present evidence showing that the plan was unworkable. *State v. Taylor*, No. 123,005, 2021 WL 3823437, at *2-3 (Kan. App. 2021) (unpublished opinion). According to the panel, the only evidence before the district court was Taylor's responses to the court's questions and his assertion that his prison sentence prohibited him from paying while incarcerated. And in the panel's view, that evidence failed to establish that the plan was unworkable. 2021 WL 3823437, at *3. The panel also stated that because the district court had tried "to align Taylor's repayment plan with the goals of restitution," the plan was not objectively unreasonable. 2021 WL 3823437, at *3. And citing our decision in *State v. Holt,* 305 Kan. 839, 844, 390 P.3d 1 (2017), the panel questioned the evidentiary value of Taylor's colloquy with the district court because Taylor had not been sworn in as a witness. 2021 WL 3823437, at *3.

We granted Taylor's petition for review and held oral arguments on the matter during our October 2022 docket. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

To resolve Taylor's challenge, we first identify the controlling legal framework and standard of review. Then, we apply that framework to the dispute at hand and conclude that Taylor failed to satisfy his burden to show error.

As to the proper legal framework, the Legislature has incorporated restitution as a component of criminal sentencing in K.S.A. 2022 Supp. 21-6604. The district court's authority in addressing restitution is outlined in subsection (b)(1), which provides that:

"[T]he court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime. Restitution shall be due immediately unless: (A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2022 Supp. 21-6604(b)(1).

The plain language reflects that "[r]estitution is the rule and a finding that restitution is unworkable is the exception." *Holt*, 305 Kan. at 842. Thus, the burden is on the defendant to show compelling circumstances that would render restitution unworkable, in whole or part. *State v. Meeks*, 307 Kan. 813, 816-17, 415 P.3d 400 (2018). To meet that burden, defendants must generally present evidence of their inability to pay at the time the financial obligation is due. 307 Kan. 813, Syl. ¶ 2; *Holt*, 305 Kan. at 842; *State v. Alcala*, 301 Kan. 832, 840, 348 P.3d 570 (2015). Absent that evidence, the restitution order is presumed to be workable.

Whether a district court's plan of restitution is unworkable is reviewed on appeal for an abuse of discretion. *State v. Shank*, 304 Kan. 89, 93, 369 P.3d 322 (2016). A district court abuses its discretion when its decision turns on a legal or factual error or when its ruling is objectively unreasonable. *Meeks*, 307 Kan. at 816. Although the panel elected to address reasonableness, Taylor has not argued on appeal that no reasonable person could agree with the plan. Nor has he argued that a legal error occurred. Instead, Taylor argues only that the district court committed a factual error. As the party asserting an abuse of discretion, Taylor has the burden of establishing error. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

A factual error is an abuse of discretion when the record does not support a factual finding on which a legal conclusion or an exercise of discretion is based. *State v. Wilson*, 301 Kan. 403, Syl. ¶ 2, 343 P.3d 102 (2015). Taylor argues that there is no evidentiary basis to conclude that he could pay any amount in restitution during his incarceration. He therefore contends that the district court's factual finding that he could pay $15 per month is not supported by substantial competent evidence. And because that factual finding allegedly supported the district court's ultimate legal conclusion that the plan was workable, Taylor believes the district court abused its discretion. He asks us to vacate the restitution plan and

remand his case to the district court with directions for payments to begin when he is released from prison or to make payments contingent upon employment at his correctional facility.

We disagree with Taylor's framing of the argument as one of factual error. Under the controlling legal framework outlined above, neither the State nor the district court have the burden to point to evidence in the record that shows the district court's installment plan is *workable*. As the statute and our precedent makes clear, the burden is on Taylor to present some evidence showing the plan is *unworkable*. *Meeks*, 307 Kan. 813, Syl. ¶ 2. So we must ask, as the panel did, whether Taylor's evidence establishes that the plan is unworkable.

As the panel pointed out, the evidence presented by Taylor is slim. In response to questions posed by the district court about his financial circumstances, Taylor said he had children to support, but he did not have cash, a home, a car, or any bank accounts. Citing our decision in *Holt,* the panel questioned whether it could give much, if any, weight to these answers, suggesting that a defendant's unsworn "testimony" at a sentencing hearing is not "real evidence" but merely an affirmative response to the court's questioning. *Taylor*, 2021 WL 3823437, at *3 (citing *Holt,* 305 Kan. at 844). Sworn testimony may certainly be more credible than unsworn responses. But *Holt* does not preclude a court from considering—and even relying on—the responses it has elicited from the parties at sentencing. Here, the district court properly relied on Taylor's responses regarding his poverty status to find that Taylor had minor children he was financially responsible for and that he lacked substantial assets. In turn, the district court relied on these findings to conclude that restitution should be repaid in specified installments, rather than ordering the entire amount due immediately, as the statutory scheme contemplates in most instances.

Aside from his responses to the district court's questions, Taylor presented no evidence about his ability to make those monthly restitution payments. He did not introduce evidence about the likelihood of securing employment while incarcerated, the daily wages he might expect from such employment, or other expenses he expected to incur while incarcerated. Fortunately for defendants, they need not possess clairvoyance or rely on any other sixth

sense to obtain such information, as the dissent suggests. Much of it is readily available in the Internal Management Policies and Procedures of the Kansas Department of Corrections, which the Department is required to publish under K.A.R. 123-2-110 and is readily available on its website. While the parties agree that Taylor lacked the assets to pay restitution in full at the time of sentencing, he simply failed to put on any evidence showing he would be unable to make the $15 monthly payments while incarcerated. See *Shank*, 304 Kan. at 96 (defendant failed to meet burden to show unworkability by failing to present evidence of his inability to pay restitution at the time it would be due); *Alcala*, 301 Kan. at 840 (same). In short, Taylor's responses alone would not compel a reasonable jurist to conclude that the $15 monthly payment plan was unworkable.

Taylor has the burden to show the plan is unworkable—neither the State nor the court must show that the plan is workable. As a result, we agree with the panel: "With the dearth of evidence presented here, we hold that Taylor has not met his burden to show that the restitution plan is unworkable." *Taylor*, 2021 WL 3823437, at *3.

Affirmed.

* * *

STANDRIDGE, J., dissenting: I agree with the majority on the applicable law but disagree with the majority's application of the law to the specific facts presented in this case. Based on the facts presented, no reasonable person would agree that requiring Taylor to pay $15 per month while serving his prison sentence is a workable restitution plan. As such, the district court abused its discretion. For this reason, I respectfully dissent.

As set forth by the majority, once a district court determines a restitution amount, the amount is due immediately unless:

"(A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or

"(B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2022 Supp. 21-6604(b)(1).

The defendant bears the burden to show compelling circumstances that repaying restitution—either generally or in the method proposed by the State or the court—would not work. An appellate court reviews a district court's decision on the unworkability of a restitution plan for an abuse of discretion. A district court abuses its discretion when its decision is based on an error of fact or law or when no reasonable person would agree with its decision. *State v. Meeks*, 307 Kan. 813, 816, 415 P.3d 400 (2018).

At sentencing, the district court ordered Taylor to pay $1,954.36 in restitution beginning in July 2020, the month immediately following sentencing, at the rate of $15 per month. Taylor did not challenge the restitution *amount* but opposed the *manner* in which he was ordered to pay it—specifically, the requirement that he pay $15 per month while incarcerated during his 100-month prison sentence. Taylor advised the court at the sentencing hearing that he had no cash, no bank account, no car, no home, and some child-support obligations. When asked by the court for recommendations on a restitution payment plan, defense counsel reiterated Taylor had no money and no ability to get a job and earn money until released from prison and therefore the restitution plan would be "totally unworkable at this point."

In response, the State disagreed with Taylor's claim of unworkability:

> "I don't think it's totally unworkable. I think if I did my math correctly, if he were to pay $19.54 every month for the next 100 months that he's in prison, it would be paid off by the time he's out [of] prison. *I don't know if that's feasible or doable*, but at least it would basically be 20 bucks a month for the . . . hundred months that he's going to be in custody." (Emphasis added.)

Asked if she wanted to add any additional information for consideration by the court, defense counsel declined, likely because (1) the State's proposed payment plan focused on a mathematical formula to calculate monthly payments based on the total restitution amount due and the number of months Taylor would be in custody and (2) the State acknowledged its uncertainty about whether the proposed payment plan was "feasible or doable" given Taylor's circumstances.

Despite concerns from both parties about feasibility and unworkability of the payment plan in terms of Taylor's present and

future ability to make monthly payments toward restitution while incarcerated, the court adopted a modified version of the State's mathematical formula based on the total restitution owed and the length of Taylor's sentence: "Based upon the length of incarceration, the Court's going to order restitution to be payable in the amount of $15 per month beginning in July of 2020." The court then noted that if "the Court needs to readdress [the restitution payment plan] in the future, [defense counsel] can always bring it to the court's attention."

Taylor moved to amend the restitution payment plan the next day. In his motion, he asked the court to enter an amended order deferring commencement of monthly restitution payments until his release from prison. In support, Taylor reiterated he had no cash, no bank account, no car, no home, and "no conceivable way [to] make this plan workable."

The State opposed Taylor's motion to amend. Relevant here, it argued Taylor failed to show the current restitution plan was unworkable "*because he can earn an income in prison and friends or family can put money on his books that can be applied toward the restitution order*." (Emphasis added.) The record contains no evidence to support the State's argument.

But the district court was persuaded by the State's response and denied Taylor's motion. In its order, the court began by acknowledging Taylor's pretrial jail confinement and current indigency (no income or assets) presented compelling circumstances to establish the unworkability of an order requiring him to pay restitution, in full, immediately. Notwithstanding these compelling circumstances, the court concluded Taylor failed to show he would be unable to make monthly $15 restitution payments for 100 months while serving his prison sentence. Specifically, the court held Taylor failed to *affirmatively* prove he "would *not* be able to make limited income while incarcerated and apply that towards the court ordered $15.00 monthly payments."

Taylor appealed and a panel of the Court of Appeals affirmed. Today, a majority of the court affirms the panel and the district court. Preliminarily, the majority implicitly agrees with the district court that Taylor's pretrial jail confinement and indigency at the

time of sentencing presented compelling circumstances to establish the unworkability of an order requiring him to pay restitution, in full, immediately. Although compelling at the time of sentencing, the majority nevertheless concludes these circumstances are not compelling to establish the unworkability of an order requiring restitution payments of $15 per month, *effective immediately after sentencing*. In support of its conclusion, the majority cites Taylor's failure to "introduce evidence about the likelihood of securing employment while incarcerated, the daily wages he might expect from such employment, or other expenses he expected to incur while incarcerated." Slip op. at 8. In the absence of this evidence, the majority holds the district court did not abuse its discretion by ordering the $15 monthly restitution payments because no reasonable judge would find confinement and indigency *at the time of sentencing* compelling enough to establish the unworkability of monthly restitution payments that come due *in the month immediately after sentencing*.

I disagree with the majority and would find the district court abused its discretion in ordering Taylor to pay $15 per month while incarcerated in prison because no reasonable judge would agree this restitution payment plan is workable.

The defendant bears the burden to show "compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2022 Supp. 21-6604(b)(1)(B). The statute does not define "unworkable." Given this lack of definition, this court has held that the Legislature did not intend a rigid or unyielding definition and that unworkability should be evaluated on a case-by-case basis. *Meeks*, 307 Kan. at 819-20. But when a statute does not define a term, we also have held the court must attempt to determine legislative intent by giving common words their ordinary meanings. Dictionary definitions are good sources to determine the ordinary meaning of common words. *Midwest Crane & Rigging, LLC v. Kansas Corp. Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017).

Black's Law Dictionary does not define "unworkable" but does have a definition for "workable": "adj. (1865) (Of a plan, system, strategy, etc.) practical and effective; feasible." Black's Law

Dictionary 1924 (11th ed. 2019). In turn, practical and effective also are defined:

> "practical adj. (15c) 1. Real as opposed to theoretical; of, relating to, or involving real situations and events rather than ideas, emotions, or idealized situations <for practical purposes>. 2. Likely to succeed or be effective <a practical alternative>. 3. Useful or suitable for a particular purpose or situation <a well-drafted indemnity clause may be the most practical solution>. 4. (Of a person) good at dealing with problems and making decisions based on what is possible and will actually work <she tried to be practical and figure out a solution>." Black's Law Dictionary 1418 (11th ed. 2019).
>
> "effective adj. (14c) 1. (Of a statute, order, contract, etc.) in operation at a given time <effective June 1>. • A statute, order, or contract is often said to be effective beginning (and perhaps ending) at a designated time. 2. Performing within the range of normal and expected standards <effective counsel>. 3. Productive; achieving a result <effective cause>." Black's Law Dictionary 651 (11th ed. 2019).

Given the definition encompasses feasibility and the State's acknowledgment at sentencing that it was uncertain about whether the proposed payment plan was "feasible or doable" given Taylor's circumstances, it appears Taylor—at the very least—may have persuaded the State that the plan was unworkable. Consistent with the dictionary definition above, it bears repeating that the parties, the district court, the Court of Appeals panel, and the majority all implicitly find Taylor's pretrial jail confinement and indigency *at the time of sentencing* presented compelling circumstances to establish the unworkability of a plan to pay restitution, in full, immediately. And not surprisingly, the district court declined to make the first monthly restitution payment due on the day of sentencing, presumably because such a payment would have been unworkable given Taylor was in custody, had no cash, no bank account, no car, no home, and some responsibility for child support. Yet the court went on to find workable a restitution payment plan of $15 per month, effective the month immediately after sentencing, which was just three weeks later. According to the district court, the sole reason for finding the future restitution payment plan workable is based on Taylor's failure to show he would not be able to make limited income while incarcerated.

Short of presenting the testimony of a psychic with the ability to divine the likelihood of Taylor securing employment while in-

carcerated, the daily wages he might expect from such employment, and expenses Taylor would incur while incarcerated, I cannot imagine what evidence the majority expected Taylor to present. Moreover, Taylor's ability to obtain employment and the amount of any earnings are both circumstances beyond Taylor's control. Taylor cannot control which prison he is assigned to serve his sentence. Taylor cannot control whether he will obtain employment at the prison to which he is assigned. Even if he does obtain employment, Taylor does not control how many hours he will work or the wages he will receive.

In the absence of a supernatural intervention, it appears the majority might have found persuasive a submission by Taylor presenting statistical information from the Kansas Department of Corrections (KDOC) regarding the likelihood that a prisoner will obtain employment while incarcerated, the average monthly wage the prisoner might be expected to earn if employed, and the average monthly expense incurred by a prisoner to maintain hygiene and other necessities. But putting the burden on Taylor to present such information is unrealistic and impractical given that the KDOC likely gathers and retains this statistical information internally, if it does so at all.

Even if he could use his criminal case to subpoena the information, the statistics are averages and have minimal value in deciding unworkability because they do not consider Taylor's individual and unique circumstances, which contravenes our directive that "unworkability should be evaluated on a case-by-case basis." *Meeks*, 307 Kan. at 820.

> "District courts should use this flexible guideline to evaluate each defendant's unique circumstances before deciding whether the defendant has shown a plan would be unworkable. Some of the factors relevant to the court's inquiry will be the defendant's income, present and future earning capacity, living expenses, debts and financial obligations, and dependents. In some circumstances, the amount of time it will take a defendant to pay off a restitution order will also be relevant, especially if the defendant is subject to probation until the restitution is paid in full. In all circumstances, the district court should keep in mind the ultimate goals of restitution: compensation to the victim and deterrence and rehabilitation of the guilty." *Meeks*, 307 Kan. at 820.

Applying this flexible guideline for unworkability to Taylor's individual and unique circumstances yields the following results:

Income

Taylor has no income.

Present and future earning capacity

Taylor currently is in custody and unemployed and has no way to establish his future earning capacity during the 100 months he will spend in prison.

Living expenses

Taylor has no way to establish his future living expenses while confined in prison.

Debts and financial obligations

Taylor has some financial responsibility for child support.

Dependents

Taylor has dependent children.

Amount of time to pay off restitution order

The State and the district court focused exclusively on this factor in fashioning a restitution payment plan that could be paid off at the time Taylor is released from prison by using a mathematical formula to calculate monthly payments based on the total restitution amount due and the number of months in custody.

Purposes of restitution; victim compensation and offender deterrence and rehabilitation

Imposing an unachievable monthly restitution payment plan does not align with the purpose of restitution because its effect is offender punishment instead of deterrence and rehabilitation. Conversely, deferring the monthly restitution payments until Taylor has the ability to earn money upon release from prison balances the competing interests of payment to the victim and offender deterrence and rehabilitation without punishment.

In sum, the majority agrees Taylor presented compelling circumstances (no assets and no job) to find unworkable a plan for whole or partial restitution payments at the time of sentencing.

Although Taylor had no way to predict, speculate, or control whether his financial situation would change in the next three weeks or the next 100 months, the majority placed an impossible burden on Taylor to show he would not be able to earn income as soon as he was placed in prison. Based on the facts presented showing indigency, lack of assets, and lack of employment, no reasonable judge would find workable the restitution plan requiring Taylor to pay $15 per month, beginning 3 weeks after sentencing and continuing for the next 100 months. Accordingly, I would find the district court abused its discretion and remand the matter for the district court to enter a workable order of restitution.

ROSEN and WILSON, JJ., join the foregoing dissenting opinion.

No. 125,968

In the Matter of CHRISTOPHER C. BARNDS, *Respondent*.

(530 P.3d 711)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Three-month Suspension, Stayed Pending Successful Completion of Two-year Period of Probation.*

Original proceeding in discipline. Opinion filed June 16, 2023. Three-month suspension, stayed pending successful completion of two-year period of probation.

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

Christopher C. Barnds, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent Christopher C. Barnds, of Overland Park, an attorney admitted to practice law in Kansas in September 2012.

On August 25, 2022, the Disciplinary Administrator's office filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer to the formal complaint on September 15, 2022. A panel of the Kansas Board for Discipline of Attorneys held a hearing on December 1, 2022. The respondent appeared with counsel, Diane L. Bellquist.

At the end of the hearing, the panel determined that the respondent violated KRPC 3.4(c) (2023 Kan. S. Ct. R. 394) (knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists), KRPC 4.4(a) (2023 Kan. S. Ct. R. 405) (shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person), KRPC 8.4(a) (2023 Kan. S. Ct. R. 433) (to violate the rules or knowingly assist another to do so), KRPC 8.4(d) (engage in conduct that is prejudicial to the administration of justice), and KRPC 8.4(g) (engage in any other conduct that adversely reflects on the lawyer's fitness to practice law). The

panel set forth its findings of fact and conclusions of law, along with its recommendation on disposition, in a final hearing report, the relevant portions of which are set forth below. The respondent initially filed exceptions to the hearing panel's report but later withdrew them.

"Findings of Fact

. . . .

"*Count 1-DA13,349*

"9. In March 2017, respondent entered his appearance on behalf of [R.R.] in a post-divorce, child-custody dispute in Johnson County District Court Case No. 2015-CV-724.

"10. Around the time respondent entered his appearance, [R.R.]'s ex-wife, [M.], had filed an emergency motion to suspend [R.R.]'s parenting time of the former couple's two minor children. [M.] was also seeking the court's permission to relocate with the children to the state of Washington.

"11. On April 3, 2017, the presiding judge, Hon. Christina Dunn Gyllenborg, appointed attorney Tobi Bitner to serve as the Guardian ad Litem (GAL) to represent the bests interests of the children pursuant to K.S.A. Supreme Court Rule 110A (2022 Kan. S. Ct. R. at 193).

"12. Rule 110A(c)(1) states in pertinent part:

'Conducting an Independent Investigation. A guardian *ad litem* must conduct an independent investigation and review all relevant documents and records, including those of social service agencies, police, courts, physicians, mental health practitioners, and schools. Interviews—either in person or by telephone—of the child, parents, social workers, relatives, school personnel, court-appointed special advocates (CASAs), caregivers, and others having knowledge of the facts are recommended. Continuing investigation and ongoing contact with the child are mandatory.'

"13. In April 2017, [R.R.] was the defendant in a pending criminal case. That same month, both [R.R.] and respondent sent emails to Bitner, indicating that she could communicate directly with [R.R.]'s criminal defense attorney, Trey Pettlon, about the pending criminal case.

"14. In December 2017, there was a change in the individual appointed by the court to monitor [R.R.]'s parenting time. On December 14, 2017, respondent sent Bitner an email regarding the changes in the monitor and manner in which supervised exchanges were taking place. In his email, respondent wrote:

'I very honestly feel like these changes are retaliatory against my client and I for having a legitimate difference in opinion as to what was ordered last week.

If you want to dislike me, or punish me in some way, that's fine. I sadly understand how personal feelings can play a role in these cases, and I can accept that and work with that. But I do not think it's fair (among a lot of other concerns) that my client gets punished because his attorney is telling him he understood the court's orders to be something different then what the GAL thought.'

"15. On December 18, respondent sent a follow-up email to his December 14 email to Bitner. In the email, respondent wrote:

'I am not showing any response to my email below. I would like to arrange a time to talk to you. This can occur over the phone or in person, although my availability for the latter will be more limited. I am also hoping you have seen the recent ROA notes that were recently uploaded. As one of the issue [*sic*] I want to discuss is how we plan to make up some of the time dad lost this past week.'

"16. That same day, Bitner responded by email, stating:

'In the past few weeks, you have sent an onslaught of emails stating you continue to be confused over the Court's orders, implying I am not only that I am [*sic*] impartial, but that I have some sort of a personal vendetta against you, and making false statements about me to the professionals involved in this case.

You emailed me on Friday, 12/8/17, and requested a time to meet with me in my office. I replied the same day with my availability (choosing from the times you suggested) and held that time open on my calendar for Monday, 12/11/17. You didn't reply and never showed up. I emailed a follow up the same day and you replied, telling me you would get back to me with additional times to speak. You never replied again. Then, you sent the email on this email chain, alleging my impartiality again, on 12/14/17.

'Now, you email me and request I set aside more time to talk.

'Given all of your allegations, your continued misunderstandings about orders, and the fact you've misrepresented my statements to professionals in this case, I believe the only communication we need to have at this juncture should be in written form or on the record.'

"17. On December 20, 2017, Bitner filed a Motion for an Emergency Hearing to Modify the Temporary Parenting Plan, alleging that [R.R.] was refusing to comply with the parameters set forth by the parenting time supervisor and her to assure all parties were following the court's temporary orders. Accordingly, Bitner moved the court to find that it was in the best interest of the minor children for [R.R.] to have supervised parenting time through the Layne Project until further order of the court.

"18. At 2:04 p.m. on December 20, Bitner sent an email to counsel for the parties with the subject line: 'Reed 15CV0724—EMERGENCY Motion Attached—request for hearing.' Attached to the email was a copy of Bitner's emergency motion.

"19. At 2:16 p.m., respondent sent an email to Bitner with the subject line: 'REED: Sincere Ethical Concerns.' In the email, respondent wrote:

'As you have requested we only communicate via email, and have stated you do not wish to talk to me over the phone or in person, I have no other option but to communicate this message via email.

'I have concerns you have violated your ethical obligations in this case as a GAL. Specifically, I have been advised you have spoken to other third-parties about this case without having any formal or legal release to do so. Among those who have been reported you talked to, is attorney Trey Pettlon. Can you please immediately forward [to] me the release that has been executed authorizing you to speak with Mr. Pettlon, or any release for that matter that you presently have from my client authorizing you to speak with any third-party.'

"20. At 2:31 p.m., Bitner replied to respondent's 'Ethical Concerns' email and carbon copied attorney Pettlon on the email. In the reply email, Bitner stated:

'I can assure you that I have upheld my ethical obligations, pursuant to the Court's Orders and Rule 110A. It is also my understanding that Mr. Pettlon can make any disclosures necessary, in his client's best interest, he believes are appropriate. However, I will let Mr. Pettlon speak for himself.'

"21. Respondent replied at 2:36 p.m., stating: 'Are you indicating you do not believe you needed a release to speak directly with my client's criminal attorney?'

"22. At 3:03 p.m., respondent replied to Bitner's emergency motion email, stating:

'Didn't want to mention anything about the kids commenting on being exposed to Grandparents over the last 24 hrs? I think we both see where this is going. I will be filing a Motion to have you removed, as I think you are incapable of providing objective and impartial representation for the children. You have taken a personal issue with me, and apparently with my client, and let it turn into something much greater. That is not o.k.'

"23. At 3:22 p.m., Bitner responded to respondent's email regarding a release to speak to Pettlon. Bitner stated:

'I am not sure what you seek to gain from continuing to ask me the same question. Not only is your allegation out of bounds, but it is completely unfounded. [R.R.] requested I communicate with Mr. Pettlon and, as counsel for [R.R.], you are aware of this and have even participated in email exchanges with Mr. Pettlon and myself.'

"24. At 3:28 p.m., Bitner responded to respondent's emergency motion email, telling respondent that he was free to file whatever motion he felt was appropriate and beneficial to his client.

"25. At 5:10 p.m., respondent replied to Bitner's email regarding speaking to Pettlon, stating:

'I understand your position. Should I feel the need to further discuss this issue, I will reach out. I am going to try and step away from our email communications until after

the Christmas holiday, as I think we would both agree they are no longer helping to resolve anything, and only deteriorating the situation further. With time being arranged through Sunday, I also do not see a need to contact until after the holiday.

'Hope you have a merry Christmas.'

"26. On February 6, 2018, respondent, on behalf of [R.R.], filed a motion entitled, 'Time Sensitive Motion to Immediately Remove Current Guardian Ad Litem and Appoint Case Manager or New Guardian Ad Litem.' In the motion, respondent alleged that Bitner needed to be immediately removed as the GAL because of a 'fundamental conflict between Ms. Bitner's duties and responsibilities to the minor children and the court in this matter, and Ms. Bitner's actions in this case over recent months.'

"27. In the motion, respondent alleged that Bitner had (1) made a social media post mocking respondent; (2) demonstrated prejudice towards [R.R.]; (3) called [R.R.] an 'idiot' during Judge Assisted Mediation; (4) intentionally failed to vet the possibility of the children's paternal grandfather serving as a parenting time monitor; (5) intentionally failed to investigate allegations of child alienation by [M.]; (6) attempted to force the new parenting time monitor's services upon [R.R.] sooner than what the court had ordered; (7) seeking to limit [R.R.]'s parenting time out of bias, vindictiveness, and prejudice; (8) issuing a unilateral 'order' to stop [R.R.]'s parenting time; (9) reporting to professionals (but not the court) that she believed [M.] raised allegations of abuse against [R.R.] to assist her in her quest to relocate herself and the children to Washington; and (10) reporting to the court that 'every professional' [R.R.] encountered regarding the custody case had problems with him.

"28. Both Bitner and [M.]'s counsel filed responses, denying the allegations.

"29. On February 28, 2018, Judge Gyllenborg conducted a hearing on respondent's motion. From the bench, Judge Gyllenborg denied the motion and directed respondent to prepare a proposed journal entry pursuant to Rule 170 (2022 Kan. S. Ct. R. at 236).

"30. In March of 2018, Judge Gyllenborg recused herself and Judge Robert Wonnell was assigned to preside over the case.

"31. Because Bitner and [M.]'s counsel objected to the proposed journal entry that respondent prepared, respondent submitted the proposed journal entry and accompanying objections to the district court to settle the journal entry pursuant to Rule 170(d)(3).

"32. Prior to the district court settling the journal entry, respondent sent an email to Bitner on April 6, 2018, advising her that if she did not voluntarily withdraw as GAL from the case,

'I fully intend on filing a Motion for Reconsideration before Judge Wonnell as soon as the JE from our Feb. 28th hearing is actually entered. As you likely know,

I cannot file that motion until the judge signed JE is actually on file. Which is the only reason such a Motion has not been filked [*sic*] yet. From the date the JE is formally entered, I have 28 days to file my Motion. A Motion I again fully intend to file if you do not wish to recuse yourself in line with Father's statutory rights. At which point I also intend to have Judge Wonnell fully review each and every allegation I levied against you. As the bias, prejudice, and favoritism in this case has gotten beyond control—and at this point it is becoming severely detrimental to the emotional and psychological well being of two very young children.'

"33. On June 12, 2018, Judge Gyllenborg issued a journal entry regarding the orders she made at the February 28, 2018 hearing, which included denying [R.R.]'s Motion to Remove Bitner as the GAL. In denying this motion, the court found that

'GAL Bitner has put in countless hours, that she has previously made recommendations to the Court that have been at times beneficial to Father, and at times beneficial to Mother. GAL Bitner has not presented to this Court as being prejudiced to either party, and she has not displayed animosity toward Father. GAL Bitner previously recommended an expansion of Father's time with the minor children despite objection by Mother. The Court followed that GAL recommendation. The Court additionally finds that GAL Bitner is still committed to work diligently to seek a good relationship by working with both the children and the parents. GAL Bitner's investigation is ongoing. The Court is not surprised by the ongoing disputed issues between the parties. The Court is amazed by the time GAL Bitner has put into the case, despite respondent being behind on his payment of GAL fees.'

"34. Notably, the court ordered 'in the event a party intends to file a pleading that contains information regarding attorney misconduct, such pleading shall first be emailed to opposing counsel and a copy emailed to the Court for a threshold determination of whether the pleading will be allowed to be filed, and whether such pleading shall be filed under seal.'

"35. Finally, the court granted [M.]'s request for an award of attorney fees against Father for 2.75 hours of attorney time required to respond to the Motion to Remove Guardian ad Litem.

"36. On July 10, 2018, respondent, on [R.R.]'s behalf, filed a Motion for New Trial or in the Alternative, to Alter or Amend pursuant to K.S.A. 60-259 and Motion for Appointment of Case Manager. In the motion, respondent argued that the court's June 12 journal entry amounted to an 'erroneous ruling' and was 'contrary to the evidence that was available to be presented at a hearing on the motion' and 'additional evidence that has came to light since.'

"37. In addition to some of the previous allegations respondent raised in his February 6, 2018, motion, respondent claimed in the current motion that Bitner had failed to respond to several emails he had sent to her on March 20, 22, 28,

and April 23, 2018, asking Bitner to articulate the safety concerns she had regarding father having parenting time with the children. Respondent stated that '[d]espite email, after email, after email being sent requesting this information, the GAL never responded to a single email. *And still has not responded to any such emails to this date*. These emails can be submitted to this Court as record evidence at a hearing on this Motion.' (Emphasis added.) Respondent claimed that Bitner's alleged failure to respond to these emails 'was yet another example' of her 'extreme bias and prejudice' in this matter, which respondent claimed was the result of [R.R.] failing to timely submit payments to Bitner for her GAL services, compared to [M.], who timely paid Bitner.

"38. Subsequently, Bitner and [M.]'s counsel filed responses to respondent's motion, both noting that respondent had failed to comply with the district court's June 12, 2018, journal entry, requiring any party that intends to file a pleading containing information regarding alleged attorney misconduct to first email the pleading to opposing counsel and the court 'for a threshold determination of whether the pleading will be allowed to be filed, and whether such pleading shall be filed under seal.' Bitner again denied the allegations contained in respondent's motion. Regarding the allegation that she failed to respond to the emails mentioned above, Bitner stated: 'The GAL vehemently denies the allegations in this subparagraph and asserts she diligently responds to the parties in this case, despite [R.R.]'s continuing failure to comply with the Orders of this Court and remit payment to the GAL.'

"39. On September 6, 2018, the district court conducted a hearing and ultimately denied the motion for new trial.

"40. On December 17-18, 2018, the district court conducted a hearing on [M.]'s motions for sole legal custody of the children and to relocate them to Washington and [R.R.]'s motion to modify the parenting plan. Subsequently, the court issued a journal entry denying the motion to relocate the children and granting in part and denying in part the remaining motions.

"41. On February 7, 2019, attorney Catherine Zigtema entered her appearance on behalf of Bitner and filed a motion seeking judicial review of a proposed Motion for Sanctions and Attorney's Fees pursuant to the district court's June 12, 2018, journal entry. The motion asked the court to provide direction on whether the proposed motion should be publicly filed or filed under seal. Copies of the proposed Motion for Sanctions and Attorney's Fees were emailed to the court and counsel for the parties.

"42. After receiving approval, Bitner publicly filed her Motion for Sanctions and Attorney's Fees on February 14, 2019. Within the motion, Bitner asked that [R.R.] and respondent be sanctioned for (1) repeated violations of court orders and directives in this matter; (2) repeated use of improper litigation tactics alleging unfounded ethics violations; (3) repeated use of other cumbersome, excessive, and improper litigation tactics; (4) and repeated failure to conduct litigation in a civil and appropriate manner consistent with the pillars of professionalism.

"43. Bitner pointed out that respondent violated the court's June 12, 2018, journal entry by publicly filing his July 10, 2018 motion for a new trial (alleging that Bitner had engaged in attorney misconduct) without first submitting it to the court for review to determine whether the motion should be publicly filed or filed under seal.

"44. In addition to respondent's allegations against Bitner in publicly filed motions, Bitner also noted that respondent had alleged in emails and phone calls to her that she had engaged in unethical conduct. Bitner stated that respondent's allegations 'appear to be an attempt to coerce the Guardian Ad Litem to take a particular action or make a particular recommendation favorable to his client' and noted the December 20, 2017, email she had received from respondent, claiming that she had improperly communicated with third parties regarding [R.R.], including [R.R.]'s criminal defense attorney.

"45. Finally, Bitner argued that respondent's conduct towards her was substantially similar to his conduct in a Wyandotte County domestic case where respondent had also filed a motion to remove and replace the GAL. Bitner argued that the GAL in that case filed a response to the motion by filing an affidavit with the court, which documented her efforts in the case and described a phone call she had with respondent where respondent accused her of ethical violations. Notably, the GAL stated she believed respondent engaged in the conduct to improperly influence her decisions.

"46. The district court conducted an evidentiary hearing on the motion on March 29, 2019.

"47. On July 18, 2019, the district court issued its journal entry regarding the March 29, 2019, hearing. The district court found that respondent had violated the court's previous June 12, 2018, journal entry by filing his July 11, 2018, motion for new trial without first seeking judicial review of whether the motion should be filed publicly or under seal. The court noted that respondent's motion

'contained allegations of misconduct by the GAL and its filing, without court permission, was in direct violation of the current, standing applicable order. The fact that the judge ruling on the matter had changed did not negate the prior Judge's order. The filing of this motion in direct violation of the court's directive is sanctionable conduct.'

"48. As a sanction, the court ordered respondent to personally pay $250 to Bitner and $250 to [M.]'s counsel.

"49. The court also found troubling the email respondent sent to Bitner on December 20, 2017, stating that he had 'concerns' Bitner had violated her ethical obligations as GAL in the case, accusing her of speaking to 'third-parties about this case without having any formal or legal release to do so,' and asking her to forward the executed release that authorized her to speak with third parties. The court stated:

'If [Respondent] had knowledge of any action, inaction, or conduct which in his opinion constituted misconduct of the GAL, he had an obligation to inform the appropriate professional authority. See Rule 226, Kan. R. Prof. Conduct 8.3. Second, he is alleging that the GAL engaged in improper communications without a release and demanded to see her authority. Again, this request does not serve a legitimate purpose as the original order appointing the GAL clearly states that the GAL has the court-ordered authorization to review the records of and/or interview any agency, school, school district, organization, person or office, including the Clerk of the Court, any police department or law enforcement agency, any pediatrician, psychologist, psychiatrist, hospital, mental health treatment facility, medical provider, social worker, welfare agency, doctor, nurse, teacher, school official, staff, etc. In the email, [Respondent] states that he has 'been advised' (although he does not say by whom) that GAL has spoken to third-parties without a release to do so. This is simply false. Third, [Respondent] implies that it was improper for the GAL to have spoken with [R.R.]'s other attorney. [R.R.]'s other attorney would have the responsibility to decide what matters could be discussed with the GAL. Additionally, [Respondent] himself emailed the GAL and specifically stated that the emails had a "clear release" and [R.R.] could save some money if the GAL would email [R.R.] directly and not have [Respondent] relay information.'

"50. Accordingly, the court concluded that the email 'served no legitimate purpose' and that its timing (sent 12 minutes after the GAL notified respondent that she would be filing an emergency motion) left the court 'with no other conclusion [but] that the email from [Respondent] was meant to harass or intimidate the GAL and that [Respondent] acted in bad faith in sending the email.'

"51. The district court also took issue with the allegation respondent made in his July 10, 2018, Motion for New Trial, claiming that Bitner had failed to respond to his emails requesting the safety concerns she had regarding [R.R.] having parenting time and that she 'still has not responded to any such emails to this date.' The district court noted that at the March 29, 2019, hearing, [R.R.] 'affirmed [Respondent's] statement that the list of safety concerns was actually received by [Respondent] in June 2018.' The court also noted that respondent offered no evidence to support the allegation made in the July 10, 2018, motion 'that the GAL was responding to emails from [M.] because she was paying her bills and ignoring [R.R.]'s emails because he was late on payments to the GAL.'

"52. The district court took judicial notice of the Wyandotte County child custody case that Bitner had noted in her motion for sanctions. The court noted that the pleadings respondent filed in the Wyandotte County case regarding the GAL were substantially similar to the pleadings he filed in the current case. The court concluded that in both cases, respondent would accuse the GAL of 'extreme bias and prejudice' whenever the GAL happened to advocate for a position contrary to that of respondent.

"53. In taking judicial notice of the Wyandotte County case, the court stated that it was 'not taking judicial notice as to whether or not the assertions actually

occurred or of the Judge's ultimate ruling, but rather only of the fact that Respondent's counsel filed a pleading making these allegations against another GAL.'

"54. The court specifically found that respondent acted in bad faith when he engaged in the conduct noted above. As a result, the district court ordered respondent to personally pay $2,500 in attorney's fees to Zigtema. This was in addition to the $500 in attorneys' fees he was ordered to pay Mother's counsel and Bitner for filing his July 11, 2018, motion without first seeking court approval.

"55. Subsequently, both Judge Wonnell and Zigtema filed complaints with the Office of the Disciplinary Administrator (ODA) regarding respondent's conduct. The matter was docketed for investigation as DA13,349.

"56. On September 16, 2019, the ODA received respondent's response to the complaints, contending that he did not engage in any unethical conduct. In part, he claimed that if he would have received sufficient notice that he needed to present evidence at the March 29, 2019, hearing of Bitner's extreme prejudice against [R.R.] due to [R.R.]'s failure to timely pay Bitner's GAL fees, respondent would have presented such evidence. Furthermore, respondent claimed that the email he sent to Bitner on December 20, 2018, regarding the ethical concerns he had with Bitner was not sent in bad faith or in retaliation for Bitner filing her motion asking for an emergency hearing to modify the temporary parenting plan.

"57. In the underlying custody case, respondent sought to challenge the district court's journal entry by filing a motion for new trial or alter or amend the judgment on August 15, 2019. After that motion was denied on September 11, 2019, respondent filed a notice of appeal on October 8, 2019.

"58. In October 2019, Bitner and Zigtema retained attorney Eric Kraft to collect the attorneys' fees that Barnds was ordered to pay to them. On October 24, Kraft obtained an order of garnishment for a bank account that respondent had with Commerce Bank.

"59. Ultimately, respondent did not appeal the district court's journal entry. Instead, he settled the judgments he owed to Zigtema and Bitner, with satisfactions of judgment being filed on November 12, and December 2, 2019, respectively.

"*Count II-DA13,563*

"60. Based on an incident that occurred on April 1, 2020, J.S. filed a petition for protection from abuse (PFA) pursuant to K.S.A. 60-3101 *et seq.* against M.S. in Johnson County District Court on April 22, 2020 (Case No. 20-CV-1790). That same day, temporary orders were issued, which prevented M.S. from contacting J.S.

"61. Prior to J.S. filing the PFA petition, J.S. and M.S. had dated intermittently for approximately 10 years. In May 2019, J.S. was arrested and charged in

Johnson County District Court with domestic battery (Case No. 19-DV-00640). M.S. was the alleged victim. In November 2019, the State dismissed the charge without prejudice.

"62. Shortly after filing the PFA petition, J.S. retained attorney Joseph Booth to represent her.

"63. M.S. initially retained attorney Suzanne Hale Robinson to represent him. Robinson entered her appearance in the case on May 7, 2020, but subsequently filed a motion to withdraw five days later. On May 19, Robinson was allowed to withdraw, and respondent formally entered his appearance on behalf of M.S.

"64. The day before, May 18, respondent and Booth began exchanging emails regarding the PFA case. Booth informed respondent that M.S. had been calling J.S. and leaving her several voice messages in violation of the temporary orders.

"65. That same day, respondent sent a reply email to Booth, thanking him for the information. [R]espondent also wrote:

'What time are you available tomorrow afternoon? I would like to talk timely, as [J.S.] has a lot of property and money of [M.S.], *and I need to assess if I need to file separate actions for those issues and the allegations being levied. He is also noting concerns of tax fraud on* [J.S.'s] *behalf, due to large sums of monies she has received in the past*.

. . . .

'These parties have a troubled history (see Case No. 19DV00640). *I would like to keep this matter from blowing up if we can*.' (Emphases added.)

"66. Subsequently, Booth and respondent arranged to have a phone call on May 19, 2020.

"67. On May 20, 2020, respondent sent an email to Booth with an attached 'copy of the proposed Settlement and Release that I am working on getting [M.S.] to sign.' Respondent stated in the email:

'As I noted in my call yesterday, *it is my hope we can keep a reasonable lid on this matter and not have it blow up into further litigation and law suits* [*sic*].

'I believe having the parties' enter into the attached mutual settlement agreement would be a tremendous first step in that direction.

'I know you have reviewed the 19DV case where my client is the victim and yours the assailant. There is a lot more to that case than I believe either you or I have been able to wrap our head around at this point. There was also a prior incident with [*sic*] the parties' lived in MO when your client slit the forearm of my client from nearly elbow to wrist. There are medical records and police reports that would correspond and support.

'Unfortunately, I think there is even more to these two parties past than the above. My client is also starting to produce documentation, which I am working to organize in a presentable fashion, supporting his claims of monies and property your client has in essence unlawfully converted to her own. Now, there may [be] both facts and evidence that your client has to contest those assertions and allegations, *but that is precisely the point I am trying to get at. That is, that if we fail to keep a reasonable lid on this matter early, it is without question going to spill over into more litigation*.

'I am working on a separate letter today (05/20) also, one that I plan to forward to you by this evening. The letter will address some of the personal property and money matters.

'All of the above said, in the spirit of candor and professionalism, please know on the front end that [M.S.] has indicated he will not agree to a no-contest consent order is [*sic*] this matter. As that would not only affect his ability in the future to find housing and employment, but would also, in practice, take away his 2nd Amendment Rights. That is not something he can agree to. I believe [J.S.] could understand why that is the case. In the event a trial will ultimately be necessary, I will need time to issue business record subpoenas and get in contact with at least one or two additional witnesses. I also believe will we [*sic*] need at least a half-day for the trial. These are all points I intended to relay to the Court at the Status Hearing on Friday, thus why I wanted to provide you some advance notice of same in the spirit of openness.' (Emphasis added.)

"68. After not receiving a response, respondent sent Booth a follow-up email on May 22, 2020. In the email, respondent noted that he was still working with M.S. 'to get clear on the property and money issues, and am preparing a corresponding letter to your attention.' Respondent noted that the previous day, M.S. had told him that he had proof J.S. had written a fraudulent check from M.S.'s checking account. Respondent said, 'I have of course asked my client to forward what documentation he has in this regard, so I can forward it on to you. The check was apparently written somewhat recently based on what was initially stated to me.' Respondent concluded his email by stating:

'As I noted in my earlier messages, *I would very much like to avoid this thing blowing up like a powder keg*. I plan to ask for Pretrial to be set a few weeks out, to give you and I time to talk, and me time to look at what discovery, if any, I will truly need if this matter were to have to go to Trial. Just brief heads up there.' (Emphasis added.)

"69. Booth responded back a few minutes later, stating:

'We are nowhere near an agreement at this time. Send me credible evidence of issues like the accusation that [J.S.] wrote a check on his account and I will respond.

'Since this action has nothing to do with personal property, it is our intention to

not engage in discussions over personal property issues until appropriate protections are in place for [J.S.].'

"70. In May 2020, M.S. was charged with violating the temporary orders (Johnson County Case No. 20-DV-00678). On May 26, 2020, M.S. was arrested pursuant to a warrant.

"71. That same day, respondent sent an email to Booth. In the email, respondent wrote:

'[M.S.] has asked about the possibility of a 4-way settlement conference to be attended by counsel and the parties.

'I know in past emails and during the Status Hearing held last week you have stated [J.S.] does not wish to discuss any property matters, and only wishes to focus on the protection claims. Notwithstanding, it was still my sincere hope the parties might be able to save themselves a lot of expense and time by trying to timely resolve all matters pending between them, in an amicable setting?

'I would appreciate it if this request could be relayed to [J.S.] as timely as possible. We could file a short agreed order allowing attendance and communication at this conference once coordinates [*sic*] In the alternative, *I have relayed to* [M.S.] *that should* [J.S.] *not wish to hold such discussions, the only option will be to file a corresponding civil action to deal with property and money matters.*' (Emphasis added.)

"72. Booth responded that same day, indicating that he would forward the request to J.S. Booth also asked respondent to provide information regarding the property and money M.S. claimed J.S. had wrongly taken.

"73. On June 10, 2020, respondent sent an email to Booth, trying to schedule a phone call sometime in the next two days to discuss with him

'various pending issues between the parties that I would like to at least try and discuss with you, as I am presently preparing a *Petition for Partition* as well as a *Complaint for Damages* (both civil filings) that will be filled [*sic*] in Johnson County by weeks end. Thus, [J.S.] will have to confront these issues one way or another. As surprised as I was to hear it even today, [M.S.] would still like to avoid more legal issues popping up for either party.'

"74. Booth responded back that day, stating that he was available for a phone call that Friday. Booth also claimed that the civil actions respondent mentioned were 'not appropriate under the circumstances, as you know, I'm sure, the district courts handle these matters under the general divorce statutes.'

"75. It appears that Booth and respondent were unable to speak that Friday.

"76. On June 18, 2020, respondent emailed Booth, asking if he was available to speak that day or early the next day, prior to a status conference scheduled in the PFA case. Booth responded that he didn't have time to speak that day but maybe would have time to speak the next day.

"77. That same day, respondent sent a follow-up email to Booth, stating:

'As we are not talking today, and I want to give you a chance to hold aconversation with your client about a specific topic, I will provide the"short" version here.

'In 2014, [J.S.] assaulted [M.S.] while intoxicated. Specifically, she slashed [M.S.] arm from elbow to wrist. It resulted in over $250,000.00 in medical work.

'At the time of the incident, your client called [A.K.], a mutual friend of the parties whom both went to high school with, and confessed to the crime. Your client was the one who actually called 911 because she was no [*sic*] nervous of what she had done.

'Police showed up later that night, as did [A.K.]. At the time my client lied to police and told them it was an "accident." Police wanted to pursue charges, but [M.S.] refused to change his story due to threats from your client at the time of making his life difficult.

'My client has been in contact with the Cass County (MO) D.A.'s office, and as the incident would classify as a Class A felony—due to the extent of damages and medical bills—they can still pursue the charges. They are ready to do this.

'While not as serious, a similar incident occurred in 2019. It is the DV charge. My client literally dogged [*sic*] the subpoena, so they could not pursue charges. [M.S.] has a call with their office next week to review the file. It would still be within the 3-yr statute of limitations.

'There is also a serious tax fraud issue. I genuinely did not know before this matter that the IRS will literally provide financial rewards for those who turn in someone who has committed tax fraud, assuming charges are later substantiated. Your client engaged in same with [J.S.R.]. Owner of [J.S.R.] Home Builders. He provided [J.S.] with well over $100k in money. He also made a fake document indicating [J.S.] worked for [J.S.R.] Home's and made $6,000.00 a month income. This is how she applied for and was approved for an apartment at Watercrest at City Center. [J.S.R.] verified [J.S.] had a job, however [J.S.R.] never issued [J.S.] any paychecks. Rather, [J.S.R.] merely gave her money. The two were in a "romantic" relationship. Despite [J.S.R.] being married to [N.R.].

'*Joe, I am providing the details I am above, and mentioning specific names, so you can hopefully speak with [J.S.] and let her know that the last thing either of our clients want to do is go to war with the other.*

'There is also the serious conversion issue with the $25k. Authorities in MO have updated Police Reports recently so as to confirm that it was law enforcement who specifically directed [M.S.] to take his name off the joint account at the time, as he had his identity stolen. Again, law enforcement can verify this.

'*While somewhat surprising to me,* [M.S.] *still would like to have all four (4) of us sit down and work all this out, as opposed to all of us litigating out the matters over the next 12 months.* If it would make you and [J.S.] more comfortable, we

could even do a Video Conference where my client is with me in my office, and your [*sic*] with you.

'As for tomorrow, I plan to tell the Judge we still want to keep the trial date held as is. That will hopefully allow time for our settlement conference.

'[M.S.] *again does not want to see your client or himself get into a bad spot.* He even indicated that if this is about the $25k inheritance from my client's father, [M.S.] is willing to help [J.S.] some financially if she needs it. All details we could discuss during the settlement conference.'

"78. Booth responded back by email that same day, June 18, stating:

'First, Do [*sic*] you have any evidence you are willing to share that would support these claims? Any at all?

'Second, are you saying that [M.S.] will pursue these various actions and claims unless [J.S.] does what? Sits down to talk, or are you asking her to drop the protection from abuse action in exchange.'

"79. Respondent replied:

'I am doubling check [*sic*] with [M.S.] to determine what he has now, specifically. I may also need to formally subpoena a police department or two for a full report, as well as maybe a hospital. I will have more information by tomorrow morning to share one way or another.

'The request to sit down has not changed. Was always [M.S.'s] desire, and still is, to have these two parties civilly resolve their issues as opposed to using the court system. He has known [J.S.] for going on some 25 yrs. as I understand it. I candidly am still trying to get caught up on that history, and all that has occurred. All I know right now is that my client believes if the parties' could talk civilly with one another, with the assistance of counsel in a secure setting, we might be able to work through a lot of issues.'

"80. On June 19, 2020, respondent, on behalf of M.S., filed a separate action in Johnson County District Court—Petition for Partition & Complaint for Damages—Case No. 20-CV-2599. In the petition, M.S. alleged that J.S. had wrongfully retained $25,500 of M.S.'s money and had taken various pieces of personal property from M.S. Subsequently, Booth, on behalf of J.S., filed an answer and counterclaim.

"81. On July 10, 2020, Booth, on behalf of J.S., filed a Trial Brief and Motions for Sanctions, seeking sanctions against M.S. because of his multiple violations of the temporary orders established in the case and sanctions against respondent, based on the emails he sent to Booth (quoted above), suggesting that M.S. would pursue unrelated civil and criminal actions against J.S. unless she agreed to settle the pending PFA petition.

"82. On July 23, 2020, respondent filed a response to the motion for sanctions, generally denying that the emails he sent to Booth were inappropriate.

"83. A final hearing on the PFA petition was scheduled for July 24, 2020. At the hearing, M.S. indicated that he would be willing to enter into a final consent order regarding the PFA. The matter was then continued to August 14 for the parties to present the agreement and for the court to hear arguments regarding J.S.'s motion for sanctions and attorney fees.

"84. On August 14, 2020, the final consent order was filed in the case. The order notes that J.S. and M.S. 'have knowingly and voluntarily waived their rights to a hearing' and that M.S. 'consents to the orders without finding of fact or fault.' That same day, the court conducted a hearing regarding the motion for sanctions and took the matter under advisement.

"85. A transcript of the August 14, 2020, hearing could not be produced because the audio equipment being used to record the hearing was not working.

"86. On August 21, 2020, the district court issued a journal entry denying the motion for sanctions. The journal entry indicates that the district court denied the motion for sanctions against M.S. because criminal proceedings were pending against him for violating the court's temporary orders. Regarding the motion for sanctions against respondent, the journal entry simply stated that the motion was denied. The journal entry did not provide the court's reasoning for denying the motion.

"87. On August 26, 2020, the ODA received Booth's complaint against respondent regarding the emails (noted above) that he sent to Booth.

"88. The matter was docketed for investigation as DA13,563. Respondent submitted a response to Booth's complaint and cooperated in the subsequent investigation.

"*Count III-DA13,665*

"89. In May 2016, [B.S.] filed for divorce from his wife, [T.], in Johnson County District Court, Case No. 16-CV-2992. Two children had resulted from the marriage, a 15-year old and an 11-year old.

"90. Eventually, the parties entered into an agreement regarding a parenting plan and property division. A divorce decree was filed on September 1, 2017.

"91. In March 2018, attorney Kelli Cooper, on behalf of [T.], filed a motion to modify the parties' parenting plan, alleging that [B.S.] had engaged in physical and emotional abuse of the ex-couple's children.

"92. In February 2019, while the motion to modify was still pending, respondent entered his appearance on behalf of [B.S.].

"93. Ultimately, a hearing on the motion to modify occurred June 17-19, 2019. Thereafter, on August 1, 2019, the court issued its journal entry, modifying the parenting plan.

"94. On October 8, 2020, respondent, on behalf of [B.S.], filed a motion to modify the parenting plan. That same month, the court ordered the parties to participate in mediation.

"95. Ultimately, a status conference was scheduled for March 3, 2021.

"96. Prior to the status conference, respondent sent attorney Cooper an email on February 17, 2021. In the email, respondent noted that there were three attachments to the email: (1) a letter from respondent to Cooper; (2) a letter from [B.S.] to Cooper; and (3) a proposed Agreed Journal Entry to resolve [B.S.]'s pending motion to modify the parenting plan. Regarding the letter from [B.S.] to Cooper, respondent wrote:

'At the request and insistence of [B.S.], I have also enclosed the latter document which [B.S.] has prepared himself independently. As a review of the additional PFD enclosure reflects, the enclosure contains the opinions and contentions of [B.S.] in the matter.

. . . .

. . . .

'For whatever it may be worth, please know I have spoken with [B.S.] a few times recently as to the advantages of getting this matter resolved without intensive court involvement, or anyone else for that matter. Of course, [B.S.] has his own opinions and perceptions of the matter. As do you and I. However, I think all could agree an early global settlement would be the best way *to insulate the parties' son* from a parenting conflict, or that which may follow.'

"97. In the attached letter from respondent to Cooper, respondent noted the proposed Agreed Journal Entry and asserted that it represented a reasonable settlement to the parties' disagreement over child custody. Respondent asked that the agreement be accepted by February 25, 2021.

"98. Respondent also noted in his letter the letter that [B.S.] provided to him to forward to Cooper. In a section of his letter titled 'Additional Considerations—Not "Business as Usual,"' Respondent stated:

'[B.S.] has also asked that I relay another point in close. And that being the efforts he has made to ensure that if litigation does proceed forward, he does not intend to allow tactics utilized in the past to be utilized again.

. . . .

. . .

'I could expound on the [*sic*] all the research [B.S.] had done, or his efforts in getting in contact with the State AG's office to formalize a lengthy criminal complaint with reference to his concerns with how the matter was handled previously, and with intent to dual-copy the relevant BAR agencies, but I am cognizant that you know [B.S.], and that you can likely appreciate that this is not something he takes lightly.

'[B.S.] has prepared his own attachment to this Letter, which he has asked I forward. The attachment tracks his concerns in more detail. You may review same if you wish, and will note the time period covered.

'All the above being said, I have advised [B.S.] that often one can attract more bees with honey. As opposed to something else. And for that reason, I am seeking to extend this sincere "olive branch" to resolve the matter timely and quickly for all parties and counsel's benefit. If this does not occur timely, however, I am inclined to speculate [B.S.] may indeed take a different approach to litigation moving forward, and those whom he may seek to involve starting the morning of Friday the 26th if we do not have an agreement. I would sincerely like to avoid having to even think about what that will entail. Rather just avoid it.'

"99. In the letter from [B.S.] to Cooper, [B.S.] accused Cooper of committing numerous instances of unethical and criminal misconduct during her representation of [T.] and, consequently, threatened to file civil and criminal actions as well as file a disciplinary complaint against her.

"100. After not receiving a response, respondent sent a follow-up email on February 26, 2021, stating: 'To keep things short, I would sincerely like to get this one settled. As I fear it will get messy and complicated—not to mention costly for parties—if we can't stop the train before going off the tracks.'

"101. Cooper replied on March 1, stating that her client would agree to the terms of the proposed journal entry. But, Cooper asked that they appear for the March 3 status hearing to put their agreement on the record.

"102. At the March 3 hearing, Cooper expressed objections about respondent's February 17 email and attachments. Ultimately, the district court did not approve the proposed journal entry, citing concerns about possible coercion/blackmail arising from the email and attachments.

"103. The registry of actions for Case No. 16-CV-2992 indicates that no further action was taken regarding [B.S.]'s October 8, 2020, motion to modify the parenting plan.

"104. On March 11, 2021, the ODA received a disciplinary complaint from Cooper, contending that respondent's email and attached letters constituted an improper threat to her, *i.e.*, that if [T.] did not accept [B.S.]'s proposed settlement agreement, [B.S.] would pursue civil and criminal actions against her as well as file a disciplinary complaint.

"105. The matter was docketed for investigation as DA13,665. On April 9, 2021, the ODA received respondent's response to Cooper's complaint. In his response, respondent stated that it was not his intent to convey a threat to Cooper when he emailed [B.S.]'s letter to her. Respondent indicated that he was merely following [B.S.]'s directives in forwarding the letter to Cooper and that he did not share [B.S.]'s beliefs regarding Cooper's conduct in representing [T.].

"Conclusions of Law

"106. The hearing panel makes the following conclusions of law based on clear and convincing evidence.

"107. All Kansas lawyers are bound by Kansas Supreme Court Rule 203 to comply with the Kansas Rules of Professional Conduct (KRPC) found at Rule 240, Rules of the Kansas Supreme Court.

"108. Misconduct—violation of the KRPC—is a ground for discipline by this Board. Kansas Supreme Court Rule 203(b).

"109. The panel finds, on clear and convincing evidence, that respondent violated the following rules, in the cases filed against him, as follows:

"*Count I-Case No. DA13,349*

"110. Judge Wonnell found that respondent committed sanctionable conduct in filing, without court permission, a motion alleging misconduct by the GAL, 'in direct violation of the current, standing applicable order.' Under Rule 220(b), this is prima facie evidence of a violation, imposing on respondent the burden to disprove the violation—which he failed to do.

"111. Rule 3.4(c), KRPC provides:

'A lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists';

"112. Respondent violated Rule 3.4(c).

"*Count II-Case No. DA13,563*

"113. Respondent sent a threat to attorney Joseph Booth that, unless a suitable 'settlement' were reached in the Protection From Abuse action filed by Booth's client—i.e. dismissal—then respondent's client would pursue criminal charges and tax fraud complaints against Booth's client. Such criminal and tax fraud claims had nothing to do with the underlying PFA action.

"114. While threatening criminal charges to gain an advantage in a civil matter is not prohibited, it is necessary 'that the criminal matter is related to the client's civil claim.['] ABA Formal Opinion 92-363 (July 6, 1992), available online at https://www.americanbar.org/products/ecd/chapter/219928/.

"115. As noted above, Rule 4.4(a) provides that a lawyer 'shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.'

"116. Respondent violated Rule 4.4(a) by threatening Booth's client with criminal and tax fraud charges unless the PFA were settled.

"117. Rule 8.4(a), KRPC provides:

'It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another';

"118. Respondent violated Rule 8.4(a), by parroting his client's words and conveying his client's threats.

"119. Rule 8.4(d), KRPC provides:

'It is professional misconduct for a lawyer [to]: . . .

'(d) engage in conduct that is prejudicial to the administration of justice';

"120. Respondent violated Rule 8.4(d) by threatening Booth's client with criminal and tax fraud charges unless the PFA were settled. In closing argument, respondent admitted a violation of Rule 8.4(d) in this Count.

"*Count III-Case No. DA13,665*

"121. In threatening attorney Cooper and her client, respondent conveyed his client's threatening letter, and supported with his own words, threatening criminal complaints against Cooper's clients and disciplinary complaints against Cooper, unless the divorce action were settled to the satisfaction of respondent's client.

"122. As noted above, Rule 4.4(a) provides that a lawyer 'shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.'

"123. Respondent violated Rule 4.4(a) by threatening Cooper and her client with criminal charges and disciplinary complaints unless the divorce case were settled to the satisfaction of respondent's client.

"124. As noted above, Rule 8.4(a), KRPC makes it misconduct to violate the rules or knowingly assist another to do so.

"125. Respondent violated Rule 8.4(a) by threatening Cooper and her client with criminal charges and disciplinary complaints unless the divorce case were settled to the satisfaction of respondent's client, and conveying his client's letter making those threats.

"126.As noted above, Rule 8.4(d) makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

"127. Respondent violated Rule 8.4(d) by threatening Cooper and her client with criminal charges and disciplinary complaints unless the divorce case were settled to the satisfaction of respondent's client.

"128. Rule 8.4(g), KRPC provides:

'It is professional misconduct for a lawyer to: (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.'

"129. Because of the repeated nature of respondent's conduct in making threats to gain advantage for his clients, respondent violated Rule 8.4(g). See also, *In re Pyle*, 278 Kan. 230, 241[,] 91 P.2d 1222 (2004) (finding violations of Rules 4.4 and 8.4(d) where respondent 'wrote the letter merely to threaten [opposing counsel] with the sole purpose "of attempting to frighten or to put pressure on opposing counsel to settle the lawsuit upon the terms dictated and desired by [respondent]."'); and *In re Kenny*, 289 Kan. 851, 217 P.3d 36 (2009) (finding violations of Rules 4.4, 8.4(d) and 8.4(g) where lawyer conveyed client's threat to file disciplinary complaint against opposing counsel unless opposing party settled claims)[;] as his pattern of misconduct reflects adversely on his very fitness to practice.

"Recommended Discipline

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

"131. Under Standard 6.2—Abuse of the Legal Process, Rule 6.22 states:

'Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.'

"132. In the present case, respondent acted knowingly, and not negligently, in filing a motion in direct contravention of a court order expressly requiring him to submit the motion to the court before filing it. He knew he was violating the order because (a) he heard the court make the order; (b) he asked the court for clarification at the time the order was entered; and (c) he reviewed the draft and then saw the submitted and filed journal entry setting out the court's ruling. Injury was caused to other parties, who had to pay lawyers to oppose the motion, and to the legal system, which was burdened and delayed by the filing and prosecution of the motion.

"133. Under Standard 7.0—Violations of Duties Owed As A Professional, Rule 7.2 provides:

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

"134. In the present case, respondent acted knowingly, and not negligently, when he made several inappropriate threats, and filed a motion in direct contravention of a court order that the motion be submitted to the court before it was

filed. This knowing conduct violated the duties owed by respondent as a professional as enumerated above. The conduct also caused injury to [the] parties, court and the legal system, by requiring the expenditure of lawyer and court time and resources, and delaying the proceedings.

"Aggravation and Mitigation

"135. Pursuant to Rule 226(a)(1)(C), the panel considered and applied the following aggravating and mitigating circumstances. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating factors will not excuse a violation and are to be considered only when determining the nature and extent of discipline to be administered.

"136. The panel applied the following aggravating factors from Rule 226:

(c) a pattern of misconduct—the three charges are quite similar, and there was evidence that respondent has engaged in similar conduct in at least one other case;

(d) multiple offenses—respondent is found to have violated a number of rules, in more than one case; and

(g) refusal to acknowledge wrongful nature of the conduct—respondent, while acknowledging most of the facts alleged, denied any violation of the KRPC and—while acknowledging some of his conduct to be 'stupid'—he did not admit that any of it was misconduct.

"136.[*sic*] The panel applied the following mitigating factors from Rule 226:

(a) absence of a prior disciplinary record—respondent has had no prior complaints;

(b) absence of a dishonest or selfish motive—it appears that respondent's motive was always to advance the cause of his clients, albeit sometimes overly zealously;

(f) inexperience in the practice of law—at the time of the first complaint, respondent had been practicing law for a total of seven years, and he had practiced domestic relations law for some period less than that;

(g) 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—it appears from Google ratings, Super Lawyers—Rising Stars, Attorney and Practice Magazine, and Expertise.com Best Divorce Lawyers, that respondent enjoys some degree of recognition among members of the public and some other members of the Bar. The

panel would wish for letters of support from other lawyers separate from the respondent's own sister, who happens to be a lawyer but might be expected to express words of support regardless of the situation. But the various online ratings are sufficient to demonstrate some degree of respondent's reputation in the community;

(k) other sanctions—the panel does not conclude that the imposition of sanctions by the various courts as described were sufficient to mitigate the discipline here recommended; and

(l) remorse—the respondent repeatedly stated his regret for the conduct, and that, given the opportunity, he would not repeat it.

"Discipline

"137. Based on the Findings of Fact and Conclusions of Law set forth above, and applying the Standards described above, the panel concludes and recommends that respondent be suspended for a period of six months.

"Probation Plan

"138. On October 4, 2022, respondent timely presented a proposed probation plan in case the hearing panel found one or more violations of the rules by clear and convincing evidence. Respondent complied with Rule 227(a) by timely submitting a plan and with Rule 227(c) by complying with the terms of the probation plan at least fourteen days prior to the hearing.

"139. In his probation plan, respondent proposes, during the following twelve months:

a. Monthly one-hour coaching sessions with Professor Michael Hoeflich of the University of Kansas School of Law, with Professor Hoeflich reporting to the ODA quarterly;

b. Using the services of the Kansas Lawyers Assistance Program (KALAP) by:

(1) Implementing improvements suggested by KALAP;

(2) Meeting with KALAP mentor, Jace McClasky, an experienced family law practitioner at least once per month;

(3) Attending KALAP therapy sessions; and

(4) Attending KALAP resiliency group meetings periodically.

c. Respondent cites two ethics CLE courses he has attended in the past fourteen months, and states that he will attend one-hour of additional ethics CLE per month, including five hours on civility and professionalism, over and above the hours required by Kansas Supreme Court Rule 804.

d. Respondent will write and provide to the ODA memorandum on the key learning points from his coaching sessions and CLE.

e. Respondent will engage in collaboration with other members of his law firm.

"140. The panel finds that this proposed plan, while apparently workable, very substantial, and very detailed, it does not provide adequate safeguards to address the violations listed above, to protect the public while the plan can and should correct the violations found above, and is in the best interest of the bar and the public, the plan's proposed duration is too short. Therefore, the probation plan proposed by the respondent is rejected. However, the panel does believe that with one addition—requiring the plan to be in place for two years instead of one—the proposed plan would provide adequate safeguards to address the violations listed above, to protect the public, and to comply with the KRPC, that it can and should correct the violations found above, and is in the best interest of the bar and the public. So, with the additional condition that the probation plan remain in place for two years from the date of this order (rather than the one year proposed by the respondent), all of the other terms of the respondent's proposed probation plan are accepted and put into place, starting on the date of this Order.

"*Recommendation of the Hearing Panel*

"Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the panel recommends that the respondent be suspended for a period of three months, but that this discipline be suspended and that respondent be placed on the probation plan he submitted with the additional condition that it remain in place and be complied with for a period of two years from the date of this final hearing report.

"Costs are assessed against the respondent in an amount to be certified by the ODA.

"Concurring and Dissenting Opinion

"I concur in the other panel members' decisions on Case Nos. DA13,349 and DA13,665, but dissent on Case No. DA13,563, which I would vote to dismiss. I also dissent from the other panel members' decision as to discipline, and I vote for public censure.

"141. The ODA and majority opinion cites Kansas Supreme Court Rule 220 reciting that a prior judicial decision based upon the same conduct as prima facie evidence of misconduct. With regard to Case No. DA13,563 the District Court DENIED the complainant's motion for sanctions. The trial court's decision is based upon the standard of proof of a preponderance of the evidence. In this proceeding, the applicable standard of proof is 'clear and convincing'. Further, Rule 220 provides that the party opposing the prior decision has the burden of proof to overcome the prima facie evidence of the prior adjudication. In this case,

the ODA did not provide clear and convincing evidence to overcome the presumption created by the operation of Rule 220.

"142. As to discipline, I dissent for the reason that these cases present the first opportunity for discipline to affect the conduct of respondent. It is clearly proven and true that Judge Wonell's [*sic*] civil adjudication in 2019, based upon the same conduct which first occurred in 2017, was a judicial determination on the issue of *civil* liability, not *professional* responsibility. Thus, no prior discipline has been imposed. Secondly, the second motion for sanctions resulted in dismissal of the sanctions motion said adjudication upon similar conduct as the present complaint in Case No. DA13,563 occurred in 2020 and the trial court decision entered in August of 2020. Therefore, at that time, there was no prior imposed discipline. Finally, in Case No. DA13,663 the conduct of respondent in March of 2021 is clearly misconduct as pronounced in the majority decision. However, there was no prior discipline imposed according to our system. There was no evidence given at hearing of prior reprimand nor cautionary letter to respondent from the ODA. Therefore, in my opinion, the imposition of 'suspension' is not fair to a practicing attorney with no prior disciplinary history. Both cases in which I concur are first offenses.

"143. While each case is serious giving rise to the need for discipline, since the filing of the last action in March of 2021, there are no further instances of bad conduct of respondent brought to our attention. Perhaps retaining good counsel, receiving the mentoring that has thus far occurred is sufficient to correct the misconduct and further dissuade others from considering use of the woeful tactics as shown in these cases. I was clearly convinced that resoibdebt [*sic*] had truthfully and professionally assisted in the investigation of all three of the complaints, assisted the assigned investigator and testified truthfully during the hearing of these cases. Since the ODA chose not to hear from the 'boots on the ground' investigator, this panel heard from the investigator only through the presentation of evidence by respondent. This testimony of Mr. Rowe, the assigned investigator, carries great weight with me. No one testified nor was heard to say that diversion would not have been a fair and reasonable resolution to the complaints, including the judges and attorney's who labored, endured and judged the prior bad acts of respondent. The testimony of Mr. Rowe, shedding light on the assistance of respondent, providing the background and obtaining the opinions of those involved, must not and cannot be ignored. If these seasoned lawyers and judges were satisfied with diversion, then perhaps the least sanction likely to do the most good, should now be administered.

"144. It is for these reasons that I concur in the findings of misconduct in Case Nos. DA13,349 and DA13,665 even though the conduct at issue in Case No. DA13,349 occurred in 2017 and July of 2018. The sequence of events sheds light to this analysis. The first abusive threat was in 2017. The formal complaint was not filed until September of 2022. As to discipline, there was no explanation of the delay in bringing these cases to hearing and this fact alone weighs heavily in my reasoning that 'suspension' is simply too harsh. It is my hope that if respondent had been timely punished for the 2017 and 2018 conduct, we could

have avoided the remainder. Censure is more in line with violations of the MRPC for first time serious breaches of these pillars of professionalism.

"145. I dissent from imposing discipline under Rule 8.4(g) as such imposition of discipline is not supported by the evidence. As stated above, there has been no prior discipline upon which to opine respondent's conduct reflects a head strong disposition to engage in unprofessional conduct and therefore, unfit to practice law. The course of these three cases and public censure is a serious sanction and it adequately protects the public and provides considerable guidance for the benefit of all. Public censure is warranted."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see Supreme Court Rule 226(a)(1)(A) (2023 Kan. S. Ct. R. 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 Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

The respondent was given adequate notice of the formal complaint, to which he filed an answer. The respondent initially filed exceptions to the final hearing report but later withdrew them. Therefore, the panel's factual findings are considered admitted. Supreme Court Rule 228(g)(1), (2) (2023 Kan. S. Ct. R. 288). The evidence before the hearing panel clearly established the charged misconduct violated KRPC 3.4(c) (2023 Kan. S. Ct. R. 394) (knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists), KRPC 4.4(a) (2023 Kan. S. Ct. R. 405) (shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person), KRPC 8.4(a) (2023 Kan. S. Ct. R. 433) (violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or to do so through the acts of another), KRPC 8.4(d) (engage in conduct that is prejudicial to the administration of justice), and KRPC 8.4(g) (engage in any other conduct that adversely reflects on the lawyer's fitness to practice law).

The only remaining issue is to determine the appropriate discipline for the respondent's violations. Although the hearing panel first proposed a six-month suspension, its final recommendation was to suspend respondent for three months, but that this discipline be suspended and that the respondent be placed on the probation plan he submitted with the added condition that it remain in place for two years from the date of the final hearing report. One member of the hearing panel concurred in the panel's decisions on case nos. DA13,349 and DA13,665 but dissented with respect to case no. DA13,563. This member also dissented from the other panel members' decision as to discipline. The Disciplinary Administrator's office agrees with the panel's recommendation.

After carefully considering the evidence presented, as well as the ABA Standards for Imposing Lawyer Sanctions, we adopt the panel's findings and conclusion, except for the recommendation that the probation plan be retroactively effective from the date of the final hearing report. We conclude it is in the best interest of the bar and the public to make the respondent's probation plan effective from the date this opinion is filed. Respondent is therefore suspended for three months, with the three-month suspension stayed pending successful completion of a two-year probation period, the terms of which are in the respondent's proposed probation plan, effective from the date this opinion is filed.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Christopher C. Barnds is suspended for a period of three months from the practice of law in the state of Kansas, effective from the date this opinion is filed, with the three-month suspension stayed pending successful completion of a two-year probation period, in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. R. 281) for violating KRPC 3.4(c), 4.4(a), 8.4(a), 8.4(d), 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. 126,105

In the Matter of MARK GREGORY AYESH, *Respondent.*

(530 P.3d 731)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Indefinite Suspension.*

Original proceeding in discipline. Opinion filed June 16, 2023. Indefinite suspension.

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

Gregory Alan Andersen, of Law Offices of Gregory Alan Andersen, of Wichita, argued the cause, and *Mark G. Ayesh,* respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Mark Gregory Ayesh, of Wichita, who was admitted to practice law in Kansas in April 1979.

This court suspended Ayesh's license to practice law on May 7, 2021. See *In re Ayesh,* 313 Kan. 441, 485 P.3d 1155 (2021). About six months later, the Disciplinary Administrator's office filed another formal complaint against Ayesh alleging violations of the Kansas Rules of Professional Conduct. This complaint stemmed from Ayesh's unauthorized practice of law after this court had suspended his license.

The parties entered into a summary submission agreement under Supreme Court Rule 223 (2023 Kan. S. Ct. R. at 277). Ayesh admitted that he violated the Kansas Rules of Professional Conduct (KRPC)—specifically KRPC 5.5(a) (2023 Kan. S. Ct. R. at 411) (unauthorized practice of law) and KRPC 8.4(c) (2023 Kan. S. Ct. R. at 433) (engaging in conduct involving dishonesty)—and Kansas Supreme Court Rule 231(b) (2023 Kan. S. Ct. R. at 292) (unauthorized practice of law). The parties also stipulated to the content of the record, the findings of fact, the conclusions of law, and the applicable aggravating and mitigating circumstances. They additionally agreed to waive a formal hearing and to recommend the sanction of indefinite suspension. See Rule 223(b) (detailing requirements for summary submission agreements).

The chair of the Board for Discipline of Attorneys approved the summary submission and cancelled a hearing on the formal complaint. See Supreme Court Rule 223(e) (2023 Kan. S. Ct. R. at 278). The summary submission was filed with this court for hearing.

Before us, the parties recommend a finding of misconduct and the imposition of a sanction of indefinite suspension.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant portions of the summary submission agreement follow.

"*Findings of Fact*

. . . .

"6. On April 6, 2021, K.E.B. consulted with respondent about preparing a prenuptial agreement. K.E.B. was planning on marrying R.G. on October 9, 2021.

"7. At the time of the consultation, respondent had a disciplinary case pending before the Supreme Court. Respondent did not inform K.E.B. of his pending disciplinary case. Ultimately, respondent agreed to prepare a prenuptial agreement for K.E.B.

"8. On April 8, 2021, respondent mailed a cover letter and a draft of a Cohabitation and Antenuptial Agreement to K.E.B. In the cover letter, respondent informed K.E.B. that she and R.G. would need to exchange financial statements with one another. Respondent also informed K.E.B. that R.G. needed to retain his own attorney to review the agreement for him. Respondent also noted that '[t]he attorneys would also sign Certificates to the Agreement. Of course, I'll be signing for you.'

"9. The certificate respondent said he would be signing stated in relevant part:

'[K.E.B.] has consulted with me in connection with her entering into the foregoing premarital agreement with [R.G.] and I have advised her as to her rights under such agreement and her legal rights in the absence of such agreement. During such consultation, I reviewed with her the financial statement of [R.G.], which is attached as Exhibit A to such agreement.'

"10. Finally, respondent stated in the cover letter: 'I understand the wedding date is October 9, 2021. It is not recommended that you wait until the last moment to have this Agreement reviewed and signed.'

"11. The language of the cover letter and the certificate respondent was to sign contemplated that respondent would be providing additional legal work and advice to K.E.B. prior to her signing the agreement.

"12. On May 7, 2021, the Supreme Court issued its opinion in respondent's disciplinary case, suspending respondent for three years but allowing the suspension to be stayed after six months if respondent entered into a probation plan approved by the ODA. See *Matter of Ayesh*, 313 Kan. 441, 471, 485 P.3d 1155 (2021).

"13. In the opinion, the Supreme Court ordered respondent to comply with Supreme Court Rule 231(a)(1) (2022 Kan. S. Ct. R. at 292), which required him, among other things, 'to notify in writing each client that the client should obtain new counsel because the attorney is suspended or disbarred and is no longer authorized to practice law in Kansas.'

"14. Supreme Court Rule 231(a)(2) states: 'No later than 30 days after the Supreme Court issues an order suspending an attorney's license to practice law . . . the attorney must provide an affidavit to the Supreme Court certifying that the attorney complied with subsection (a)(1).'

"15. On June 25, 2021, respondent filed his Rule 231 affidavit with the Supreme Court. The affidavit stated in relevant part that respondent 'has read Rule 231 and has complied with all aspects including notice to clients, opposing counsel and courts concerning his suspension.'

"16. Prior to filing the affidavit, respondent never informed K.E.B. of his suspension. At the time of filing his affidavit, respondent had not received any communications from K.E.B. regarding the cohabitation and antenuptial agreement he had sent to her. Accordingly, respondent 'assumed that the wedding was a nonevent.'

"17. Rule 231(b) provides that it is 'the unauthorized practice of law and a violation of Kansas Rules of Professional Conduct 5.5 for an attorney to continue to practice law in Kansas after the Supreme Court issues an order suspending or disbarring the attorney.'

"18. The Supreme Court has stated that the practice of law includes giving '"legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in court." [Citation omitted.]' *State ex rel. Stephan v. Williams*, 246 Kan. 681, 689, 793 P.2d 681 (1990).

"19. In addition to providing a general definition of the practice of law, the Supreme Court has established guidelines for the type of law-related work a suspended or disbarred attorney may do:

'"[A]n attorney who has been disbarred or suspended from the practice of law is permitted to work as a law clerk, investigator, paralegal, or in any capacity as a lay person for a licensed attorney-employer if the suspended lawyer's functions are limited exclusively to work of a preparatory nature under the supervision of a licensed attorney-employer and does not involve client contact. Any contact with a client is prohibited. Although not an inclusive list, the following restrictions apply: a suspended or disbarred lawyer may not be present during conferences with clients, talk to clients either directly or on the telephone, sign correspondence to them, or contact them either directly or indirectly."' *In re Juhnke*, 273 Kan. 162, 166, 41 P.3d 855 (2002) (quoting *In re Wilkinson*, 251 Kan. 546, 553-54, 834 P.2d 1356 [1992]).

See also *In re Jones*, 291 Kan. 405, 420-21, 241 P.3d 90 (2010) (concluding that a suspended attorney that fails to abide by the *Wilkinson* restrictions violates KRPC 5.5[a]).

"20. On August 16, 2021, K.E.B. sent an email to respondent, asking whether R.G.'s attorney, Carolyn Sue Edwards, had contacted him. Respondent replied on August 19, stating 'not yet.'

"21. In September 2021, respondent and Edwards discussed revisions to the agreement.

"22. On September 10, 2021, K.E.B. sent a follow-up email, asking respondent again whether he had heard from Edwards. Respondent replied that same day, stating, 'Yes making some revisions.'

"23. On September 16, 2021, respondent sent a letter to K.E.B., stating that based on conversations he had with Edwards, he had made changes to the agreement and was providing her with a draft of the current version for her review. Notably, the respondent's letterhead identified respondent's business as 'Ayesh Accounting.'

"24. Paragraph 14 of the draft agreement stated:

'Each party has had the opportunity to be represented in negotiations for and in the preparation of this Cohabitation and Antenuptial Agreement by counsel of his or her choosing. HUSBAND has been represented by Carolyn Sue Edwards. WIFE has been represented by Mark G. Ayesh. Each party has read this agreement and is fully aware of the contents hereof and of its legal effect.'

"25. On September 27, 2021, respondent, based on further discussions he had with K.E.B., made changes to the agreement. That same day, he faxed a cover letter and a current version of the agreement to Edwards as well as emailed and mailed a cover letter and copy of the agreement to K.E.B.

"26. In a cover letter to K.E.B. regarding the agreement, respondent advised her to 'execute four originals of the Agreement so that each party has an original and *each counsel* has an original. I am sending by regular mail four copies of the Agreement. If you prefer, you can come by the office and sign. We have several notaries available.'

"27. Like the September 16 version of the agreement, the September 27 version of the agreement again identified respondent as K.E.B.'s counsel, who represented her 'in negotiations for and in the preparation of this Cohabitation and Antenuptial Agreement.'

"28. Upon receiving respondent's fax and seeing that his letterhead indicated he was doing business as an accountant rather than a lawyer, Edwards checked on the status of respondent's law license and discovered that he had been suspended in May 2021.

"29. The next day, September 28, Edwards informed R.G. and K.E.B. of respondent's suspension and advised K.E.B. that she needed a licensed attorney to review the agreement for her.

"30. That same day, R.G. and K.E.B. went to respondent's office and confronted him about the suspension. Respondent admitted to being suspended and offered to have a lawyer in his office represent K.E.B. so the document could be executed. Ultimately, K.E.B. and R.G. left the office without signing the agreement.

"31. On October 4, 2021, ODA received Edwards' complaint regarding respondent's conduct. The ODA docketed the matter for investigation as DA13,759. Respondent cooperated in the subsequent investigation of the complaint.

"*Conclusions of Law*

"32. Under Supreme Court Rule 223(b)(1), the respondent admits that he engaged in misconduct. Under Rule 223(b)(2)(C), the ODA and the respondent stipulate that the findings of fact stated above constitute clear and convincing evidence of violations of the following rules:

"KRPC 5.5(a) (unauthorized practice of law) and Kansas Supreme Court Rule 231(b)

"33. KRPC 5.5(a) states that a 'lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.' Furthermore, Rule 231(b) states that '[i]t is the unauthorized practice of law and a violation of Kansas Rule of Professional Conduct 5.5 for an attorney to continue to practice law in Kansas after the Supreme Court issues an order suspending or disbarring the attorney.' The respondent violated KRPC 5.5(a) and Rule 231(b) by practicing law after the Supreme Court suspended him on May 7, 2021. After that date, respondent performed legal work for K.E.B. by communicating with attorney Edwards on K.E.B.'s behalf regarding the cohabitation and antenuptial agreement and revising the agreement based on those communications. He also provided legal advice to K.E.B. regarding the changes made to the agreement.

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

"34. 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) by continuing to conduct himself as a lawyer after his law license was suspended by the Supreme Court. Instead of informing K.E.B. of his suspension in August 2021 when she reached out to him regarding the pending cohabitation and antenuptial agreement, respondent proceeded to perform legal work for K.E.B. by engaging in communications with Edwards about the agreement, making subsequent changes to the agreement, and advising K.E.B. on those changes. Finally, in the drafts of the agreement and in the cover letters respondent sent to K.E.B. and Edwards in September 2021, he identified himself as 'counsel' for K.E.B. even though he was not authorized to practice law at that time.

"*Aggravating and Mitigating Evidence*

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

"Aggravating Factors

"36. *Prior Disciplinary Offenses*. The respondent has been disciplined on four prior occasions.

i. In 2006, the ODA informally admonished the respondent for violating 4.2 (communication with person represented by counsel).

ii. In 2008, the ODA informally admonished the respondent for violating KRPC 1.1 (competence) and KRPC 1.2 (scope of representation).

iii. In 2013, the respondent successfully completed an attorney diversion agreement for violating KRPC 1.15 (safeguarding client property).

iv. In May 2021, the Supreme Court suspended respondent for violating KRPC 1.2 (scope of representation); KRPC 1.6 (confidentiality); KRPC 1.7 (conflict of interest: current clients); KRPC 1.8 (conflict of interest: current clients); KRPC 1.9 (conflict of interest: former clients); KRPC 1.16 (termination of representation); KRPC 3.1 (meritorious claims and contentions); KRPC 3.3 (candor to the tribunal); KRPC 4.1 (truthfulness in statements to others); KRPC 8.3 (failure to report misconduct); KRPC 8.4(c) (engaging in dishonest conduct); and KRPC 8.4(d) (conduct prejudicial to the administration of justice). Respondent engaged in the current misconduct while serving the suspension for these rule violations.

"37. *Dishonest or Selfish Motive.* Respondent acted with a dishonest motive when he failed to notify K.E.B. of his suspension when she reached out to him in August 2021 regarding the pending cohabitation and antenuptial agreement and proceeded to act as her attorney in communicating with Edwards regarding changes to the agreement and providing advice to K.E.B. regarding those changes.

"38. *Substantial Experience in the Practice of Law.* Respondent was admitted to the Kansas Bar in 1979. When respondent was suspended in May 2021, he had been practicing law for more than forty years.

"Mitigating Factors

"39. *Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings*. Respondent fully cooperated in the investigation of disciplinary complaint. Once the ODA's filed its formal complaint, Respondent filed an answer, admitting to all allegations. Lastly, respondent willingly entered into this summary submission agreement, stipulating to facts and rule violations.

"40. *Previous Good Character and Reputation in the Community Including any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney.* The respondent was an active and productive member of the bar of Wichita, Kansas. The respondent also enjoys the respect of

his peers and generally possesses a good character and reputation as evidenced by numerous letters of support.

"41. *Remorse*. The respondent is genuinely remorseful for engaging in the misconduct in this case.

"*Recommendation for Discipline*

"42. Under Supreme Court Rule 223(b)(3), the ODA and respondent agree to a recommended sanction of indefinite suspension and that such suspension will begin to run on the date the parties execute this summary submission agreement."

DISCUSSION

In a disciplinary proceeding, we consider the evidence and the parties' arguments and determine whether KRPC violations exist and, if they do, the appropriate discipline. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2023 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."'" 315 Kan. at 147 (quoting *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 [2009]).

Respondent Ayesh had adequate notice of the formal complaint, to which he filed an answer. He waived formal hearing after entering into a summary submission agreement. In this agreement, the parties agreed they would take no exception to the findings of facts and conclusions of law. By Supreme Court rule, the parties thus admitted the factual findings and conclusions of law in the summary submission. See Supreme Court Rule 228(g)(1) (2023 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 Ayesh's conduct violated KRPC 5.5(a) and 8.4(c) and Rule 231(b). The remaining issue is discipline.

The parties' summary agreement recommending discipline is advisory only and does not prevent us from imposing a greater or lesser discipline. Kansas Supreme Court Rule 223(f) (2023 Kan. S. Ct. R. at 279). That said, after review of the stipulated facts and

conclusions of law we agree with the recommendation that indefinite suspension is the appropriate remedy. We do not agree, however, with the recommendation that the suspension begin to run on the date when the parties executed the summary submission agreement. Instead, we order that the suspension begins to run on the date of this decision.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Mark Gregory Ayesh is hereby suspended from the practice of law in the state of Kansas for an indefinite period, effective the date of this opinion in accordance with Supreme Court Rule 225(a)(2) (2023 Kan. S. Ct. R. at 281) for violating KRPC 5.5(a) and 8.4(c) and Rule 231(b).

IT IS FURTHER ORDERED that respondent shall comply with Rule 231 (notice to clients, opposing counsel, and courts following suspension or disbarment).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) (reinstatement following suspension or disbarment) when seeking reinstatement.

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. 125,113

STATE OF KANSAS, *Appellee*, v. DAVID MONCLA, *Appellant.*

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Successive Motion to Correct Illegal Sentence—Application of Res Judicata.* Res judicata bars a defendant from raising the same claim in a second or successive motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504, unless subsequent developments in the law shine new light on the original question of whether the sentence was illegal when pronounced.

2. SAME—*Successive Motion to Correct Illegal Sentence—Party has Burden of Proof to Show Subsequent Development in Law*. A party filing a successive motion to correct an illegal sentence bears a threshold burden to prove that a subsequent development in the law undermines the earlier merits determination. A successive motion that merely seeks a second bite at the illegal sentence apple is susceptible to dismissal according to our longstanding, common-law preclusionary rules.

Appeal from Sedgwick District Court; ERIC N. WILLIAMS, judge. Opinion filed June 23, 2023. Affirmed.

David L. Miller, of The Law Office of David L. Miller, LLC, of Wichita, was on the briefs for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: This is the second time that David Moncla has appealed a district court's denial of a motion to correct an illegal sentence to our court. As he did in his prior appeal, Moncla argues that the district court's irregular procedures divested it of subject-matter jurisdiction to impose restitution. See *State v. Moncla*, 301 Kan. 549, 554, 343 P.3d 1161 (2015). But the State argues that Moncla is barred from bringing that claim again under a legal doctrine called res judicata. That doctrine generally prevents a person from raising a particular claim after a court has ruled on it. See *State v. Kingsley*, 299 Kan. 896, 901, 326 P.3d 1083 (2014).

We agree with the State that Moncla has raised the same claim. And because no later development in the law has undermined our earlier decision on the legality of Moncla's sentence, we affirm the district court's order.

FACTS AND PROCEDURAL BACKGROUND

A jury convicted Moncla of first-degree murder in 1995. He is serving a life sentence with no chance of parole for 40 years (a so-called "hard 40" sentence). Our court affirmed Moncla's conviction and sentence on direct appeal. *State v. Moncla*, 262 Kan. 58, 936 P.2d 727 (1997). And his attempt to pursue habeas-corpus relief proved unsuccessful. *Moncla v. State*, No. 101,979, 2010 WL 2978032, at *4 (Kan. App. 2010) (unpublished opinion).

This appeal is about the district court's imposition of restitution and fees. At Moncla's sentencing hearing, the district court stated that the murder victim's sister-in-law was seeking $13,537.64 in restitution for the victim's funeral, burial, and other expenses. When Moncla's counsel informed the court that the State had not yet provided receipts supporting that amount, the trial court gave the parties 30 days to determine restitution, commenting that it would hold a hearing if there was still a dispute over the amount. When no party requested a restitution hearing, the court filed a journal entry of sentencing 34 days later. That journal entry ordered Moncla to pay $164.50 in court costs, $220 in witness fees, and $13,627.64 in restitution.

Moncla first challenged the district court's procedure for ordering restitution in a 2013 motion to correct an illegal sentence under K.S.A. 22-3504. He argued that the district court lacked subject-matter jurisdiction to impose restitution, court costs, and fees because it was not ordered in open court with him present. *State v. Jones*, 292 Kan. 910, 914, 257 P.3d 268 (2011) (a sentence imposed by a court without jurisdiction is illegal); see also K.S.A. 2022 Supp. 22-3504 (same). The district court summarily denied the motion, meaning that it dismissed the motion """without a hearing or appointment of counsel""" because it determined that """the motion, files, and records of the case conclusively""" showed that Moncla was entitled to no relief. See *Jones*, 292 Kan. at 913. On appeal, our court was "satisfied that 'the spirit, if not the letter' of the proper procedure was followed," so we held that

the district court had subject-matter jurisdiction to impose the restitution, costs, and fees. *Moncla*, 301 Kan. at 554 (citing *State v. Frierson*, 298 Kan. 1005, 1021, 319 P.3d 515 [2014]).

Then in 2019, Moncla filed the illegal-sentence motion that is the subject of this appeal. He again argued that the district court lacked subject-matter jurisdiction to impose restitution because he was not present. In Moncla's view, the district court should have explicitly ordered a continuance of his sentencing hearing and entered the order of restitution within 30 days. He asked the court to correct the restitution amount via an amended order (called a "nunc pro tunc" order). Once again, the district court summarily denied the motion. It determined that Moncla's sentence was not illegal and that the appellate courts had ruled on his claim.

Moncla now appeals that order. His appeal comes directly to us because he was convicted of the off-grid crime of first-degree murder. See K.S.A. 2022 Supp. 22-3601(b)(4).

ANALYSIS

Moncla argues that the district court's sentencing procedures divested it of jurisdiction to impose restitution. The State insists that the doctrine of res judicata bars that claim because our court resolved it in his last appeal. Whether res judicata bars a claim is a question of law, meaning that we need not defer to the district court's decision. *Kingsley*, 299 Kan. at 899. The district court's denial of the illegal-sentence motion embraced the doctrine without naming it.

As we have said, res judicata prevents a litigant from raising claims that the courts have resolved. 299 Kan. at 901. The doctrine generally bars a claim when the same parties are involved, the same claim was previously raised, and there has been a final judgment on the merits. 299 Kan. at 901.

There is no dispute that this appeal involves the same parties as Moncla's prior appeal. But Moncla insists that res judicata does not apply to this appeal for three reasons. First, he argues there was no final judgment on the merits of his previous illegal-sentence claim. Second, Moncla believes that he raised new claims in his 2019 motion. Finally, Moncla suggests he can bring this claim under a limited exception to ordinary res-judicata principles that

we have recognized in the illegal-sentence context. Under that exception, res judicata does not apply if a development in the law shows that a previous illegal-sentence motion was improperly denied. See *State v. Murdock*, 309 Kan. 585, 592, 439 P.3d 307 (2019).

We disagree with all three of Moncla's arguments. First, Moncla contends there was no final decision on the merits of his prior illegal-sentence claim because the district court summarily denied it. But a summary denial of an illegal-sentence motion *is* a ruling on the merits. As we explained above, it means that the district court ruled that the """motions, files, and records of the case conclusively show the defendant is not entitled to relief.""" *Jones*, 292 Kan. at 913. We affirmed the district court's summary denial, and our decision became final when we issued the mandate in that case. So there has been a final decision on the merits of Moncla's 2013 illegal-sentence claim.

Second, Moncla argues that he raised a new claim in his 2019 motion. In Moncla's view, the 2019 motion raises a new claim because he argues that the sentencing court should have ordered a continuance of his sentencing hearing and resolved restitution within 30 days. And in his 2013 motion, he argued only that the district court failed to set restitution while he was present. But both arguments go to the same claim—whether the district court's sentencing procedures deprived it of subject-matter jurisdiction to order restitution. And in his prior appeal, we specifically addressed the procedural nuances the district court employed and concluded that they did not deprive the court of jurisdiction. *Moncla*, 301 Kan. at 554. Moncla also suggests that his request for a nunc pro tunc order presents a new claim. We disagree. His request for that order is simply a different remedy for an underlying claim challenging the district court's jurisdiction to order restitution, and our court previously resolved that claim on the merits.

Finally, we disagree with Moncla that the limited exception to res judicata applies to his successive illegal-sentence claim. That exception is not, as Moncla suggests, an invitation to reexamine claims that a defendant believes were incorrectly decided. Instead, we have simply recognized that K.S.A. 22-3504 gives a defendant "the opportunity to revisit a merits determination of legality" when

the defendant can point to a "subsequent development in the law" that shows the prior merits determination "was wrong in the first instance." *Murdock*, 309 Kan. at 592. In other words, "true *changes* in the law cannot transform a once legal sentence into an illegal sentence, but developments in the law may shine new light on the original question of whether the sentence was illegal when pronounced." 309 Kan. at 592. In the latter case, we have declined to apply the doctrine of res judicata to a successive illegal-sentence motion.

But Moncla "bears a threshold burden to prove that a subsequent development in the law undermines the earlier merits determination." 309 Kan. at 592. "A successive motion that merely seeks a 'second bite' at the illegal sentence apple is susceptible to dismissal according to our longstanding, common-law preclusionary rules." 309 Kan. at 592-93. Here, Moncla points to *State v. Hall*, 298 Kan. 978, 986, 319 P.3d 506 (2014), where our court outlined the appropriate procedure for ordering restitution, as a subsequent development in the law undermining our earlier merits determination of legality. But in Moncla's prior appeal, we held that jurisdiction was proper because the district court had satisfied "'the spirit, if not the letter'" of *Hall*'s procedures. *Moncla*, 301 Kan. at 554 (quoting *Frierson*, 298 Kan. at 1021). So Moncla has not met his burden to show that a development in the law has undermined our prior decision.

Because the doctrine of res judicata bars Moncla's successive claim, we affirm the district court's summary denial of his illegal-sentence motion.

Judgment of the district court is affirmed.

No. 123,063

KANSAS FIRE AND SAFETY EQUIPMENT, a Kansas Corporation; HAL G. RICHARDSON d/b/a BUENO FOOD BRAND and TOPEKA VINYL TOP; and HAL G. RICHARDSON and DOUG VESS, General Partners in MINUTEMAN SOLAR FILM, a Kansas Partnership, *Appellants/Cross-appellees*, v. CITY OF TOPEKA, KANSAS, *Appellee/Cross-appellant.*

SYLLABUS BY THE COURT

1. STATUTES—*Determination Whether Statute Implies Private Right of Action—Two Part Test.* Kansas courts generally follow a two-part test to determine whether a statute implies a private right of action. First, the party must show that the statute was designed to protect a specific group of people rather than to protect the general public. Second, the court must review legislative history to determine whether a private right of action was intended.

2. EMINENT DOMAIN—*No Implied Private Right of Action under K.S.A. 26-518*. K.S.A. 26-518 does not create an implied private right of action allowing displaced persons to sue a condemning authority for relocation benefits and assistance in a civil cause of action filed directly in district court.

3. SAME—*Eminent Domain Procedure Act Limits Judicial Review in Appeals to Just Compensation under Statute*. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits the scope of judicial review in eminent-domain appeals to the issue of just compensation as defined by K.S.A. 26-513. Relocation benefits are not a component of just compensation under K.S.A. 26-513.

4. ADMINISTRATIVE LAW—*Act Provides Remedy to Appeal Relocation Benefits—Procedure.* K.S.A. 58-3509(a) of the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act, K.S.A. 58-3501 et seq., provides a comprehensive remedy for vindicating the statutory right to relocation benefits and assistance. K.S.A. 58-3509(a) allows a displaced person to appeal to the state, agency, or political subdivision within 60 days of the initial determination of relocation benefits. If such an appeal is made, an independent hearing examiner shall be appointed by the condemning authority within 10 days and a determination of the appeal made within 60 days. After administrative review is complete, any party wishing to appeal the ruling of the hearing examiner may do so by filing a written notice of appeal with the clerk of the district court within 30 days of the hearing examiner's decision. Any such appeal to the district court shall be a trial de novo only on the issue of relocation benefits.

5. SAME—*Statute Provides Party Must Exhaust Administrative Remedies before Appealing Relocation Benefits and Assistance to District Court.* A party must exhaust their administrative remedies under K.S.A. 58-3509(a) before appealing a hearing examiner's ruling on the issue of relocation benefits and assistance to the district court. The failure to exhaust such administrative remedies deprives the district court of subject matter jurisdiction.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 341, 514 P.3d 387 (2022). Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Oral argument held March 31, 2023. Opinion filed June 30, 2023. Judgment of the Court of Appeals reversing and remanding to the district court is affirmed. Judgment of the district court is reversed, and the case is remanded with directions.

John R. Hamilton, of Hamilton, Laughlin, Barker, Johnson & Jones, of Topeka, argued the cause, and *Jason B. Prier*, of The Prier Law Firm, L.L.C., of Lawrence, was with him on the briefs for appellants/cross-appellees.

Shelly Starr, chief of litigation, City of Topeka, argued the cause and was on the briefs for appellee/cross-appellant.

The opinion of the court was delivered by

WALL, J.: Governmental authorities have inherent power to take private property for public use. But the exercise of this power comes at a cost to those whose property is taken. Thus, the Fifth Amendment to the United States Constitution and Article 12, section 4, of the Kansas Constitution prohibit such takings without just compensation. These constitutional principles are reflected in the Kansas Eminent Domain Procedure Act (EDPA), K.S.A. 26-501 et seq., which creates a process for determining just compensation.

But the financial costs of eminent domain are not limited to the loss of private property. Persons may be displaced when the government exercises this power. So Kansas law also requires a condemning authority to provide certain relocation benefits and assistance to those displaced by the government's exercise of eminent domain. Specifically, the EDPA provides that whenever federal funding is not involved and real property is acquired by a condemning authority through negotiation in advance of a condemnation action or through a condemnation action, the authority must provide relocation payments and assistance to displaced persons. K.S.A. 26-518(a). The Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (KRA), K.S.A. 58-

3501 et seq., recognizes the same substantive right to relocation benefits and assistance. See K.S.A. 58-3508. In fact, the language in the two statutory provisions is nearly identical.

But the EDPA and KRA differ in remedy. The EDPA does not provide for judicial review of relocation-benefit determinations. Instead, in eminent-domain appeals, the EDPA limits the district court's scope of review to the issue of just compensation only. But the KRA provides an administrative remedy designed to vindicate the statutory right to relocation benefits and assistance under the EDPA and KRA. Under K.S.A. 58-3509, a displaced person may appeal the condemning authority's relocation-benefits determination to an independent hearing examiner. Once the administrative remedy has been exhausted, any party dissatisfied with the examiner's ruling may seek judicial review in the district court.

Kansas Fire and Safety Equipment, Hal G. Richardson d/b/a Bueno Foods Brand and Topeka Vinyl Top, and Minuteman Solar Film (the tenants), were forced to relocate when the City of Topeka (the City) bought the real property the tenants leased for their business operations. The tenants alleged that the property was acquired before a condemnation action. And they sued the City to recover relocation expenses in an action filed directly with the district court under the EDPA.

The City moved for summary judgment, arguing there is no statutory right to judicial review of relocation-benefit determinations under the EDPA. And without a statutory basis for such review, the City claimed the district court lacked subject matter jurisdiction over the action. The district court agreed and granted summary judgment to the City. On appeal, a panel of the Court of Appeals agreed that the district court lacked subject matter jurisdiction. But the panel held that the proper disposition of the case was dismissal without prejudice, rather than entry of judgment for the City. So, the panel reversed and remanded for the district court to enter such an order. *Kansas Fire and Safety Equipment v. City of Topeka*, 62 Kan. App. 2d 341, 353, 514 P.3d 387 (2022).

We granted the tenants' petition for review to determine whether the district court had subject matter jurisdiction. Ulti-

mately, we hold that the district court lacked subject matter jurisdiction over the tenants' petition. The EDPA neither provides a private right of action to recover relocation benefits nor authorizes judicial review of relocation-benefit determinations in eminent-domain appeals. In contrast, the KRA does provide an administrative remedy to vindicate the statutory right to relocation benefits. And once the administrative appeal is completed, the KRA also authorizes district court review of the hearing examiner's ruling. But the tenants' failure to exhaust this administrative remedy deprived the district court of subject matter jurisdiction under the KRA. Finally, while K.S.A. 60-2101(d) authorizes appeals to the district court from certain final judgments and orders of a political subdivision, this statute does not apply because the KRA provides a more specific procedure for judicial review. We thus affirm the judgment of the Court of Appeals.

FACTS AND PROCEDURAL BACKGROUND

This is the second time this case is before us. In 2011, the City passed an ordinance authorizing a public works project to replace a structurally deficient drainage system on a tributary to Butcher Creek. The purpose of the project was to alleviate potential flooding within the city limits. As part of the project, the City entered negotiations to buy property the tenants leased to operate their businesses. During negotiations, the City informed the property owner that it wanted the land vacant before obtaining title. The owner and the City entered a purchase agreement in September 2013. That agreement required the owner to notify all tenants to vacate and ensure the property was vacant by early January 2014.

On October 18, 2013, an attorney representing the tenants sent a letter to the City requesting relocation costs under K.S.A. 26-518 (if no federal funds were involved in the public works project), or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (if federal funds were involved).

The Deputy City Attorney denied the request in an October 31, 2013 letter. The letter stated that no federal funds were involved in the project, thus the City need not pay relocation costs under K.S.A. 58-3502 (the provision in the KRA providing for

relocation benefits when federal funds are part of the displacing project). The letter also stated that the City was purchasing the property from the owner, rather than acquiring the property through condemnation, thus the City need not pay relocation costs under K.S.A. 58-3508 or K.S.A. 26-518.

The tenants later sued for relocation costs. They alleged that they were entitled to such costs because they were displaced persons as defined by K.S.A. 26-518 of the EDPA and the URA. According to the United States Department of Housing and Urban Development, the URA "is a federal law that establishes minimum standards for federally funded programs and projects that require the acquisition of real property (real estate) or displace persons from their homes, businesses, or farms." https://www.hudexchange.info/programs/relocation/overview/#overview-of-the-ura. While K.S.A. 26-518 incorporates some provisions of the URA by reference, the URA itself applies only when federal funds are involved in the displacing project. See *City of Columbia v. Baurichter*, 713 S.W.2d 263, 265 (Mo. 1986) (condemner must satisfy URA requirements when federal funds involved); see also 42 U.S.C. §§ 4601-4655 (2018). In their petition, the tenants alleged that the City had represented that no federal funds were involved, so their cause of action was based solely on K.S.A. 26-518 of the EDPA.

The City responded by arguing K.S.A. 26-518 did not apply because the City never intended to condemn the property. The City also argued that the tenants did not meet the statutory definition of "displaced persons" under K.S.A. 26-518. Both parties moved for summary judgment.

The district court entered summary judgment for the City, ruling that the tenants were not displaced persons under the EDPA. It also found the uncontroverted facts showed that the City did not acquire the property "in advance of a condemnation action."

See K.S.A. 26-518 (condemning authority must provide relocation payments and assistance when acquiring real property "through negotiation in advance of a condemnation action or through a condemnation action"). The tenants appealed.

The Court of Appeals held that the tenants were displaced persons under the EDPA and that a question of fact existed as to

whether the City had acquired the property through negotiation before a condemnation action. The panel thus reversed and remanded for the district court to resolve disputed issues of material fact. *Nauheim v. City of Topeka*, 52 Kan. App. 2d 969, 975-77, 979-80, 391 P.3d 508 (2016). The tenants petitioned our court for review. They argued that the panel erred by holding that a displaced person must prove the condemning authority either threatened condemnation or took affirmative acts to condemn the property in order to recover relocation benefits under K.S.A. 26-518.

On review, we held that the Court of Appeals erred by requiring a specific evidentiary showing on this factor. *Nauheim v. City of Topeka*, 309 Kan. 145, 153, 432 P.3d 647 (2019). Instead, we concluded that a displaced person may prove the property was acquired through "'negotiation in advance of a condemnation action'" by showing "(1) a negotiation resulted in the property's acquisition before any eminent domain proceedings commenced; and (2) a condemnation would have followed had that negotiation failed." 309 Kan. at 151-52. We then remanded the case to the district court for further proceedings "to explore whether the City's negotiations were in advance of a condemnation action under K.S.A. 2017 Supp. 26-518." 309 Kan. at 154.

On remand, the tenants moved to amend their petitions to add parties in interest, but the amended petitions continued to list the URA and K.S.A. 26-518 as the basis of the tenants' causes of action.

The City again moved for summary judgment, arguing there was no evidence that the City would have condemned the property if negotiations had failed. And for the first time, the City also argued that the district court lacked subject matter jurisdiction over the tenants' cause of action because there is no private right of action for relocation benefits under the EDPA. The City asserted that the tenants should have brought their claim under the KRA but failed to do so.

In response, the tenants argued that there was a factual dispute as to whether the City would have condemned the property if negotiations had failed. As for the jurisdictional challenge, the tenants claimed that the appellate courts had implicitly found subject matter jurisdiction by ruling on the merits in the previous appeal.

The tenants also claimed that K.S.A. 26-518 creates a private right of action and that our court has recognized that a condemning authority must provide relocation benefits under the two statutorily recognized circumstances. See *Nauheim*, 309 Kan. at 151 ("K.S.A. 2017 Supp. 26-518 identifies two distinct situations in which a condemning authority must provide relocation benefits to a displaced person: [1] when the acquisition occurs through negotiation before a condemnation action, or [2] when the acquisition occurs through a condemnation action.").

The district court ruled that it lacked subject matter jurisdiction and granted summary judgment to the City. The court reasoned that there was no private right of action for relocation benefits under K.S.A. 26-518 and no other statute in the EDPA granted the district court jurisdiction. The district court also stated that "[h]ad [it] not found subject matter jurisdiction lacking, summary judgment would not be appropriate" because there was a disputed question of fact as to whether the City would have condemned the property if negotiations had failed. The tenants appealed the district court's ruling on subject matter jurisdiction. The City cross-appealed the district court's advisory ruling that plaintiffs had demonstrated a genuine issue of material fact.

A panel of the Court of Appeals affirmed the district court's ruling on subject matter jurisdiction. *Kansas Fire and Safety Equipment*, 62 Kan. App. 2d at 350-51. The panel held that judicial review of eminent domain proceedings under the EDPA is limited to the issue of just compensation for a taking, which does not include relocation benefits. 62 Kan. App. 2d at 346-48. The panel also held that the Legislature did not intend to create an implied private right of action under K.S.A. 26-518, which would have invoked the original jurisdiction of the district court under K.S.A. 20-301. 62 Kan. App. 2d at 348-50. The panel declined to reach the merits of the City's cross-appeal having concluded that jurisdiction was lacking. 62 Kan. App. 2d at 353. Finally, the panel held that the district court should have dismissed the matter without prejudice rather than granting summary judgment based on a lack of subject matter jurisdiction. The panel thus reversed and remanded for the district court to enter such an order. 62 Kan. App. 2d at 352-53.

The tenants petitioned for review of the panel's jurisdictional holding. The City conditionally cross-petitioned for review of the district court's advisory ruling that the tenants had shown a genuine issue of material fact as

to whether the City would have condemned the property if purchase negotiations had failed.

We granted both petitions. And we heard oral argument from the parties on March 31, 2023. The City did not petition for review of the panel's holding that the proper disposition of the case was dismissal without prejudice. Thus, that issue remains settled in favor of the tenants. See Supreme Court Rule 8.03(b)(6)(C)(i) (2023 Kan. S. Ct. R. at 56) (Supreme Court will not consider issues not presented or fairly included in petition for review).

ANALYSIS

The question before us is straightforward: did the district court have subject matter jurisdiction over tenants' claims for relocation benefits? We consider four potential theories of subject matter jurisdiction in this matter. First, the EDPA creates a private right of action permitting displaced persons to sue for relocation benefits in a civil action filed directly in the district court. Second, the Legislature created a right to judicial review of relocation-benefit determinations in eminent-domain appeals under the EDPA. Third, the Legislature created a right to judicial review of relocation-benefit determinations under the KRA. And, finally, K.S.A. 60-2101(d) grants the district court jurisdiction to review relocation-benefit determinations made by political subdivisions.

We address each theory in turn. Ultimately, we conclude that none of these theories vest the district court with subject matter jurisdiction.

I. *K.S.A. 26-518 Does Not Create a Private Right of Action, Thus the District Court Did Not Have Original Civil Jurisdiction*

We begin our analysis by considering the tenants' primary argument in support of subject matter jurisdiction—the private-right-of-action theory. The tenants contend that K.S.A. 26-518 creates a private right of action allowing displaced persons to sue the condemning authority for relocation costs in a civil action filed directly with the district court. If tenants are correct, then the district court would have original jurisdiction over that civil cause of action under K.S.A. 20-301 (District courts have "general original jurisdiction over all matters, both civil and criminal, unless otherwise provided by law".).

A. *Standard of Review and Relevant Legal Framework*

The tenants argue that K.S.A. 26-518 creates a private right of action and that the district court has original jurisdiction over that civil action. But K.S.A. 26-518 does not expressly create a private right of action. Thus, we must decide whether the Legislature implied such a right. Whether a statute implies a private right of action is a question of law subject to unlimited review. *Pullen v. West*, 278 Kan. 183, 194, 92 P.3d 584 (2004).

We apply a two-part test to answer this question. "First, the party must show that the statute was designed to protect a specific group of people rather than to protect the general public. Second, the court must review legislative history in order to determine whether a private right of action was intended." *Pullen*, 278 Kan. at 194; see also *Nichols v. Kansas Political Action Committee*, 270 Kan. 37, 48, 11 P.3d 1134 (2000).

B. *K.S.A. 26-518 Does Not Satisfy the Two-Part Test for an Implied Private Right of Action*

Under the first prong of the test, the tenants must show that K.S.A. 26-518 was designed to protect a specific group of people rather than the general public. *Pullen*, 278 Kan. at 194. In its order granting summary judgment, the district court found that the EDPA protects the general public, not a specific group. The panel did not address this ruling specifically. The tenants argue the district court erred because the general principles of eminent domain and the language of the EDPA protects a specific group of people—those who have had private property taken for public use. And K.S.A. 26-518's plain language protects an even narrower group of people—those displaced by a condemning authority's acquisition of property through negotiations in advance of a condemnation action or through a condemnation action when federal funds are not involved.

The tenants' argument has appeal. But the second part of the legal test is more relevant and insightful to our analysis. See *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 371, 819 P.2d 587 (1991) (The test for an implied private right of action turns on "whether the legislature intended to give such a right."). Thus, we presume without deciding

that K.S.A. 26-518 is designed to protect a specific group of people and proceed to the second part of the inquiry.

The second part of the test directs us to the relevant statutes and pertinent legislative history. *Pullen*, 278 Kan. at 194. The plain language and structure of K.S.A. 26-518, along with the legislative history, confirm that the Legislature did not intend to create a private right of action under K.S.A. 26-518.

1. *The Plain Language and Structure of K.S.A. 26-518, Other EDPA Provisions, and the KRA Undermine Tenants' Argument*

We begin our analysis of the second part of the test by reviewing the plain language and structure of the relevant statute. See *Pullen*, 278 Kan. at 194 (quoting *Greenlee v. Board of Clay County Comm'rs*, 241 Kan. 802, 804, 740 P.2d 606 [1987]) ("'The legislative intent to grant or withhold a private cause of action for a violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute.'"). But we do not examine K.S.A. 26-518 in isolation. Instead, we consider that statute alongside its companion provisions in the EDPA, along with other KRA provisions addressing the same subject matter, to achieve a sensible interpretation. See *State v. Mora*, 315 Kan. 537, 543, 509 P.3d 1201 (2022) (courts must consider statutes relating to same subject together to achieve sensible results if possible).

Reading these provisions together, it is apparent the Legislature intended the KRA's administrative and judicial review process to serve as the exclusive remedy when displaced persons challenge relocation-benefit determinations. And it did not intend to create a private right of action under K.S.A. 26-518 of the EDPA.

The EDPA creates an administrative process for determining just compensation when a condemning authority takes private property for public use. *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 558-59, 215 P.3d 561 (2009); *Miller v. Bartle*, 283 Kan. 108, 113-14, 150 P.3d 1282 (2007). The condemning authority initiates the process by filing a petition with the district court in the county where the land is situated. K.S.A. 26-501(b); see also

K.S.A. 26-504; K.S.A. 26-507. If the district court finds the condemning authority has the power of eminent domain and the taking is necessary to a lawful corporate purpose, the district court then appoints three appraisers to view and determine the value of the property. K.S.A. 26-504.

If the condemning authority, or any property owner, is dissatisfied with the appraisers' award, they may appeal to the district court for a trial de novo. K.S.A. 26-508. The only issue that the district court has jurisdiction to consider in such an appeal is the "compensation required by K.S.A. 26-513." K.S.A. 26-508(a). In turn, K.S.A. 26-513 defines that compensation based on the fair market value of the property or interest at the time of the taking. As discussed in greater detail in Issue II, such compensation does not include relocation benefits.

Since 2003, the EDPA has also required condemning authorities to provide relocation payments and assistance to displaced persons when the authority acquires property through condemnation or through negotiations before condemnation, and federal funds are not involved in the displacing project. K.S.A. 26-518 provides:

> "Whenever federal funding is not involved, and real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action, and which acquisition will result in the displacement of any person, the condemning authority shall:
>
> "(a) Provide the displaced person, as defined in the federal uniform relocation assistance and real property acquisition policies act of 1970, fair and reasonable relocation payments and assistance to or for displaced persons.
>
> "(b) Fair and reasonable relocation payments and assistance to or for displaced persons as provided under sections 202, 203 and 204 of the federal uniform relocation assistance and real property acquisition policies act of 1970, and amendments thereto, shall be deemed fair and reasonable relocation payments and assistance pursuant to this section.
>
> "(c) Nothing in this section shall preclude the voluntary negotiation of fair and reasonable relocation payments and assistance between the displaced person and condemning authority. If such negotiations lead to agreement between the displaced person and the condemning authority, that agreement shall be deemed fair and reasonable."

The same statutory right to relocation benefits and assistance is found in the KRA. The purpose of the KRA is to minimize the injuries and hardships faced by persons displaced by public works

projects. See K.S.A. 58-3501 (KRA authorizes compliance with URA); 42 U.S.C. § 4621(b) (2018) (purpose of URA is to "ensure that [displaced] persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons").

Since 2004, the KRA, like the EDPA, has required condemning authorities to provide relocation payments and assistance to displaced persons when acquiring property through condemnation or through negotiations before condemnation, and federal funds are not involved. K.S.A. 58-3508 provides in relevant part:

"On and after July 1, 2004: (a) Whenever federal funding is not involved, real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action and the acquisition will result in the displacement of any person, the condemning authority shall:

"(1) Provide the displaced person, as defined in the federal uniform relocation assistance and real property acquisition policies act of 1970, and amendments thereto, fair and reasonable relocation payments and assistance to or for displaced persons. Relocation payments shall not be required until title to the real property vests in the condemning authority.

"(2) Fair and reasonable relocation payments and assistance to or for displaced persons as provided under sections 202, 203 and 204 of the federal uniform relocation assistance and real property acquisition policies act of 1970, and amendments thereto, shall be deemed fair and reasonable relocation payments and assistance pursuant to this section.

"(3) Nothing in this section shall preclude the voluntary negotiation of fair and reasonable relocation payments and assistance between the displaced person and condemning authority. If such negotiations lead to agreement between the displaced person and the condemning authority, that agreement shall be deemed fair and reasonable."

Since July 2004, the KRA has also provided a review procedure whereby displaced persons can challenge the condemning authority's relocation-benefit determination. That procedure includes an administrative review and the right to an appeal to the district court on the issue of relocation benefits:

"On and after July 1, 2004: (a) Any displaced person entitled to benefits under this article may appeal by written notice to the state, agency or political subdivision a determination of relocation payments. If such an appeal is made to the state, agency or political subdivision within 60 days of the [*sic*] receiving notice of the determination being appealed, an independent hearing examiner

shall be appointed by the state, agency or political subdivision within 10 days and a determination of the appeal made within 60 days. Any party wishing to appeal the ruling of the hearing examiner may do so by filing a written notice of appeal with the clerk of the district court within 30 days of the hearing examiner's decision. In the event any parties shall perfect an appeal to district court, copies of such notice of appeal shall be mailed to all parties affected by such appeal within three days after the date of perfection thereof. Any such appeal to district court shall be a trial de novo only on the issue of relocation benefits." K.S.A. 58-3509(a).

In short, both the EDPA and the KRA contain nearly identical provisions granting displaced persons the right to relocation benefits and assistance. But only the KRA provides a mechanism to enforce that right. Specifically, the KRA creates an administrative remedy (appeal to an independent hearing examiner), coupled with the right to judicial review of the hearing examiner's ruling in district court.

Construing K.S.A. 26-518 to create an implied private right of action would be inconsistent with the plain language of K.S.A. 26-508 and K.S.A. 26-513. As discussed more fully in Issue II, these provisions limit the scope of judicial review in eminent-domain appeals to the issue of just compensation for the taking, which does not include relocation benefits. Recognizing an implied private right of action for relocation benefits under K.S.A. 26-518 would undermine both the administrative remedy and the limited scope of judicial review the Legislature has created within the EDPA.

It would also be inconsistent with the plain language of K.S.A. 58-3509(a), which establishes a comprehensive administrative remedy for vindicating the statutory right to relocation benefits. Recognizing a private right of action under K.S.A. 26-508 would permit displaced persons to circumvent the KRA remedy altogether, rendering K.S.A. 58-3509(a) obsolete. In short, the comprehensive administrative remedy in the KRA offers compelling evidence that the Legislature did not intend to create a separate private right of action under K.S.A. 26-518. See *Nichols*, 270 Kan. at 46-53 (concluding Campaign Finance Act did not provide for implied private right of action because it provided for comprehensive administrative remedy).

2. *The History Confirms that the Legislature Did Not Intend to Create a Private Right of Action Under K.S.A. 26-518*

A review of the relevant history bolsters our conclusion that the Legislature did not intend to create a private right of action under K.S.A. 26-518. As originally enacted, the EDPA did not require condemning authorities to pay relocation benefits to displaced persons. L. 1963, ch. 234. This changed in 2003 with H.B. 2032.

As introduced, H.B. 2032 would have amended the KRA to require condemning authorities to provide relocation payments and assistance to displaced persons whether or not federal funds were involved in the project causing displacement. H.B. 2032, as introduced (2003); House Journal, p. 55 (January 17, 2003). The House then amended the bill to create what is now K.S.A. 26-518 and to delete the language limiting the district court's jurisdiction in eminent-domain appeals under K.S.A. 26-508. H.B. 2032, as amended by House Committee (2003); House Journal, p. 166 (February 18, 2003); House Journal, p. 179 (February 20, 2003); House Journal, p. 184-85 (February 21, 2003). In other words, the House version of the bill would have amended the EDPA (rather than the KRA) in two respects. First, it would have required condemning authorities to pay relocation benefits to displaced persons. Second, it would have effectively expanded the scope of judicial review in eminent-domain appeals to include all issues raised in an EDPA proceeding, including relocation benefits.

But H.B. 2032 was later amended by the Senate to reintroduce the language found in K.S.A. 26-508 that limits the scope of review in eminent-domain appeals to only the issue of just compensation. H.B. 2032, as amended by House Committee, as amended by Senate Committee (2003); Sen. Journal, p. 300-01 (March 24, 2003). Ultimately, the Senate version of H.B. 2032 was enacted. Thus, H.B. 2032 amended the EDPA to require condemning authorities to provide relocation payments and assistance in certain circumstances. But it left unchanged the limited the scope of judicial review in eminent-domain appeals. L. 2003, ch. 106, §§ 2 and 4.

But the Legislature soon recognized that it had created a statutory right to relocation benefits without a remedy to enforce that

right. So, during the 2004 session, the Legislature considered two potential solutions: (1) making relocation-benefit determinations appealable under the EDPA; or (2) providing an administrative review procedure for relocation-benefit determinations under the KRA.

The first potential solution was included in H.B. 2800. This bill would have amended K.S.A. 26-508 to provide district courts with jurisdiction to hear appeals of relocation-benefit determinations in eminent domain proceedings. See H.B. 2800 (2004) (deletions indicated by strikethrough text; additions indicated by italics text) ("The only ~~issue~~ *issues* to be determined therein shall be the compensation required by K.S.A. 26-513, and amendments thereto, *and the adequacy of fair and reasonable relocation payments and assistance as provided by law*."). But H.B. 2800 eventually died in committee. House Actions Report and Subject Index, p. 106 (May 27, 2004).

The second potential solution was included in proposed amendments to S.B. 461. That version of S.B. 461 proposed to amend the KRA to create an administrative review procedure for relocation-benefit determinations, followed by judicial review of that agency action. The amended version of S.B. 461 would later become K.S.A. 58-3508 (providing for relocation benefits when no federal funding involved) and K.S.A. 58-3509 (review process for relocation-benefit determinations). Minutes of the House Judiciary Committee, Attachment 5 (March 8, 2004); House Journal, p. 1566 (March 25, 2004). S.B. 461 was enacted with these amendments effective July 1, 2004. L. 2004, ch. 110, §§ 8 and 9.

This history confirms that the Legislature never intended to create a private right of action for relocation benefits under the EDPA. Rather, the Legislature considered proposals to make relocation-benefit determinations appealable to the district court under the EDPA. But those proposals were never enacted. Instead, the Legislature amended the KRA to provide an administrative remedy for relocation-benefit determinations, along with the right to judicial review of that agency action. The Legislature's decision to enact a comprehensive administrative remedy under the KRA confirms that it did not intend to create a private right of action for

relocation benefits under K.S.A. 26-518 of the EDPA. See *Alexander v. Sandoval*, 532 U.S. 275, 290, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Osher v. City of St. Louis, Missouri*, 903 F.3d 698, 703 (8th Cir. 2018) (existence of administrative review procedures in URA "'counsel[s] against . . . finding a congressional intent to create individually enforceable private rights'") (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290, 122 S. Ct. 2268, 153 L. Ed. 2d 309 [2002]).

The tenants point out that this same history reflects the Legislature's intent to impose a duty on condemning authorities to provide relocation benefits to displaced persons. We agree that K.S.A. 26-518 imposes such a duty, as does K.S.A. 58-3508. But it does not necessarily follow that the Legislature intended the remedy for a violation of that duty to be a private right of action. See *Cannon v. University of Chicago*, 441 U.S. 677, 688, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."). Rather, the remedy for a failure to provide relocation benefits lies under the KRA and not the EDPA. See *Nichols*, 270 Kan. at 52 (statutorily created wrong is to be remedied in the manner prescribed by the Legislature). Thus, contrary to the tenants' assertion, our holding that K.S.A. 26-518 provides no private right of action does not render that statute meaningless. See *Montgomery v. Saleh*, 311 Kan. 649, 655, 466 P.3d 902 (2020) (courts presume Legislature does not intend to enact meaningless legislation). The statutory right to relocation benefits under both the EDPA and KRA can be vindicated through the administrative remedy the Legislature created in K.S.A. 58-3509(a).

The tenants also contend that K.S.A. 26-518 was enacted to implement the URA. And failing to recognize a private right of action under the statute ignores the URA's purpose, which is to ensure displaced persons are compensated. See 42 U.S.C. § 4621(b) (2020). But again, we are not suggesting that K.S.A. 26-518 imposes no duty on condemning authorities to provide relocation payments and assistance. Rather, we hold that the remedy

for a failure to fulfill that duty is the review process under K.S.A. 58-3509(a), not a private right of action. Thus, our holding is consistent with the URA and its purpose.

Finally, the tenants note that both our court and the Court of Appeals issued decisions on the merits in the previous appeal. They reason that such decisions could not have been entered without an implicit finding that jurisdiction was proper. Thus, in granting summary judgment to the City on remand, the tenants believe the district court made an unsupported finding of fact that the appellate courts overlooked the issue of jurisdiction in the prior appeal, and the panel erroneously adopted that unsupported finding.

But the tenants' argument is a red herring. For one, whether jurisdiction exists is a question of law. *Barnes v. Board of Cowley County Comm'rs*, 293 Kan. 11, 16, 259 P.3d 725 (2011). And no fact-findings were required to determine whether the district court had subject matter jurisdiction in this case. Further, "'[o]ne of the first and continuing duties of a court is to determine whether it has jurisdiction of the subject matter of the action.'" *Harshberger v. Board of County Commissioners*, 201 Kan. 592, 594, 442 P.2d 5 (1968). Thus, once the City raised the issue of subject matter jurisdiction on remand, it was incumbent upon the district court to address it. Neither the parties' failure to raise the issue earlier nor the absence of an explicit ruling on the issue in the previous appeal can create subject matter jurisdiction. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009) ("[P]arties cannot convey subject matter jurisdiction on a court by failing to object to the court's lack of jurisdiction. If the district court lacks jurisdiction to make a ruling, an appellate court does not acquire jurisdiction over the subject matter on appeal. [Citations omitted.]").

In sum, there is no private right of action under K.S.A. 26-518. Even presuming that the statute protects a specific group of people, the relevant statutory provisions and legislative history confirm that the Legislature did not intend to create a private right of action to recover relocation costs under K.S.A. 26-518. Instead, the Legislature intended K.S.A. 58-3509(a) to provide a single, comprehensive administrative remedy to vindicate the statutory

right to relocation benefits and assistance. Because there is no private right of action under K.S.A. 26-518, the district court did not have original civil jurisdiction over the tenants' cause of action. See K.S.A. 20-301.

II. *The EDPA Provides No Right to Judicial Review of Relocation-Benefit Determinations*

Having concluded that the EDPA provides no private right of action to recover relocation benefits under K.S.A. 26-518, we next consider whether the EDPA provides a right to judicial review of relocation-benefit determinations in eminent-domain appeals. If so, the district court would arguably have appellate jurisdiction to review the City's denial of relocation benefits. See K.S.A. 20-301 (district courts have "such appellate jurisdiction as prescribed by law"). But as suggested in the analysis of Issue I, the EDPA limits judicial review to the question of just compensation only, which does not include relocation benefits.

A. *Standard of Review and Relevant Legal Framework*

We continue to employ an unlimited standard of review when determining the existence of subject matter jurisdiction. *In Equalization Appeal of Target Corp.*, 311 Kan. 772, 775, 466 P.3d 1189 (2020).

Also, eminent domain proceedings under the EDPA are administrative in nature. *Bartle*, 283 Kan. at 113-14. Courts have appellate jurisdiction to review administrative actions only if the Legislature has enacted statutes providing for such review:

> "Courts have no inherent appellate jurisdiction over official acts of administrative officials or boards, unless there is a statute providing for judicial review. Absent such a statutory provision, appellate review of administrative decisions is limited to claims of relief from illegal, fraudulent, or oppressive official conduct through the equitable remedies of quo warranto, mandamus, or injunction. The right to appeal an administrative decision is not vested or constitutional; it is statutory and may be limited or completely abolished by the legislature. [Citation omitted.]" *Barnes*, 293 Kan. at 17.

In short, the second theory of jurisdiction turns on whether the EDPA authorizes the district court to review relocation-benefit determinations in eminent-domain appeals. We employ unlimited review when interpreting the relevant statutory provisions of the

EDPA. *State v. Smith*, 311 Kan. 109, 111, 456 P.3d 1004 (2020) (applying a de novo review to a statutory interpretation question).

B. *The EDPA's Plain Language Limits the Scope of Judicial Review to the Exclusion of Relocation-Benefit Determinations*

In determining whether the EDPA provides for judicial review of relocation-benefit determinations under K.S.A. 26-518, we first look to the plain language of the relevant statutory provisions. See *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022) (when interpreting statutes, courts begin with statute's plain language, and may consider statutes *in pari materia* even when language is unambiguous).

K.S.A. 26-508 specifically limits eminent-domain appeals to the issue of just compensation. The statute provides that the plaintiff or any defendant may appeal the appraisers' award to the district court, but "[t]he only issue to be determined [in an eminent-domain appeal] shall be the compensation required by K.S.A. 26-513, and amendments thereto." K.S.A. 26-508(a).

Relocation benefits are not part of the "compensation required by K.S.A. 26-513, and amendments thereto." K.S.A. 26-508(a). Instead, K.S.A. 26-513(b) provides that "the measure of compensation is the fair market value of the property or interest at the time of the taking." And, if only a part of the property or interest is taken, just compensation is based on the "difference between the fair market value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking." K.S.A. 26-513(c). The statute defines fair market value as "the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion." K.S.A. 26-513(e). Relocation benefits fall outside the statutory meaning of "fair market value" under K.S.A. 26-513(e). Nor are relocation benefits listed as a factor in determining compensation and damages under K.S.A. 26-513(d).

Based on this plain language, we have held that district courts lack subject matter jurisdiction to review any issue other than just

compensation (defined as the fair market value of a taking) in an eminent-domain appeal. See, e.g., *Miller v. Glacier Development Co.*, 293 Kan. 665, 672, 270 P.3d 1065 (2011) (district court lacked jurisdiction in eminent-domain appeal to determine whether LLC's member or manager could be held personally liable to reimburse condemning authority for excess payment to LLC); *Bartle*, 283 Kan. at 115-117 (compensation beyond fair market value not justiciable in eminent-domain appeal); *Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte County/Kansas City*, 272 Kan. 1239, 1245, 39 P.3d 723 (2002) (no right to litigate outside issues—such as right to exercise the power of eminent domain and the necessity and the extent of the taking—in eminent-domain proceeding).

The plain language of K.S.A. 26-508(a) limits the district court's jurisdiction in eminent-domain appeals to "the compensation required by K.S.A. 26-513." And K.S.A. 26-513 makes clear that relocation benefits are not a component of, nor a factor to be considered in calculating, the compensation required for the taking. Thus, relocation-benefit determinations are not subject to judicial review under K.S.A. 26-508(a). And the EDPA did not provide the district court with jurisdiction over the tenants' claims.

C. *Legislative History Also Supports This Plain-Language Interpretation*

Because this issue can be resolved on the EDPA's plain language alone, we need not look to legislative history to determine intent. See *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020) (if Legislature's intent unclear from statutory language, court may look to legislative history, background considerations, and canons of construction to determine legislative intent). That said, we note that the legislative history bolsters our plain-language interpretation.

At one point during the 2003 legislative session, H.B. 2032 (the bill that enacted K.S.A. 26-518) was amended to remove the language limiting the scope of judicial review in eminent-domain appeals under K.S.A. 26-508. But that limiting language was later reintroduced and incorporated into H.B. 2032 before it was enacted.

The next year, H.B. 2800 was introduced, and that bill would have amended K.S.A. 26-508 to expand the scope of judicial review in eminent-domain appeals to include relocation-benefit determinations specifically. But H.B. 2800 died in committee, leaving intact K.S.A. 26-508's limits on judicial review.

In sum, the plain language of K.S.A. 26-508 and K.S.A. 26-513 limits the district court's review in eminent-domain appeals to the question of just compensation only, which does not include relocation benefits. The legislative history supports our plain-language interpretation. Thus, the EDPA provides no basis for the district court to exercise jurisdiction over the tenants' claims.

III. *The KRA Creates a Right to Judicial Review of a Hearing Examiner's Ruling on Relocation Benefits, but Tenants Failed to Pursue and Exhaust This Remedy, Foreclosing District Court Review*

We next consider whether the KRA vested the district court with subject matter jurisdiction over the tenants' relocation benefits claims. Again, we exercise unlimited review when interpreting statutes and deciding whether subject matter jurisdiction exists. *Barnes*, 293 Kan. at 16.

As noted, the EDPA does not provide for judicial review of relocation-benefit determinations. But the KRA provides an administrative remedy, with subsequent judicial review of that agency action, to enforce the statutory right to relocation benefits found in both the EDPA and KRA. But the tenants' failure to pursue that remedy at all, let alone in a timely manner, deprived the district court of jurisdiction under the KRA.

K.S.A. 58-3509(a) allows a displaced person to appeal to the state, agency, or political subdivision within 60 days of the initial determination of relocation benefits. If such an appeal is made, "an independent hearing examiner shall be appointed by [the condemning authority] within 10 days and a determination of the appeal made within 60 days." K.S.A. 58-3509(a). After administrative review is complete, "[a]ny party wishing to appeal the ruling of the hearing examiner may do so by filing a written notice of appeal with the clerk of the district court within 30 days of the hearing examiner's decision." K.S.A. 58-3509(a). And "[a]ny such

appeal to district court shall be a trial de novo only on the issue of relocation benefits." K.S.A. 58-3509(a).

Here, the tenants did not pursue this remedy. The City denied the tenants' request for relocation benefits on October 31, 2013. Under the KRA, the tenants had 60 days, roughly through the end of 2013, to pursue an administrative appeal of the City's relocation-benefits determination. The tenants never initiated an administrative appeal. See *State ex rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 453, 172 P.3d 1154 (2007) (party ordinarily must exhaust any administrative remedy provided by statute before that party may bring the matter before a court).

The failure to pursue the KRA's administrative remedy deprives the district court of subject matter jurisdiction over the petition. K.S.A. 58-3509(a) allows any party to seek review in the district court of the hearing examiner's ruling on the issue of relocation benefits. But without a ruling by the hearing examiner, there is no basis for district court review. In other words, exhaustion of the administrative appeal process in K.S.A. 58-3509(a) is a jurisdictional prerequisite to judicial review in the district court. Cf. *Kingsley*, 288 Kan. at 410 (exhaustion requirement of K.S.A. 77-612 is a jurisdictional prerequisite to the entire petition for judicial review).

This legal conclusion is consistent with our precedent interpreting K.S.A. 58-3509. We have held that in conducting judicial review of relocation benefits under K.S.A. 58-3509(a), the district court must make "independent findings of fact and conclusions of law regarding the question of relocation benefits *based upon the record of proceedings before the administrative hearing examiner*." (Emphasis added.) *Frick v. City of Salina*, 289 Kan. 1, 24, 208 P.3d 739 (2009). When a displaced person fails to exercise the administrative remedy under the KRA, there is no record of the administrative proceeding upon which the district court can make those findings and conclusions. Thus, where, as here, petitioners do "not exhaust all available and adequate administrative remedies before filing a petition for judicial review of an agency action, then the district court lacks subject matter jurisdiction to consider the contents of the petition." *Kingsley*, 288 Kan. at 408-09.

The tenants attempted to circumvent the KRA remedy altogether by filing a civil action directly in district court to recover relocation

benefits. The tenants assert that Kansas courts have held that a private right of action and subject matter jurisdiction exists under the KRA. But no Kansas court has expressly held that K.S.A. 58-3508 creates a private right of action to recover relocation benefits.

The tenants cite an unpublished Court of Appeals opinion, *Stalnaker v. Cowley County Community College*, No. 112,659, 2016 WL 1391631 (Kan. App. 2016) (unpublished opinion), to support their proposition. But *Stalnaker* involved a different issue—whether a displaced person had produced records demonstrating they were entitled to relocation benefits under K.S.A. 58-3508. The panel in *Stalnaker* never addressed whether K.S.A. 58-3508 creates a private right of action for relocation benefits. And while the decision states that the plaintiff "filed this lawsuit for relocation payments," the decision also refers to both "the hearing on this matter" and a trial. 2016 WL 1391631, at *1. Thus, it is unclear whether the plaintiff sued directly in district court or followed the review process in K.S.A. 58-3509(a).

Perhaps more important, construing K.S.A. 58-3508 to create a private right of action would undermine the comprehensive administrative remedy the Legislature created in K.S.A. 58-3509. Recognizing such a private right of action would allow displaced persons to circumvent that administrative remedy altogether. And, as we established in Issues I and II, the Legislature intended K.S.A. 58-3509(a) to serve as the single, comprehensive remedy for redressing violations of the statutory right to relocation benefits under both the EDPA and KRA.

In sum, the KRA grants district courts subject matter jurisdiction to review a hearing examiner's ruling on the issue of relocation benefits. But a petitioner must first exhaust the administrative appeal and then timely seek review of the examiner's decision to invoke that jurisdiction. The tenants failed to exhaust their KRA administrative remedies, depriving the district court of subject matter jurisdiction over their claims.

IV. *A Relocation-Benefit Determination Is Not Appealable Under K.S.A. 60-2101(d)*

Finally, we examine whether the district court had jurisdiction over the tenants' petition under K.S.A. 60-2101(d). That statute generally authorizes the district court to review final judgments and orders

of a political or taxing subdivision when it exercises judicial and quasi-judicial functions:

> "A judgment rendered or final order made by a political or taxing subdivision, or any agency thereof, exercising judicial or quasi-judicial functions may be reversed, vacated or modified by the district court on appeal. If no other means for perfecting such appeal is provided by law, it shall be sufficient for an aggrieved party to file a notice that such party is appealing from such judgment or order with such subdivision or agency within 30 days of its entry, and then causing true copies of all pertinent proceedings before such subdivision or agency to be prepared and filed with the clerk of the district court in the county in which such judgment or order was entered." K.S.A. 60-2101(d).

The City is a political subdivision. But even assuming the City was exercising a judicial or quasi-judicial function when it denied the tenants' request for relocation costs, K.S.A. 60-2101(d) does not apply. The statute's plain language confirms it is intended to be a default jurisdictional statute because it applies "[i]f no other means for perfecting such appeal is provided by law." K.S.A. 60-2101(d). But the KRA provides other means for perfecting an appeal of a relocation-benefit determination. See K.S.A. 58-3509(a). And K.S.A. 58-3509 would also control as the statute more specific to judicial review of relocation-benefit determinations. See *State ex rel. Schmidt v. Governor Kelly*, 309 Kan. 887, 898, 441 P.3d 67 (2019) ("'A specific statute controls over a general statute.'").

Having reviewed and rejected all viable theories of jurisdiction, we conclude that the district court lacked subject matter jurisdiction in this action. This conclusion likewise deprives the appellate courts of jurisdiction over the subject matter of the tenants' claims. See *In re Care & Treatment of Emerson*, 306 Kan. 30, 39, 392 P.3d 82 (2017) (if trial court lacks jurisdiction, appellate court does not acquire jurisdiction on appeal).

And because we lack jurisdiction over the matter, we do not reach the City's conditional cross-petition addressing the merits of the district court's advisory summary judgment ruling. See *In re of Estate of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151 (2020) (a court that dismisses for lack of jurisdiction should not opine on the merits).

CONCLUSION

We hold that neither the district court nor the appellate courts have subject matter jurisdiction over the tenants' claims. The EDPA does not

create an implied private right of action over which the district court has original jurisdiction. Nor does the EDPA separately provide a right to judicial review of relocation-benefit determinations in eminent-domain appeals. While the KRA provides a right to judicial review of relocation-benefit determinations, the tenants did not exhaust their administrative remedies under K.S.A. 58-3509(a), depriving the district court of subject matter jurisdiction. And while K.S.A. 60-2101(d) authorizes appeals to the district court from certain final judgments and orders of a political subdivision, this statute does not apply because the KRA provides a more specific procedure for judicial review.

We thus affirm the Court of Appeals judgment. Because the City did not challenge the panel's holding regarding the proper disposition of this case, see *Kansas Fire and Safety Equipment*, 62 Kan. App. 2d at 352-53, we reverse the district court's order granting summary judgment and remand to the district court to enter an order dismissing the case without prejudice.

On a final note, because we hold that the district court lacked subject matter jurisdiction over the tenants' petition, the decisions issued in the prior appeal of this case—*Nauheim v. City of Topeka*, 309 Kan. 145 and *Nauheim v. City of Topeka*, 52 Kan. App. 2d 969—were also entered without subject matter jurisdiction. We thus vacate those decisions, and they are no longer of any precedential value.

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

No. 123,100

STATE OF KANSAS, *Appellee*, v. RONALD LEVON BUCHANAN, *Appellant.*

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Aggravated Arson Charge—No Double Jeopardy Violation When Convicted on Multiple Counts.* A defendant charged with aggravated arson committed under K.S.A. 2022 Supp. 21-5812(b)(1)—that is, arson committed upon a property in which there is a person—does not suffer a double jeopardy violation when convicted on multiple counts arising from damage by fire to separate apartments, each with a person inside.

2. SAME—*Sufficiency of Evidence Challenge—Appellate Review.* When the sufficiency of the evidence is challenged in a criminal case, appellate courts review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility.

3. SAME—*Untimely Motion for New Trial—May Be Summarily Denied if Determined that Movant Not Entitled to Relief.* A district court judge may summarily deny an untimely motion for new trial based on dissatisfaction with counsel without appointing counsel if the judge determines from the motion, files, and records that the movant is not entitled to relief.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 26, 2022. Appeal from Johnson District Court; JAMES CHARLES DROEGE, judge. Oral argument held March 28, 2023. Opinion filed June 30, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Emily Brandt, of Kansas Appellant Defender Office, argued the cause, and *Jennifer C. Bates*, of the same office, was on the briefs for appellant, and *Ronald Buchanan,* appellant, was on a supplemental brief pro se.

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: The State charged Ronald Levon Buchanan with several crimes after an intentionally set fire damaged several

apartments. A jury convicted Buchanan of six counts of aggravated arson, three counts of attempted first-degree murder, and one count of animal cruelty. He appeals, raising three issues.

He first argues the district court judge violated his right to be free from double jeopardy by sentencing him to six counts of aggravated arson when the evidence proved the arsonist started only one fire. The State argues the single act of igniting a fire does not determine the allowable unit of prosecution for aggravated arson. Rather, the Kansas Legislature has defined the unit of prosecution for aggravated arson as each damaged building or property in which there is a person. Under the circumstances of this case, we agree with the State's argument.

Buchanan also argues the State failed to present sufficient evidence that he intended to kill and thus his convictions for attempted first-degree murder must be reversed. Contrary to his argument, the State presented evidence sufficient to convince a rational fact-finder beyond a reasonable doubt that he intended to murder his daughter, her mother, and her brother when he ignited a fire outside their apartment door.

Finally, Buchanan argues the judge erred by failing to investigate his untimely posttrial allegation that he was denied his right to conflict-free counsel. A district court judge may summarily deny an untimely motion for new trial if the judge determines from the motion, files, and records that the movant is not entitled to relief. Here, Buchanan did not establish a basis for relief, and the judge did not err in denying the motion.

We thus affirm Buchanan's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

The State told the jury that Buchanan's criminal acts were motivated by arguments between him and his daughter, Maraya, that climaxed the day Maraya graduated from high school. Several days before her graduation, Maraya told Buchanan not to come to her graduation. He came anyway. Although, according to Buchanan, Maraya "didn't lash out" and "no one got into it or anything," he perceived Maraya's conduct toward him at the graduation to be disrespectful, and he felt hurt.

After the ceremony, Maraya returned to the Overland Park apartment she shared with her brother, her mother, and their dog. Buchanan had moved out of the apartment months earlier and was living in Kansas City, Missouri.

The night of Maraya's graduation, Buchanan made a public post on Facebook in which he complained about Maraya's treatment of him. A neighbor in Maraya's apartment complex saw the Facebook post and called him to ask about it. During the conversation,

Buchanan asked the neighbor to go to his old apartment and get his belongings. The neighbor agreed to do so but did not immediately act on the promise because of the late hour.

Maraya and Buchanan also communicated, and Buchanan demanded Maraya return a key to his house. She agreed to leave it under the apartment's doormat. When Maraya's mother heard of the arrangement, she moved her car. She wanted to avoid a confrontation with Buchanan and hoped he would think she was not home.

About two hours later, around 4 a.m., Maraya and her family woke to a fire alarm. When they opened the front door of the family's second-floor apartment, fire engulfed the stairs, cutting off the family's ability to exit the apartment through the door. The mother tied bedding together in Maraya's room and used it to lower her children through a window and to the ground; she then climbed out herself.

When firefighters arrived, they found a "heavy fire" that engulfed the first and second floors. The fire lapped above the structure, invaded the attic, and spread across the building. The firefighters found residents outside who reported being awakened by fire alarms. These residents told the firefighters others were still inside, and the firefighters went into rescue mode. Ten fire companies responded to the two-alarm fire. Firefighters had to back out of the building when an exterior wall began collapsing around them. Residents of six apartments other than Maraya's testified at trial about the fire, being awakened by alarms, fleeing from their apartments, and the damage to their property.

Maraya's dog, Dash, died in the fire.

Maraya immediately suspected Buchanan of starting the fire and told him as much in a text message. Maraya and her mother told law enforcement they suspected Buchanan.

In the early morning hours after the fire, Buchanan sent a Facebook message to one of Maraya's friends he had never messaged

before. In the message, he complained about Maraya's disrespectful conduct at the graduation ceremony, he denied setting the fire, and he added that he did not care about her losses. In a public Facebook message, he repeatedly called Maraya and her mother "them bitches," suggested he would urinate in the spare rooms of his house before allowing them to use them, and made other derogatory remarks directed toward them. He added that "they Got what God sent to em. Damn I wish they [*sic*] house didn't burn down but I'll be a lie [*sic*] if I said I cared."

Investigators determined the fire started in the stairwell in front of Maraya's apartment, and they eliminated accidental or natural causes. A dog trained to detect accelerants alerted on a glass bottle with liquid inside. Testing identified the bottle's contents as acetone, a flammable liquid. Investigators swabbed the bottle for DNA. Testing determined that Buchanan was 394 million times more likely to contribute the DNA found on the bottle's outside than an unknown source, and 88.1 trillion times more likely to contribute the DNA found on the bottle's mouth than an unknown source.

Investigators interviewed Buchanan, who denied involvement and told police he was at the hospital around the time of the fire. But detectives found no medical records verifying that claim.

Investigators did obtain Buchanan's cell phone records, which showed his phone was in Kansas City, Missouri, in the hours before the fire. But, around 3:30 a.m., the phone moved from Missouri into Kansas near cell towers around the family's apartment. About 25 minutes later, it moved back into Missouri. Around the same time, traffic camera footage showed a Pontiac G6, like one owned by Buchanan, traveling into and out of Maraya's neighborhood. This timing coincided closely with the first reports about the fire.

The State charged Buchanan with several crimes, and the district court judge appointed an attorney to represent Buchanan. Within weeks, Buchanan moved for a new attorney. The judge held a hearing and appointed a second attorney after finding that Buchanan's relationship with the first attorney had become strained and the two were no longer communicating effectively.

Despite having a new attorney, Buchanan kept filing motions himself. He also filed a disciplinary complaint against his newly appointed attorney, claiming the attorney had not communicated during jail visits. Because this created a conflict between Buchanan and his counsel, the judge allowed counsel to withdraw. The judge then appointed a third attorney and ordered a competency evaluation.

Buchanan was found competent, and the judge set dates for the trial and for a scheduling conference. At the conference, Buchanan's attorney asked for time to get a report from a fire reconstruction expert. The judge continued the trial to a new date.

As the trial date approached, the judge conducted a pretrial conference. Buchanan told the judge he was not ready for trial because his attorney did not have experts to rebut the State's evidence about the fire, phone records, or DNA. He told the judge that unless his attorney had "some type of Hail Mary he's going to throw up that he hasn't made me aware of, we're nowhere ready for trial."

Speaking about the fire expert, Buchanan complained that his attorney was "telling me the building has been destroyed. There is no way a fire expert can test the building or anything to prove an arson took place." Buchanan's attorney explained the building had been torn down before he became Buchanan's attorney. He had consulted an expert who had explained "they can't look at a scene that doesn't exist and determine if it was or was not an arson."

Addressing Buchanan's request for his own DNA expert, the defense attorney explained there had been two DNA examinations, both of which confirmed a high likelihood that Buchanan's DNA was on the bottle found at the scene. He reported that Buchanan did not trust the State's expert. But he also told the judge that Buchanan was not arguing the DNA results were incorrect. Instead, he would explain the reason he had used the bottle. Buchanan would later tell the jury he had painted various things at the apartment complex, and he stored nail polish remover in the bottle and used it when cleaning up paint. Buchanan's attorney explained he was not pursuing a DNA expert as a matter of strategy and would instead rely on Buchanan's innocent explanation.

Finally, discussing Buchanan's complaint about not having a phone technology expert, Buchanan's attorney told the judge he understood the phone records and did not need an expert to interpret them. He also reported having told Buchanan that "[y]ou can't be sleeping at home in Missouri and have a cell tower in southern Johnson County pick your phone up randomly."

The judge addressed Buchanan and explained that criminal defense attorneys make most trial strategy decisions. Buchanan again explained his concerns, including his view that his attorney had not adequately investigated the case or checked out his alibi. Following this discussion, the judge asked if the defense was ready for trial, and Buchanan's attorney replied he was ready. The judge gave Buchanan and his attorney time to visit privately. After a recess, Buchanan's attorney told the judge he had again explained why he was not hiring the various experts. The judge asked if they had talked about whether Buchanan wanted a new attorney. Buchanan replied by saying, "I apologize to the Court and my counsel. I was a little frustrated and . . . I kind of reacted over that."

The trial proceeded as scheduled. Buchanan testified and denied setting the fire. He said there had been "a little tension" at Maraya's graduation, and after the ceremony he had called Maraya's mother and had texted Maraya. A little after 2 a.m., he had texted Maraya and let her know he was going to the hospital and would not pick up his key.

Buchanan also told the jury he had experienced stomach pains in the hours before the fire. He had asked his neighbor for a ride to the hospital, but his neighbor had been drinking and could not drive. Others at his neighbor's house, who were visiting from out of town, dropped him off at the hospital around 2 a.m. Buchanan then realized he did not have his phone and must have left it in the car when he went into the emergency room. He immediately called his neighbor, who started calling Buchanan's phone to alert the driver Buchanan needed his phone. When the driver did not return, Buchanan called another friend who picked him up even though he had not received any medical attention. Buchanan told the jury he did not get his phone back until about 5 a.m. He could not explain why his phone could be tracked in Johnson County, and he denied the video showed his car.

The jury convicted Buchanan for attempted first-degree murder of Maraya, her mother, and her brother; for cruelty to animals; and for six

counts of aggravated arson (one for each apartment other than the one occupied by Maraya's family).

Before sentencing, Buchanan filed an untimely motion for a new trial. He repeated the complaints he had raised at the pretrial conference—counsel had failed to procure fire and phone technology experts, conduct independent DNA testing, and adequately investigate the case. He also raised trial issues. The next day, Buchanan's counsel also filed a motion for new trial, simply citing K.S.A. 22-3501. The judge discussed the motions before sentencing but declined to consider Buchanan's own motions because counsel represented him. The judge then summarily held there was no basis for a new trial.

Buchanan appealed through counsel; he also raised additional issues in his own filings. The Court of Appeals affirmed. *State v. Buchanan*, No. 123,100, 2022 WL 3694882 (Kan. App. 2022) (unpublished opinion).

Buchanan, through counsel, then petitioned seeking this court's review of the Court of Appeals decision. We granted Buchanan's petition and have jurisdiction. *State v. Buchanan, rev. granted* 316 Kan. 759 (2022). See K.S.A. 20-3018(b) (providing for jurisdiction over 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).

Buchanan's petition did not include all issues Buchanan had raised before the Court of Appeals, and the State did not file a cross-petition for review on points the Court of Appeals decided against it. Both Buchanan and the State have waived any issue not preserved through a petition or cross-petition for review. See *State v. Valdiviezo-Martinez*, 313 Kan. 614, 624, 486 P.3d 1256 (2021).

ANALYSIS

We turn to the three issues preserved for our consideration.

(1) Do the six counts of arson subject Buchanan to double jeopardy?

(2) Did the State present sufficient evidence that he intended to murder Maraya, her mother, and her brother? and,

(3) Did the judge err in denying Buchanan's motions for new trial?

ISSUE 1: DOUBLE JEOPARDY CLAUSE NOT VIOLATED

We begin with Buchanan's double jeopardy argument, in which he complains about being convicted and sentenced for six counts of aggravated arson—one for each damaged apartment unit other than Maraya's residence. His argument is rooted in the Double Jeopardy Clause of the Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. Double Jeopardy Clause violations can occur in many ways, including when a court imposes multiple punishments for the same offense. *State v. Schoonover*, 281 Kan. 453, 463-64, 133 P.3d 48 (2006). Buchanan asserts this type of double jeopardy argument as he argues his six convictions and resulting sentences for aggravated arson punish him multiple times for setting one fire.

When considering this type of multiplicity argument, courts apply a two-part test and determine whether a jury convicted a defendant for multiple counts charging the same offense: (1) Do the convictions arise from the same conduct? and, (2) By statutory definition are there two offenses or only one? 281 Kan. at 496.

In discussing the first step, the parties agree that the arsonist set only one fire. In other words, the damage to all the apartments arose from the same conduct. Agreement on this question means we need not discuss the test's first component. But "[t]he 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.

In determining the proscribed conduct, our sole focus is the offense's statutory definition. Here, only one offense is at issue—aggravated arson. That means the convictions are based on a single statute. In looking at multiple convictions under a single statute, courts apply the unit of prosecution test that focuses on how the Legislature defined the scope of conduct composing a statutory violation. That definition determines the allowable unit of prosecution, and there can be only one conviction for each unit of prosecution. 281 Kan. at 497-98. As the Court of Appeals noted, defining the unit of prosecution for aggravated arson presents a question of first impression under Kansas law. *Buchanan*, 2022 WL 3694882, *6; see *State v. Coble*, 312 Kan. 615, 629, 479 P.3d 201 (2021) (declining to weigh in on potential double jeopardy issues upon remand of arson case).

The Kansas Legislature defined multiple ways to commit arson and aggravated arson in K.S.A. 2022 Supp. 21-5812. Only one way is involved here because the six counts of aggravated arson that resulted in Buchanan's convictions were charged with identical language, except for identifying six apartments by a four-digit number. For example, one aggravated arson count charged Buchanan with having "unlawfully, knowingly, and feloniously, by means of fire or explosive, damage[d] any building or property, to wit: Spring Hill Apartment 2202, in which there was a human being, which resulted in a substantial risk of bodily harm."

While the complaint referred to damage by "means of fire or explosive" to "any building or property," the jury instruction narrowed the jury's consideration to "fire" and "a property," telling the jury it needed to find:

> "1. The defendant committed arson by knowingly, by means of fire, damaging a property specifically apartment 2202.
> "2. At the time there was a human being in the property.
> "3. The fire resulted in a substantial risk of bodily harm."

The same jury instruction was given for each aggravated arson count on which the jury returned a guilty verdict, although the apartment number changed.

These elements reflect the language in K.S.A. 2022 Supp. 21-5812 that defines aggravated arson. More specifically, the language in the complaint and in paragraph 2 of the instruction corresponds with the aggravated arson definition in K.S.A. 2022 Supp. 21-5812(b), which states: "(b) Aggravated arson is arson, as defined in subsection (a): (1) Committed upon a building or property in which there is a human being." Paragraph 1 of the instruction and corresponding language in the complaint echo the following italicized words found in K.S.A. 2022 Supp. 21-5812(a), which states: "Arson is: (1) *Knowingly, by means of fire* or explosive damaging any building or property which . . . ." And paragraph 3 of the instruction, and corresponding language in the complaint, uses statutory language from K.S.A. 2022 Supp. 21-5812(c)(2), which defines an aggravating sentencing factor that applies "if such crime results in a substantial risk of bodily harm." Buchanan makes no instructional error claim. We thus focus on

the language in the instruction—the language on which the jury based its verdict.

That language was narrow and did not include many of the words and phrases discussed by the parties and the Court of Appeals, such as "building," "dwelling," and "any." See, e.g., *Buchanan*, 2022 WL 3694882, at * 5 (discussing K.S.A. 2022 Supp. 21-5812[a][1][A], which applies when damage by fire or explosion occurs to "a dwelling in which another person has any interest without the consent of such other person"). We will not review the Court of Appeals' discussion regarding that provision because we are not called on today to define the unit of prosecution under the arson statute's subsections. If we tried to sort those out, we would be issuing advisory opinions rather than deciding the actual controversy before us. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 898, 179 P.3d 366 (2008). We likewise do not reach the parties' arguments that go beyond the language at issue.

Even so, part of their arguments and the Court of Appeals' discussion remains relevant because they focus on the phrase "building or property," which is found in both (a)(1) and (b)(1). Buchanan's primary argument is that this phrase uses singular, rather than the plural, forms of "building or property" and all the apartments were part of a large building and property. He points out that the Legislature could have used these words' plural forms or added the phrase "portion thereof" in the arson statutes, but it did not.

We are not persuaded those changes are necessary for the unit of prosecution to be an individual apartment, however, because of the criminal code's definition of "[p]roperty." See K.S.A. 2022 Supp. 21-5111(w).

Before discussing that definition, we address Buchanan's misguided criticism of the Court of Appeals' reliance on that and other definitions because, among other things, they are not part of the arson statute. His argument does not account for our duty to discern legislative intent about the scope of the unit of prosecution. See *Schoonover,* 281 Kan. at 497-98. When discerning intent, we consider the words used by the Legislature. See *Valdiviezo-Martinez*, 313 Kan. at 617-18 ("[C]ourts . . . seek to determine the Legislature's intent by examining the statute's wording."). And the

Legislature has directed courts and others to use the definition section "when the words and phrases defined are used in this [criminal] code." K.S.A. 2022 Supp. 21-5111. It is thus appropriate to rely on the Legislature's stated meaning of "[p]roperty."

The criminal code definition section defines "[p]roperty" as "anything of value, tangible or intangible, real or personal." K.S.A. 2022 Supp. 21-5111(w). And it defines "[r]eal property" as "every estate, interest, and right in lands, tenements and hereditaments." K.S.A. 2022 Supp. 21-5111(bb). Apartment tenants hold interests in real property and, more specifically, possess habitation rights in their apartments that allow excluding others. See K.S.A. 58-2543(o); *State v. Bollinger*, 302 Kan. 309, 314, 352 P.3d 1003 (2015) (discussing K.S.A. 2014 Supp. 21-5812[a][1][A] and stating: "This court has held that the State is not required to establish exactly what the nature of the 'any interest' is, be it a fee simple, a rental, or a tenancy, in order to satisfy the statutory requirement.").

Applying the Legislature's definitions to aggravated arson's elements under K.S.A. 2022 Supp. 21-5812(b)(1), the focus is on a property, including an apartment, in which there is a person. In this statute's context, the singular form of property conveys that damage to each property, including each apartment in an apartment building, constitutes a unit of prosecution.

This reading of the statute adheres to the long-understood purpose of criminalizing arson, which "was to preserve the security of the habitation." Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 300 n.17 (1986) (citing 4 W. Blackstone, Commentaries on the Laws of England 220 [1st American ed. 1772]).

We hold the unit of prosecution that supported Buchanan's six convictions for aggravated arson committed under K.S.A. 2022 Supp. 21-5812(b)(1)—that is, arson committed upon a property in which there is a person—reflects the unit of prosecution intended by the Legislature. Under this unit of prosecution, Buchanan could be convicted and sentenced for six counts of aggravated arson for damaging by fire six apartments in which there was a person.

Buchanan thus does not suffer a double jeopardy violation when convicted on multiple counts arising from damage by fire to separate apartments, each with a person inside.

ISSUE 2: SUFFICIENT EVIDENCE OF INTENT TO KILL

Buchanan next argues the State failed to present sufficient evidence that he specifically intended to kill Maraya, her mother, and her brother.

Our standard for reviewing this argument is well established: When the evidence's sufficiency is challenged in a criminal case, appellate courts review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

As Buchanan points out, the State must present evidence proving each element of the crime. *State v. Kettler*, 299 Kan. 448, 471, 325 P.3d 1075 (2014). Here, the crime at issue is attempted first-degree murder.

"[I]n prosecutions for an attempted crime—when the statute defining the crime does not include an attempt as a means of violating that statute—the default rule in K.S.A. 2020 Supp. 21-5301(a) requires the State to prove the defendant had the specific intent to commit the intended crime, even if that crime would not require specific intent as a completed crime." *State v. Mora*, 315 Kan. 537, 543, 509 P.3d 1201 (2022).

First-degree murder includes the specific intent to kill a human being with premeditation. K.S.A. 2022 Supp. 21-5402(a)(1); *State v. Mattox*, 305 Kan. 1015, 1025, 390 P.3d 514 (2017). Premeditation means thinking about killing a person before doing so. *State v. Stanley*, 312 Kan. 557, 571, 478 P.3d 324 (2020). "It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." 312 Kan. at 574.

The State thus had to prove that Buchanan had the specific intent to kill and that he premeditated the murder of Maraya, her mother, and her brother. "Specific intent is a question of fact for

the jury which may be established by acts, circumstances, and inferences and need not be shown by direct proof." *State v. Mitchell*, 262 Kan. 434, 437, 939 P.2d 879 (1997).

Ample evidence allowed a rational juror to conclude beyond a reasonable doubt that Buchanan intended to murder Maraya, her mother, and her brother and had premeditated that murder. Buchanan asked a neighbor to remove his property from Maraya's apartment, suggesting he planned to destroy the apartment. He then drove from Missouri to Kansas bringing or otherwise obtaining a bottle of acetone. Once there, he ignited the fire in a location that blocked Maraya and her family from exiting the apartment. The fire was set just before 4 a.m. when people would be expected to be at home and asleep. And the evidence of text messages and other communications before and after the fire revealed Buchanan's anger, resentment, and lack of compassion.

Buchanan attempts to offset this evidence by pointing to testimony that Maraya's mother moved her car in the hopes Buchanan would think she was gone when he came to get his key. Buchanan uses this testimony to argue he had no way of knowing whether anyone was home, and he thus could not have had the intent to kill the apartment's occupants. But Buchanan testified he learned during the trial that the car had been moved. The absence of the car was not a matter he noticed or considered before setting the fire.

Buchanan also argues that the evidence shows only an intent to start the fire, and although intent may be proven by circumstantial evidence, just showing he intended to start a fire did not establish he intended to murder the apartment's occupants. For support, he cites *State v. Phillips*, 299 Kan. 479, 498, 325 P.3d 1095 (2014), which held that use of a deadly weapon, without more, cannot prove premeditation. Here, however, there was much more evidence of intent than just starting a fire. Buchanan's own words before and after the fire and his act of starting the fire in a location that would block the family's ability to escape reveal his intent to commit murder. His call to the neighbor raised an inference he formed the plan to destroy the apartment several hours before he drove from his place to the apartment where he started the fire in a location that would block the exit. This and other evidence

would allow a reasonable juror to conclude he considered his action and formed the intent to commit murder before attempting to do so.

We hold there was sufficient evidence to support the convictions for attempted first-degree murder.

ISSUE 3: NO VIOLATION OF RIGHT TO CONFLICT-FREE COUNSEL

In his final claim, Buchanan asserts that the district court judge erred in disposing of his motion for a new trial in a cursory fashion. He contends he was denied his right to conflict-free counsel, a right guaranteed by the Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights.

When a defendant raises a timely pro se posttrial motion for a new trial, the motion is a critical stage in the proceedings during which the defendant is entitled to counsel and the correlative right that counsel have no conflicts of interest. *State v. Sharkey*, 299 Kan. 87, 95-100, 322 P.3d 325 (2014). In that situation, if the judge fails to make an adequate inquiry into the potential conflict, prejudice is presumed. 299 Kan. at 96-101.

But Buchanan's motion was untimely. A motion for new trial, other than on the ground of newly discovered evidence, must be filed within 14 days of the verdict. Buchanan filed his motion nearly two months later. K.S.A. 2022 Supp. 22-3501. Such an untimely motion is considered a postconviction collateral proceeding. As such, K.S.A. 22-4506, which governs the entitlement of counsel in postconviction proceedings, applies. 299 Kan. at 95. Under that statute, a judge "may determine that the motion, files, and records of the case conclusively show that the movant is entitled to no relief, in which case [the judge may] summarily deny the motion without appointing counsel." *Albright v. State*, 292 Kan. 193, 196, 251 P.3d 52 (2011). The determination of whether the motion presents substantial questions of law justifying the appointment of counsel rests within a district court judge's sound discretion. *State v. Kingsley*, 252 Kan. 761, 766, 851 P.2d 370 (1993); see *Albright*, 292 Kan. at 196. Judicial discretion is abused if the action is (1) arbitrary, fanciful, or unreasonable; (2) based

on an error of law; or (3) based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

The record here shows that all posttrial issues Buchanan pursues on appeal relating to his dissatisfaction with counsel are arguments he raised before trial. He has abandoned any other arguments. See *State v. Galloway*, 316 Kan. 471, 479, 518 P.3d 399 (2022).

The judge had thoroughly considered those preserved complaints at the pretrial conference and knew they concerned strategic decisions made by counsel. Strategic choices by counsel after a thorough investigation of law and facts are generally unchallengeable. *Sola-Morales v. State*, 300 Kan. 875, 887, 335 P.3d 1162 (2014).

Given this general rule and the judge's previous exploration of counsel's investigation, the judge could summarily deny Buchanan's motion without appointing counsel. The judge's decision was not arbitrary, fanciful, or unreasonable, was not based on an error of law, and was not based on an error of fact. The district court judge thus did not err in denying the motion for a new trial or in failing to appoint new counsel.

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

STANDRIDGE, J., not participating.

State v. Johnson

No. 124,064

STATE OF KANSAS, *Appellee*, v. DARRYLN MICHAEL JOHNSON, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Challenge to Constitutional Validity of Waiver— Outside Definition of Illegal Sentence.* A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence, overruling *State v. Duncan*, 291 Kan. 467, 472-73, 243 P.3d 338 (2010).

2. SAME—*Absent Illegal Sentence Claim—Lack of Jurisdiction by Appellate Court to Review Agreement Approved by Sentencing Court.* Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court lacks jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the sentencing court approves on the record.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 29, 2022. Appeal from Shawnee District Court; STEVEN R. EBBERTS, judge. Oral argument held March 29, 2023. Opinion filed June 30, 2023. Judgment of the Court of Appeals affirming the district court is reversed, and the appeal is dismissed.

Grace Tran, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Bates*, of the same office, was on the briefs for appellant.

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

The opinion of the court was delivered by

STANDRIDGE, J.: Darryln Johnson pleaded guilty to two counts of sexual exploitation of a child. The district court advised Johnson of—and he exercised—his constitutional right to waive a jury trial on criminal liability for the crimes charged. As part of his plea, Johnson agreed to an upward departure from the guidelines sentence based on his stipulation to the existence of two aggravating factors. The court approved this agreement on the record but did not advise Johnson of his separate statutory right under K.S.A. 2019 Supp. 21-6817 to have the aggravating factors—which increased his sentence beyond the statutory maximum—

proved to a jury beyond a reasonable doubt. The district court sentenced Johnson to 180 months in prison with lifetime postrelease supervision, as contemplated by the plea agreement.

Johnson appealed, arguing for the first time on appeal that his sentence was illegal under K.S.A. 2021 Supp. 22-3504 because he was not advised of and did not knowingly and voluntarily waive his right to a jury trial on the upward departure factors. The Court of Appeals panel interpreted Johnson's challenge as a constitutional one that generally cannot be raised in a motion to correct illegal sentence. Rather than dismissing the appeal for lack of jurisdiction, however, the panel relied on our opinion in *State v. Duncan*, 291 Kan. 467, 470-71, 243 P.3d 338 (2010), as an exception to the jurisdictional bar and rejected his challenge on the merits, holding (1) an aggravating factors jury needs to convene only when there is an issue of fact and there was no issue of fact because Johnson pleaded guilty; and (2) even if the district court violated Johnson's rights, any error was harmless. *State v. Johnson*, No. 124,064, 2022 WL 3017620, at *2-3 (Kan. App. 2022) (unpublished opinion).

While K.S.A. 2022 Supp. 22-3504 vests appellate courts with jurisdiction to hear the appeal of an illegal sentence, we hold that a district court's failure to advise—and obtain a waiver from—the defendant of the right to have a jury determine aggravating factors beyond a reasonable doubt falls outside the scope of an illegal sentence as defined by K.S.A. 2022 Supp. 22-3504. As no other statute provides a possible jurisdictional basis, we dismiss Johnson's appeal for lack of jurisdiction. In so holding, we expressly overrule our prior opinion in *Duncan*. Because the panel relied on *Duncan* to reach the merits of the appeal, we reverse the Court of Appeals' judgment and dismiss the appeal for lack of jurisdiction.

PROCEDURAL HISTORY

In April 2015, Johnson's parole officer reported to law enforcement a belief that Johnson possessed child pornography on his phone. The court issued a search warrant and, when executed, law enforcement discovered two videos depicting sexually explicit conduct of a child under 14 recorded by Johnson. In the vid-

eos, Johnson recorded a 6-year-old girl who was partially undressed in a changing room at a retail store. Johnson gave the child directions and told her how to pose. Law enforcement learned the child was the granddaughter of Johnson's long-time friend, and Johnson was helping the child shop for an Easter dress. The State charged Johnson with three counts of sexual exploitation of a child, two of which were off-grid crimes because Johnson recorded the two videos himself.

The parties reached a plea agreement. Johnson agreed to plead to an amended complaint charging two severity level 5 counts of sexual exploitation of a child. The parties agreed to jointly recommend Johnson serve an upward departure sentence of 180 months in prison. In the agreement, the parties acknowledged that

> "[the] agreement is expressly conditioned on the defendant stipulating to, and agreeing to, an upward durational departure in order to receive a sentence of 180 months in prison. The Defendant agrees to stipulate to the following aggravating factors pursuant to K.S.A. 21-6815:
>
> > The victim was particularly vulnerable due to age which was known or should have been known to the offender. K.S.A. 21-6815(c)(2)(A); and/or
> >
> > The offense involved a fiduciary relationship which existed between the defendant and the victim. K.S.A. 21-6815(c)(2)(D)."

At sentencing, the State summarized the factual basis for its original charges. The detective who investigated Johnson's phone testified at the sentencing hearing as to the phone's contents. The State also presented the two videos. The videos zoom in on the child's nude top and crotch area.

Johnson also testified at the hearing. He admitted to both aggravating factors by acknowledging the child victim was of a vulnerable age and that he violated a fiduciary trust relationship with the child victim. Consistent with the plea agreement and the amended complaint, the district court sentenced Johnson to 180 months in prison with lifetime post-release supervision. Also consistent with the agreement, the court found the offense involved a fiduciary relationship, and the victim was particularly vulnerable due to age.

Johnson appealed, arguing his sentence is illegal because he was not advised of and did not knowingly and voluntarily waive

his right to a jury trial on the upward departure aggravating factors. The Court of Appeals held the sentence was not illegal and affirmed the district court. *Johnson*, 2022 WL 3017620, at *1, 4-5. Johnson petitioned this court for review, again arguing his sentence was illegal because he was never advised of, nor did he waive, his right to have a jury determine the facts to support the upward departure. The State cross-petitioned, asking us to clarify or overrule *Duncan* because it conflicts with our well-established caselaw over the past decade holding that a motion to correct an illegal sentence is not the proper vehicle to raise a constitutional challenge to the sentence imposed.

ANALYSIS

Johnson argues his sentence is illegal because the district court relied on aggravating factors to impose a sentence above the statutory maximum authorized by statute without advising him and obtaining a knowing and voluntary waiver of the right to have a jury determine those aggravating factors beyond a reasonable doubt. Whether a sentence is illegal is a question of law subject to de novo review. *State v. Juiliano*, 315 Kan. 76, 78, 504 P.3d 399 (2022). Statutory interpretation is also a legal question subject to unlimited review. *State v. Clark*, 313 Kan. 556, 572, 486 P.3d 591 (2021).

> An illegal sentence is defined as: (1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served. K.S.A. 2022 Supp. 22-3504(c)(1). Johnson's argument does not allege that the court lacked jurisdiction to impose the sentence or that the sentence imposed was ambiguous, so we construe his illegal sentence claim as grounded in the second definition of the statute: that his sentence does not conform to the applicable statutory provision, either in character or punishment.
>
> We have held the "applicable statutory provision" in K.S.A. 2022 Supp. 22-3504(c)(1) is limited to those statutory provisions that define the crime, assign the category of punishment, or involve the criminal history classification axis. See *State v. Alford*, 308 Kan.

1336, 1340, 429 P.3d 197 (2018). This includes whether a person's previous conviction was properly classified under the Kansas Sentencing Guidelines Act (KSGA) when determining criminal history. See *State v. Dickey*, 305 Kan. 217, 221-22, 380 P.3d 230 (2016).

A claim that a sentence fails to conform to the applicable *statutory* provision is not the same as a claim that a sentence fails to conform to *constitutional* requirements. *State v. Edwards*, 281 Kan. 1334, 1337, 135 P.3d 1251 (2006). "Because this narrow, statutory definition does not include a claim that a sentence violates a constitutional provision, a motion to correct an illegal sentence under [K.S.A. 22-3504] is not a proper vehicle to raise such a constitutional challenge." *State v. R. H.*, 313 Kan. 699, 702, 490 P.3d 1157 (2021) (citing *State v. Bryant*, 310 Kan. 920, 922, 453 P.3d 279 [2019]); see *State v. Mitchell*, 284 Kan. 374, 377, 162 P.3d 18 (2007) (definition of illegal sentence does not encompass violations of constitutional provisions).

Johnson claims his sentence is illegal because it does not conform to K.S.A. 2022 Supp. 21-6817(b)(2), which gives a defendant the right to have a jury—instead of the court—determine whether aggravating factors have been proved beyond a reasonable doubt. Johnson acknowledges this right can be waived. See K.S.A. 2022 Supp. 21-6817(b)(4). But he argues his sentence is illegal because the court imposed an upward departure sentence without advising him and obtaining a knowing and voluntary waiver of the statutory right. In response, the State argues Johnson's claim alleging the lack of a knowing and voluntary waiver is a constitutional claim that does not meet the statutory definition of an illegal sentence.

Given this dispute between the parties, we must decide the nature of Johnson's claim before addressing the merits. The question presented is (1) whether Johnson's claim alleges his sentence does not conform to the applicable statutory provision, either in character or punishment, or (2) whether Johnson's claim alleges his sentence violates a constitutional provision. To resolve this question, we begin with the statutes cited by Johnson to argue his sentence does not conform to the applicable statutory provision.

- K.S.A. 2022 Supp. 21-6815(b), which provides that, subject to K.S.A. 2022 Supp. 21-6817(b), aggravating factors

that increase the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

- K.S.A. 2022 Supp. 21-6817(b)(2), which requires the court to decide whether the aggravating factors should be submitted to a jury during trial or to a jury in a separate departure sentencing hearing after determination of the defendant's innocence or guilt.

- K.S.A. 2022 Supp. 21-6817(b)(4), which applies if the court decides the aggravating factors should be presented at a separate departure sentencing hearing and provides that the defendant can waive the right to have a jury decide aggravating factors in the manner provided by K.S.A. 22-3403. If a jury determination on aggravating factors is waived, the court will conduct the upward durational departure sentence proceeding.

- K.S.A. 22-3403(1), which permits the parties—with the court's consent—to submit the trial of any felony to the court.

In short, these statutes give a defendant (1) the right to have a jury determine whether aggravating factors exist and (2) the ability to waive that right upon agreement by defendant with the consent of the court. Johnson argues his sentence is illegal because it does not conform to the "applicable statutory provision" in K.S.A. 2022 Supp. 21-6817(b), which gives a defendant the right to have a jury determine aggravating factors unless waived by the defendant. But Johnson's illegal sentence argument is based on a faulty premise—that K.S.A. 2022 Supp. 21-6817(b) is the "applicable statutory provision" under the facts of his case. As we have held, the "applicable statutory provision" language in K.S.A. 2022 Supp. 22-3504(c)(1) is limited to those statutory provisions that define the crime, assign the category of punishment, or involve the criminal history classification axis. See *Alford*, 308 Kan. at 1340. Notably, none of the K.S.A. 2022 Supp. 21-6817(b) provisions define the crime of sexual exploitation of a child, assign a category of punishment to be imposed on conviction of that crime,

or involve the criminal history classification axis. Instead, K.S.A. 2022 Supp. 21-6817(b) is part of a procedural framework for determining the existence of aggravating factors for upward departure sentences. The upward departure sentence imposed here was authorized because Johnson committed the crime of sexual exploitation of a child under circumstances where the victim was particularly vulnerable and involved a fiduciary relationship. For this reason, we conclude that a claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors under K.S.A. 2022 Supp. 21-6817(b) does not qualify as an "applicable statutory provision, either in character or punishment" under the illegal sentence statute, K.S.A. 2022 Supp. 22-3504(c)(1).

And the arguments presented by Johnson in both his brief to the Court of Appeals and in his petition for review lead us to conclude that his claim depends solely on constitutional principles:

> "Mr. Johnson did not waive his right to have a jury determine the facts supporting any upward departure. To effect a knowing and voluntary waiver of the right to jury trial, a criminal defendant must be informed by the district court of that right and must then clearly and unequivocally give up that right. See *State v. Rizo*, 304 Kan. 974, Syl. ¶ 2, 377 P.3d 419 (2016); *State v. Beaman*, 295 Kan. 853, 858-59, 286 P.3d 876 (2012). A generic waiver of the jury trial right regarding guilt or innocence does not encompass the right to have a jury determine the facts supporting an upward durational departure—a defendant must be explicitly informed of that right to effectively waive it. *State v. Duncan*, 291 Kan. 467, 472-73, 243 P.3d 338 (2010)."

Johnson challenges the constitutional validity of the jury waiver and not a statutorily unauthorized sentence. Consistent with longstanding precedent, Johnson is precluded from using K.S.A. 22-3504 to challenge the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward durational departure factors. See *State v. Gayden*, 281 Kan. 290, 292-93, 130 P.3d 108 (2006) (holding claim that cumulative punishments for six convictions violated Double Jeopardy Clause of Fifth Amendment to United States Constitution cannot be properly raised in motion to correct illegal sentence); see also *Mitchell*, 284 Kan. at 377 (holding district court properly concluded it lacked jurisdiction under K.S.A. 22-3504

to address constitutional challenges to sentence on grounds it violated double jeopardy, equal protection, and Eighth Amendment).

With no valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, we lack jurisdiction to review Johnson's sentence because he agreed to the sentence and the district court approved the agreement on the record. See K.S.A. 2022 Supp. 21-6820(c)(2) ("On appeal from a judgment of conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review . . . any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.").

We acknowledge that our holding today appears to conflict with the holding we announced under a similar challenge in *Duncan*, 291 Kan. at 470-71. As here, *Duncan* pleaded guilty to a reduced charge but agreed to a specific upward durational departure sentence. After a colloquy with the district court, he waived all rights associated with the guilt phase of a jury trial and pleaded guilty. The district court, however, did not ask him to and he did not waive his right to have a jury determine the existence of aggravating factors. The district court imposed the agreed-upon upward departure sentence and granted him probation.

The court ultimately revoked probation and Duncan appealed, claiming his sentence was illegal. To support his illegal sentence claim, Duncan argued the district court violated his constitutional rights by imposing an upward departure sentence without a valid waiver of the right to have a jury determine the aggravating factors. The State argued the court did not have jurisdiction to consider Duncan's claim because K.S.A. 21-4721 (the predecessor to K.S.A. 21-6820) prohibits the appellate court from reviewing "any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record." 291 Kan. at 470.

We rejected the State's jurisdictional argument, holding that "an appellate court's jurisdiction to consider a challenge to a sentence is limited to those grounds authorized by [K.S.A. 21-4721] *or a claim that the sentence is otherwise illegal*." 291 Kan. at

470. Since *Duncan*, we have consistently reaffirmed the rule that an appellate court has jurisdiction to correct an illegal sentence even if it were agreed to in a plea and approved by the court on the record. See *State v. Quested*, 302 Kan. 262, 264, 352 P.3d 553 (2015); see also K.S.A. 2022 Supp. 21-6820(a) (adding language authorizing appeal of a ruling on a motion to correct illegal sentence under K.S.A. 22-3504).

After finding Duncan cleared the jurisdictional hurdle by claiming his sentence was illegal, we moved to the merits of his waiver challenge. 291 Kan. at 471. After reviewing the plea agreement and the transcript of the plea hearing, we held Duncan did not make a constitutionally valid waiver of his right to a jury determination of the aggravating sentencing factors. 291 Kan. at 473. In discussing the appropriate remedy for this constitutional deficiency, we noted K.S.A. 21-4718 did not permit the district court to empanel a jury solely to conduct an upward durational departure proceeding when the defendant has pleaded guilty. Thus, we vacated Duncan's sentence and remanded for resentencing without an upward departure.

In retrospect, we find our jurisdictional decision in *Duncan* is analytically flawed. We properly held an appellate court has jurisdiction to review an illegal sentence claim. We then concluded an upward departure sentence imposed in an unconstitutional proceeding results in an illegal sentence, which in turn gave us jurisdiction to consider Duncan's constitutional claim. Missing from this analysis is the essential inquiry into whether his constitutional claim of error met the definition of an illegal sentence by considering if (1) the sentence was imposed by a court without jurisdiction; (2) the sentence failed to conform to the applicable statutory provision, either in the character or punishment; or (3) the sentence was ambiguous with respect to the time and manner in which it is to be served.

Although *Duncan* was decided in 2010 and K.S.A. 22-3504 did not include this definition of an illegal sentence until the statute was amended in 2017, we have repeatedly used this specific definition in our caselaw dating back to at least 1986. See *State v. Thomas*, 239 Kan. 457, 460, 720 P.2d 1059 (1986) ("An 'illegal

sentence' is either a sentence imposed by a court without jurisdiction; a sentence which does not conform to the statutory provisions, either in the character or the term of the punishment authorized; or a sentence which is ambiguous with respect to the time and manner in which it is to be served."). Had we properly evaluated Duncan's constitutional claim to determine whether it met the definition of an illegal sentence, we are confident our holdings would have been the same as the ones we reach today:

- A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors under K.S.A. 2022 Supp. 21-6817(b) falls outside the definition of an illegal sentence.

- Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court lacks jurisdiction to review a sentence resulting from an agreement between the State and the defendant which the sentencing court approves on the record.

To the extent *Duncan* conflicts with our holdings today, we overrule it. "We do not overrule precedent lightly and must give full consideration to the doctrine of stare decisis." *State v. Sherman*, 305 Kan. 88, 107, 378 P.3d 1060 (2016). "We recognize that '[t]he application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.'" *Herington v. City of Wichita*, 314 Kan. 447, 456, 500 P.3d 1168 (2021) (quoting *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 [2004]).

But stare decisis "'is not a rigid inevitability but a prudent governor on the pace of legal change.'" *Herington*, 314 Kan. at 456 (quoting *State v. Jordan*, 303 Kan. 1017, 1021, 370 P.3d 417 [2016]). "While this court is not inexorably bound by its own precedent, we generally will follow the law of earlier cases unless clearly convinced that the rule 'was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'" 314 Kan. at

457 (quoting *Sherman*, 305 Kan. at 108). In this case, we are clearly convinced that we erred in *Duncan*. Our holdings today correct this previous error.

CONCLUSION

We hold a claim challenging the constitutional validity of a waiver relinquishing the statutory right under K.S.A. 2022 Supp. 21-6817(b) to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence. Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court has no jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the court approves on the record. Based on these holdings, we expressly overrule our prior opinion in *Duncan,* 291 Kan. 467. Because the panel relied on *Duncan* to reach the merits of the appeal, we reverse the Court of Appeals' decision and dismiss the appeal for lack of jurisdiction. We deny as moot the State's motion for supplemental briefing on the issue of harmless error and note Johnson's response to the State's motion.

Judgment of the Court of Appeals affirming the district court is reversed, and the appeal is dismissed.

No. 124,116

In the Matter of the Marriage of JON HOLLIDAY, *Appellant*, and TAMARA HOLLIDAY, *Appellee*.

SYLLABUS BY THE COURT

1. DIVORCE—*Division of Retirement Account—Judgment Subject to Dormancy If Qualifies as Final Determination of Parties' Interests.* A district court's division of a retirement account in a divorce proceeding constitutes a judgment subject to dormancy under K.S.A. 2022 Supp. 60-2403 when the division order qualifies under K.S.A. 2022 Supp. 60-254(a) as a final determination of the parties' interests in the marital estate.

2. JUDGMENTS—*Dormancy Period under Statute Does Not Run if Judgment is Stayed or Prohibited.* The dormancy period under K.S.A. 2022 Supp. 60-2403(c) does not run "during any period in which the enforcement of the judgment by legal process is stayed or prohibited."

3. DIVORCE—*Statutory Tolling Provision Prevents Division of Interests in KPERS Retirement Account Until Benefits are Payable*. K.S.A. 2022 Supp. 60-2403(c)'s tolling provision prevents a divorce decree dividing the parties' interests in a retirement account with the Kansas Public Employee Retirement System from becoming dormant until benefits become payable to the plan member.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 23, 2022. Appeal from Jackson District Court; CHRISTOPHER T. ETZEL, judge. Oral argument held May 16, 2023. Opinion filed June 30, 2023. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

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

Cecilia T. Mariani, of Topeka, argued the cause and was on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: When Jon and Tamara Holliday divorced in 2009 after 24 years of marriage the district court divided Jon's not-yet-payable retirement account with the Kansas Public Employees Retirement System equally between them. It directed Tamara to prepare a qualified domestic relations order "to effectuate this division." In 2021, as Jon readied for retirement, he asked the court to

extinguish Tamara's interest in his KPERS account. He claimed her judgment from the divorce had gone dormant because she did not send a copy of it to KPERS as instructed. The district court rejected this argument, but a Court of Appeals panel agreed with it. On review to resolve the conflict, we hold K.S.A. 2020 Supp. 60-2403(c) tolled the dormancy period until Jon's benefits from his KPERS account became payable. We reverse the Court of Appeals panel that held otherwise and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

No one disputes what happened. The 2009 divorce decree divided Jon's KPERS retirement account equally between the couple, with the valuation date tied to the divorce petition's filing. The court directed Tamara to prepare within 60 days a qualified domestic relations order recognizing her right as an alternate payee to receive a portion of Jon's KPERS plan assets—but that did not happen. Twelve years later, as he prepared to retire, Jon moved to extinguish Tamara's judgment in his KPERS account under the dormancy statute, K.S.A. 2020 Supp. 60-2403(a)(1), which establishes circumstances under which a district judge must release a judgment of record. After receiving Jon's motion, Tamara's attorney sent the divorce decree to KPERS and opposed Jon's motion.

Kathleen Billings, a KPERS staff attorney, testified at an evidentiary hearing on Jon's motion. She described her duties as receiving and reviewing divorce decrees and QDROs, as well as helping interpret and enforce court orders for asset division. She said KPERS received the Hollidays' divorce decree on April 19, 2021, and considered it sufficient for administrative processing. She agreed the agency views a QDRO "as sort of a lien" on an account until the member retires, dies, or withdraws from the system. And she said KPERS would consider the Hollidays' division order as a "Type A" QDRO that splits the accumulated contributions in the account as of a specified effective date. To process this order, she continued, KPERS only needed to know how to split the contributions and the date of division, so that everything before that date could be allocated as ordered, and everything else would remain with the KPERS plan member.

The district court denied Jon's motion to extinguish Tamara's judgment. It observed that this circumstance differed from plans governed by the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (2018), because KPERS is a state governmental pension system controlled by Kansas law. It found the original filing of the 2009 divorce decree with the district court clerk within the time limit contemplated by the dormancy statute equivalent to filing a QDRO with KPERS. Therefore, it continued "a QDRO was timely filed and [Tamara's] rights to receive her portion of the retirement benefits has been preserved." Jon appealed.

A Court of Appeals panel took a different view. It held the judgment expired under the dormancy statute because Tamara failed to timely send KPERS a copy of the decree within the seven-year period set out in the dormancy statute. It equated this notification as being "a form of execution on that judgment." *In re Marriage of Holliday*, No. 124,116, 2022 WL 4391026, at *4 (Kan. App. 2022) (unpublished opinion) (remarking "[c]ommon sense tells us that . . . enforcement of this judgment inherently requires delivery of the divorce decree or some court order to KPERS"). We granted Tamara's petition for review.

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

ANALYSIS

This case presents two questions: (1) Was this 2009 divorce judgment a final judgment subject to the dormancy statute; and (2) if yes, when did the dormancy period commence? We start with the applicable statutes: K.S.A. 2022 Supp. 60-2403 and K.S.A. 2022 Supp. 60-254(a). Questions of law involving statutory interpretation are subject to unlimited review. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015).

The dormancy statute provides in pertinent part:

"(a)(1) . . . [I]f a renewal affidavit is not filed or if execution, including any garnishment proceeding, support enforcement proceeding or proceeding in aid of execution, is not issued, within five years from the date of the entry of any

judgment in any court of record in this state, . . . the judgment . . . shall become dormant, and shall cease to operate as a lien on the real estate of the judgment debtor. When a judgment becomes and remains dormant for a period of two years, it shall be the duty of the judge to release the judgment of record when requested to do so. . . .

. . . .

"(c) The time within which action must be taken to prevent a judgment from becoming dormant does not run during any period in which the enforcement of the judgment by legal process is stayed or prohibited." K.S.A. 2022 Supp. 60-2403.

Tamara suggests the 2009 division order should not be considered a "final judgment" because KPERS had not approved it yet. But this argument has no merit. A "judgment" is defined as "the final determination of the parties' rights in an action." K.S.A. 2022 Supp. 60-254(a); see also *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 1, 836 P.2d 1128 (1992) ("A final decision is one that finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the court."); *Bandel v. Pettibone*, 211 Kan. 672, 677, 508 P.2d 487 (1973) ("It is a fundamental rule that a judgment should be complete and certain in itself, and that the form of the judgment should be such as to indicate with reasonable clearness the decision which the court has rendered, so that the parties may be able to ascertain the extent to which their rights and obligations are fixed, and so that the judgment is susceptible of enforcement in the manner provided by law."). A "court of record" under K.S.A. 2022 Supp. 60-2403(a)(1) is defined as "[a] court that is required to keep a record of its proceedings." Black's Law Dictionary 445 (11th ed. 2019); see also Kan. Const. art. 3, § 1 ("The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal."). A district court is a court of record. See *State v. Higby*, 210 Kan. 554, 558, 502 P.2d 740 (1972).

The judgment here is the 2009 divorce decree by the Jackson County District Court. It fixes the parties' rights and obligations in Jon's KPERS retirement account by evenly dividing its valuation as of a date certain—the divorce petition's filing date. And

Billings testified this 2009 decree is all that is needed for KPERS to treat it as a QDRO to administratively process the account as the court contemplated. We easily conclude from this that the court's division of Jon's KPERS account constitutes a final judgment under K.S.A. 2022 Supp. 60-254(a).

Following from that, the division judgment is subject to dormancy under K.S.A. 2022 Supp. 60-2403(a)(1). See *Bank IV Wichita v. Plein*, 250 Kan. 701, 706, 830 P.2d 29 (1992) (holding judgment in divorce action awarding a lien on real estate to a party was a judgment subject to dormancy). The dormancy statute speaks of "any judgment" of any court of record in this state and does not limit its application to just monetary judgments. 250 Kan. 701, Syl. ¶ 2. And K.S.A. 60-254(a)'s language is clear that a judgment's finality does not depend on completing a subsequent ministerial task, such as KPERS's approval here. Instead, finality "depends primarily upon the intention of the court, and upon the governing statutory provisions and rules." *Roe Village, Inc. v. Board of County Commissioners*, 195 Kan. 247, 248, 403 P.2d 970 (1965). We hold the answer to our first question is Yes.

Our next question is more involved. We must decide whether this 2009 final judgment in a not-yet-payable KPERS account became dormant just because Tamara did not send a copy of it to KPERS until 2021. To decide that we look again to the dormancy statute's tolling provision. It states, "The time within which action must be taken to prevent a judgment from becoming dormant *does not run during any period in which the enforcement of the judgment by legal process is stayed or prohibited*." (Emphasis added.) K.S.A. 2022 Supp. 60-2403(c). And since all agree Tamara had no way to share in Jon's account until he retired, we need to decide whether her inability to enforce the 2009 judgment "by legal process" before Jon retired was "stayed or prohibited." If so, the statute says the dormancy period "does not run."

The panel looked at this much differently. It simply considered "whether a judgment in a divorce decree that divides a retirement account can become dormant and expire with the passage of time." *In re Marriage of Holliday*, 2022 WL 4391026, at *1. And it held that unless "some action is taken," these division judgments

can erode. 2022 WL 4391026, at *2. In the panel's view, the "action" required of Tamara was "notification to KPERS of a judgment dividing a KPERS retirement account" because this notification was "*a form of execution on that judgment*." (Emphasis added.) 2022 WL 4391026, at *4 ("With no execution, the judgment can become dormant and then subject to expiration."). Although it is true in the abstract that a judgment in a divorce decree can become dormant as explained above, we question the panel's conclusion that Tamara's judgment became permanently extinguished as to Jon's KPERS account.

The panel did not explain why mere delivery of a divorce decree to KPERS years before someone can collect any benefits is a do-or-die step in "execution" of a judgment under K.S.A. 2022 Supp. 60-2403(a)(1). And since this case turns on that missing explanation, we must explore more precisely what a "qualified domestic relations order" is under the KPERS statute, K.S.A. 74-4923(b), and what "execution" is under the dormancy statute. In doing so, we will also look at retirement plans subject to federal ERISA provisions, which differ from KPERS plans, because the *Holliday* panel relied on *In re Marriage of Larimore*, 52 Kan. App. 2d 31, 44, 362 P.3d 843 (2015), for its conclusion and that case dealt with an ERISA-governed plan.

QDROs under KPERS

The KPERS Act, K.S.A. 74-4901 et seq., offers statewide retirement plans for state and local public employees, which we call KPERS. See *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, Syl. ¶ 2, 941 P.2d 1321 (1997) ("As KPERS is a classic 'defined benefit' retirement plan, the State of Kansas and the numerous public entities whose employees are subject to the plan have an unequivocal constitutional, statutory, and contractual obligation to ensure that KPERS has sufficient funds to pay the required benefits to public employees who are participating in the plan."). And K.S.A. 74-4923(b) governs division of retirement accounts in a divorce decree. It states in pertinent part:

"Any annuity, benefits, funds, property or rights created by, or accruing to any person under the provisions of K.S.A. 74-4901 et seq. . . . shall not be subject to execution, garnishment or attachment, or, except as otherwise provided, any

other process or claim whatsoever; and shall be unassignable . . . . *Any annuity or benefit or accumulated contributions due and owing to any person under the provisions of K.S.A. 74-4901 et seq. . . . are subject to claims of an alternate payee under a qualified domestic relations order.* As used in this subsection, the terms 'alternate payee' and 'qualified domestic relations order' shall have the meaning ascribed to them in section 414(p) of the federal internal revenue code. . . . [KPERS] shall not be a party to any action under the Kansas family law code, . . . but is subject to orders from such actions issued by the district court . . . and may also accept orders which it deems to be qualified under this subsection from courts having jurisdiction of such actions outside the state of Kansas. Such orders from such actions shall specify either a specific amount or specific percentage of the amount of the pension or benefit or any accumulated contributions due and owing from the system to be distributed by the system pursuant to this act." (Emphasis added.) K.S.A. 74-4923(b).

As readily seen, the statute declares a general rule that KPERS retirement benefits cannot be seized by or assigned to any other party. But it also provides an exception to this, by noting benefits are subject to an alternate payee's claim under a QDRO. And the law requires KPERS to comply with a domestic relations order deemed to be qualified and lists elements these orders must contain to be considered qualified. The Act, however, does not provide a separate definition for QDROs; it instead refers to section 414(p) of the federal Internal Revenue Code, which provides that a QDRO "means a domestic relations order . . . which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 26 U.S.C. § 414(p)(1)(A)(i) (2018).

In Tamara's case, a domestic relations order "means any judgment, decree, or order" relating to "marital property rights to a spouse," and "made pursuant to a State . . . domestic law." 26 U.S.C. § 414(p)(1)(B). To be qualified, a domestic relations order "must clearly specify certain facts," which are:

"(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

"(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

"(C) the number of payments or period to which such order applies, and

"(D) each plan to which such order applies." 26 U.S.C. § 414(p)(2).

In addition, a domestic relations order "may not alter amount, form, etc., of benefits." 26 U.S.C. § 414(p)(3). In other words, it "meets the requirements of this paragraph only if such order":

> "(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> "(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> "(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order." 26 U.S.C. § 414(p)(3).

While Kansas law borrows ERISA's definition of QDROs, K.S.A. 74-4923(b) clarifies that under the KPERS Act, to be qualified, the domestic relations order must specify either a specific dollar amount or a specific percentage of the pension or benefit due to be distributed by the system. This state law requirement is not much different from the federal language under 26 U.S.C. § 414(p)(2)(B) ("[T]he amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee . . . ."). But under the KPERS Act, the system need not split the member's account upon a determination of a QDRO. See K.S.A. 74-4923(b); KPERS, QDRO Guidelines (April 30, 2023), https://www.kpers.org/qdro ("When a QDRO is accepted by KPERS, the alternate payee's award is maintained, in essence, as a lien on the member's account. No separate account is maintained.").

This differs from ERISA, which provides that once a plan administrator receives a domestic relations order, it must maintain a separate account for the amounts payable to the alternate payee while the status of a domestic relations order is being determined as a QDRO. 26 U.S.C. § 414(p)(7)(A); see also 26 U.S.C. § 414(p)(8) (defining "alternate payee"). When this determination is completed, the administrator "shall pay the segregated amounts" to the alternate payee. 26 U.S.C. § 414(p)(7)(B).

Our state statute does not specify procedures for processing a domestic relations order, even though it relies on ERISA for the definition of QDROs. Turner, 2 Equitable Distribution of Property § 6:19 (4th ed. 2023), explains the federal procedures as follows: After a state court renders a domestic relations order, typically the

alternate payee submits it to the plan administrator. See 26 U.S.C. § 414(g) (defining plan administrator). The plan administrator makes an initial determination of whether the order is qualified. 26 U.S.C. § 414(p)(6)(A)(ii). Usually this takes 18 months. 26 U.S.C. § 414(p)(7). If it determines the order to be qualified, the alternate payee is entitled to the segregated benefits; otherwise, "the order will then be modified by the state court judge to address the problems which caused the plan administrator to refuse to qualify it." Equitable Distribution of Property § 6:19. And if either spouse disagrees with the administrator's decision about qualified status, the issue can be tried before a judge. See 29 U.S.C. § 1132(e)(1) (2018) (state and federal courts have concurrent jurisdiction over such actions). In such cases, the plan is joined as a party. But recall that KPERS "shall not be a party to any action under the Kansas family law code." K.S.A. 74-4923(b). See Snyder, Qualified Domestic Relations Orders § 11:2 (2023) ("The general rule is that [QDRO] rules do not apply to governmental plans unless they have elected to be covered under [ERISA]."); 26 U.S.C. § 414(d) (defining governmental plan); K.S.A. 74-4903 (KPERS is a governmental plan).

Although our state law borrows the federal definitions for a QDRO and an alternate payee, other aspects of the KPERS Act simply underscore that KPERS does not operate as a plan subject to ERISA.

Execution

The next consideration is whether Tamara's notice to KPERS of her 2009 domestic relations order years before any benefits were due would have constituted "execution" under K.S.A. 2022 Supp. 60-2403(a)(1). We hold it would not. Recall that under K.S.A. 2022 Supp. 60-2403, a party wishing to keep a judgment alive must either file a renewal affidavit or issue execution. K.S.A. 2022 Supp. 60-2401(a) defines "execution" as follows:

"A general execution is a direction to an officer to seize any nonexempt property of a judgment debtor and cause it to be sold in satisfaction of the judgment. A special execution or order of sale is a direction to an officer to effect some action with regard to specified property as the court determines necessary in adjudicating the rights of parties to an action."

The panel held the "action" required by the dormancy statute in Tamara's case was "the notification to KPERS of a judgment dividing a KPERS retirement account." *In re Marriage of Holliday*, 2022 WL 4391026, at *4. And to reach that conclusion, the panel relied on *In re Marriage of Larimore*, which dealt with an ERISA-qualified plan. See *In re Marriage of Holliday*, 2022 WL 4391026, at *2-3. But as explained above, a KPERS plan is not an apt comparison. The *Holliday* panel did not address that.

The *Larimore* panel held "[a] party may execute on a judgment in a divorce decree that divides a party's retirement accounts governed by [ERISA], by filing a [QDRO] with the retirement plan administrator." *In re Marriage of Larimore*, 52 Kan. App. 2d 31, Syl. ¶ 3. And in rejecting the alternate payee's request to apply K.S.A. 2014 Supp. 60-2403(c)'s tolling provision, the *Larimore* panel noted that "because the legal process for enforcing such a judgment—the filing of a QDRO—is not stayed or prohibited until the benefits become payable," the time started running on the date of the judgment's entry. 52 Kan. App. 2d at 44. It also noted: "Although Janice may not have been able to receive money from David's retirement accounts during the ensuing 12 years, the necessary legal process—a QDRO—for enforcing Janice's interest in the retirement accounts was fully available to her." 52 Kan. App. 2d at 44; see also *In re Marriage of Smith*, No. 105,365, 2012 WL 1649835, at *5 (Kan. App. 2012) (unpublished opinion) (holding part of executing on a judgment was sending the QDRO to the plan administrator; noting clock starts ticking when the judgment was entered).

But as Tamara correctly points out, notification is not execution under K.S.A. 2022 Supp. 60-2401(a) since it is not a direction to an officer to seize a debtor's property and sell it to satisfy the judgment. And a renewal affidavit would have been futile until the benefits become payable. See K.S.A. 2022 Supp. 60-2403(a)(2) (defining "renewal affidavit" as "a statement under oath . . . stating the remaining balance due and unpaid on the judgment"). Also, the revivor statute would have no practical application to these circumstances pending Jon's retirement because it is "a request for the immediate issuance of an execution thereon if such motion is granted." K.S.A. 60-2404.

As discussed earlier, even if KPERS receives a domestic relations order and processes it under the KPERS Act by noting its existence in its files, as long as Jon's retirement benefits are not yet payable, nothing will happen. And when the benefits become payable, the notification simply permits Tamara to receive her share of Jon's account directly from the system. So the key effect of a QDRO here is to require KPERS to pay a portion of the member's benefits directly to the alternate payee once the member's benefits become payable—but not until then.

We express no opinion whether *In re Marriage of Larimore*, which applied the dormancy statute to a plan subject to ERISA, correctly decided the issue presented. That would be a question of first impression for our court and best left to a controversy directly on point. But we do note important administrative differences in the way KPERS handles division orders from those under ERISA qualified plans, and since the *Holliday* panel did not address those differences in its rationale, we consider it flawed for that reason.

The Holliday *panel erred.*

What the above tells us is this:

- The 2009 decree recognized Tamara and Jon's marital property, specifically acknowledging Jon's KPERS account as part of the marital property and entitling Tamara to an equal share as of a specified date.

- Once a DRO is delivered, KPERS will process it, and if it contains all the necessary information, KPERS must comply with it when the time comes to pay benefits.

- Jon's retirement benefits were not payable until he retires, dies, or withdraws from KPERS. Until then, no legal process exists for Jon to receive his retirement benefits from KPERS, nor is there a legal process for Tamara to extract her share. Both parties are on the same footing.

- A QDRO is a procedural mechanism in this context that simply makes KPERS aware that it is to pay the benefits to the alternate payee directly when they become due to the plan member.

We hold the dormancy period tolled until Jon's retirements benefits became payable to him from his account. In the language of K.S.A. 2022 Supp. 60-2403(c), no legal process was available for Tamara to enforce her judgment until Jon started receiving benefits. Filing the court's division order with KPERS any earlier would have had no effect unless the plan member was receiving benefits. The result here adheres to our holding in *Bank IV Wichita*, 250 Kan. 701, Syl. ¶ 4 ("The time within which a judgment must be enforced to prevent it from becoming dormant does not run during any period in which it is impossible to collect the judgment by legal process."). It also aligns with K.S.A. 2022 Supp. 23-2102. ("The provisions of the Kansas family law code shall be construed to secure the just, speedy, inexpensive and equitable determination of issues in all domestic relations matters.")

We reverse the Court of Appeals and affirm the district court with alternate reasoning.

Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

No. 124,529

In the Matter of the Marriage of LISA MICHELLE SHAFER (nka WEBSTER), *Appellant*, and JON FRANCIS SHAFER, *Appellee.*

SYLLABUS BY THE COURT

1. DIVORCE—*Division of Retirement Account—Judgment Subject to Dormancy If Qualifies as Final Determination of Parties' Interests.* A district court's division of a retirement account in a divorce proceeding constitutes a judgment subject to dormancy under K.S.A. 2022 Supp. 60-2403 when the division order qualifies under K.S.A. 60-254(a) as a final determination of the parties' interests in the marital estate.

2. SAME—*K.S.A. 60-260 Not Applicable When Movant Requests to Clarify Original Property Division Order.* The relief from judgment statute, K.S.A. 2022 Supp. 60-260, is not applicable when a movant merely requests to clarify the original property division order that does not require any substantive change to the order.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 23, 2022. Appeal from Johnson District Court; K. CHRISTOPHER JAYARAM, judge. Oral argument held May 16, 2023. Opinion filed June 30, 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 to the district court.

Bruce W. Beye, of Overland Park, argued the cause and was on the briefs for appellant.

Ronald W. Nelson, of Ronald W. Nelson, PA, of Overland Park, argued the cause, and *Joseph A. DeWoskin*, of Kansas City, was with him on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: When Jon Shafer and Lisa Webster divorced in 2007, the district court ordered she receive a share of Jon's Army Reserve and National Guard retirement pay based on the months of their marriage. He retired about 15 years later, which was when Lisa submitted the court's division order to the federal office administering Jon's retirement benefits. But that office said it needed more detail to calculate Lisa's share, and the district court denied her request to clarify its order. It reasoned the original judgment had gone dormant under state law, and that Lisa had waited too

long to seek changes. A Court of Appeals panel reversed that ruling because it believed the division order was not a final judgment subject to dormancy. On review, we affirm the panel's judgment, although our reasoning differs from the panel's.

We hold: (1) the division order was a final judgment, subject to the dormancy statute; and (2) the relief from judgment statute, K.S.A. 2020 Supp. 60-260, was not applicable because Lisa's clarification request does not require substantive change to the original property division. Our rationale on the dormancy issue under K.S.A. 2022 Supp. 60-2403(a)(1) follows *In re Marriage of Holliday*, 317 Kan. 470, __ P.3d __ (2023). We remand the case to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, the district court awarded Lisa a share of Jon's military retirement benefits. The ruling states: "Army Reserve Retirement Pays equal to 50% of months of marriage divided by the total months in the Reserves" and "National Guard Retirement Pay equal to 50% of months of marriage divided by the total months in the Guard." It also confirmed Jon and Lisa married on February 1, 1992. Their divorce decree, entered in 2007, incorporated the 2006 division of assets and liabilities by reference. Jon retired from service about 14 years after the divorce.

To process her share of Jon's benefits, Lisa submitted the court's division order to the Defense Financial Accounting Services office. But it asked for more information, including how long, in months, the parties were married. Lisa returned to the district court for that clarification, asking that it specify the total months of marriage. Jon opposed the motion.

At a hearing, Lisa's attorney explained that DFAS had written asking "the Court issue an order to clarify . . . the number of the months of the marriage." Counsel claimed the division order was "not a final order until that number is clarified" and said Lisa was "not asking for a modification of the order" but just asking for a "simple clarification." Her attorney explained, "All I am seeking the Court to do is to plug in the number that [DFAS] is requesting in order to enforce the order."

Jon's attorney argued the court had no authority to modify the division order under K.S.A. 2021 Supp. 60-260(b) (imposing one-year time limit for filing a motion for relief from a judgment), and that the original judgment giving Lisa a share of Jon's benefits had expired under the dormancy statute, K.S.A. 2021 Supp. 60-2403(a)(1) (stating that if a renewal affidavit is not filed or execution is not issued within five years from the date of the judgment's entry, the judgment becomes dormant; noting after two years of being dormant with no attempts to revive it, the judgment permanently expires on request). The court asked Lisa's counsel if anything had prevented Lisa from filing a qualified domestic relations order for the military retirement benefits shortly after filing of the divorce decree. Counsel answered, "No."

The court denied Lisa's motion. Its journal entry states:

"The basis for the Court's decision denying Petitioner's Motion for Clarification is as follows:

"a. That under K.S.A. 60-260(b), the mistake that Petitioner's Motion is trying to correct was not brought within one year of the Judgment being entered;

"b. The Decree was entered in [2007] and no action appears to have been taken until April of 2021 when Petitioner filed her Motion to address the issue raised in the Motion for Clarification;

"c. Petitioner did not submit a QDRO or take any enforcement steps until 2021, despite admissions on the record that there was nothing prohibiting her from affirmatively taking steps to seek the same prior to this year;

"d. The Decree issued in [2007] is not an interlocutory order but was a final judgment for all purposes;

"e. The Judgment was extinguished in 2011 and no action was taken to revive the judgment; and

"f. The Court finds [*In re Marriage of Larimore*, 52 Kan. App. 2d 31, 362 P.3d 843 (2015), and *In re Marriage of Porterfield*, No. 118,479, 2019 WL 847671 (Kan. App. 2019) (unpublished opinion),] to be persuasive to the Court;

"g. The Court is obviously empathetic to Petitioner's current situation and acknowledges that previously awarded property may no longer be available to her; the Court recognizes the inherent injustice that this result may present. However, the Court simply lacks any legal basis, given the significant lapse in time during which no action was taken, to amend, alter, or modify the prior judgment. Moreover, litigants have an affirmative obligation to assert their rights, and a party may not simply sit idly by and only years later seek to vindicate such rights. There are counterbalancing interests of finality and certainty, as well as timely adjudication that are involved in situations such as this. Thus, as a matter of law, this Court simply cannot grant the requested relief, as much as it might wish at this time."

Lisa appealed, and a Court of Appeals panel reversed. It held the division order was not a final judgment subject to the dormancy statute because "[t]he precise length of the parties' marriage was not readily discernible from either the decree or the division of assets," so the order did not have a complete calculation mechanism to apportion Jon's military retirement benefits. *In re Marriage of Shafer*, No. 124,529, 2022 WL 4390875, at *1, 6 (Kan. App. 2022) (unpublished opinion). The panel remanded the case to the district court "to consider the merits of Lisa's motion for clarification." 2022 WL 4390875, at *1. We granted Jon's petition for review.

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

DISCUSSION

This case presents three issues: (1) whether the property division is a final judgment subject to the dormancy statute, (2) whether the relief statute applies, and (3) whether inactivity rendered the judgment dormant. All three are questions of law involving statutory interpretation, which are subject to unlimited review. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015).

The judgment was final.

The panel held the division order was not final as "[t]he precise length of the parties' marriage was not readily discernible from either the decree or the division of assets." *In re Marriage of Shafer*, 2022 WL 4390875, at *1. We disagree. The district court's 2006 memorandum decision states, "The parties were married on Feb. 1, 1992 in Louisville, KY." The Decree of Divorce is file-stamped November 16, 2007, so this means the precise length of this marriage was 15 years, 9 months, and 15 days—or 189.5 months.

K.S.A. 60-254(a) defines a "judgment" as "the final determination of the parties' rights in an action." See *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 1, 836 P.2d 1128 (1992) ("A final

decision is one that finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the court."); *Bandel v. Pettibone*, 211 Kan. 672, 677, 508 P.2d 487 (1973) ("It is a fundamental rule that a judgment should be complete and certain in itself, and that the form of the judgment should be such as to indicate with reasonable clearness the decision which the court has rendered, so that the parties may be able to ascertain the extent to which their rights and obligations are fixed, and so that the judgment is susceptible of enforcement in the manner provided by law."). And the 2007 decree of divorce, which incorporates by reference the 2006 memorandum decision, provides all the information needed to establish the precise length of Jon and Lisa's marriage in months.

When read together, the two documents dispose of the division of these marital assets. Lisa's motion to the district court did not require the court to alter or amend its original property division. The panel erred when it found "the division of Jon's military retirement pay contained an incomplete calculation mechanism" as its rationale for holding "the order was not susceptible to enforcement and was therefore not subject to dormancy." *In re Marriage of Shafer*, 2022 WL 4390875, at *1.

We hold the 2007 divorce decree, with its incorporation of the 2006 memorandum decision, constitutes a final judgment under K.S.A. 60-254(a).

K.S.A. 2021 Supp. 60-260 is not applicable.

Lisa's motion for clarification is not part of the appellate record. But the hearing transcript suggests she filed her motion under K.S.A. 2021 Supp. 60-260(b)(1). It provides:

"(b) *Grounds for relief from a final judgment, order or proceeding*. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise or excusable neglect;

. . . .

"(c) *Timing and effect of the motion*. (1) *Timing*. A motion under subsection (b) must be made within a reasonable time, and for reasons under paragraphs (b)(1), (2) and (3) no more than one year after the entry of the judgment or order, or the date of the proceeding." K.S.A. 2021 Supp. 60-260.

In any event, the district court cited K.S.A. 2021 Supp. 60-260(b) as part of its ruling. But as discussed, Lisa's request to identify the length of the marriage in months should not be deemed as asking for any relief from the final division order, as her request does not demand any substantive change in the final judgment. In other words, the relief statute is inapplicable.

The judgment is subject to the dormancy statute.

Our determination that there was a final judgment here necessarily leads us to conclude that same judgment is subject to the dormancy statute, K.S.A. 2022 Supp. 60-2403. As we explained in *In re Marriage of Holliday*, 317 Kan. 470, Syl. ¶ 1: "A district court's division of a retirement account in a divorce proceeding constitutes a judgment subject to dormancy under K.S.A. 2022 Supp. 60-2403 when the division order qualifies under K.S.A. 60-254(a) as a final determination of the parties' interests in the marital estate."

But we also held in *Holliday* that under the facts of that case involving division of a spouse's benefits with the Kansas Public Employees Retirement System that K.S.A. 2022 Supp. 60-2403(c)'s tolling provision prevented the divorce judgment from becoming dormant because benefits were not yet payable from that account. *In re Marriage of Holliday*, 317 Kan. 470, Syl. ¶ 3. This holding contradicts the underlying assumption of the district court that Lisa was obligated under K.S.A. 60-2403 to file appropriate paperwork with the Defense Financial Accounting Services office earlier than she did to avoid dormancy.

We hesitate, however, to apply our holding in *Holliday* concerning subsection (c)'s tolling provisions with these military retirement accounts on this record because that question was understandably not briefed with us or addressed below. The discussion at oral argument with counsel about similarities between these military benefits and KPERS suggests *Holliday* resolves this case entirely, but we will leave that to the district court on remand should the parties make it an issue.

We affirm the panel although our reasoning differs. The case is remanded to the district court for further proceedings.

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

No. 124,636

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

SYLLABUS BY THE COURT

JURISDICTION—*Supreme Court has Jurisdiction in Appeals from Judgments Regarding Restitution in First-degree Murder Convictions.* Under K.S.A. 60-2101(b) and K.S.A. 2022 Supp. 22-3601, the Kansas Supreme Court has jurisdiction over appeals from district court judgments upholding or reversing the validity of restitution orders imposed in first-degree murder convictions.

Appeal from Johnson District Court; DANIEL VOKINS, magistrate judge. Submitted without oral argument March 31, 2023. Opinion filed June 30, 2023. Affirmed.

Richard P. Klein, of Lenexa, was on the brief for appellant.

Stephanie B. Poyer, of Butler & Associates P.A., of Topeka, was on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Brian C. Bailey challenges the continuing validity of the restitution imposed on him in connection with convictions for felony murder and aggravated robbery.

Bailey was convicted in 1988 of one count of first-degree felony murder and four counts of aggravated robbery for events that took place in December 1986. His convictions were affirmed in *State v. Bailey*, 247 Kan. 330, 799 P.2d 977 (1990), *cert. denied* 500 U.S. 920 (1991). Following the vacating of his sentence and a remand for resentencing in *State v. Bailey*, 251 Kan. 527, 531, 834 P.2d 1353 (1992), the district court reimposed a life sentence for the felony murder and ordered that he serve three of his four aggravated robbery convictions concurrently. In addition, the court ordered restitution of $37,521.07.

Bailey has engaged in many years of litigation and appeals relating to various aspects of conviction and sentence. In 2017, this court once again considered an appeal from challenges Bailey raised to his sentence and to the restitution order. *State v. Bailey,* 306 Kan. 393, 394 P.3d 831 (2017). In that case, Bailey argued his restitution order was dormant under K.S.A. 60-2403 and 60-

2404 and thus void because no civil actions had been filed to keep the claim alive. The court concluded that, under the law in effect at the time he was sentenced, the district court lacked the authority to impose both incarceration and simultaneous restitution. 306 Kan. at 397. The sentencing court could only specify the amount Bailey should pay if restitution were later ordered as a condition of conditional release. 306 Kan. at 397; see K.S.A. 1986 Supp. 21-4603(2)(f). Accordingly, no enforceable restitution judgment existed against Bailey during the term of his incarceration, and, as a result, he could not rely on dormancy statutes to void the restitution order. 306 Kan. at 397.

This court went on to conclude that the State had been wrongly collecting restitution from Bailey's prison account since 2012 based on a clerical error entered into the county district court computer system. The court remanded the case for a hearing to find and correct any clerical error affecting collection of restitution from Bailey. *Bailey*, 306 Kan. at 398.

On remand, the district court indeed found a clerical error and ordered it be corrected. The court determined that the Clerk of the District Court made a mistake during conversion of district court records from paper to digital records. Under K.S.A. 1986 Supp. 21-4603(2)(f), the court was precluded from collecting restitution from Bailey while he was imprisoned. The court ordered that no further collection of restitution take place while Bailey remained in prison.

Bailey also requested that he be refunded $3,347.16 already improperly collected from his account. The district court established that the actual amount of $2,349.93 was collected and distributed to victims in the case and $535.89 remained in an open-payables account under the clerk's control. Looking to *United States v. Hayes*, 385 F.3d 1226 (9th Cir. 2004), the court reasoned that funds already distributed to victims could not be recouped because they were no longer under the control of the government, and only the $535.89 could be ordered returned to Bailey. In addition, the court noted that the return of some of the funds was barred by the K.S.A. 60-513(a) statute of limitations.

Bailey appealed from that decision. In that appeal, this court observed that K.S.A. 2020 Supp. 22-3504(b), relating to correction of sentences, did not authorize a court to do anything more than correct the clerical order; there was no statutory authority for refunding improperly collected funds. *State v. Bailey*, 313 Kan. 895, 897, 491 P.3d 1256 (2021). The court then noted that Bailey had failed to brief adequately an argument that he had some statutory or constitutional basis for demanding a refund of funds already distributed. 313 Kan. at 897-900. The court refused to consider his claim on appeal and affirmed the district court.

While that appeal was pending, on April 30, 2021, Bailey filed a "Motion to Void Restitution, Reimbursements for Indigent Defense Services and Court Cost and Fees and Witness Fees." Bailey repeated his argument that the restitution order was dormant and therefore void because no civil actions had been filed to keep the claim alive. The district court relied on *Bailey*, 306 Kan. at 393, to deny the motion. In doing so, the court cited to the law-of-the-case doctrine and declined to reopen the matter already decided by this court.

Bailey took a timely appeal to this court.

As a threshold question, we directed the parties to include in their briefing a discussion of certain jurisdictional matters. In particular, we asked the parties to address whether this court is the appropriate venue for this appeal. We conclude that it is.

Instead of appealing to the Court of Appeals, Bailey took his appeal directly to the Kansas Supreme Court under K.S.A. 60-2101(b), which states that this court has jurisdiction over appeals governed by K.S.A. 2022 Supp. 22-3601. The plain language of K.S.A. 2022 Supp. 22-3601(b) states that "[a]ny appeal permitted to be taken from a district court's final judgment in a criminal case shall be taken to the supreme court" in cases of life sentences and certain off-grid convictions.

This court has held that "[r]estitution is part of a criminal defendant's sentence." *State v. Northern*., 304 Kan. 860, 862, 375 P.3d 363 (2016); see also *State v. Hall*, 298 Kan. 978, 983, 319 P.3d 506 (2014) ("Restitution constitutes part of a criminal defendant's sentence."); *State v. McDaniel*, 292 Kan. 443, 446, 254

P.3d 534 (2011) (same). This is not an action challenging a garnishment or a civil order. A criminal restitution order itself is not a legal obligation equivalent to a civil judgment. See *State v. Arnett*, 314 Kan. 183, 194, 496 P.3d 928 (2021), *cert. denied* 142 S. Ct. 2868 (2022).

Because restitution is part of Bailey's sentence, challenges to the ongoing validity of that part of the sentence properly lie with this court. See, e.g., *State v. Gilbert*, 299 Kan. 797, 800, 326 P.3d 1060 (2014) (jurisdiction over appeal of motion to correct illegal sentence lies with court having jurisdiction to hear original appeal under K.S.A. 2013 Supp. 22-3601[b][3]).

This conclusion is consistent with other cases in which this court has assumed jurisdiction over matters directly relating to the conviction and sentence in first-degree murder convictions, even when the appellants have invoked the civil code as authority for their actions. See, e.g., *State v. Kingsley*, 299 Kan. 896, 326 P.3d 1083 (2014) (Supreme Court considered direct appeal from denial of motion under K.S.A. 60-260[b] for relief from judgment); *State v. Mitchell*, 297 Kan. 118, 298 P.3d 349 (2013) (same); *State v. Robinson*, 309 Kan. 159, 432 P.3d 75 (2019) (court assumed jurisdiction to decide whether civil code authorizes postconviction discovery in a criminal case); *Bailey*, 313 Kan. at 895.

This court therefore has jurisdiction over Bailey's appeal. He is subject to life sentences, and his off-grid convictions lie within the statutory scope for direct appeals to this court. This is "any appeal"; it is from "a district court's final judgment"; and it is the result of pleadings filed under Bailey's criminal case number. It meets the statutory conditions for an appeal to this court under K.S.A. 2022 Supp. 22-3601(b).

Bailey argues the dormancy statutes render his restitution judgment void because no renewal affidavit and no motion to revive judgment have been filed. In *Bailey*, 306 Kan. at 397, this court explicitly held that "no enforceable restitution judgment exists against Bailey, and the dormancy statutes do not apply." See also *Arnett*, 314 Kan. at 194 ("unlike most other civil judgments, a modern judgment for restitution never becomes dormant"); *State v. Alderson*, 299 Kan 148, 151, 322 P.3d 364 (2014) (restitution is

not enforceable judgment at time of sentencing; judgment cannot become dormant).

The district court relied on the law-of-the-case doctrine when it denied Bailey's claim. The law-of-the-case doctrine prevents a party from relitigating an issue already decided on appeal in successive stages of the same proceeding. *State v. Parry*, 305 Kan. 1189, Syl. ¶ 1, 390 P.3d 879 (2017). Courts adhere to the law of the case """to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts. [Citations omitted.]""" 305 Kan. at 1194-95.

One circumstance under which the law-of-the-case doctrine comes into play is when a second appeal is brought in the same case. In that instance, the first decision is generally the settled law of the case on all questions involved in the first appeal, and "reconsideration will not normally be given to those questions." *Parry*, 305 Kan. at 1195. An argument once made to and resolved by an appellate court becomes "the law" in that case and generally cannot be challenged in a second appeal. *State v. Collier*, 263 Kan. 629, Syl. ¶ 3, 952 P.2d 1326 (1998).

Bailey offers no new arguments or authority demonstrating that the State is required to renew its restitution judgments for such judgments to become enforceable upon release from incarceration. *Bailey*, 313 Kan. at 895, and *Bailey*, 306 Kan. at 393, are the law of this case, and the judgment of the district court ruling against Bailey based on the law-of-the-case doctrine is accordingly affirmed.

STANDRIDGE, J., not participating.

In re Marvin S. Robinson Charitable Trust

No. 126,125

In the Matter of the MARVIN S. ROBINSON CHARITABLE TRUST, dated May 22, 1985.

SYLLABUS BY THE COURT

1. TRUSTS—*Charitable Trust— Supreme Court has Subject Matter Jurisdiction to Review District Court Order Modifying Charitable Trust.* The Kansas Supreme Court has subject matter jurisdiction to review an uncontested district court order retroactively modifying a charitable trust to decide whether the district court's order should be binding on federal tax authorities under *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967).

2. COURTS—*Appellate Review of Cases Decided on Documents and Stipulated Facts.* Appellate courts need not defer to the district court when reviewing cases decided on documents and stipulated facts.

Appeal from Riley District Court; JOHN F. BOSCH, judge. Submitted without oral argument May 18, 2023. Opinion filed June 30, 2023. Affirmed.

Thomas M. Ruane, of Polsinelli PC, of Kansas City, Missouri, and *Stephen J. Bahr*, of the same firm, were on the brief for appellants Dirk Daveline, Matt Crocker, Wayne Sloan, Jim Gordon, Neal Helmick, and Lance White, Co-Trustees.

No other parties appear.

The opinion of the court was delivered by

WALL, J.: This case involving the modification of a charitable trust is the latest in a line of appeals we have decided under *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). In *Bosch*, the United States Supreme Court held that the Internal Revenue Service (IRS) and federal courts are not bound by decisions of lower state courts on issues of state law, but they will defer to decisions of a state's highest court.

Here, the district court granted the uncontested petition of the trustees of the Marvin S. Robinson Charitable Trust to retroactively modify the trust's terms to maintain its status as a tax-exempt "supporting organization" under the federal tax code. But under *Bosch*, orders on such matters are binding on federal tax

authorities only if they emanate from our court. See *In re Common-Law Marriage of Heidkamp and Ritter*, 317 Kan. 125, 127-328, 526 P.3d 669 (2023). We therefore agreed to review the district court's order. For the reasons set forth in this opinion, we affirm the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

The facts are undisputed. Before his death, longtime Riley County resident Marvin Robinson founded a charitable trust in his name to support local public charities like the Jewish Congregation of Manhattan and the Kansas State University Foundation. The IRS issued a determination letter classifying the trust as a "supporting organization" rather than a private foundation, meaning that it was a tax-exempt entity organized and operated "exclusively for the benefit of, to perform the functions of, or to carry out the purposes of" one or more public charities. 26 U.S.C. § 509(a)(3)(A) (2018). That classification was important because Robinson intended to fund the trust using his substantial stock ownership in his family's steel business, SPS Companies. And classification as a private foundation would have subjected the trust to rules limiting the amount of SPS stock the trust could hold. See 26 U.S.C. § 4943(c)(2) (2018).

But in 2006, Congress altered the rules governing supporting organizations. See Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 424. Most relevant here, it extended the private-foundation limits on stock holdings to certain types of supporting organizations that were not (in tax lingo) "functionally integrated Type III supporting organizations." Pension Protection Act § 1243 (amending 26 U.S.C. § 4943). Under the IRS regulations implementing those amendments, organizations had until January 2015 to comply with these new rules. See 77 Fed. Reg. 76382, 76392 (Dec. 28, 2012) (providing for transitional period until "first day of the organization's second taxable year beginning after December 28, 2012").

Then in 2021, the trustees realized that Robinson's trust might qualify as the type of supporting organization subject to the private-foundation limits on stock holdings. They decided to amend the trust agreement to explicitly satisfy the requirements of (again,

in tax lingo) Type I supporting organizations, which are not typically subject to those limits. See 26 U.S.C. § 4943(f). For example, the amended trust required a majority of the six trustees to be appointed by public charities that the trust supports. See 26 C.F.R. § 1.509(a)-4(g)(1)(i) (2022).

In January 2023, the trustees filed an uncontested petition to retroactively modify the trust under the Kansas Uniform Trust Code. The trustees asked the district court to recognize the amendment as retroactive to December 31, 2014, just before the deadline to comply with the new supporting-organization requirements. After reviewing the petition and the uncontroverted evidence, the court adopted the trust's proposed factual findings and legal conclusions. The court determined that it could retroactively modify the trust (1) to enable the trustees to administer the trust in accordance with Robinson's charitable intention, (2) to prevent the trust from being classified as a private foundation, and (3) to preserve the trust's assets for the intended beneficiaries.

The trustees appealed from that favorable ruling to the Court of Appeals, and we granted the trustees' motion to transfer the case to our court to render a binding opinion under *Bosch*. See K.S.A. 2022 Supp. 20-3017 (upon motion of a party, Kansas Supreme Court may transfer to itself a case from the Kansas Court of Appeals).

Ordinarily, appellate courts do not have jurisdiction to review cases that lack adverse parties. See *In re Estate of Keller*, 273 Kan. 981, 985-86, 46 P.3d 1135 (2002). But "[t]his court has jurisdiction to consider this uncontested appeal because of the *Bosch* requirement that the highest state court in Kansas must affirm a ruling in this kind of case in order to have legal effect on federal courts and agencies." *In re Marriage of Heidkamp and Ritter*, 317 Kan. at 128.

ANALYSIS

We do not defer to the district court when reviewing cases that, like this one, were decided on documents and stipulated facts. See *In re Harris Testamentary Trust*, 275 Kan. 946, 951, 69 P.3d 1109 (2003). The question before us is a legal one: whether Kansas law supports the district court's modification of the trust. See

275 Kan. at 951; *In re Cohen*, No. 101,187, 2009 WL 862463, at * 4 (Kan. 2009) (unpublished opinion). We hold that it does.

The trustees cited—and the district court relied on—three statutes of the Kansas Uniform Trust Code: K.S.A. 58a-412, K.S.A. 58a-413, and K.S.A. 58a-416. Under the first statute, K.S.A. 58a-412(b), a court may "modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." The second statute, K.S.A. 58a-413(a), codifies the common-law doctrine of *cy pres*. It provides that "[i]f a charitable trust is or becomes . . . impracticable of fulfillment" and the settlor "manifested a general intention to devote the property to charity," then a court "may order an administration of the trust" that is "as nearly as possible to fulfill the manifested general charitable intention of the settlor." Finally, under the third statute, K.S.A. 58a-416, "the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention" in order "[t]o achieve the settlor's tax objectives." Importantly, this statute permits the court to "provide that the modification has retroactive effect."

We agree with the district court that this final statute, K.S.A. 58a-416, authorizes the retroactive modification of Robinson's trust. There is no question that Robinson did not wish the trust to be classified as a private foundation under the federal tax code because that classification would have prevented the trust from holding substantial stock in SPS Companies. The uncontroverted affidavits presented to the district court make that clear. As does a provision of the trust agreement allowing the trustees to "change or amend [the] trust agreement to meet any requirements of the Internal Revenue Code so as to retain the tax exempt status of this trust, and to obtain recognition of exempt status as an organization which is not a private foundation and to retain this status."

But the trust's failure to meet various Pension Protection Act requirements by the end of 2014 threatened to subject the trust to private-foundation limits on stock holdings, contrary to Robinson's clear tax objectives. The amendments to the trust agreement avoid that danger by bringing the trust explicitly in line with the

requirements of a Type I supporting organization that is not subject to those limits. These facts satisfy the requirements to retroactively modify a charitable trust under K.S.A. 58a-416.

Because that statute authorizes the modification of the trust, we need not decide whether modification was also proper under the other two statutes that the trustees and district court cited. And in fact, there is good reason not to decide those issues here. Unlike K.S.A. 58a-416, neither K.S.A. 58a-412 nor K.S.A. 58a-413 expressly permit a court to modify a trust retroactively. The absence of that express language may suggest that, in contrast to K.S.A. 58a-416, K.S.A. 58a-412 and K.S.A. 58a-413 permit prospective modification only. Moreover, it is unclear that K.S.A. 58a-413 even applies to the facts here. That statute—which implements but does not expand the common-law doctrine of *cy pres*—"permits a court to implement a testator's intent and save a gift to charity by substituting beneficiaries when the named charitable beneficiary is unable to take the gift." *In re Estate of Crawshaw*, 249 Kan. 388, Syl. ¶¶ 1, 4, 819 P.2d 613 (1991). And here, the point of the trust modifications is to maintain the preferred tax and organizational status, not to select a new beneficiary. Because this is an uncontested appeal, none of those questions have been put to the adversarial process. And in the absence of briefing and argument, we decline to resolve those issues here.

We affirm the order of the district court making the trust modifications effective as of December 31, 2014, under K.S.A. 58a-416.

Judgment of the district court is affirmed.