REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 319, No. 3
Opinions filed in October – December 2024

"Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals" (USPS 007-480) are published every month except February, June, August, and October by the State of Kansas, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598. Periodical postage paid at Topeka, Kansas. POSTMASTER: Send address changes to "Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals," State Law Librarian, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598.

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Subscriptions (bound vol. and adv. sheets)	$65.00
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PUBLISHED 2025 BY

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IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2025-RL-003

RE: Rules Relating to Appellate Practice

The court amends the attached Supreme Court Rule 1.05, effective the date of this order.

Dated this 6th day of January 2025.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 1.05

FORM OF FILING; GENERAL REQUIREMENTS

(a) **Page Type and Statutory Requirements.** Unless the court permits otherwise, a filer must use black type or print on an 8½" x 11" page with one-inch margins for each document filed in a case. K.S.A. 60-205, 60-210, and 60-211 apply to all filings.

(b) **Filer Information.** A filer must include the filer's name; address; telephone number; email address; and fax number, if any, on each document filed in a case. An attorney must also include the attorney's Kansas registration number on the document and indicate the party represented.

(c) **Lead Attorney.** If multiple attorneys appear on behalf of the same party, the attorneys must designate a lead attorney for purposes of subsequent filings and notices.

(d) **Electronic Format.** A filer must submit an electronically filed document in a portable document format (PDF).

(e) **Electronic Document Size.** A filer must not submit an electronically filed document that exceeds 10 MB. A filer should contact the Office of the Clerk of the Appellate Courts for assistance with any document that exceeds this size restriction.

(f) **Paper Copy.** A Kansas licensed attorney need not provide a paper copy of an electronically filed document.

(g) **Time Computation.** A court will compute time periods as described in K.S.A. 60-206(a) and (d).

(h) **Date of Electronic Filing.** A court will consider an electronically filed document as filed on the date and at the time reflected in the file stamp on the document. The clerk of the appellate courts may change the file stamp date on a document only when directed by a court.

(i) **Case File.** The clerk of the appellate courts must keep a separate file for each case and preserve all filed documents. The clerk must record the file date for each document and maintain a case summary comparable to the appearance docket required under K.S.A. 60-2601.

[**History:** Am. effective July 1, 1982; Am. effective July 1, 1988; Am. effective February 8, 1994; Restyled rule and amended effective July 1, 2012; Am. effective December 19, 2016; Am. effective January 6, 2025.]

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-085

RE: Rules Relating to Appellate Courts and District Courts

The court amends the attached Supreme Court Rules 1.10 and 116, effective November 1, 2024.

Dated this 30th day of October 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 1.10

ADMISSION PRO HAC VICE OF OUT-OF-STATE ATTORNEY

(a) **Eligibility for Admission.** An attorney not admitted to practice law in Kansas may request admission to practice law in the Kansas appellate courts for a specific case if the attorney meets the following requirements:
   (1) has an active law license from the highest court of another state, the District of Columbia, or a United States territory;
   (2) is in good standing under the rules of that jurisdiction; and
   (3) associates with a Kansas attorney of record in the case who is registered as active under Supreme Court Rule 206 and is in good standing under the Supreme Court Rules.

(b) **Kansas Attorney's Duties.** The Kansas attorney of record under subsection (a)(3) must fulfill the following duties:
   (1) actively engage in the case;
   (2) sign and file all pleadings, documents, and briefs under Supreme Court Rules 1.12 and 1.14; and
   (3) attend any prehearing conference or oral argument.

(c) **Pro Hac Vice Motion.** An out-of-state attorney must request admission pro hac vice for each appellate case.
   (1) **Requirements.** The following requirements apply to the motion for admission pro hac vice.
      (A) The Kansas attorney must file the motion.
      (B) The motion must include the out-of-state attorney's verified application under subsection (d).
      (C) The Kansas attorney must file the motion as soon as possible but no later than the date the out-of-state attorney appears on any document filed in the case or 15 days before the out-of-state attorney appears at any prehearing conference or oral argument.
      (D) The Kansas attorney must serve the motion on all parties and the client the out-of-state attorney seeks to represent in the appellate court.
   (2) **Denial of Motion.** An appellate court must specify the reason for denying any pro hac vice motion.

(d) **Verified Application.**
   (1) **Contents.** The out-of-state attorney must include the following information in the attorney's verified application for admission pro hac vice:
      (A) the client represented;
      (B) the Kansas attorney's name; attorney registration number; business address; telephone number; email address; and fax number, if any;
      (C) the out-of-state attorney's business address; telephone number; e-mail address; and fax number, if any;
      (D) all jurisdictions that have admitted the out-of-state attorney to the practice of law and the dates of admission and attorney registration numbers;

(E) a statement that the out-of-state attorney is in good standing under the rules of each jurisdiction identified under subsection (d)(1)(D);
(F) a statement that the out-of-state attorney has never received public discipline, including suspension, disbarment, or loss of license, in any jurisdiction;
(G) a statement that the out-of-state attorney has no pending attorney disciplinary complaint in any jurisdiction or a detailed description of the pending complaint and the address of the disciplinary authority in charge; and
(H) the case name, case number, and court where the out-of- state attorney has appeared pro hac vice in Kansas in the last 12 months, if any.

(2) **Obligation to Report Changes.** The out-of-state attorney has a continuing obligation to notify the court of any change in the information the attorney provided in the application.

(e) **Fee.** The attorney must submit a nonrefundable fee of $300, payable to the clerk of the appellate courts, with each motion for admission pro hac vice.
(1) **Disciplinary Fee Fund.** The Office of the Clerk of the Appellate Courts will forward the fee to the Office of Judicial Administration, which will deposit the fee in the disciplinary fee fund.
(2) **Waiver.** The Kansas attorney may move the court to waive the fee if the out-of-state attorney represents the government or an indigent party. The Kansas attorney must move for waiver before filing the motion for admission pro hac vice.

(f) **Service.** Serving a document on the Kansas attorney has the same effect as personally serving the document on the attorney admitted pro hac vice.

(g) **Consent to Disciplinary Jurisdiction.** An out-of-state attorney who is admitted under this rule consents to the exercise of disciplinary jurisdiction under Supreme Court Rule 202(a)(5).

(h) **Appearance by Self-Represented Litigant.** This rule does not prohibit a party from appearing before an appellate court on the party's own behalf.

[**History:** New rule effective July 1, 2005; Restyled rule and amended effective July 1, 2012; Am. effective November 1, 2024.]

Rule 116

ADMISSION PRO HAC VICE OF OUT-OF-STATE ATTORNEY

(a) **Eligibility for Admission.** An attorney not admitted to practice law in Kansas may request admission to practice law in a Kansas district court or an administrative tribunal for a specific case if the attorney meets the following requirements:
(1) has an active law license from the highest court of another state, the District of Columbia, or a United States territory;
(2) is in good standing under the rules of that jurisdiction; and

(3) associates with a Kansas attorney of record in the case who is registered as active under Supreme Court Rule 206 and is in good standing under the Supreme Court Rules.

(b) **Kansas Attorney's Duties.** The Kansas attorney of record under subsection (a)(3) must fulfill the following duties:
   (1) actively engage in the case;
   (2) sign and file all pleadings and other documents;
   (3) be present throughout all court or administrative proceedings; and
   (4) attend any deposition or mediation unless excused by the court or tribunal or under a local rule.

(c) **Pro Hac Vice Motion.** An out-of-state attorney must request admission pro hac vice for each case.
   (1) **Requirements.** The following requirements apply to the motion for admission pro hac vice.
      (A) The Kansas attorney must file the motion.
      (B) The motion must include the out-of-state attorney's verified application under subsection (d);
      (C) The Kansas attorney must file the motion as soon as possible but no later than the date the out-of-state attorney appears on any document filed in the case or appears at any proceeding.
      (D) The Kansas attorney must serve the motion on all counsel of record, unrepresented parties not in default for failure to appear, and the client the out-of-state attorney seeks to represent.
   (2) **Denial of Motion.** A district court or an administrative tribunal must specify the reason for denying any pro hac vice motion.

(d) **Verified Application.**
   (1) **Contents.** The out-of-state attorney must include the following information in the attorney's verified application for admission pro hac vice:
      (A) the client represented;
      (B) the Kansas attorney's name; attorney registration number; business address; telephone number; e-mail address; and fax number, if any;
      (C) the out-of-state attorney's business address; telephone number; e-mail address; and fax number, if any;
      (D) all jurisdictions that have admitted the out-of-state attorney to the practice of law and the dates of admission and attorney registration numbers;
      (E) a statement that the out-of-state attorney is in good standing under the rules of each jurisdiction identified under subsection (d)(1)(D);
      (F) a statement that the out-of-state attorney has never received public discipline, including suspension, disbarment, or loss of license, in any jurisdiction;
      (G) a statement that the out-of-state attorney has no pending attorney disciplinary complaint in any jurisdiction or a detailed description of the pending complaint and the address of the disciplinary authority in charge; and

(H) the case name, case number, and court where the out-of-state attorney has appeared pro hac vice in Kansas in the last 12 months, if any.

(2) **Obligation to Report Changes.** The out-of-state attorney has a continuing obligation to notify the district court or administrative tribunal of any change in the information the attorney provided in the application.

(e) **Fee; District Court.** The attorney must submit a nonrefundable fee of $300, payable to the clerk of the district court, with each motion for admission pro hac vice.

(1) **Disciplinary Fee Fund.** The clerk of the district court will forward the fee to the Office of Judicial Administration, which will deposit the fee in the disciplinary fee fund.

(2) **Waiver.** The Kansas attorney may move the court to waive the fee if the out-of-state attorney represents the government or an indigent party. The Kansas attorney must move for waiver before filing the motion for admission pro hac vice.

(f) **Fee; Administrative Tribunal.** An administrative tribunal may impose a similar fee as provided in subsection (e).

(g) **Service.** Serving a document on the Kansas attorney has the same effect as personally serving the document on the attorney admitted pro hac vice.

(h) **Consent to Disciplinary Jurisdiction.** An out-of-state attorney who is admitted under this rule consents to the exercise of disciplinary jurisdiction under Supreme Court Rule 202(a)(5).

(i) **Appearance by Self-Represented Litigant.** This rule does not prohibit a party from appearing before a district court or an administrative tribunal on the party's own behalf.

(j) **Exemption in Qualifying Indian Child Welfare Act Proceeding.** The following provisions apply in a Qualifying Indian Child Welfare Act proceeding.

(1) **Exemption.** An out-of-state attorney is not required to associate with a Kansas attorney of record under subsection (a)(3) or to pay the fee under subsection (e) if a district court determines that the attorney qualifies for an exemption. To qualify, the attorney must establish the following requirements:

(A) the attorney seeks to appear in a Kansas court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903 under the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;

(B) the attorney represents a parent or an Indian tribe or Indian custodian as each of those terms is defined by 25 U.S.C. § 1903;

(C) the Indian tribe has affirmed the child's membership or eligibility for membership under tribal law; and

(D) if the attorney represents an Indian tribe, the tribe has asserted its intent to intervene and participate in the state court proceeding.

(2) **Inapplicable Provisions.** Subsections (b), (c)(1)(A), and (g) are inapplicable when an out-of-state attorney qualifies for an exemption under subsection (j)(1).

[**History:** Am. effective May 14, 1987; Am. effective July 1, 2005; Restyled rule and amended effective July 1, 2012; Am. effective May 8, 2019; Am. effective November 1, 2024.]

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-098

RE: Rules Relating to Appellate Practice

The court amends the attached Supreme Court Rule 7.043, effective the date of this order.

Dated this 4th day of December 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 7.043

REFERENCE TO CERTAIN PERSONS

(a) **Purpose.** This rule establishes guidelines for identifying certain persons in an appellate case to avoid unnecessary trauma and to maintain statutory requirements of confidentiality.

(b) **Applicability.** This rule applies when referencing any of the following persons in an appellate case:

(1) a minor;

(2) a person whose identity could reveal the name of a minor;

(3) a victim of a sex crime;

(4) a party in a protection from abuse case;

(5) a party in a protection from stalking, sexual assault, or human trafficking case; and

(6) a juror or venire member.

(c) **Reference.** Except for certified district court documents required when docketing an appeal under Rule 2.04, any document filed in an appellate case and any appellate court decision must reference a person described in subsection (b) by the following:

(1) initials;

(2) pseudonym;

(3) familial relationship or generic descriptor; or

(4) juror number.

(d) **Attachment or Appendix.** A person filing an attachment or appendix to a document must either redact the name of any person described in subsection (b) or must follow subsection (c) in referencing the person.

(e) **Exception.** This rule does not prohibit using a defendant's full name in an appeal from a criminal case or a related case under K.S.A. 60-1501 or K.S.A. 60-1507.

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-101

RE: Rules Relating to District Courts

The court amends the attached Supreme Court Rule 174, effective January 1, 2025.

Dated this 13th day of December 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 174

FORMS REQUIRED IN A CHILD IN NEED OF CARE PROCEEDING

(a) **Forms Required; Court Orders.** To ensure compliance with federal and state law, a district court must use the applicable Judicial Council form when entering any of the following orders in a child in need of care proceeding:
  (1) placing a child in the custody of a person other than the child's parent or legal guardian;
  (2) ruling in a permanency hearing;
  (3) ruling in a proceeding in which the Indian Child Welfare Act applies;
  (4) ruling on adjudication, disposition, or termination of parental rights;
  (5) ruling on a child's placement in a qualified residential treatment program;
  (6) ruling on a requested review of a child's change of placement;
  (7) ruling on a SOUL Family Legal Permanency appointment or dispute;
  (8) terminating the court's jurisdiction; or
  (9) reinstating a child in need of care case when the court orders SOUL Family Legal Permanency.

(b) **Attachments.** To include additional information, a district court may attach an additional order or supplemental affidavit to a Judicial Council form required under this rule.

(c) **Forms Required; Consent and Affidavit.** When applicable, a parent must use the Judicial Council form for Consent to Appointment of SOUL Family Legal Permanency and a custodian must use the Affidavit of SOUL Family Legal Permanency Custodian.

(d) **Administrative Matters.**
  (1) **Official File.** A district court must maintain all orders and any attachments in the official file.
  (2) **Data Collection; Entry.** The judicial administrator is authorized to adopt standard operating procedures for the collection of data under this rule. A district court must enter all data that is required under the standard operating procedures into the court's case management system.

(e) **Form Changes.** The Supreme Court Task Force on Permanency Planning must approve any new or modified Judicial Council form under this rule.

[**History:** New rule adopted effective May 1, 2013; Am. effective January 1, 2022; Am. effective January 1, 2025.]

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Bartlett Family Real Estate Fund v. Robben	126,815	Denied	11/27/2024	Unpublished
CVR Energy, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA	126,271	Granted	11/19/2024	Unpublished
Gillespie v. State	126,273	Granted	11/19/2024	Unpublished
Hamwi v. First Student Services	126,272	Denied	11/27/2024	Unpublished
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc.	126,005	Denied	12/23/2024	64 Kan. App. 2d 511
Hernandez v. Pistotnik	126,255	Denied	12/23/2024	Unpublished
In re A.K.	127,259	Granted	12/19/2024	Unpublished
In re F.J.	127,187	Denied	12/19/2024	Unpublished
In re H.T.	127,344	Denied	12/19/2024	Unpublished
In re I.G.	127,434	Denied	12/19/2024	Unpublished
In re M.M.	127,189	Denied	12/19/2024	Unpublished
In re Marriage of L.S. and D.J.	125,656	Denied	10/29/2024	Unpublished
In re Marriage of Rrapaj	126,386	Denied	11/27/2024	Unpublished
Matson v. State	126,020	Denied	11/27/2024	Unpublished
Powell v. State	125,351	Denied	12/19/2024	Unpublished
Romero v. Hornung	126,331	Denied	11/27/2024	Unpublished
Schutt v. Foster	126,555	Granted	11/19/2024	Unpublished
State v. Arnold	125,443	Denied	11/27/2024	Unpublished
State v. Arreola	124,612	Denied	12/23/2024	64 Kan. App. 2d 562
State v. Baggett	125,597	Denied	10/29/2024	Unpublished
State v. Brewer	126,112	Denied	11/27/2024	Unpublished
State v. Cipra	125,221	Denied	12/19/2024	Unpublished
State v. Collins	125,971	Denied	10/29/2024	Unpublished
State v. Courtney	126,109	Denied	11/27/2024	Unpublished
State v. Denney	125,436			
	125,958	Denied	11/27/2024	Unpublished
State v. Godat	125,619	Denied	11/27/2024	Unpublished
State v. Goddard	125,501	Denied	10/29/2024	Unpublished
State v. Gray	125,888	Denied	11/27/2024	Unpublished
State v. Humphrey	125,925	Granted	11/19/2024	Unpublished
State v. Landis	125,279	Denied	12/19/2024	Unpublished
State v. Luna	125,978	Denied	11/27/2024	Unpublished
State v. Mangold	124,092			
	124,093	Denied	12/19/2024	Unpublished
State v. Morgan	126,036	Denied	11/27/2024	Unpublished
State v. Morris	125,537	Denied	10/29/2024	Unpublished
State v. Phillips	125,079	Denied	12/23/2024	Unpublished
State v. Powell	126,408	Denied	10/29/2024	Unpublished
State v. Robbins	125,367	Denied	12/23/2024	Unpublished

Title	Docket Number	Disposition	Date	Reported Below
State v. Schmeidler	125,662	Denied	12/19/2024	Unpublished
State v. Schmeidler	125,663	Denied	12/19/2024	Unpublished
State v. Seymour	125,961	Denied	11/27/2024	Unpublished
State v. Smalling	125,357	Denied	12/23/2024	Unpublished
State v. Vazquez-Carmona	124,801	Denied	10/29/2024	Unpublished
State v. Wilkerson	125,570	Granted	11/19/2024	Unpublished
State v. Yeargin-Charles	125,754	Granted	11/19/2024	Unpublished
T.R. v. University of Kansas Med. Ctr.	126,536	Denied	12/23/2024	Unpublished
Valentine v. State	125,527	Denied	12/23/2024	Unpublished
Washburn South Apartments v. Zou	126,735	Denied	12/19/2024	Unpublished
Williams v. State	125,183	Denied	12/19/2024	Unpublished
Zou v. Washburn South Apartments	126,652	Denied	12/19/2024	Unpublished

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ADMINISTRATIVE LAW:

Board of Tax Appeals—Agency Record Controls Issues Raised in Appeals. For trial de novo proceedings under K.S.A. 2023 Supp. 74-2426(c)(4)(B), the agency record controls in resolving any dispute about what issues were raised before the Board of Tax Appeals. Unless an exception applies, a district court may only review those issues litigated at the administrative level.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

— Burden on Party to Show Judicial Review Is Proper. For trial de novo proceedings under K.S.A. 2023 Supp. 74-2426(c)(4)(B), the party asserting an issue was raised before the Board of Tax Appeals bears the burden to show judicial review is proper.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

Kansas Judicial Review Act—Court's Consideration of New Issues in Proceedings Is Limited. K.S.A. 77-617 limits a court's consideration of new issues in proceedings under the Kansas Judicial Review Act. The trial de novo provision in K.S.A. 2023 Supp. 74-2426(c)(4)(B) applicable to the Board of Tax Appeals, which specifies "an evidentiary hearing at which issues of law and fact shall be determined anew," does not expand that limitation.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

AGRICULTURE:

Kansas Right to Farm Statute—Statutory Presumption Agricultural Activities Are Not a Nuisance—Requirements. K.S.A. 2-3202(a) creates a statutory presumption that agricultural activities do not constitute a nuisance when the statute's several requirements are met. To receive the benefit of that presumption, the nuisance must arise from an agricultural activity, the activity must be conducted on farmland, the activity must have been established prior to surrounding agricultural and nonagricultural activities, and the activity must be consistent with good agricultural practices.
Ross v. Nelson 266

Right to Farm Statute—Presumption of Good Agricultural Practices—Requirements. K.S.A. 2-3202(b) creates a presumption that an agricultural activity is consistent with good agricultural practices when it is undertaken in conformity with federal, state, and local laws and rules and regulations.
Ross v. Nelson 266

— Statutory Presumption Is Rebuttable. K.S.A. 2-3202(a)'s statutory presumption is rebuttable. Even if the requirements for invoking the presumption are met, the presumption does not attach when the activity has a substantial adverse effect on public health and safety.
Ross v. Nelson 266

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APPEAL AND ERROR:

Appeal from District Court Proceedings Involving BOTA Orders—Appellate Review. In an appeal from district court proceedings conducted under K.S.A. 2023 Supp. 74-2426(c)(4)(B), an appellate court considers the agency record de novo when deciding whether the district court exceeded its scope of judicial review.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

Claim of Ineffective Assistance of Counsel—Remand to District Court for Evidentiary Hearing. Generally, we do not address the merits of an ineffective assistance of counsel claim for the first time on appeal. Instead, the usual course is a remand to the district court for an evidentiary hearing on the ineffective assistance claim. We will only address the merits of an ineffective assistance claim for the first time on appeal on the rare occasions when the evidentiary record is well-established and the merits of the claim are obvious. If a defendant does not request a remand, this court need not order one sua sponte. *State v. Zongker* 411

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. Peters 492

Law of the Case Doctrine—Application. 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. James* 178

Raising Constitutional Issues First Time on Appeal—Rule Requires Explanation Why Issue Properly before Court if Issue Not Raised Below. Constitutional issues generally cannot be raised for the first time on appeal. Under Kansas Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36), a party must provide "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court. " *State v. Hinostroza* 129

Six Justices Equally Divided on Issue on Appeal—Judgment of Lower Court Must Stand. When one of the justices of the Supreme Court is disqualified to participate in a decision of the issues raised in an appeal or petition for review, and the remaining six justices are equally divided as to the proper disposition of the appeal, the judgment of the court from which the appeal or petition for review is made must stand. *State v. Frost* 646

ATTORNEY AND CLIENT:

Counsel's Statement Regarding Alleged Conflict of Interest with Client. A statement by counsel outlining the facts underlying an alleged conflict of interest with their client does not create a conflict of interest, but it may illuminate an existing one. *State v. Z.M.* 297

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Disciplinary Proceeding—One-year suspension. Attorney stipulated in a joint agreement with the Disciplinary Administrator's Office that he violated KRPC 1.1, 1.3. 1.4, and 8.4(c). The Supreme Court suspended his license for one-year, stayed after 90 days, conditioned upon successful participation and completion of nine-month probation period.
In re Solorio …….. 810*

— — Attorney waived a formal hearing after entering a summary submission agreement, and the Court adopted the findings of facts which proved Rundus had three DUIs. The findings of fact and conclusions of law establish violations of KRPC 8.4(b) and Rule 219. Rundus must undergo a reinstatement hearing if requesting reinstatement. The Supreme Court ordered a one-year suspension. *In re Rundus* ……..…… 823*

— **Order of Disbarment**. Attorney is found to have violated numerous KRPCs, including KRPC 1.3, 1.4(a), 1.15(a), 1.16, 3.3, 3.4(c), 8.1(b), and 8.4(d), as well as Rules 206(o) and 210. By failing to appear at the oral argument before the Supreme Court, she also is found to have violated KRPC 228(i). The hearing panel recommended disbarment, and the Supreme Court concluded the sanction of disbarment is warranted.
In re Crow-Johnson 192

— **Six-month suspension**. Attorney and the Disciplinary Administrator entered into summary submission agreement stipulating and agreeing that Gamble violated KRPC 8.4(d) in contentious domestic cases. A majority of the Supreme Court finds that Gamble is suspended for six months, but stayed the suspension, conditioned upon successful participation and completion of a 12-month probation period. *In re Gamble* ……..…… 680*

— — In two separate matters, attorney is found to have violated KRPC 1.1, 1.3, 1.4, 1.5, 1.15, 3.3, and 8.4(c). The Supreme Court suspended Edwards from the practice of law for six months and she must undergo a reinstatement hearing. *In re Edwards* …….....……. 782*

— **Two-year Suspension Stayed Pending Successful Completion of Two-year Probation Plan**. Attorney practiced law in Kansas and Missouri. A Formal Complaint was filed by the Office of the Disciplinary Administrator alleging violations of KRPC 1.8 (conflict of interest: current clients: specific rules) (2024 Kan. S. Ct. R. at 347) and KRPC 1.15 (safekeeping property) (2024 Kan. S. Ct. R. at 369). A hearing panel found he violated these KRPCs and recommended a one-year suspension stayed with completion of probation plan. The Supreme Court concluded the appropriate discipline is two years suspension, stayed pending successful completion of a two-year probation plan. *In re Fulcher* 105

Order of Discharge from Probation. Attorney previously suspended for 90 days, which was stayed pending completion of 3-year probation plan, now applies for discharge from probation. The Supreme Court grants Lowry's motion, and he is discharged from probation. *In re Lowry* …..... 296

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Order of Reinstatement—Reinstatement. Attorney suspended for two years in March 2024, now petitions the Court for reinstatement. The Supreme Court agrees to stay the two-year suspension, conditioned on successful participation and completion of two-year probation period. No reinstatement hearing is required. *In re Davis* 662*

Test for Effectiveness of Appellate Counsel—Same Test as Trial Counsel. The test for effectiveness of appellate counsel is the same as for trial counsel. A defendant claiming ineffective assistance of appellate counsel must demonstrate counsel's performance, considering the totality of the circumstances, fell below an objective standard of reasonableness. And, to determine whether counsel's performance was objectively reasonable, the reviewing court judges the challenged conduct on the facts of the particular case, viewed as of the time of the counsel's conduct.
State v. James 178

Voluntary Surrender of License—Order of Disbarment. Attorney's request to voluntarily surrender his law license was accepted by the Supreme Court. His license had been suspended for failure to pay attorney registration fees. Any pending proceeding or case terminates upon the date of the order of disbarment. *In re Frick* 649

CIVIL PROCEDURE:

Declaratory Judgment Actions—Must Satisfy Kansas' Case-or-Controversy Requirement. K.S.A. 60-1701 empowers courts to declare rights, statuses, and other legal relations whether or not further relief is or could be sought. But declaratory judgment actions, like all suits, must still satisfy Kansas' case-or-controversy requirement. *POM of Kansas v. Kobach* 764*

Final Decision Disposes of Entire Merits of Controversy—No Further Action of District Court. Although K.S.A. 2023 Supp. 60-2102(a)(4) does not define the term, a final decision disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the district court.
Benchmark Property Remodeling v. Grandmothers, Inc. 227

Occurrence of Mootness in Litigation—Judicial Decision Rendered Ineffectual. Mootness occurs when something changes during litigation to render a judicial decision ineffectual to the parties' rights and interests. *American Warrior, Inc. v. Board of Finney County Comm'rs* 78

Partial Summary Judgment Not Final Decision—If Remaining Claims Dismissed, Previous Partial Summary Judgment Becomes Final Judgment. A district court's entry of partial summary judgment on some claims, but not all, does not constitute a final decision, so it is not appealable under K.S.A. 2023 Supp. 60-2102(a)(4) absent certification under K.S.A. 2023 Supp. 60-254(b). But if the remaining claims are dismissed, the previous partial summary judgment becomes a final judgment adjudicating all claims. *Benchmark Property Remodeling v. Grandmothers, Inc.* 227

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COMMON LAW:

State Law Includes Kansas Common Law. A statutory reference to Kansas law includes the Kansas common law. *Ross v. Nelson* 266

CONFLICT OF LAWS:

Choice-of-Law Analysis under Restatement—Law of Forum State to Determine if Substantive or Procedural Issue. A choice-of-law analysis under the Restatement (First) of Conflict of Laws begins by looking to the law of the forum state to determine whether a given issue is substantive or procedural. All procedural matters are governed by the law of the forum state. If a substantive matter, the category of substantive law will control what law is applied, as different rules apply to different legal categories. *M & I Marshall & Ilsley Bank v. Higdon* 572

Resolution of Conflict-of-Laws Issue—Appellate Review. Resolution of a conflict-of-laws issue involves a question of law over which appellate courts exercise unlimited review. *M & I Marshall & Ilsley Bank v. Higdon* 572

— Restatement Followed by Appellate Courts. When addressing choice of law issues, Kansas appellate courts traditionally follow the Restatement (First) of Conflict of Laws (1934). *M & I Marshall & Ilsley Bank v. Higdon* 572

CONSTITUTIONAL LAW:

Defendant's Right to Self-Represent—Three Requirements before Court Accepts Waiver of Right to Counsel. To ensure a defendant's right to self-represent is exercised knowingly and intelligently, district courts must satisfy three things on the record before accepting a defendant's waiver of his right to counsel. First, the defendant must be advised of their right to counsel and to appointed counsel if indigent. Second, the defendant must possess the intelligence and capacity to appreciate the consequences of their decision. Finally, the defendant must comprehend the charges and proceedings, punishments, and the facts necessary for a broad understanding of the case. These three things need not be established in a single colloquy. *State v. Kemmerly* 91

Denial of Sixth Amendment Right to Assistance of Counsel—Appellate Review. Whether a criminal defendant has been denied the Sixth Amendment right to assistance of counsel is a constitutional issue over which appellate courts exercise unlimited review. *State v. Trass* 525

Determination of Involuntary Statement—Requires Overreach by Government Actor. Overreach by a government actor is a necessary predicate to a determination that a statement is not voluntary under the Fifth and Fourteenth Amendments. *State v. Huggins* 358

Fifth Amendment—Liberal Construction by Supreme Court. The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself or herself.

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The United States Supreme Court has long held this provision is to be liberally construed. *State v. Showalter* 147

— Two Distinct Privileges against Incrimination. The Fifth Amendment provides two distinct privileges against self-incrimination: (1) that of criminal defendants not to be compelled to testify at their own trial and (2) that of any person not to be compelled to answer questions which may incriminate him or her in future criminal proceedings.
State v. Showalter 147

Fifth Amendment Privilege—Standard for Determining Whether Privilege Protects Witness Being Compelled to Testify. The proper standard to determine whether the Fifth Amendment privilege protects a witness from being compelled to testify is whether the testimony sought exposes the witness to a legitimate risk—meaning a real and appreciable danger—of incrimination, not a hypothetical or speculative one. The witness' fear of self-incrimination must be objectively reasonable and the threat discernible for the privilege to apply. *State v. Showalter* 147

Fifth Amendment Privilege against Self-Incrimination—Application to States. The Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment to the United States Constitution. *State v. Showalter* 147

Fifth Amendment Protections Prohibit Coerced or Involuntary Statements to Establish Guilt. The protections of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibit the State from relying on coerced or involuntary statements to establish a defendant's guilt. But these protections do not justify evidentiary suppression of confessions that are either unrelated to law enforcement tactics, or are connected to, but not causally related to, law enforcement tactics that constitute misconduct.
State v. Garrett……..... 465

Involuntary Statements by Defendant—Link Required between Government Overreach and Resulting Statements. There must be a link between government overreach and the resulting statements that a defendant makes to law enforcement to render such statements involuntary under the Fifth and Fourteenth Amendments. *State v. Huggins* 358

Privilege against Self-Incrimination—Application. The privilege against self-incrimination protects a person from being forced to disclose information which would support a criminal conviction against that person as well as that which would furnish a link in the chain of evidence that could lead to a criminal prosecution of that person. *State v. Showalter* 147

Sixth Amendment Right of Criminal Defendants to Assistance of Legal Counsel. The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to assistance of legal counsel during all critical stages of a criminal proceeding. *State v. Trass* ……..……. 525

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Sixth Amendment Right to Self-Representation—Requirement of Knowing Waiver of Right to Counsel. The right to self-representation, like the right to assistance of counsel, arises from the Sixth Amendment. Because these rights are in tension, a defendant who wishes to self-represent must waive their right to counsel knowingly and intelligently. *State v. Kemmerly* 91

COURTS:

Disciplinary Proceeding—Certificate Revoked. Two separate complaints were filed against court reporter Belcher, which alleged she violated Supreme Court Rule 367, Board Rule 9.F.5, and 9.F.11. Following a hearing to the Board, the Board recommended Belcher's certificate be revoked under Board Rule 9.E.4. The Supreme Court agreed that the appropriate discipline is revocation of Belcher's certificate as a certified court reporter.
In re Belcher 120

Doctrine of Stare Decisis—Application. Under the doctrine of stare decisis, points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised. *State v. James* 178

CRIMINAL LAW:

Accused Person's Request for Counsel Prevents Further Interrogation—Exception. Once an accused person has expressed a desire to deal with police only through counsel, they may not be subject to further interrogation by the authorities until counsel has been made available, unless the accused person initiates further communication, exchanges, or conversations with the police. *State v. Younger* 585

Accused's Request for Counsel—Accused May Change Mind and Talk to Police without Counsel. Even after requesting counsel, an accused may change his or her mind and talk to police without counsel, if the accused initiates the change without interrogation or pressure from the police. *State v. Younger* 585

Acquiring Controlled Substance Does Not Prove Distribution of Controlled Substance. Simply acquiring a controlled substance in a drug buy is not enough to prove the recipient's guilt for distribution of that controlled substance. *State v. Stuart* 633

Alternative Means Crime—Jury Instructions Incorporate Multiple Means for Single Statutory Element. The State may charge a defendant with a single offense that can be committed in more than one way. This is called an alternative means crime. A district court presents an alternative means crime to a jury when its instructions incorporate a statute's multiple means for a charged crime's single statutory element.
State v. Reynolds 1

Arrestee's Admission That Guns Not Permitted on Premises of Correctional Facility—Sufficient to Prove Crime. An arrestee's admission to knowing that a correctional facility did not permit guns on its premises, when viewed in the light most favorable to the State, is sufficient to allow a

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rational fact-finder to conclude the arrestee had notice that a gun was considered contraband by the administration of the correctional facility.
State v. Hinostroza 129

Brady Violation Claim—Three Essential Elements. There are three essential elements of a *Brady* violation claim: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *State v. Collins* 439

Challenge to Previously Established Criminal History—Statute Requires Proof by Preponderance of the Evidence. K.S.A. 21-6814(c) requires an offender seeking to challenge their previously established criminal history to prove their criminal history by a preponderance of the evidence.
State v. Daniels 340

Challenge to Sufficiency of Circumstantial Evidence Supporting Finding of Premeditation by Jury—Appellate Review. When the sufficiency of the circumstantial evidence supporting a jury's finding of premeditation is challenged on appeal, courts often reference five factors that are said to support an inference of premeditation: (1) the nature of the weapon used; (2) the lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless. While these factors sometimes help appellate courts frame the sufficiency inquiry, they need not always apply them, nor are they limited to those factors. Whether premeditation exists is a question of fact. Thus, when an appellate court reviews the sufficiency of the evidence of premeditation, the determinative question is not whether one or more of these factors are present. Instead, the court must decide whether a rational juror could have found beyond a reasonable doubt that the case-specific circumstances, viewed in a light most favorable to the State, established the temporal and cognitive components of premeditation. *State v. Dotson* 32

Charging Document—All Facts Alleged Not Required to Be Proved to Support Conviction. There is no requirement that the State prove all facts alleged in a charging document to support a conviction for the charged crime. *State v. Huggins* 358

Claim for Wrongful Conviction and Imprisonment—Statutory Language Construed. In claims under state law for wrongful conviction and imprisonment, the phrase "the charges were dismissed" in K.S.A. 2023 Supp. 60-5004(c)(1)(B) means both terminating the criminal accusation presented in court and relieving the defendant of the accusation's criminal liability.
In re Wrongful Conviction of Mashaney 673*

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Concealing and Carrying Contraband into Correctional Facility—Voluntary Act. An arrestee who consciously acts to conceal and carry contraband into a correctional facility acts voluntarily.
State v. Hinostroza 129

Conviction Final When Judgment of Conviction Rendered and Time for Final Review has Passed. A conviction is generally not considered final until the judgment of conviction has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing or final review has passed. *State v. Showalter* 147

Crime of Aggravated Burglary—Statute Describes Alternative Means. K.S.A. 2017 Supp. 21-5807(b) describes alternative means for committing aggravated burglary that depend, in part, on where the crime occurs—a dwelling, a nondwelling building, or a means of conveyance. .
State v. Reynolds 1

— Statute's Language "With Intent to Commit a Felony" Not Limited to Particular Felony. K.S.A. 2017 Supp. 21-5807(b) criminalizes entering into or remaining within a dwelling, a nondwelling building, or a means of conveyance, in which a human being is present, "with intent to commit a felony." The quoted element is not limited to any particular felony.
State v. Reynolds 1

Crime of Contraband in Correctional Facility—A Notice by Administrators Required. Administrators of correctional facilities must provide fair notice about what constitutes contraband in their facility under K.S.A. 21-5914. That warning need not be individualized.
State v. Hinostroza 129

Crime of Introducing Contraband into Correctional Facility—Arrestee's Admissions Sufficient for Proof of Crime. When viewed in a light most favorable to the State, an arrestee's admissions to being asked on arrest about possession of a weapon, to intentionally not disclosing possession of a weapon, and to knowing that weapons were not allowed in a jail facility, are sufficient to allow a rational fact-finder to conclude the arrestee intended to introduce contraband into a correctional facility. *State v. Hinostroza* 129

Custodial Interrogation—Invocation of Right to Counsel Any Time by Suspect. A suspect may invoke the right to counsel at any time by making, at a minimum, some statement that could be reasonably construed as an expression of a desire for the assistance of an attorney during a custodial interrogation. *State v. Younger* 585

— Triggers Procedural Safeguards. Procedural safeguards concerning self-incrimination are triggered when an accused is in custody and subject to interrogation. *State v. Younger* 585

Defendant May Forfeit Right to Counsel. A criminal defendant may forfeit the right to counsel. Unlike waiver, forfeiture results in the loss of a right through some action or inaction. *State v. Trass* 525

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Defendant May Waive Right to Counsel Through Express or Implied Waiver. A criminal defendant may waive the right to counsel through waiver, an intentional and voluntary relinquishment of a known right or privilege. A defendant's waiver of the right to counsel under the Sixth Amendment may be expressly stated or implied by the defendant's conduct. *State v. Trass* ……...…….. 525

Defendant's Admission to Criminal History in PSI Report—Supports Criminal History for Sentencing Purposes. A defendant's admission to their criminal history as set forth in the presentence investigation report relieves the State from having to produce additional evidence to support criminal history for sentencing purposes, and the admission includes a prior crime's person/nonperson classification as set forth in the presentence investigation report. *State v. Daniels* 340

Defendant's Appeal Based on Apprendi Error—Appellate Review. In evaluating whether an *Apprendi* error is harmless, a court reviews the evidence to determine whether a judicially found fact is supported beyond a reasonable doubt and was uncontested, such that the jury would have found the fact had it been asked to do so. *State v. Nunez* 351

Determination if Confession Obtained in Violation of Due Process—Review of Totality of Circumstances if Misconduct by Law Enforcement. When determining whether a confession was obtained in violation of due process, a reviewing court must first consider the totality of the circumstances to determine whether any related law enforcement tactics constituted misconduct. If such law enforcement tactics do not constitute misconduct, a resulting confession cannot be rendered inadmissible because of those tactics. *State v. Garrett* ……..…….465

Determination of Availability of Privilege against Self-Incrimination. When determining the availability of the privilege against self-incrimination, the risk-of-incrimination standard applies equally when the information sought relates to a witness' prior conviction by verdict or by guilty plea. Language to the contrary in *State v. Longobardi*, 243 Kan. 404, 756 P.2d 1098 (1988), and *State v. Bailey*, 292 Kan. 449, 255 P.3d 19 (2011), is overruled. *State v. Showalter* 147

Determination of Defendant's Criminal History under Sentencing Guidelines—Right to Jury Trial under Section 5 Not Implicated. The method of determining a defendant's criminal history under the Kansas Criminal Sentencing Guidelines—which includes consideration of any prior convictions or juvenile adjudications—does not implicate a defendant's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. *State v. Peters* ……..……..…. 492

Felony Murder Definition—All Elements of underlying Felony Must Be Established. Felony murder is the killing of a human being committed

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in the commission of, attempt to commit, or flight from an inherently dangerous felony. The State must establish all elements of the underlying felony to successfully prove felony murder. *State v. Stuart* ……..…..…… 633

Fifth Amendment Privilege against Self-Incrimination—Remains Available if Postsentence Motion to Withdraw Plea Not Final. The Fifth Amendment privilege against self-incrimination remains available to a defendant or witness who pled guilty but has filed a postsentence motion to withdraw plea pursuant to K.S.A. 22-3210(d)(2) and (e) and a decision on the motion or a decision on the timely appeal of denial of the motion is not final, when the testimony sought exposes the witness to a legitimate risk of incrimination. *State v. Showalter* 147

— Remains Available When Appeal Not Final or Right to File Appeal Not Expired. The Fifth Amendment privilege against self-incrimination remains available to a defendant or witness who has filed a direct appeal in a criminal case and a decision on appeal is not final (or whose right to file a direct appeal has not expired) when the testimony sought exposes the witness to a legitimate risk of incrimination. *State v. Showalter* 147

Guilty Plea—Constitutes Limited Waiver of Privilege against Self-Incrimination for Establishing Guilt. A guilty plea constitutes a limited waiver of the privilege against self-incrimination for purposes of establishing guilt. A defendant who waives the privilege by guilty plea retains it for sentencing and until the risk of incrimination terminates.
State v. Showalter 147

If Confession Obtained by Misconduct of Law Enforcement—Totality of Circumstances—Due Process Violation Results in Suppression of Confession. If law enforcement committed misconduct related to a confession, a reviewing court must then assess whether, under the totality of the circumstances, the misconduct caused the confession. In other words, the court must consider whether the misconduct caused the defendant's free will to be overborne, such that the resulting confession was not voluntary. If that happened, law enforcement has violated due process and the resulting confession must be suppressed. *State v. Garrett*…….……..…… 465

Illegal Sentence Defined under K.S.A. 22-3504(c)(1). K.S.A. 22-3504(c)(1) defines an illegal sentence as one imposed by a court without jurisdiction, one that does not conform to the applicable statutory provision, or one that is ambiguous. *State v. Cook* …… 777*

Illegal Sentence Statute—Limitations of Phrase "applicable statutory provision." As used in 22-3504(c)(1), the phrase "applicable statutory provision" is limited to those statutory provisions that define the crime, assign the category of punishment, or involve the criminal history classification. *State v. Cook* ……..…… 777*

Invocation of Right to Counsel by Suspect—No Further Questioning unless Knowing and Intelligent Waiver of Right. Once a suspect has invoked the right to counsel, there may be no further questioning unless the suspect both initiates

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further discussions with the police and knowingly and intelligently waives the previously asserted right. *State v. Younger* 585

Miranda Warnings Required before Custodial Interrogation. The procedural safeguards of *Miranda* are not required when a suspect is simply taken into custody; they only begin to operate when a suspect in custody is subjected to interrogation. *State v. Younger* 585

Motion to Correct Illegal Sentence—Sentence's Legality Determined at Time of Original Sentencing. The law existing at the time of the original sentencing determines a sentence's legality when a case arises from a motion to correct an illegal sentence. *State v. Jacobson* 70

Motion to Withdraw Plea after Sentencing—Direct Appeal Allowed. A defendant who pleads guilty and moves to withdraw the plea after sentencing pursuant to K.S.A. 22-3210(d)(2) can directly appeal the district court's denial of that motion. *State v. Showalter* 147

No Contest Plea to Charged Offense—Use of Facts as Evidence to Support Restitution. A no contest plea to a charged offense operates to establish every essential well-pleaded element of that offense. When one of those essential elements requires the taking of resources having a certain value, the well-pleaded facts in the charging document necessary to support this "value" element may be considered as evidence to support restitution. *State v. Union* 214

No Right to Take Direct Appeal When Conviction from Plea of Guilty or No Contest. A defendant cannot take a direct appeal from a conviction flowing from a plea of guilty or no contest. The right to take such a direct appeal is one of the rights surrendered when the plea is entered. *State v. Showalter* 147

Order to Pay Restitution While Serving Probation—Statute Permits Extension of Probation if Restitution Is Unpaid. If a defendant is ordered to pay restitution along with serving probation, K.S.A. 21-6608(c)(7) permits extending the probation for as long as restitution remains unpaid. *State v. Wilson* 55

Proof of Existence of Premeditation—Requirements. Premeditation exists when the intent to kill arises before the act takes place and is accompanied by reflection, some form of cognitive review, deliberation, or conscious pondering. Premeditation requires more than mere impulse, aim, purpose, or objective. 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. *State v. Dotson* 32

Recorded Conversations—Knowledge by Defendant Not Necessary. The fact that a defendant is in custody and does not know his or her conversations are being recorded does not render the conversations involuntary or the products of custodial interrogations. *State v. Younger* 585

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Reminder to Accused that Attorney Might Intervene to Stop Interview—No Proof of Coercion. Reminding an accused person that an attorney might intervene to stop them from speaking with investigators is not proof of coercion and does not constitute an impermissible extension of the interview. *State v. Younger* ……..... 585

Resentencing on Remand—Jurisdiction of District Court to Consider Departure Motion. On a remand for resentencing on all counts, a district court has jurisdiction to consider a departure motion unless a mandate explicitly states otherwise, or it is determined consideration is otherwise precluded. *State v. McMillan* 239

Right to Counsel May Be Forfeited by Egregious Conduct or by Intent to Disrupt Judicial Proceedings. As a matter of first impression, a defendant may be found to have forfeited the right to counsel regardless of whether the defendant knew about or intended to relinquish the right when the defendant engaged in egregious misconduct, or a course of disruption intended to thwart judicial proceedings. Forfeiture is an extreme sanction in response to extreme conduct that jeopardizes the integrity or safety of court proceedings and should be used only under extraordinary circumstances as a last resort in response to the most serious and deliberate misconduct. *State v. Trass* ……..…. 525

Sentences in Multiple Count Case—Illegal and Vacated Sentences by Appellate Court—Jurisdiction of Resentencing Judge to Consider Departure Issues. In a case involving a multiple count sentence, if an appellate court holds the sentences are illegal and vacates all sentences and thus new sentences need to be imposed, the revised Kansas Sentencing Guidelines Act, K.S.A. 21-6801 et seq., opens the door to consideration of departure issues the defendant may raise and the resentencing judge has jurisdiction to consider those issues. *State v. McMillan* 239

Sentencing—Application of *Apprendi v. New Jersey*. Under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), a defendant's constitutional jury trial rights guaranteed by the Sixth Amendment to the United States Constitution are violated by judicial fact-finding (that is, facts found by a judge rather than a jury) which increases the penalty for a crime beyond what is authorized by the facts reflected in the jury's verdict. When a defendant has made a knowing and voluntary waiver of the jury trial right, admissions by the defendant may be relied upon as facts by a sentencing court. *State v. Nunez* 351

— Motion to Correct Illegal Sentence—Cannot Raise Constitutional Claim. A defendant cannot use a motion to correct an illegal sentence to raise a constitutional claim. *State v. Martis* ……..…..…. 650

— Reasons for Denial of Departure Motion and Imposition of Presumptive Sentence on the Record Not Required. K.S.A. 21-6620(c)(2)(A) does not require a district court to state on the record its reasons for denying a departure motion and imposing a presumptive sentence. *State v. Zongker* ……..…….... 411

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— Requirements to Conform to Statutory Provisions—Appellate Review. Sentences in a multiple count case fail to conform to applicable statutory provisions and are illegal when the judge fails to identify the primary count, to assign sentences to each count, and to identify criminal history scores on each count and the record makes it impossible to otherwise determine the sentences the judge imposed. Under those circumstances, an appellate court may vacate all sentences and remand for resentencing on all counts. *State v. McMillan* 239

— Restitution Amount—Actual Damage or Loss Caused by the Crime. The appropriate amount for restitution is that which compensates a victim for the actual damage or loss caused by the defendant's crime. *State v. Younger* 585

— — Burden on State. The State has the burden of justifying the amount of restitution it seeks. *State v. Younger* 585

Statements Made in Custodial Interrogation Excluded under Fifth Amendment—Exception if Procedural Safeguards and *Miranda* Warnings. Statements made during a custodial interrogation must be excluded under the Fifth Amendment to the United States Constitution unless the State demonstrates it provided procedural safeguards, including *Miranda* warnings, to secure the defendant's privilege against self-incrimination. *State v. Younger* 585

Statutory Provision for Order to Pay Restitution—Two Considerations. K.S.A. 21-6604(b)(1)'s provision that "the 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" has two considerations: (a) damage or loss, and (b) causation. *State v. Wilson* 55

Statutory Provision Permits Monetary Award When Damage or Loss Caused by Defendant's Crime. K.S.A. 21-6604(b)(1) permits a district court to award monetary interest as part of restitution when evidence shows it is a "damage or loss caused by the defendant's crime."
State v. Wilson 55

Summary Denial of Motion to Withdraw Plea—Appellate Review. Appellate courts review de novo a district court's summary denial of a motion to withdraw plea because the appellate court has all the same access to the records, files, and motion as the district court. *State v. Espinoza* 653

Support to Prove Aggravated Robbery Conviction for Taking Vehicle. When the property taken is a vehicle, an aggravated robbery conviction can be supported by a showing that the driver or any passengers would have remained in possession or control of the vehicle but for being overcome by violence or intimidation. *State v. Mendez* 718*

Two Stages of Criminal Case under K.S.A. 21-6814. K.S.A. 21-6814 contemplates procedures at two stages of a criminal case: (1) the time before the sentencing judge establishes the defendant's criminal history for purposes of sentencing; and (2) any time after. *State v. Daniels* 340

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Valid Consent to Search—Two Conditions. For a consent to search to be valid, two conditions must be met: (1) there must be clear and positive testimony that consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion, express or implied. *State v. Younger* 585

Wrongful Conviction Claim—Three Requirements Claimant Must Prove for Compensation. Before a person can be compensated for time spent incarcerated while wrongfully convicted of a crime, K.S.A. 2023 Supp. 60-5004(c)(1)(C) requires the claimant for compensation to prove three things. First, that he or she did not commit the crime of conviction. Second, that he or she was not an accessory or accomplice to the crime. And third, that by demonstrating the first two requirements, the claimant obtained one of three possible outcomes: (1) the reversal of his or her conviction; *or* (2) dismissal of the charges; *or* (3) a finding of not guilty upon retrial. *In re Wrongful Conviction of Doelz* 259

EVIDENCE:

If Law Enforcement Officers Do Not Prompt Spontaneous Statements—No Basis for Finding Subtle Compulsion. When law enforcement officers say nothing to prompt spontaneous statements from a suspect, there is no basis for finding even subtle compulsion. *State v. Younger* 585

Statements by Defendant in Custody Must Be Voluntary to Be Admissible. To be admissible as evidence, statements by a defendant who is in custody and subject to interrogation must be voluntary and, in general, made with an understanding of the defendant's constitutional rights. *State v. Younger* 585

Statements Freely and Voluntarily Given—Admissible in Evidence. Statements that are freely and voluntarily given without compelling influences are admissible in evidence. *State v. Younger* 585

Sufficiency of Evidence Challenge—Appellate Review. When considering challenges to the sufficiency of the evidence, appellate courts do not assess witness credibility or reweigh evidence. *State v. Kemmerly* 91

HIGHWAYS AND STREETS:

Permanent Occupation of Part of Public Highway Easement for Private Use—Outside Easement's Scope. The permanent occupation of a portion of a public highway easement for private and exclusive use is inconsistent with the public nature of the easement and thus falls outside the easement's scope. *Ross v. Nelson* 266

Scope of Public Highway Easement—Limitations. The scope of a public highway easement is limited to public uses that facilitate the highway's purposes of travel, transportation, and communication. *Ross v. Nelson* 266

HUSBAND AND WIFE:

Joint Ownership of Real or Personal Property by Husband and Wife in Missouri—Presumption of Tenancy by Entirety Created. In Missouri,

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joint ownership of real or personal property by husband and wife creates a presumption of a tenancy by the entirety. Because the interest in a tenancy by the entirety cannot be divided, a judgment against either the husband or the wife alone may not attach to property held as a tenancy by the entirety. *M & I Marshall & Ilsley Bank v. Higdon* ……..…….….. 572

Tenants in Common or Joint Tenants with Rights of Survivorship of Property in Kansas—Tenancy by Entirety Not Recognized in Kansas. Property in Kansas may be jointly owned as tenants in common or as joint tenants with rights of survivorship. Kansas does not recognize tenancy by the entirety as a form of property ownership. A joint tenant's ownership is severable for meeting the demands of creditors.
M & I Marshall & Ilsley Bank v. Higdon ……..…….….. 572

Under Facts of this Case Issue of Bank Account Ownership Opened in Missouri Is Substantive Issue for Choice of Law Analysis—Property Ownership Issue. Under the facts of this case, the issue of whether a husband and wife owned property in a bank account opened in the state of Missouri, as tenants by the entirety, such that judgment against either the husband or the wife alone may not attach to the property, or as joint tenants with right of survivorship when garnishment occurs in the state of Kansas, which is severable to meet the demands of creditors, was not a procedural issue controlled by laws of the forum state but was a substantive issue for purposes of choice-of-law analysis. This issue related to property ownership, rather than contracts, when resolving a conflict-of-laws question. *M & I Marshall & Ilsley Bank v. Higdon* ……..…….….. 572

JURISDICTION:

Appellate Jurisdiction Defined by Statute—Appellate Review. Appellate jurisdiction is defined by statute; the right to appeal is neither a vested nor a constitutional right. Whether appellate jurisdiction exists is a question of statutory interpretation over which an appellate court has unlimited review. *In re Parentage of E.A.* …… 748*

Decision by District Court Denying Standing at Pleading Stage—Appellate Review. When reviewing a district court's decision denying a party's standing at the pleading stage, an appellate court must accept the facts alleged in the pleadings as true, along with any inferences reasonably drawn therefrom. If those facts and inferences demonstrate the party has standing, the district court must be reversed. *In re Parentage of E.A.* …...…… 748*

Establishing Standing by Plaintiffs—Two-Part Test. To establish standing, plaintiffs in Kansas courts must satisfy a two-part test: they must demonstrate a cognizable injury and a causal connection between the injury and the challenged conduct. A cognizable injury need not be current—an impending, probable future harm can suffice. Whether a future harm is impending and probable turns on the case-specific facts. *POM of Kansas v. Kobach* ……..…….. 764*

Jurisdiction of Appellate Courts in Kansas Governed by Statutes. The jurisdiction of Kansas appellate courts is governed by statutes. K.S.A. 2023

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Supp. 60-2102(a)(4) grants appellate courts jurisdiction to hear appeals arising from a district court's final decision.
Benchmark Property Remodeling v. Grandmothers, Inc. 227

Motion to Dismiss for Lack of Subject-Matter Jurisdiction—Plaintiff Must Make Prima Facie Showing of Jurisdiction—Appellate Review. When a district court rules on a defendant's K.S.A. 60-212(b)(1) motion to dismiss for lack of subject-matter jurisdiction before trial based on the pleadings, affidavits, and other written materials without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor, and the plaintiff need only make a prima facie showing of jurisdiction. Appellate courts then exercise unlimited review, examining these materials anew rather than deferring to the district court's evaluation.
POM of Kansas v. Kobach ……...……. 764*

Subject Matter Jurisdiction—Court's Power to Hear and Decide Case. Subject matter jurisdiction is a court's power to hear and decide a case. It cannot be conferred by the parties' stipulation, consent, or waiver, and a court may consider its own jurisdiction—even sua sponte—at any time.
Benchmark Property Remodeling v. Grandmothers, Inc. 227

Subject-Matter Jurisdiction Is Constitutional Power of Courts to Decide Disputes. Subject-matter jurisdiction is the constitutional power of courts in this state to decide disputes. Once properly invoked, that power does not go away simply because a claim is flawed. *Nicholson v. Mercer* ……...…….. 712*

KANSAS CONSTITUTION:

Section 10 Provides Same Protections against Self-Incrimination as Fifth Amendment. Section 10 of the Kansas Constitution Bill of Rights provides that no person shall be a witness against himself or herself and extends the same protections against self-incrimination as the Fifth Amendment. *State v. Showalter* 147

MOTOR VEHICLES:

Statute Requires Light Display Only Red Color on Rear of Vehicle. K.S.A. 8-1729(e)—which provides that "[a]ll lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color"—requires that the light must display *only* a red color.
State v. Mendez ……. 718*

PARENT AND CHILD:

Child in Need of Care Adjudication—Termination of Parental Rights When Finding by Clear and Convincing Evidence Parent Is Unfit. When a child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly

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for a child and the conduct or condition is unlikely to change in the foreseeable future. *In re D.G.* ……..…….. 446

Finding of Parental Unfitness—Court Considers if Termination in Best Interests of Child—Primary Considerations. If the court makes a finding of unfitness, the court shall consider whether termination of parental rights as requested in the petition or motion is in the best interests of the child. In making the determination, the court shall give primary consideration to the physical, mental, and emotional health of the child. If the physical, mental, or emotional needs of the child would best be served by termination of parental rights, the court shall so order. *In re D.G.* ……..…… 446

Findings of Parental Unfitness—Appellate Review. When reviewing findings of parental unfitness, appellate courts view all the evidence in a light most favorable to the State and decide whether a rational fact-finder could have found it highly probable—i.e., by clear and convincing evidence—that the parent was unfit. In making this decision, the appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re D.G.* ……..…. 446

Termination of Parental Rights Hearing—Court's Duty to Ensure Party Has Ability to Be Meaningfully Present. When a party appears for an evidentiary hearing which will address termination of their parental rights, the district court has the duty to ensure that this party has the ability to be meaningfully present in all respects, including the ability to see, hear, speak, and consult with counsel (if they have one) during the proceeding. *In re A.S.* ……...…….. 396

— Waiver by Appearing Party Must Be Made Voluntarily and on Record. A waiver of an appearing party's right to fully and meaningfully participate in a termination of parental rights hearing must be made knowingly, voluntarily, intelligently, and on the record. *In re A.S.* ……..…….. 396

REAL PROPERTY:

Rights of Fee Owners of Land Containing Highway Easement—Owner has Standing to Sue for Alleged Trespass if Outside Scope of Easement. A person who owns the fee to land dedicated to a highway easement retains all rights in the land not included in the easement, including rights above, on, and under the surface of the ground within the limits of the highway. Such rights are subject only to the condition that the owner does not interfere with the public's use of the easement. The owner has standing to sue for an alleged trespass based on uses outside the scope of the easement. *Ross v. Nelson* 266

SUMMARY JUDGMENT:

Conflicting Evidence or More Than One Inference—Question of Fact—Improper Summary Judgment. When the evidence pertaining to the existence of a contract or the content of its terms is conflicting or permits more than one inference, a question of fact is presented—and thus summary judgment is improper. *Benchmark Property Remodeling v. Grandmothers, Inc.* …….. 227

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TRIAL:

An Exception to Right to Face-to-face Confrontation—Individualized Determination by Judges to Meet Constitutional Requirements. In order to meet constitutional requirements, judges must make individualized determinations that an exception to the right to face-to-face confrontation is necessary to fulfill other important policy needs. *State v. Younger* …... 585

Appearance by Party in Hearing Presumes Participation by Party. If a party appears for a hearing in their own case, then it is presumed the party wants to fully and meaningfully participate in that hearing. *In re A.S.* ……..……396

Burden on Defendant to Persuade Court That Mental Examination Necessary under Statute. The defendant bears the burden to persuade a sentencing court that a mental examination, evaluation, and report under K.S.A. 22-3429 serves the interests of justice. K.S.A. 22-3429 does not require courts to raise this issue sua sponte; a district court does not abuse its discretion in failing to order an evaluation if a defendant does not request one. *State v. Zongker* ……..……..…..… 411

Confrontation Clause Violation—Harmless Error Analysis. A violation of the Sixth Amendment Confrontation Clause is subject to harmless error analysis. *State v. Younger* ……..…… 585

Crime of Aggravated Kidnapping—Term of Bodily Harm Requires No Definition in Jury Instruction. To prove aggravated kidnapping under K.S.A. 21-5408(b), the State must demonstrate bodily harm was inflicted upon the person kidnapped. The term "bodily harm" is readily understandable and requires no instructional definition. *State v. Moore* ……..…… 557

Cross-Examination Essential to Fair Trial. The opportunity to conduct cross-examination is essential to a fair trial and helps assure the accuracy of the truth-determination process. *State v. Younger* …….…….…… 585

Cumulative Error Analysis—Unpreserved Instructional Issues May Not Be Aggregated if Not Clearly Erroneous. Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 22-3414(3) limits a party's ability to claim them as error. *State v. Moore* ……..…..…….. 557

Cumulative-Error Doctrine—Single Error Cannot Support Reversal. A single error cannot support reversal under the cumulative-error doctrine. *State v. Peters* ……..…… 492

Defendant's Exercise of Right to Self-Represent—Midtrial Request for Appointed Counsel. Once a defendant has validly exercised their right to self-represent, they do not have an absolute right to reverse course mid-trial and have counsel appointed to represent them. A district court's decision on a self-represented defendant's midtrial request for appointed counsel is discretionary. When faced with such a request, district courts should balance

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the reason for the request and alleged prejudice to the defendant if the request is denied with any disruption of the proceedings, inconvenience, delay, and possible confusion of the jury. *State v. Kemmerly* 91

Defendant's Right to Self-Represent—Court's Discretion to Appoint Standby Counsel. The decision to appoint standby counsel rests within the discretion of the district court. *State v. Kemmerly* 91

Determination Whether Erroneous Conduct by Prosecutor—Appellate Review. When determining whether a prosecutor engaged in erroneous conduct, an appellate court considers whether the challenged act falls outside the wide latitude a prosecutor has to conduct the State's case and attempt to obtain a conviction in a manner that does not prejudice the defendant's constitutional right to a fair trial. *State v. Willis* 663*

Discussion of Aiding and Abetting Doctrine Not Legal Error if Jury Not Misled. There is no requirement that each discussion of aiding and abetting must include every aspect of the doctrine. It is not legal error to discuss the doctrine's various aspects separately so long as the jury is not confused or misled. *State v. Z.M.* 297

Establishing Prosecutorial Error—Misstatement of Facts in Evidence. A defendant meets the first prong of establishing prosecutorial error by showing that the prosecutor misstated the facts in evidence, even if the misstatement was accidental or inadvertent. *State v. Zongker* 411

Jury Instruction Challenge—Clear Error Standard. Under the clear error standard, the reviewing court must be firmly convinced the jury would have reached a different verdict if the permissible instruction had been given. *State v. Willis* 663*

Jury Instruction Error Asserted by Party First Time on Appeal—Reversible if Clearly Erroneous. When a party asserts an instruction error for the first time on appeal, the failure to give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous.
State v. Willis 663*

Jury Instruction for Aiding and Abetting—"Mental Culpability" Does Not Need Definition. The phrase "mental culpability" in an aiding and abetting jury instruction based on K.S.A. 21-5210(a) is readily comprehensible and does not need additional explanation or definition.
State v. Z.M. 297

Jury Instruction Legally Inappropriate if Alternate Statutory Elements Not in Complaint. A jury instruction is legally inappropriate if it adds alternate statutory elements not included in a charging document.
State v. Huggins 358

Jury Instructions—Application of Invited Error Doctrine. Application of the invited error doctrine in the context of jury instructions turns on

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whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal. The ultimate question is whether the record reflects a party's action in fact induced the court to make the claimed instructional error.
State v. Peters 492

— Claim of Alternative Means Error—Appellate Review. If a defendant claims a jury instruction contained an alternative means error, the reviewing court must consider whether the instruction was both legally and factually appropriate. The court will use unlimited review to determine whether the instruction was legally appropriate and will view the evidence in the light most favorable to the requesting party when deciding whether the instruction was factually appropriate. Upon finding error, the court will then determine whether that error was harmless, using the test and degree of certainty set forth in *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012), and *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011). Contrary language in *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010), *disapproved of on other grounds by State v. Brooks*, 298 Kan. 672, 317 P.3d 54 (2014), and its progeny is disapproved.
State v. Reynolds 1

— Court Should Instruct Jury How It May Reach Unanimous Verdict if Alternative Theories. A district court should instruct the jury on how it may reach a unanimous verdict when a defendant is charged with a single crime of first-degree murder that is charged under the alternative theories of premeditated murder and felony murder. *State v. Z.M.* 297

— Definition of Premeditation from PIK Instruction Generally Sufficient –Additional Instruction Definition May Be Appropriate. While the PIK instruction defining premeditation is generally sufficient, in cases involving a temporal question—and where the temporal intricacies embedded in the legal concept of premeditation may confuse the jury—additional instructional language defining premeditation is appropriate so long as it properly and fairly states the law and is not reasonably likely to mislead the jury. *State v. Zongker* 411

— Unpreserved Instructional Issues Not Clearly Erroneous—No Cumulative Error Analysis. Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis under K.S.A. 22-3414(3). *State v. Reynolds* 1

Motion for New Trial Based on Newly Discovered Evidence—Requirements for Defendant to Establish. When seeking to demonstrate that the interest of justice warrants a new trial based on newly discovered evidence, the defendant bears the burden of establishing that the newly proffered evidence could not, with reasonable diligence, have been produced at trial and that the evidence is so material that there is a reasonable probability it would produce a different result upon retrial. *State v. James* 178

Objection at Trial—Required to Be Sufficiently Specific. An objection made at trial must be sufficiently specific to give the trial court a reasonable understanding of the basis of the objection. *State v. Huggins* 358

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Prosecutor May Argue No Support for Theory of Self-Defense. A prosecutor may argue that facts do not support defense theories, including a theory of self-defense. *State v. Willis* 663*

Proving Peremptory Strikes Were Pretext for Discrimination—Defendant's Burden under Batson. Where no argument or evidence is offered to show the prosecutor's reason for exercising the peremptory strikes were pretext for discrimination, a defendant fails to meet his or her burden under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *State v. Peters* 492

Sequestering Witness—Trial Court's Discretion. A trial court's decision whether to sequester a witness lies within that court's discretion. Furthermore, the trial court has discretion to permit certain witnesses to remain in the courtroom even if a sequestration order is in place. *State v. Younger* 585

Sixth Amendment Right to Counsel Violation is Structural Error—Automatic Reversal of Conviction. Violation of the Sixth Amendment right to counsel is a structural error affecting the trial mechanism; it requires automatic reversal of a defendant's conviction. *State v. Trass* 525

Structural Errors Affect Fundamental Fairness of Trial—Deprives Defendant of Due Process Protections. Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings. *State v. Trass* 525

Time Period for Premeditation to Be Formed—No Error by Prosecutor to State Premeditation Formed in Five Seconds. Though it is prosecutorial error for the State to assert premeditation can be formed in one second, it is not error for the prosecutor to state that premeditation can be formed in five seconds, because five seconds can be enough time for an internal second thought or hesitation to arise. *State v. Mendez* 718*

UNIFORM MANDATORY DISPOSITION OF DETAINERS ACT:

Statutory Time Limitation Does Not Run Until Receipt of Certificate by Court and County Attorney. Under the MDDA's plain language, the 180-day clock does not begin to run until the receipt of the certificate by the court and county attorney from the Secretary of Corrections. *State v. Munoz* 743*

Strict Compliance May Be Excused—Prison Officials' Failure to Do Required Acts. When an inmate does what the Uniform Mandatory Disposition of Detainers Act (MDDA) requires, strict statutory compliance may be excused if a defect arises because prison officials failed to do the things required of them. *State v. Munoz* 743*

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ZONING:

Statutory Authorization for Counties to Adopt Zoning Regulations—Exception. K.S.A. 12-741(a) grants counties the authority to enact zoning regulations without state interference so long as those local enactments do not conflict with the Planning, Zoning, and Subdivision Regulations in Cities and Counties Act, K.S.A. 12-741 et seq. In keeping with this statutory scheme, K.S.A. 12-755 authorizes counties to adopt zoning regulations providing for issuance of conditional use permits.
American Warrior, Inc. v. Board of Finney County Comm'rs 78

No. 126,479

In the Matter of LEON J. DAVIS Jr., *Petitioner.*

(557 P.3d 28)

ORDER OF REINSTATEMENT

ATTORNEY AND DISCIPLINE—*Order of Reinstatement—Reinstatement.*

On March 1, 2024, the court suspended Leon J. Davis Jr.'s Kansas law license for two years. *In re Davis*, 318 Kan. 450, 456-57, 543 P.3d 1143 (2024). The court further directed:

"The two-year suspension is stayed after six months, conditioned on successful participation and completion of a two-year probation period. Probation will be subject to the terms set out in the plan of probation referenced in the parties' Summary Submission Agreement. No reinstatement hearing is required upon successful completion of probation." 318 Kan. at 457.

The court now grants the parties' joint motion to stay the two-year suspension of Davis' law license, conditioned on his successful participation and completion of a two-year probation period as outlined above. The two-year probation term begins to run on the date of this order. Under Supreme Court Rule 227(h) (2024 Kan. S. Ct. R. at 282), Davis "remains on probation, subject to each condition of probation, until the Supreme Court discharges [him] from probation, regardless of whether the ordered term of probation has expired."

The court further orders Davis to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education (CLE) requirements. See Supreme Court Rule 812 (2024 Kan. S. Ct. R. at 603) (outlining CLE requirements following reinstatement after suspension). The court directs that once the OJA receives proof of Davis' completion of these conditions, the OJA must add Davis' name to the roster of attorneys actively engaged in the practice of law in Kansas.

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

Dated this 15th day of October 2024.

No. 123,451

STATE OF KANSAS, *Appellee*, v. JAMES A. WILLIS, *Appellant*.

(557 P.3d 424)

SYLLABUS BY THE COURT

1. TRIAL—*Determination Whether Erroneous Conduct by Prosecutor—Appellate Review.* When determining whether a prosecutor engaged in erroneous conduct, an appellate court considers whether the challenged act falls outside the wide latitude a prosecutor has to conduct the State's case and attempt to obtain a conviction in a manner that does not prejudice the defendant's constitutional right to a fair trial.

2. SAME—*Prosecutor May Argue No Support for Theory of Self-Defense*. A prosecutor may argue that facts do not support defense theories, including a theory of self-defense.

3. SAME—*Jury Instruction Error Asserted by Party First Time on Appeal—Reversible if Clearly Erroneous*. When a party asserts an instruction error for the first time on appeal, the failure to give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous.

4. SAME—*Jury Instruction Challenge—Clear Error Standard*. Under the clear error standard, the reviewing court must be firmly convinced the jury would have reached a different verdict if the permissible instruction had been given.

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Oral argument held September 11, 2024. Opinion filed October 18, 2024. Affirmed.

Kristen B. Patty, of Wichita, argued the cause, and *Catherine M. Decena Triplett*, of Triplett Law Firm, of Shawnee, was on the brief for appellant.

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: James A. Willis appeals from his convictions for first-degree premeditated murder and criminal possession of a firearm. He asserts errors revolving around his trial theory that he was acting in self-defense or defense of another. Finding no reversible error, we affirm the convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Willis was convicted of premeditated first-degree murder for firing multiple shots at close range into a car as the driver was backing out of a parking lot; he was also convicted of criminal possession of a firearm. His brother Dale Willis was convicted in a separate trial for the same murder as an abettor of first-degree murder and battery, and his convictions were affirmed in *State v. Willis*, 312 Kan. 127, 475 P.3d 324 (2020).

The inconsistency of witness testimony complicates a description of the events surrounding the shooting. To avoid confusing the two, the Willis brothers will be referenced as either James or Dale. The shooting took place at night in a small parking lot outside a nightclub in Overland Park. As the victim, Jurl Carter, was backing his car out of his parking space, James ran after him and shot into the car, killing him. The scene was chaotic, with dozens of people in the lot at the time of the shooting, and with many of them running or driving from the scene immediately afterwards. Witnesses subsequently differed in their versions of what happened, with some witnesses reporting there was more than one shooter, and a defense witness even testifying that four or five men ran after Carter's car.

But a surveillance camera at a nearby store captured the scene. And the witness accounts were in general accord, which, when compared with the video recording, allows a reasonable composite of what happened. Furthermore, James conceded at trial that he ran to Carter's car and fired numerous shots into it, although he disputed the State's theory of his motivation for doing so.

On the night of September 15, 2015, through early morning September 16, Dale was at The Roxy bar, a popular locale for music and dancing in Overland Park, where he performed on the stage. Around midnight, Carter, who was also a musical performer, picked up a couple of friends and went to the bar, where he spent some time dancing. About an hour later, Carter and his friends went outside and lounged outside the bar.

Shortly after midnight, Dale texted James, who was not at the club, saying: "Sucka here." Shortly afterwards, James sent Dale a text reading: "On the way." James received a ride to The Roxy from a friend, whom he told that Dale had "got into it with somebody." Witnesses

confirmed that Carter and Dale engaged in a verbal confrontation outside the bar. The confrontation may have involved a photographer who was taking pictures of performers and audience members while they were in the parking lot. Dale and Carter ended up exchanging angry words.

Dale was standing next to Carter. A couple of minutes passed, and, when Carter looked away, Dale turned and hit him in the face, knocking him to the ground with a sneak or "sucker" punch. A friend helped Carter to his feet and asked if he was all right. Carter replied, "I am cool, bro." He started walking to his car and said, "I will be right back."

Carter got in the driver's side of his car, and started to back the car up. From the sound of the engine revving, it was likely that the car was in neutral and was simply rolling backwards down a slope in the parking lot. It appeared to witnesses that he was trying to leave the scene. He was not acting aggressively, or shouting at the Willis brothers, and he did not attempt to run into them—he "was getting out of there."

As the car was backing away, Dale was walking along the passenger side of the car. About the same time, James got out of the vehicle in which he had arrived and took a gun with him. He then flipped his hoodie up onto his head, ran up to the car, and started firing at Carter from just a few feet away. Dale and James then ran away from the scene.

Demitrius Parker, a friend of Carter, witnessed the shooting and the events leading up to it. He ran over and pulled Carter from the car and then called 911. Carter died at the scene from multiple gunshot wounds to the center of his body. Witnesses at the scene and subsequent investigators found no weapon on Carter's person or in his car and no evidence that he had fired any shots.

The State charged James with one count of premeditated first-degree murder under K.S.A. 21-5402 and one count of criminal possession of a firearm after having been convicted of a felony under the laws of another state, in violation of K.S.A. 2015 Supp. 21-6304. A jury found him guilty of both counts. He was sentenced to a hard 50 life sentence for the

murder conviction and a consecutive sentence of 19 months for the firearm conviction.

DISCUSSION

James' issues on appeal largely go to his claim that he acted in self-defense. These include his assertions of prosecutorial error and his claim that the district court should have given additional lesser-included offense instructions. In considering whether there were any errors, and, if there were, whether they likely affected the outcome of the case, we will start with an overview of the situation around the time of the shooting as a guide to considering how persuasive the self-defense argument was likely to be on the jury.

The testimony of various witnesses was somewhat inconsistent; for example, one witness testified she thought it was Dale who stood at the window shooting into the car. But the evidence as a whole tended to show Carter was unarmed. Dale "sucker-punched" Carter in the face, knocking him to the ground. Carter got back to his feet, got in his car, and started to back his car out of the lot. Both Willis brothers pursued Carter's retreating car, and James fired at least six shots into Carter's torso from close range. James then ducked down and ran away from the parking lot. The video surveillance recording from a nearby store was consistent with this description of the events, and James testified that he fired numerous shots into the car.

With these factors in mind, we examine the issues James brings before us.

Prosecutorial error

James maintains the prosecutor improperly drew conclusions not supported by the evidence and improperly stated the law of self-defense during closing argument.

In determining whether a prosecutor engaged in erroneous conduct, this court considers whether the challenged acts "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

On appeal, James contends the prosecutor bolstered his argument with factual assertions that were not grounded in the record. He seeks

to parse the prosecutor's statements closely with respect to the record and asks this court to conclude his defense was prejudiced by misleading assertions. He focuses on the prosecutor's contention that perceived disrespect motivated the shooting.

Specifically, the prosecutor argued to the jury:

"This was a disagreement between Dale and [Carter], a disagreement over the photographs. A disagreement that was a result of Jurl being drunk and a little bit mouthy. Dale took that as disrespect. Let's talk about disrespect because I mentioned to you in opening, this concept of disrespect. And the witnesses that came in, many of them told you about the atmosphere that night at The Roxy bar and what the concept of disrespect meant to those that were there that night.

"Demitrius Parker. Demitrious told you, you retaliate if you're disrespected. You demand respect because that reflects how you're perceived.

"Antonio Frazier who testified just the other day told you if you get disrespected, you're going to handle it right then. Remember, Dale Willis is outside with numerous members of his DOR team. He's out there with multiple other people who had seen him perform that night and who were there at the club. In front of all those people, Jurl Carter had the gall to tell him to fuck off. That was disrespect. That was disrespect in the eyes Dale Willis.

"So what did he do? He calls down his brother so that he can respond with street justice. He calls his brother down wearing a hoodie, armed with a gun, and takes a cheap shot at Jurl Carter."

Several witnesses spoke about disrespect. Parker told the jury:

"In our environment, respect is something that it's not given, it's kind of demanded, you take it. It's kind of like being seen as a man. You desire it, you know what I'm saying. So if somebody disrespects you, especially in a public place in front of people that know you, you're expected to do something about it. You can't just let it ride really."

And Antonio Frazier testified that Carter and his companions were in the back of their car talking and behaving disrespectfully. Frazier explained the Willis brothers "don't tolerate disrespect." He testified that Carter was doing a lot of "woofing," and Frazier concluded: "They are not going to stand for it, so it was my opinion if someone disrespects, they are going to deal with it accordingly."

In addition, Antoine Crosby, a defense witness, testified:

"I know Willo [Dale Willis]—you know what I am saying? He is not going to let nobody walk up in his face and disrespect him like that. Of course, he is going to turn it into some type of fight. You fought up, and you fought up and you not

talk to him. A man like that—this is exactly what it says, too. You fought up and you not talk to him, a man like that, fuck him, dot, dot."

James argues in his brief that the prosecutor drew conclusions from the testimony of the witnesses that went beyond what the witnesses actually said. Specifically, he argues that the witnesses did not state that disrespect prompted retaliatory homicide, and the witnesses did not state that Dale and James felt disrespected or were motivated by disrespect. He then accuses the prosecutor of engaging in both inference-stacking and inflaming the passions of the jury based on the perpetrators' and victim's participation in the "rap scene."

Prosecutors enjoy "wide latitude" to craft arguments that include "'reasonable inferences based on the evidence.'" See, e.g., *State v. King*, 288 Kan. 333, 351, 204 P.3d 585 (2009). But it is error when a prosecutor asserts facts or inferences that the evidence does not support. See, e.g., *State v. Waldschmidt*, 318 Kan. 633, 655, 546 P.3d 716 (2024).

No witness specifically said that Dale "took [the dispute with Carter] as disrespect," as the prosecutor asserted. But witnesses testified about an ethos in the community that demanded respect and expected an aggressive response to perceived disrespect. And there was evidence showing that *something* prompted James to jump out of his vehicle and both brothers to chase down Carter as he was backing away from the nightclub. The brothers claimed it was to protect themselves from Carter; the prosecutor offered a more plausible explanation that was moored in a culture of defending respect. That explanation was consistent with the testimony, even if it made inferences about the brothers' motivation that slightly misstated the witnesses' testimony.

James also argues that the prosecution attempted to inflame the prejudices of the jury towards people associated with rap music. This argument rests on a shaky foundation. Many of the State's witnesses were rap music performers or fans, and the victim was a rap performer. The prosecutor did not criticize or condemn rap music or rap musicians or the many people who were at The Roxy that evening to enjoy rap performances.

We conclude that the prosecution in this case made reasonable inferences that lay within the wide latitude afforded prosecutors

to conduct their case and did not impinge on James' right to a fair trial.

James also argues the prosecutor misinformed the jury about the elements of self-defense. In closing argument, the prosecutor sought to undermine James' claim that he fired at Carter in self-defense. Among other contentions, the prosecutor told the jury that, in order to find that James acted in self-defense, it would have to believe that Carter had a gun with him. On appeal, James contends this inaccurately states the law of self-defense.

K.S.A. 21-5222 sets out the conditions for asserting the defense of defending a person:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
>
> "(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.
>
> "(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person."

The statute essentially sets forth a two-part test for determining whether an individual justifiably used deadly force in self-defense or in defense of another. The first part of the test is subjective; it requires a showing that the defendant sincerely and honestly believed it was necessary to kill to defend themselves or others. The second part of the test is objective and requires a showing that a reasonable person in the defendant's circumstances would have perceived it necessary to use deadly force in self-defense. *State v. J.L.J.*, 318 Kan. 720, 730, 547 P.3d 501 (2024). James argues that he satisfied both parts of the test even if Carter had no weapon.

The State defends its closing argument statement by asserting that James' version of the events required the jury to believe Carter had a gun. But in his testimony, James conceded he was apparently wrong about Carter having a gun, and, in closing argument, his attorney did not contend that Carter actually had a gun. He instead told the jury, "James thinks he sees a gun, and Carter backs, his lights go on at that point." He went on to say, "If he

thinks that—he thinks, he doesn't even have to have a gun, he reasonably believes, and I'm going to read that for you because if you think he has to have a gun, look at the jury instructions. That was a misstatement. That does not have to be proven [w]rong." And later, he said, "James Willis believe[d] he had a gun, so don't go down the rabbit's hole of, well they can't prove he had a gun. When the prosecutor got up and said the evidence would have to show, that's a misstatement, that's not law."

Taken in isolation, the prosecutor's statement may well have misstated the law. But the challenged statement was only a part of what the prosecutor said to the jury about self-defense. Before the complained-of statement, the prosecutor correctly stated to the jury what self-defense entails:

"[W]e have this theory of self-defense, and you have an instruction on that. And, again, this theory of self-defense is simply another example of something that does not align with the evidence in this case. This gives you the definition of self-defense, and included in there is that a person must reasonably believe force is necessary to prevent death or great bodily harm to himself or someone else from the other person's imminent use of unlawful force. This is key here, it requires a reasonable belief by the defendant and the existence of facts that would persuade a reasonable person to that belief. And the video and the evidence in this case simply blow up that self-defense theory. Jurl is sucker-punched and then that imminent threat, that imminent threat is Jurl Carter is chased down and shot 11 times. A simple review of that video tells you this is not a self-defense killing."

The prosecutor referred the jury to the instruction on self-defense. That instruction read:

"As to Count 1, the defendant claims his use of force was permitted as self-defense and/or the defense of another person.

"The defendant is permitted to use against another person physical force that is likely to cause death or great bodily harm only when and to the extent that it appears to him and he reasonably believes such force is necessary to prevent death or great bodily harm to himself or someone else, from the other person's imminent use of unlawful force.

"Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief. When use of force is permitted as self-defense or defense of someone else, there is no requirement to retreat."

Prosecutors may not misstate law applicable to the evidence. *J.L.J.*, 318 Kan. at 730. "A defendant is denied a fair trial when a

prosecutor misstates the law and the facts are such that the jury could have been confused or misled by the statement." *State v. Hall*, 292 Kan. 841, 849, 257 P.3d 272 (2011). A prosecutor may, however, argue that facts do not support a defendant's theory that he or she acted in self-defense. See, e.g., *J.L.J.*, 318 Kan. at 730-31.

That is the situation that we have in this case. In the full context of the closing argument, the prosecutor simply argued that the facts did not support James' theory that he acted in self-defense. We conclude that the prosecutor did not mislead or misinform the jury about the law of self-defense.

Failure to instruct on manslaughter

The court instructed the jury on first-degree premeditated murder and the lesser-included offense of second-degree murder. Neither party requested manslaughter instructions, and the court did not give such instructions. Now, on appeal, James contends the trial court committed clear error when it failed to instruct on voluntary and involuntary manslaughter.

When, as here, a party asserts an instruction error for the first time on appeal, the failure to give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous. *State v. Butler*, 307 Kan. 831, 845, 416 P.3d 116 (2018); see K.S.A. 22-3414(3). For the failure to be clearly erroneous, the instruction must have been legally and factually appropriate and the court must be firmly convinced the jury would have reached a different verdict if the permissible instruction had been given. The party claiming clear error has the burden to show both error and prejudice. See *Waldschmidt*, 318 Kan. at 646; *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021).

James argues that the facts and law supported an instruction on voluntary manslaughter based on imperfect self-defense and it was clear error not to give that instruction.

K.S.A. 21-5404(a)(2) states that voluntary manslaughter is "knowingly killing a human being committed: . . . upon an unreasonable but honest belief that circumstances existed that justified use of deadly force under K.S.A. 21-5222, 21-5223 or 21-5225, and amendments thereto." We will assume without deciding that

an instruction on voluntary manslaughter would have been legally appropriate because it is a lesser included offense of first-degree murder and factually appropriate based on James' own trial testimony. See *State v. Gallegos*, 313 Kan. 262, 267, 485 P.3d 622 (2021).

James also argues that the facts and law supported an instruction on involuntary manslaughter. He theorizes that the evidence sufficed to show he was engaging in the lawful act of self-defense but he used excessive force in carrying it out.

K.S.A. 21-5405(a)(4) states that involuntary manslaughter includes "the killing of a human being committed: . . . during the commission of a lawful act in an unlawful manner." Involuntary manslaughter is a lesser included offense of premeditated first-degree murder. See *State v. Haygood*, 308 Kan. 1387, 1408, 430 P.3d 11 (2018).

This court has characterized this form of manslaughter as the "lawful exercise of self-defense, but with excessive force." See *State v. Nunez*, 313 Kan. 540, 551, 486 P.3d 606 (2021); *State v. McCullough*, 293 Kan. 970, 976, 270 P.3d 1142 (2012). Under this theory,

> "a defendant might kill when it was not reasonably necessary even though the defendant perceived a threat of death or great bodily harm. In such a case, the use of force could be found to be an 'unlawful manner' of committing the lawful act of self-defense, thus supplying the requisite element of involuntary manslaughter." *Nunez*, 313 Kan. at 551.

James contends this exactly fits his situation: he perceived a threat of death (reasonably believing that Carter had a gun and was either firing at him or was going to fire at him), but his own use of force was not necessary, perhaps because Carter was driving away from the scene. As with voluntary manslaughter, we will assume without deciding that an instruction on involuntary manslaughter would have been both legally and factually appropriate.

But we have considered the record as a whole, including the video recording of the events of the shooting, the testimony of the many witnesses who were present at the time of the shooting, and account that James gave of what he did and why he did it, and we are not firmly convinced that the jury would have reached a different verdict if the manslaughter instructions had been given.

Finding no basis to reverse the convictions, we affirm.

No. 126,550

In the Matter of the Wrongful Conviction of JASON MASHANEY.

(557 P.3d 1231)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Claim for Wrongful Conviction and Imprisonment—Statutory Language Construed.* In claims under state law for wrongful conviction and imprisonment, the phrase "the charges were dismissed" in K.S.A. 2023 Supp. 60-5004(c)(1)(B) means both terminating the criminal accusation presented in court and relieving the defendant of the accusation's criminal liability.

Appeal from Sedgwick District Court; ERIC A. COMMER, judge. Oral argument held September 12, 2024. Opinion filed October 25, 2024. Reversed.

Anthony J. Powell, solicitor general, argued the cause, and *Ryan J. Ott*, assistant solicitor general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellant.

Laurel A. Driskell, of Clark, Mize & Linville, Chtd., of Salina, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: The State appeals after a district court awarded Jason Mashaney nearly $414,595 in damages for wrongful conviction and imprisonment, which is a civil claim created by K.S.A. 2023 Supp. 60-5004. The court ruled the accusations against him were "effectively dismissed" when Mashaney pled to reduced charges. But the State argues the court misinterpreted the statute in reaching that conclusion, citing *In re Wrongful Conviction of Sims*, 318 Kan. 153, Syl. ¶ 2, 542 P.3d 1 (2024) (holding the statutory phrase "'the charges were dismissed'" means both terminating the criminal accusation and relieving the defendant of that accusation's criminal liability). We agree with the State.

The circumstances of the plea show the original sex offense charges continued in a modified form with Mashaney's agreement when the State replaced them with nonsexual charges involving the same victim. The district court's ruling undermines the legislative mandate when considering claims for wrongful conviction and imprisonment. See *In re Wrongful Conviction of Spangler*,

318 Kan. 697, 700, 706, 547 P.3d 516 (2024) (holding the Legislature intended to restrict compensation under K.S.A. 2023 Supp. 60-5004 to "[o]nly someone innocent of the criminal conduct"). We reverse the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are undisputed. In 2004, a jury convicted Mashaney of aggravated criminal sodomy and aggravated indecent liberties with a child for his alleged conduct in 2003 with his then-five-year-old daughter, A.A. He was sentenced to 442 months in prison. A Court of Appeals panel affirmed. *State v. Mashaney*, No. 94,298, 2007 WL 1109456, at *7 (Kan. App. 2007) (unpublished opinion), *rev. denied* 284 Kan. 949 (2007).

In 2008, Mashaney filed a K.S.A. 60-1507 motion, arguing ineffective assistance of counsel, which the district court summarily denied. On appeal, another Court of Appeals panel reversed and remanded for a full evidentiary hearing. *Mashaney v. State*, No. 101,978, 2010 WL 3731341, at *16 (Kan. App. 2010) (unpublished opinion). After that hearing, the district court found Mashaney suffered substantial prejudice from ineffective trial and appellate representation. The court wrote in its minutes order, dated March 15, 2011, that it "vacated" the 2004 convictions and scheduled the original criminal case for a new trial.

A plea agreement followed. The State replaced the original charges with new ones—two counts of attempted aggravated battery and one count of aggravated endangerment of child involving the same victim. The new charges deleted the original information's sexual component. Mashaney then entered an *Alford* plea to the new charges. See *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Case*, 289 Kan. 457, Syl. ¶ 2, 213 P.3d 429 (2009) ("An *Alford* plea is a plea of guilty to a criminal charge but without admitting to its commission."). The court accepted the plea, found Mashaney guilty, sentenced him to 72 months in prison, and ordered his release for time already served on the original 442-month sentence.

In 2020, Mashaney sued the State for monetary damages alleging wrongful conviction and imprisonment under K.S.A. 2019 Supp. 60-5004. The case went to a bench trial in 2022.

Mashaney testified he began communicating with his daughter, A.A., when she was 17 or 18 years old using Facebook Messenger and seeing her in person. He said she apologized, admitted the allegations against him were false, and explained her mother pressured her into making them. Mashaney's parents also testified. His father, Roger Mashaney, said A.A. first spoke to him about the incident in 2015, when she also acknowledged Mashaney did not commit the alleged acts and apologized for her previous statements. His mother, Sherry Gilbert, was present for this conversation and corroborated the father's account.

A.A. declined to testify and was beyond the court's jurisdiction because she lived out of state. The court permitted the State to admit her criminal case testimony into evidence. A.A.'s mother failed to appear as a witness. The State did not pursue a material witness warrant.

The district court ruled in Mashaney's favor. It found he met the four statutory elements required for compensation:

> "(A) The claimant was convicted of a felony crime and subsequently imprisoned.
>
> "(B) the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty;
>
> "(C) the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial; and
>
> "(D) the claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction. . . ." K.S.A. 2023 Supp. 60-5004(c)(1).

The district court calculated the wrongful conviction damages at $505,700. See K.S.A. 2023 Supp. 60-5004(e)(1)(A) ("Damages awarded under this section shall be . . . $65,000 for each year of imprisonment."). In reaching that amount, it found Mashaney was wrongfully imprisoned from October 1, 2003, to July 13, 2011, totaling 2,843 days or 7.78 years. The court concluded "each day wrongfully imprisoned should not be considered less than any other day in a complete year," despite the statute's reference to an annual rate. It then reduced the award by $91,105.06 received

from a legal malpractice settlement after fees and costs. The final calculation brought the judgment against the State to $414,594.94.

The State appeals, arguing Mashaney failed to satisfy the second and third statutory elements and objecting to the monetary damages calculation. Our jurisdiction is proper. See K.S.A. 2023 Supp. 60-5004(l) ("The decision of the district court may be appealed directly to the supreme court pursuant to the code of civil procedure.").

THE CHARGES WERE NOT "DISMISSED" AS REQUIRED BY LAW

We start with the second element under K.S.A. 2023 Supp. 60-5004(c)(1)(B) because the outcome on that question resolves the case. The phrase "the charges were dismissed" means both terminating the criminal accusation and relieving the defendant of that accusation's criminal liability. *Sims*, 318 Kan. 153, Syl. ¶ 2. But here, the district court came to a legal conclusion that Mashaney's charges were "effectively dismissed" when the State amended them and that this was sufficient in making his claim for wrongful conviction and imprisonment.

The State argues its amended charges do not constitute the dismissal required by K.S.A. 2023 Supp. 60-5004(c)(1)(B). We agree, although we acknowledge the court did not have our *Sims* decision to guide its analysis.

Standard of review

Determining whether Mashaney satisfied K.S.A. 2023 Supp. 60-5004(c)(1)(B) requires statutory interpretation, so we review the lower court's ruling de novo. See *Sims*, 318 Kan. at 156.

Discussion

We begin by noting the district court explicitly found in its findings of fact:

> "The Office of the Sedgwick County District Attorney *did not dismiss the case. Instead, the District Attorney amended the charges* by removing the charges of aggravated criminal sodomy and aggravated indecent liberties and replaced them with two Counts of Attempted Agg. Battery and one Ct. [Aggravated] Endangerment of Child. None of the three counts were sex offenses." (Emphasis added.)

Yet, as one of its conclusions of law relating to K.S.A. 2023 Supp. 60-5004(c)(1)(B), the district court stated:

"It is true that when Mashaney entered the Alford plea it was in the same 'case' and so he served the time in prison for his convictions of two counts of attempted aggravated battery and one count of aggravated endangering a child. There is more than one error with that argument. First, the imprisonment was not subsequent to those convictions. And second, *by the State's amendment of the complaint, the original charges of aggravated criminal sodomy and aggravated indecent liberties were effectively dismissed*." (Emphasis added.)

To reach that legal conclusion, the district court explained:

"The Court believes that K.S.A. 60-5004 is best understood when the use of the three terms 'crime(s)', 'conviction(s)' and 'charges' in all four subsections of K.S.A. 60-5004(c) are all understood to refer to the same crime(s), conviction(s) and charge(s). Applying the preponderance of the evidence standard, this Court rules that Mashaney's conviction of aggravated criminal sodomy and aggravated indecent liberties with a child were indeed '**vacated**' and when those '**charges**' were amended those '**charges**' were effectively dismissed in December of 2011."

It then declared a "charge" is "'a **written statement** presented to a court **accusing a person of the commission of a crime** and includes a complaint, information or indictment,'" quoting the criminal code's definition. K.S.A. 22-2202(h).

In *Sims*, the court also referenced the criminal code when interpreting the term "charge," but it reached a different understanding of the word in the context of K.S.A. 2022 Supp. 60-5004(c)(1)(B). 318 Kan. at 159. It held the term "charge" there means "the criminal accusation presented in court." 318 Kan. at 160. And this reading better aligns with legislative intent than the district court's view. See *Spangler*, 318 Kan. at 700 (holding a claimant "must show factual innocence from the charges giving rise to criminal liability before receiving compensation").

During Mashaney's plea hearing in the criminal case, the district court noted he had agreed to a plea bargain that changed his plea from not guilty to the sex crimes to an *Alford* plea of guilty to the nonsex crimes with the same victim. The court asked him if he understood he was "entering a plea of guilty for the purpose of taking advantage of the plea bargain . . . offered in the case." He agreed. The court also clarified that if it accepted his guilty plea, "a sentencing hearing" would follow, meaning Mashaney would be "subject to" a sentencing order imposing criminal liability on

him in the case. Given this, we conclude the district court in the civil damages case too narrowly interpreted the term "charge" to apply only to vacated convictions—deviating from K.S.A. 2023 Supp. 60-5004's plain language.

Next, as the State correctly asserts, the district court erroneously interpreted the statute to equate amending criminal charges with dismissing them. Under K.S.A. 22-3201(e), a charging document may be amended "at any time before verdict" but generally cannot include "additional or different" crimes. An amendment within these parameters does not require dismissal followed by refiling the charges.

Here, vacating the original convictions returned Mashaney's criminal case to its pre-verdict status with a new trial scheduled. And Mashaney does not argue the State's amendment introduced "additional or different" offenses that prejudiced his substantial rights. See *State v. Woods*, 250 Kan. 109, 111, 825 P.2d 514 (1992) ("[T]he plain language of the statute . . . permits an amendment only 'if no additional or different crime is charged *and* if substantial rights of the defendant are not prejudiced.'"). Indeed, it would be difficult for Mashaney to argue prejudice since the State amended the charges in accordance with his wishes and for his benefit under the plea agreement.

In *Sims*, the court held a claimant with a reversed felony conviction was ineligible for compensation because K.S.A. 2022 Supp. 60-5004(c)(1)(B) clearly and unambiguously requires both terminating the accusation presented in court and relieving the defendant of that accusation's criminal liability. 318 Kan. at 160 (citing Black's Law Dictionary 589 [11th ed. 2019] [defining "dismissal" as the termination of an action, claim, or charges without further hearing, imposing no civil or criminal liability on the defendant with respect to that case]). Sims' conviction was not dismissed because he was resentenced for the same crime as a misdemeanor, instead of the initially charged felony. In other words, the phrase "the charges were dismissed" signifies finality—meaning the charges at issue are completely discontinued.

The district court in the civil case here explicitly found—and correctly described—in its findings of fact that the State "did not dismiss the case" but instead "amended the charges." And all agree

Mashaney's current convictions stem from the 2003 criminal accusations against him that related to the same victim. The district court went astray in its subsequent legal conclusion that the charges against Mashaney had been "effectively dismissed" so his claim remained viable.

We hold the accusations involving A.A. were never "dismissed" within the statutory meaning for a claim of wrongful conviction and imprisonment under K.S.A. 2023 Supp. 60-5004. Instead, Mashaney's charges were amended by the State according to the plea agreement. An amendment changes or modifies charges. See K.S.A. 22-3201(e) (allowing "amend[ing]" complaint or information); Black's Law Dictionary 101 (12th ed. 2024) (defining "amend" as "[t]o correct or make usu. small changes to [something written or spoken]"); *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017) ("Dictionary definitions are good sources for the 'ordinary, contemporary, common' meaning of words.").

The second element's language states: "the claimant's judgment of conviction was reversed or vacated and . . . the charges were dismissed." K.S.A. 2023 Supp. 60-5004(c)(1)(B). Mashaney's original charges simply continued in a different form through the amended charges, and he incurred criminal liability for those amended charges. His compensation claim fails because he cannot establish the required second element.

We reverse the district court's judgment. This means we need not address the remaining issues.

Reversed.

No. 127,338

In the Matter of ERIC M. GAMBLE, *Respondent*.

(558 P.3d 290)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Six-month Suspension*.

Original proceeding in discipline. Oral argument held May 10, 2024. Opinion filed November 8, 2024. Six-month suspension stayed, conditioned upon successful participation and completion of a 12-month probation period.

Kate Duncan Butler, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was on the formal complaint for the petitioner.

Christopher M. McHugh, of Joseph, Hollander & Craft L.L.C., of Kansas City, Missouri, argued the cause for the respondent, and *Eric M. Gamble*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Eric M. Gamble, of Shawnee. Gamble received his license to practice law in Kansas on September 26, 2003.

On February 9, 2023, the Disciplinary Administrator's office filed the Formal Complaint against Gamble alleging violations of the Kansas Rules of Professional Conduct. The complaint stemmed from Gamble's actions as an attorney in contentious domestic cases. These cases, separately filed in two states, related to protection from abuse, child support, child custody, and divorce.

Respondent answered the Formal Complaint on March 3, 2023.

On December 22, 2023, the parties entered into a summary submission agreement under Supreme Court Rule 223(b) (2024 Kan. S. Ct. R. at 275) (summary submission is "[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken").

In the summary submission agreement, the Disciplinary Administrator and Gamble stipulate and agree that Gamble violated the following Kansas Rule of Professional Conduct (KRPC):

KRPC 8.4(d) (2024 Kan. S. Ct. R. at 430) (conduct prejudicial to the administration of justice).

FACTUAL AND PROCEDURAL BACKGROUND

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

"*Findings of Fact*

"5. Under Rule 223(b)(2)(B) (2023 Kan. S. Ct. R. at 277), the parties stipulate to the following findings of fact:

"6. The respondent, Eric M. Gamble, is an attorney at law, Kansas attorney registration number 21250. The Supreme Court admitted the respondent to the practice of law in Kansas on September 26, 2003. The respondent's most recent registration address with the Office of Judicial Administration is 12400 West 62nd Terrace, Suite H, Shawnee, Kansas 66216.

"7. On July 10, 2020, D.L.R. and J.D., attorneys, filed a complaint against the respondent. D.L.R. signed the complaint on behalf of her law firm. The complaint stems from an underlying PFA case, an emergency custody action, and a divorce case filed in Wyandotte County District Court in late 2019 and early 2020. D.L.R.'s sister, S.G. was a party in the three actions. D.L.R. and J.D. represented S.G. in the PFA case and emergency custody case. After the respondent entered his appearance in this case, D.L.R. did not appear with S.G. in the PFA case or the emergency custody case. J.D. represented S.G. in the divorce case.

"8. On January 23, 2020, the respondent entered a limited entry of appearance in the PFA case and the emergency custody action.

"9. On January 30, 2020, J.D. requested a phone conference with the district court in part seeking an order to sell the jointly held marital home, to which respondent emailed the district court and J.D. as follows:

'Good afternoon:

'My thoughts are that I would caution the court about moving so swiftly with these matters considering there is no personal jurisdiction over my client in the State of Kansas to enter orders of child support or to assume subject matter jurisdiction. In addition, he hasn't even been served with the divorce yet so I am unaware under what legal authority would allow the court to proceed with selling the parties' home without having jurisdiction or venue. As much as [J.D.], her boss, and her client would like to shove this matter forward at light speed and sell the parties home, I haven't even had the chance to file my answer yet as the transcripts have not been made available to me (they have been paid for). Wyandotte County does not have any connection with this matter other than [D.L.R.] wanted it filed there in order to have a home court advantage for her sister. It's called forum shopping at its finest. All of these issues will be put into my memo

in due time. The Utah court has not made a final decision on whether to assume jurisdiction contrary to what counsel has stated. Moreover, wife has entered an appearance and has fully answered in Utah. There have been many procedural errors made associated with this matter from what I can see. So, in order to protect everyone's interests involved, and avoid future interlocutory litigation, I would urge patience and taking things one step at a time. I have shared the court's expectations with my client. As everyone is aware, I have been retained to contest jurisdiction and venue and that is what I am going to do. I expect to have my brief on file within 2-3 weeks. Anyone who has been in private practice for a while should understand that sometimes we have to take unpopular legal positions that go against the grain. This is one of those circumstances for me. Thank you.'

"10. On March 10, 2020, the parties filed a joint motion to continue the hearing scheduled for March 26, 2020, to allow the parties time to mediate the pending issues. The parties did not resolve their disputes through mediation.

"11. On March 26, 2020, the respondent entered a limited entry of appearance in the Kansas divorce action. Two days later, on March 28, 2020, the respondent filed a motion to strike and request for sanctions in the Kansas divorce action.

"12. Between March 28, 2020 and April 2, 2020, the respondent filed three documents in the PFA case and the emergency custody action—the first omnibus motion, the amended omnibus motion, and the second amended omnibus motion. The three motions were substantially similar. In the two subsequent motions, the respondent made minor changes. Each of the motions extensively cited the transcripts of hearings that took place in the PFA and emergency custody matters on December 4, 2019, and December 10, 2019.

"13. In the motions, the respondent made multiple requests for relief, including relief from a PFA order and reconsideration of findings previously made by the district court.

"14. In each of the three motions, the respondent included D.L.R.'s home address, he made unnecessary and objectionable remarks about D.L.R. and her family, and he attached newspaper articles regarding D.L.R.'s extended family. The respondent could have effectively argued his client's position without including that information.

"15. On April 2, 2020, the day that respondent filed the second amended omnibus motion, the respondent sent an email message to the district court that provided as follows:

'Dear Judge,

'Attached is our second amended motion and memoranda in support of our motions to dismiss and for sanctions. Considering the nature of these cases and the substantial errors that were made, I am forwarding the Court this chamber copy which was submitted to E-flex today.

'We believe the court should, sua sponte, take immediate action to remedy the harm that has been done to my client and these minor children. Due to what we have discovered through the various transcripts and filings, my client does not believe mediation is an appropriate option at this time. We respectfully request the Court act on these matters without haste because as more time passes the more these children suffer and damages accrue to my client. In a normal situation, a 14 day response time would be prudent. However, based upon our memorandum, I do not see how one can even make a good faith argument that these facts were properly applied to the law. Thank you.'

'The district court did not immediately take action, rather the court provided S.G. with the opportunity to respond to the omnibus motions.

"16. On April 17, 2023, S.G. filed a response to the respondent's motion to strike in the Kansas divorce action. Additionally, S.G. filed a motion to strike portions of the respondent's second omnibus motion and requested that sanctions be imposed.

"17. On April 21, 2020, the district court conducted a hearing on the respondent's second amended omnibus motion. At the hearing, the respondent did not call any witnesses or offer any exhibits to further establish the contentions that he made in the second amended omnibus motion. Further, the respondent did not withdraw the objectionable statements made about D.L.R.

"18. The district court concluded that in the respondent's motion to strike and the second amended omnibus motion, the respondent included irrelevant information for the purpose of diminishing S.G., lodged inflammatory attacks on J.D., D.L.R. and their law firm that served no legal purpose, and improperly accused S.G.'s counsel of forum shopping.

"19. On May 4, 2020, the district court denied the respondent's motion to alter or amend the judgment as untimely. The court also denied the respondent's motion for a new trial as untimely. The court concluded that venue was appropriate in Wyandotte County. The court concluded that the respondent's argument that S.G. misled the court about where she lived prior to mid-November 2019, lacked merit. The court concluded that an emergency situation existed because D.G. displayed a firearm to S.G. and the children. The court concluded that it followed proper procedure and that the court's exercise of temporary jurisdiction was appropriate given all the circumstances. The court denied the respondent's motion for sanctions because it lacked merit. The court summarily rejected the respondent's claim that S.G., J.D., and D.L.R. engaged in a pattern of conduct involving deception. The court granted S.G.'s motion to strike and awarded attorneys' fees against D.G. in the amount of $1,000.

"20. On May 18, 2020, the respondent filed motions to withdraw from representing D.G. in the three cases. On May 26, 2020, the district court granted the respondent's motions.

"*Conclusion of Law*

"21. Under Rule 223(b)(1), the respondent admits that he engaged in misconduct. Under Rule 223(b)(2)(C), the parties stipulate that the findings of fact stated above constitute clear and convincing evidence of a violation of KRPC 8.4(d) (conduct prejudicial to the administration of justice).

"22. KRPC 8.4(d) provides that '[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.'

"23. The parties stipulate that the respondent's strategy employed with his motion practice was prejudicial to the administration of justice, in violation of KRPC 8.4(d) (conduct prejudicial to the administration of justice). The motions impugned the integrity of the judicial process and created an unnecessarily adversarial relationship with opposing counsel. Other than the citations to the transcripts of the December hearings, the respondent did not present evidence to establish the allegations in the motions nor did he withdraw the objectionable statements made about D.L.R. This resulted in the court's time and expense for all involved, including sanctions ordered against respondent's client.

"*Aggravating and Mitigating Factors*

"24. *Aggravating Circumstances.* Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Under Rule 223(b)(2)(D) (2023 Kan. S. Ct. R. at 277), the parties stipulate that the following aggravating factors are applicable in this case:

"25. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on three occasions.

"a. In 2005, the respondent participated in the attorney diversion program for having violated KRPC 4.2.

"b. In 2013, following a hearing, a hearing panel of the Kansas Board for Discipline of Attorneys concluded that the respondent violated KRPC 8.4(d) and directed the disciplinary administrator to impose an informal admonition.

"c. In 2014, the Supreme Court suspended the respondent from the practice of law for six months for violations of KRPC 8.4(d) and KRPC 8.4(g). *In re Gamble,* 301 Kan. 13 (2014).

"d. On October 21, 2016, the Supreme Court reinstated the respondent's license to practice law. The respondent's license to practice law has been active and in good standing since reinstatement. *In re Gamble,* 305 Kan. 375 (2016).

"26. *Substantial Experience in the Practice of Law*. The Supreme Court admitted the respondent to practice law in the State of Kansas in 2003. At the time of the misconduct, the respondent had been practicing law for more than 15 years.

"27. *Mitigating Circumstances.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Under Rule 223(b)(2)(D) (2023 Kan. S. Ct. R. at 277), the parties stipulate that the following mitigating factors are applicable in this case:

"28. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct was not motivated by dishonesty or selfishness.

"29. *Personal or Emotional Problems if Such Misfortunes Have Contributed to the Violation of the Kansas Rules of Professional Conduct*. The respondent has availed himself of the Kansas Lawyers' Assistance Program's resiliency group for support in coping with the general stressors associated with the practice of law.

"30. *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 Wyandotte County bar, the Johnson County bar, and Jackson County, Missouri, bar. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by Exhibits Q, R, and S, found in Volume III of the record.

"31. *Remorse.* The respondent is genuinely remorseful for engaging in the conduct and violating KRPC 8.4(d). The respondent demonstrated his remorse by accepting responsibility through this agreement. Further, the respondent[] is remorseful for engaging in the misconduct and will memorialize his remorse by issuing the apology letters as part of the probationary conditions discussed below.

"32. *Remoteness of Prior Offenses.* The misconduct which gave rise to the diversion in 2005 is remote in time and character to the misconduct in this case. The misconduct which gave rise to the informal admonition in 2013 and the suspension in 2014 is remote in time but not in character to the misconduct in this case.

"33. *Any Statement by the Complainant Expressing Satisfaction with Restitution and Requesting No Discipline*. While restitution is not applicable in this case and the recommendation in this agreement is not a recommendation for no discipline, when asked for his position on discipline, the judge involved in the underlying litigation recommended that the respondent not lose his license as a

result of the violation in this case. D.L.R. also recommend[ed] that the respondent not lose his license as a result of the violation in this case. The position of those impacted by the misconduct is a compelling mitigating factor.

"*Applicable ABA Standard*

"34. The parties stipulate that ABA Standard 7.2 applies in this case. That standard provides, '[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.'

"*Recommendation for Discipline*

"35. Based on the findings of fact, the conclusion of law, the aggravating factors, the mitigating factors, and ABA Standard 7.2 and under Rule 223(b)(3) (2023 Kan. S. Ct. R. at 277), the parties jointly recommend that the Supreme Court suspend the respondent's license for 6 months, that the imposition of the suspension be stayed, and that the respondent be placed on 12 months of probation subject to the following terms:

"a. The respondent's practice will be supervised by Daniel Parker of Abogados Parker & Parker, 535 Central Avenue, Kansas City, Kansas 66101, as follows:

"(1) The respondent and the practice supervisor will correspond monthly by phone, video conference, or in-person meeting to discuss the respondent's practice and identify any practice modifications or resources that would benefit the respondent in his practice of law. The respondent and practice supervisor began the practice supervision on July 26, 2023.

"(2) In all highly contested domestic law cases (identified by significant motion practice, appointment of a guardian *ad litem*, and cases with unique facts that present[] highly charged issues), the respondent will provide any pleadings and motions to the practice supervisor for review and feedback prior to filing. The purpose of the review is to have a detached, neutral attorney provide strategic feedback on the language and asserted basis.

"(3) While occurring infrequently, the respondent will have the practice supervisor review and provide feedback on any motions for sanctions and/or attorney fees prior to filing, as well as any responses to such motions filed by an opposing party. The purpose of the review is to have a detached, neutral attorney provide strategic feedback on the language and asserted basis.

"(4) The respondent shall comply with any requests made by the practice supervisor and follow all recommendations of the practice supervisor.

"(5) The respondent shall be responsible for any fees charged for the practice supervisor's services.

"b. The practice supervisor will provide a written report to the respondent and the disciplinary administrator on a monthly basis with the following information:

"(1) date(s) of meeting(s) with the respondent and method of meeting;

"(2) brief summary of what was discussed; and

"(3) whether, or not, the practice supervisor reviewed any pleadings or motions relating to sanctions and/or requests for attorney fees within the report period.

"c. The practice supervisor shall be acting as an officer and agent of the Supreme Court while supervising the probation of the respondent. The practice supervisor will be afforded all immunities by Rule 238 (2023 Kan. S. Ct. R. at 311), during the course of the supervision.

"d. The respondent has participated in KALAP's resiliency group meetings and will continue to participate in those meetings throughout the probationary period unless documented emergency or unique circumstances prevent his participation.

"e. The respondent shall provide a written report to the practice supervisor and the disciplinary administrator on a monthly basis with the following information:

"(1) date(s) of meeting(s) with the practice supervisor and method of meeting;

"(2) brief summary of what was discussed;

"(3) whether, or not, the respondent filed any pleadings or motions relating to sanctions and/or requests for attorney fees within the report period; and

"(4) dates of participation in KALAP's resiliency group meetings or the documented emergency or unique circumstances that prevented the respondent's participation.

"f. Within 30 days of the date of the Supreme Court's opinion in this case adopting the probation plan, the respondent will send a letter of apology to D.L.R. and J.D. and a letter of apology to Judge Mahoney that acknowledge and take responsibility for the misconduct. The respondent will provide copies of the letters to the practice supervisor and the disciplinary administrator.

"g. The respondent will not violate the Kansas Rules of Professional Conduct. Should the practice supervisor discover any violations of the Kansas Rules of Professional Conduct during the report period, he will include such information in the next report to the disciplinary administrator. Additionally, the respondent will self-report any violations of the Kansas Rules of Professional Conduct within 14 days of the violation.

"h. The respondent will participate in any scheduled meetings or phone calls with the Office of the Disciplinary Administrator and provide information as requested by the Office of the Disciplinary Administrator.

"i. Should unforeseeable circumstances present that would require substituting the practice supervisor, the respondent will work with the disciplinary administrator to select a substitute practice supervisor. Similarly, if any other unforeseeable circumstance arises hindering the respondent's ability to substantially comply with this plan in any respect, he will work with the disciplinary administrator and the practice supervisor to make necessary modifications to the plan of probation.

"*Additional Stipulations and Procedures*

"36. *Waiver of Hearing.* Under Rule 223(b)(4) (2023 Kan. S. Ct. R. at 277), the respondent waives the hearing on the formal complaint as provided by Rule 222(c) (2023 Kan. S. Ct. R. at 277).

"37. *No Exceptions.* Under Rule 223(b)(5) (2023 Kan. S. Ct. R. at 277), the parties agree no exceptions will be taken.

"38. *Notice to Complainants.* D.L.R. and J.D. filed the complaint against the respondent. After the Summary Submission Agreement is entered, the disciplinary administrator will provide a copy of the executed Summary Submission Agreement to the complainants. They will be given 21 days to provide the disciplinary administrator with their position regarding the agreement under Rule 223(d) (2023 Kan. S. Ct. R. at 277). The complaints' positions will be included in Volume IV in the record before the Supreme Court.

"39. *Board Chair*. The parties acknowledge that after the complainants provide their positions or after 21 days have passed after the complainants were provided notice, the disciplinary administrator will provide a copy of the Summary Submission Agreement to the chair of the Kansas Board for Discipline of Attorneys along with a copy of the complainants' position, if any. If the chair approves the agreement, the scheduled hearing on the formal complaint will be cancelled and the case will proceed according to Rule 228 (2023 Kan. S. Ct. R. at 287). If the chair rejects the agreement, the case will proceed to hearing as scheduled according to Rule 222 (2023 Kan. S. Ct. R. at 277).

"40. *Oral Argument.* The respondent also understands and agrees that after entering into this Summary Submission Agreement he will be required to appear before the Supreme Court for oral argument under Rule 228(i) (2023 Kan. S. Ct. R. at 287).

"41. *Effect of Agreement.* The respondent understands and agrees that pursuant to Rule 223(f) (2023 Kan. S. Ct. R. at 277), the Summary Submission Agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

"42. *Electronic Delivery and Signatures.* The parties agree that the Summary Submission Agreement may be exchanged and executed by electronic transmission and that electronic signatures will be deemed to be original signatures."

DISCUSSION

In a disciplinary proceeding, this court generally considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279) (a misconduct finding must be established by clear and convincing evidence). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009).

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

Rule 223(b) establishes the following requirements for a valid summary submission agreement:

"An agreement between the disciplinary administrator and the respondent to proceed by summary submission must be in writing and contain the following:

(1) an admission that the respondent engaged in the misconduct;

(2) a stipulation as to the following:

(A) the contents of the record;

(B) the findings of fact;

(C) the conclusions of law, including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and

(D) any applicable aggravating and mitigating factors;

(3) a recommendation for discipline;

(4) a waiver of the hearing on the formal complaint; and

(5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken." Rule 223(b) (2024 Kan. S. Ct. R. at 275).

The Kansas Board for Discipline of Attorneys approved the summary submission and canceled the formal hearing under Rule 223(e)(2). As a result, the factual findings in the summary submission are deemed admitted. See Supreme Court Rule 228(g)(1) (2024 Kan. S. Ct. R. at 285) ("If the respondent files a statement . . . that the respondent will not file an exception . . . the findings

of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent."). Here, the written summary submission agreement contained all the information required under Rule 223(b). And the summary submission and the parties' stipulations before us establish by clear and convincing evidence the facts occurred as stipulated.

However, the parties' agreements on conclusions of law are not binding on this court. We make our own conclusions. Yet, we recognize that here the parties have also agreed that the conduct established by clear and convincing evidence violated KRPC 8.4(d), in that respondent "engaged in conduct that is prejudicial to the administration of justice."

But it is difficult to discern whether respondent violated this rule under these facts. We have previously rejected challenges to KRPC 8.4(d) on vagueness grounds by emphasizing the importance of prejudice to the overall inquiry. See, e.g., *In re Comfort*, 284 Kan. 183, 199-201, 159 P.3d 1011 (2007). And we have concluded that a violation of KRPC 8.4(d) "includes any conduct that injures, harms, or disadvantages the justice system." *In re Spradling*, 315 Kan. 552, 618, 509 P.3d 483 (2022). See also *In re Kline*, 298 Kan. 96, 121, 311 P.3d 321 (2013); *In re Hawver*, 300 Kan. 1023, 1035, 339 P.3d 573 (2014). But here we are not faced with false or erroneous statements, prosecutorial misconduct, or incompetence. Instead, respondent's at-issue conduct was a choice of strategy—a choice that, in the eyes of the district court and the parties themselves, was so aggressive as to be unethical.

Within appropriate contours, aggression is no vice in litigation. But those contours lie at the heart of the practice of law; without them, litigation would largely recapitulate a nonviolent form of absolute war, where maximum ends justify maximum means. But law, despite its common depiction in popular media, is not war. The practice of law, much like adherence *to* the law, begins with respectful conduct; it is the soil from which justice—and, thus, civil society as a whole—grows. And while attorneys should represent their clients with zeal, their ardor must be tempered with an appreciation for their role as stewards of civil society—and of the damage their unethical conduct can cause to the very fabric of that society.

The administration of justice thus requires that attorneys act with restraint proportional to the situation before them. Admittedly, extreme circumstances may sometimes justify harsh conduct in litigation—but an attorney must always be mindful to keep that conduct proportional to the situation, lest it transcend the limits of ethical behavior and cause injury to the very system of justice within which it operates. Because a scorched earth strategy risks damaging the very framework of justice within which litigation operates, prudent counsel should opt for it, if at all, only as a last resort.

We are not a fact-finding court. Though the dissent gives us a detailed story of what facts *may or may not* have occurred both before and after litigation began in the underlying divorce-with-children case, the *assertions* as fact upon which the dissent's story relies violate this cardinal rule of appellate practice. Allegations asserted in divorce petitions, motions, and responses are just that–allegations. Preliminary orders prior to trial are subject to being set aside or superseded before the case is final. The reliability of all allegations and temporary orders in litigation depends on what can be proved at trial, when witnesses testify under oath and are subject to cross-examination, and when evidence is admitted only in compliance with the rules. Or by agreement.

The course of a formal disciplinary matter has a similar procedure. Anyone has the right to allege an attorney has violated the disciplinary code of ethics by signing a complaint. Accepting those fact assertions as true, the Formal Complaint is filed (docketed) only if an ethical violation *might* have occurred. The docketed Formal Complaint proceeds toward an adversarial formal hearing. That formal hearing is much like a trial, where testimony is given under oath and subject to cross-examination, and other evidence is admitted only if the panel finds it sufficiently reliable. Or the parties may enter into an agreement and submit the matter for our review without formal hearing. Here, we have an agreement, and we are not free to fill in the factual blanks with assertions insufficiently tested. Again, we are not a fact-finding court.

And equating a disciplinary complaint with "crying in baseball" reduces the honorable and ethical duty of our profession to

self-regulate into a toddler's outburst. Courts do not address interesting issues of the day. We address issues in *cases*. Cases begin with a complaint. The duty to prosecute a complaint in which an ethical violation may have occurred, pleasant or not, falls on the Office of the Disciplinary Administrator. While the parties are free to enter into a summary submission agreement, they also have the right to a formal hearing.

Here, after a motion hearing, the panel issued a preliminary order that Respondent's expert testimony would not be allowed as evidence at the formal (final) hearing before the panel. Had that preliminary order remained in effect for purposes of the formal hearing, Respondent could have filed an exception to that order, and any other finding of fact or conclusion of law made by the panel as part of its final order, so we could review those exceptions. Rule 228(e)(1) (2024 Kan. S. Ct. R. at 285). Perhaps the assertions and expert opinions extensively quoted in the dissent may have made the grade had they been submitted to us by exception for our review. But there was no hearing from which exceptions *could* be filed. And "[n]either party may file an exception in a case submitted to the Supreme Court by summary submission under Rule 223." Rule 228(f)(2). Thus, if there is no formal hearing before the panel, we do not get to tell a story about what the facts might have been, as if there *had* been a formal hearing before the panel. The facts we can consider are those set forth in the agreed summary submission agreement. While we have discretion under Rule 223(f) to make our own conclusions regarding rule violations if we think the record supports it, our record is limited to the facts set forth in the summary submission agreement under Rule 223(b)(2)(A)-(B)—unlike a disciplinary case that goes to formal hearing, where our record would be more robust.

Our duty, as an appellate court, is to determine whether there are sufficient facts submitted in the parties' summary submission agreement for this court to ascertain the existence of clear and convincing evidence to conclude that unethical conduct occurred.

The respondent has been an attorney for fifteen years and has been previously disciplined three times for violating the ethical code. Pertinent parts of the parties' summary submission agreement reveal the following facts:

- Respondent made "unnecessary" and "objectionable" remarks about D.L.R. and her family, and he attached newspaper articles regarding D.L.R.'s extended family. The respondent could have effectively argued his client's position without including that information.
- Respondent pushed for an expedited hearing on a motion, and then "did not call any witnesses or offer any exhibits to further establish the contentions that he made in the second amended omnibus motion. Further, the respondent did not withdraw the objectionable statements made about D.L.R."
- "The district court concluded that in the respondent's motion to strike and the second amended omnibus motion, the respondent included irrelevant information for the purpose of diminishing S.G., lodged inflammatory attacks on J.D., D.L.R. and their law firm that served no legal purpose, and improperly accused S.G.'s counsel of forum shopping."
- "The court concluded that the respondent's argument that S.G. misled the court about where she lived prior to mid-November 2019, lacked merit. The court concluded that an emergency situation existed because D.G. displayed a firearm to S.G. and the children. The court concluded that it followed proper procedure and that the court's exercise of temporary jurisdiction was appropriate given all the circumstances. The court denied the respondent's motion for sanctions because it lacked merit. The court summarily rejected the respondent's claim that S.G., J.D., and D.L.R. engaged in a pattern of conduct involving deception. The court granted S.G.'s motion to strike and awarded attorneys' fees against [respondent's client] in the amount of $1,000."
- Respondent entered into a joint stipulation now before us as evidence that he crossed the line of appropriate advocacy into the unethical realm of committing conduct prejudicial to the administration of justice.

- Respondent included in a pleading the personally identifiable information (PII) of opposing counsel's home address.

The parties agree these facts, and the others jointly presented, establish by clear and convincing evidence that respondent's actions demonstrate ethical misconduct "prejudicial to the administration of justice." The parties also agree respondent's misconduct supports suspension of respondent's license for six months.

We recognize that negotiated agreements rarely give a complete record of what an evidentiary hearing, replete with direct and cross-examination of witnesses, would reveal. But party stipulations are as much evidence as sworn testimony. See, e.g., K.S.A. 60-401(a) ("'Evidence' is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay."); *State v. Thomas*, 311 Kan. 403, 413, 462 P.3d 149 (2020) ("Probable cause determinations under K.S.A. 2019 Supp. 21-5231 must be premised on: [1] stipulations of the parties or evidence received at a hearing under the rules of evidence, or both; and [2] the reasonable inferences drawn from any stipulations or the evidence."); *Hardesty v. Coastal Mart, Inc.*, 259 Kan. 645, Syl. ¶ 1, 915 P.2d 41 (1996) (general rule is that trial courts are bound by a stipulation of the litigants); *White v. State*, 222 Kan. 709, 713, 568 P.2d 112 (1977) (stipulations as to evidence in criminal cases are permissible and are binding upon parties represented). And while the dissent objects vociferously that the facts presented in the parties' agreement are a "vacant lot," 319 Kan. at 702, the respondent himself stipulated, for whatever reason, that his *actions* were objectionable, unnecessary, inappropriate advocacy, prejudicial to the administration of justice, and unethical. However captioned, those opinions are unrefuted evidence, not conclusions by a neutral tribunal, and we cannot ignore them.

We also recognize the law encourages arms-length negotiated agreements among litigants on disputed matters. See *In re Estate of Thompson*, 226 Kan. 437, 440, 601 P.2d 1105 (1979) ("It is an elemental rule that the law favors compromise and settlement of disputes and generally, in the absence of bad faith or fraud, when parties enter into an agreement settling and adjusting a dispute,

neither party is permitted to repudiate it."). Ultimately, we are persuaded there is clear and convincing evidence provided by these agreed facts to conclude respondent's conduct went beyond appropriate and ethical advocacy, such that his conduct unethically prejudiced the administration of justice and thus violated KRPC 8.4(d).

The dissent asserts that when respondents admit to facts, it imposes a "high responsibility on courts to thoroughly evaluate the struck bargain for both factual and legal appropriateness." 319 Kan. at 711. We are unaware of such heightened burden. Whether submitted by evidence through an adversarial system or by uncontested agreement, we review it under the same standard—ascertaining the existence of clear and convincing evidence to support a legal conclusion.

The remaining issue is deciding the appropriate discipline. Considering the findings, aggravating factors, and mitigating factors, a majority of the court finds that the discipline recommended by the parties and the Board should be imposed. A minority of the court would impose lesser or no discipline.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Eric M. Gamble is suspended for six months, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2024 Kan. S. Ct. R. at 278) for violation of KRPC 8.4(d). The suspension is stayed conditioned upon Gamble's successful participation and completion of a 12-month probation period. Probation will be subject to the terms set out in the probation plan as set forth in the parties' summary submission agreement and the practice supervision plan as approved by the Disciplinary Administrator's office. No reinstatement hearing is required upon successful completion of probation.

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

* * *

STEGALL, J., dissenting: "There's no crying in baseball!" So intoned Tom Hanks' character in the film *A League of Their Own*

(Columbia Pictures 1992). It is a message the Kansas bar and bench—and our Disciplinary Administrator's office—should consider. Litigation—not unlike baseball—is an intense activity. Stressful. Demanding. Pitches thrown high-and-tight. Bang-bang plays. Split second rulings by the umpires. And some occasional dust kicking. But there is no crying. And if ordinary litigation is regular season baseball, custody disputes between warring parents are like a game seven in October between bitter rivals. A lesson today's case poignantly illustrates.

This disciplinary matter arises from a contentious and emotional divorce and custody battle between husband—D.G.—and his wife—S.G. For ease of reference, I will call them John and Jane. John and Jane lived in Utah with their children. Jane's large extended family is part of a break-away Mormon sect that migrated from Utah to Mexico in the 1800s when Utah outlawed polygamy. The Mormon sect has been embattled in Mexico for many years. Jane maintained close ties with her extended family, and her desire to take the family's children to Mexico became the animating disagreement at the heart of the legal drama about to unfold.

John knew Jane's family was entangled in a violent milieu. Between 2016 and 2019, Jane took the children to visit family in Mexico three times—each time over John's objection. Then, in November of 2019, nine members of Jane's extended family—including six children—were murdered in Mexico by drug cartels. Jane made plans to attend the funerals and intended to take all the children. Fearing for his children, John refused to agree, and the two argued bitterly.

The day after the argument, Jane accused John of behaving in a threatening manner toward her and the children by placing his legally owned firearm in his waistband. John is a legal gun owner in Utah and had sometimes taken his eldest child to the shooting range. He asserted he was not threatening at all, but merely carrying his unloaded firearm to his truck, consistent with Utah's open carry laws. He denied placing the gun in his waistband.

After these events, Jane made arrangements—kept hidden from John—to take the children and flee the relationship to Kansas, where her sister, a practicing Kansas lawyer, would give them shelter. Ten days later, Jane absconded with the children and their

passports to Kansas, moving in with her sister in Olathe. Jane's sister owned her own legal practice and employed an associate. Jane's sister and her associate would ultimately become the Complainants in this disciplinary action and will sometimes be referred to as either the Complainant or Complainants.

Almost as soon as Jane and the children arrived in Kansas, Jane's sister and her law firm began to assist Jane in forming a legal strategy to obtain a divorce from John and win full custody of the children under the jurisdiction of Kansas courts. With the assistance of her sister, Jane immediately filed a Protection From Abuse action in Wyandotte County District Court, which was quickly granted.

Soon thereafter, represented by her sister's law firm, Jane filed a separate action in Wyandotte County District Court and sought emergency jurisdiction to determine child custody. Her motion was again granted, and the court signed an order granting Jane temporary sole custody of the children. Jane then enrolled the children in Kansas schools. Jane would eventually also file for divorce in Wyandotte County.

By December, John had figured out what was going on. On December 2, he filed a Petition for Divorce seeking sole legal custody of the children in Utah district court. Then, on December 9, John was served with process for the legal proceedings in Kansas. The next day, the Wyandotte District Court held a hearing at which John appeared. The court entered a protective order as between John and Jane. The court found, however, that John was not a danger to the children and dissolved the temporary protective order as between John and the children. The court entered a parenting plan granting John minimal parenting time, and Jane refused to allow the children to have a phone for the purposes of talking to their father.

John realized at this point that he needed Kansas counsel to represent his interests. In January of 2020, he retained the respondent in this action—Eric Gamble—to represent him in Kansas courts for the sole purpose of contesting jurisdiction and venue. As soon as Gamble got the case, he realized his client was facing an aggressive effort by Jane—and her family's law firm—

to cut John completely out of his children's lives and to immediately dissolve all financial ties John had with his family. Gamble was confronted with a motion filed by Jane's sister in Wyandotte County to order the sale of the couple's jointly owned home.

In response, Gamble advised the Wyandotte County court that he had been retained by John and that these matters were moving far too quickly. He informed the court and Jane's counsel of the Utah divorce action and that the Utah court had not yet decided whether to assume jurisdiction. He accused Jane of forum shopping with the aid and counsel of her family law firm. Finally, he let the court know that he planned to file responses to all of Jane's legal filings soon, with the limited purpose of contesting jurisdiction and venue in Wyandotte County.

Soon, Gamble filed John's responses in all the pending Kansas actions. Central to his claim that Wyandotte County lacked jurisdiction and was an improper venue, Gamble argued to the court that Jane and the children had no connection to Wyandotte County and were actually living in Johnson County with Jane's sister—who of course was also opposing counsel. To provide evidence of his claim that Jane and the children lived in Johnson County, Gamble included the Complainant's home address in his filings. Gamble likewise presented to the court the broader factual circumstances by describing Jane's extended family in Mexico and their involvement with violent happenings. To support these claims, Gamble included press reporting on the murders. He likewise included text messages demonstrating that both Jane and the Complainant were actively interfering with his efforts to communicate with his children.

Gamble argued to the court that given all of these facts—that John's children had been taken without his knowledge or permission by Jane to be secreted away at her attorney sister's home in Johnson County; that Jane and her family's law firm were aggressively taking legal actions in Wyandotte County seeking to cut John completely out of the family; that Jane's intentions to take the children to a potentially violent situation in Mexico were clear; and that Jane and her sister were actively preventing John from communicating with his children—the court would be justified in

taking immediate and sua sponte action to protect John and the children.

The court declined this invitation, ordered responses from Jane, and scheduled a hearing. Following that hearing, the court ruled against John on all his claims. The court found jurisdiction and venue were proper in Wyandotte County; rejected Gamble's contention that Jane and her sister were forum shopping; concluded that Gamble's inclusion of the Complainant's address was improper; and awarded $1,000 of attorney fees to Jane. Soon thereafter, Gamble filed motions to withdraw as John's counsel in all the Kansas legal proceedings and the court granted his request. Several months later, Jane's sister and her associate filed an ethics complaint against Gamble with the Office of the Disciplinary Administrator, which took up the prosecution of Gamble with some fervor.

The ODA filed a formal complaint against Gamble alleging serious ethical violations. Gamble vigorously denied wrongdoing and as is evident from his response, was prepared to rebut every ethical allegation. He retained and planned to present testimony from two legal experts—Kansas lawyers who do domestic work—that all the evidence and argument Gamble presented in the underlying actions was relevant, proper, and necessary to the legal issues in play. But the testimony of those experts was disallowed by the panel, at the ODA's insistence, because it ruled the expert opinions would be "unhelpful." The ODA maintained that the experts' opinions that Gamble's presentation of argument and evidence was appropriate, relevant, and necessary amounted to legal conclusions which they were not—as experts—qualified to make.

As we will see later, it is important to understand exactly what the expert opinions were which the ODA deemed to be impermissible legal conclusions. Gamble's experts were Reed Walker and Ron Nelson. Each produced a lengthy and substantive report, after reviewing the records of all the legal actions at issue here.

Reed Walker explained in detail why Gamble's conduct fell squarely within the bounds of reasonable professional judgment under the circumstances. He summarized his opinion this way:

"Mr. Gamble had an obligation and duty to his client to include critical facts related to subject matter jurisdiction, venue, the UCCJEA, and emergency custody jurisdiction. Mr. Gamble believed [Complainant] procured legally deficient orders based upon legally deficient pleadings submitted by herself and her firm. She counseled, assisted and procured the filing of domestic actions in a county that had no connection to the parties. Mr. Gamble had an obligation to challenge the orders on behalf of his client to the best of his ability, and he did so by filing the memoranda and other related pleadings. He supported his legal positions by citing facts from the record and articulated the relevant Kansas statutes and supporting case law which supported his client's legal positions on the matters. [Complainant] was mentioned in pleadings because she had a familial relationship with [Jane], and, upon Mr. Gamble and his client's information and belief, the factual situation in which [Complainant] and her family found itself had a bearing on his client's situation. Whether and to what extent these matters were relevant, and could have been persuasive to the court, is a question of professional judgment on Mr. Gamble's behalf. Mr. Gamble could have as easily been criticized for omitting these allegations, which might have persuaded the court. There is nothing to support the conclusion that Mr. Gamble did not have 'any' good faith reason to file the memoranda and supporting documentation in the . . . matters. Likewise, there appears to be no evidence that Mr. Gamble has any personal animus toward [Complainant]. Rather, she was involved in facts, as a non-party witness, who also acted as her sister's lawyer, in a highly contested custody case, which facts Mr. Gamble believed were relevant to his client's situation, and, once known to the court, might have persuaded the court. . . . [Complainant] perceived adverse facts and legal arguments as personal attacks. But for her familial relationship to the parties, it would not have been personal. The evidence and arguments offered by Mr. Gamble pertained to legitimate discussion about the family situation, to allow the court to make an informed decision for the best interests of the children."

Ron Nelson shed light on why the tone of Respondent's rhetoric was necessary given the seriousness of the legal and factual issues at hand. He summarized his opinion this way:

"The proceedings underlying the current complaint against Mr. Gamble were amazingly inappropriate. While it was arguabl[y]appropriate for [Jane] to file a petition for protection in Kansas, even those proceedings should have been undertaken in Utah where the actions alleged to have occurred happened. As the Kansas Court of Appeals decided in a recent decision, when the actions giving rise to a protection case occur in another state and not in Kansas, a Kansas district court lacks personal jurisdiction over the defendant. . . .

"Ultimately, the Utah judge correctly determined that Utah possessed home state child custody jurisdiction and would exercise that jurisdiction to determine matters of child custody. The judge left in place the Kansas protection order (because as a Utah judge, he had no power over a Kansas proceeding). But in doing so, the Utah court noted that Utah was 'clearly the home state in this instant case'

and that 'the state of Kansas initiated temporary jurisdiction knowing [the] parties home state of residence was Utah.'. . .

"Mr. Gamble vigorously and zealously represented his client in the underlying matter. He was obviously frustrated and indignant over what he saw as a misuse of the court system and complete failure to abide by the clear intentions, language, and directions of the child custody jurisdiction act."

In other words, Complainant *was* forum shopping on behalf of her sister, Complainant's home address *was* relevant, Jane's extended family's circumstances *were* relevant, Gamble's indignance *was* justified, and his zealous advocacy on behalf of John *did not* "go[] too far" or cross "the line"—phrases this court heard repeatedly at oral argument on this matter.

But these conclusions were all deemed to be legal in nature, rather than factual, and so were disallowed. It was only after Gamble was prevented from mounting a meritorious defense to the ethical charges against him that he agreed to negotiate the Summary Submission Agreement that is before us now. Given that the recommended discipline in the Agreement negotiated by the parties is a six-month suspension (stayed during probation), it is safe to assume that the ODA made it clear to Gamble and his disciplinary counsel that it was prepared to seek a harsher penalty should Gamble refuse to accept the Agreement.

I agree with the majority that the Agreement is all we have to go on in this case, and that the parties are bound by any factual admissions included in the Agreement. But this court will only adopt the Agreement when it is "amply sustained by the evidence." *State v. Zeigler*, 217 Kan. 748, 755, 538 P.2d 643 (1975); see also *In re Lober*, 276 Kan. 633, 636-37, 78 P.3d 442 (2003) ("[T]he disciplinary panel's report will be adopted where amply sustained by the evidence, but not where it is against the clear weight of the evidence."); *In re Comfort*, 284 Kan. 183, 190, 159 P.3d 1011 (2007) (examining whether clear and convincing evidence supported the findings); *In re Wonder*, 285 Kan. 1165, 1165-66, 179 P.3d 451 (2008) (relying on *Lober* when respondent took no exceptions); *In re Jones*, 286 Kan. 544, 547, 186 P.3d 746 (2008) (relying on *Comfort*); *In re Owens*, 309 Kan. 80, 88, 431 P.3d 832 (2018) ("Attorney misconduct must be established by clear and convincing evidence.").

A cursory review of the Agreement makes it clear that there are no factual admissions which could even plausibly support the legal conclusions the Agreement purports to stipulate (that is, the existence of a violation of our Rules). And as our precedent makes clear, and the majority admits, parties may not stipulate to legal conclusions. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 400, 266 P.3d 516 (2011) (stipulations as to legal conclusions are ineffective); *In re Gamble*, 319 Kan. at 690.

This curious situation was brought about by the parties' actual inability to come to any agreement as to concrete facts that may, indeed, have supported the legal conclusions the ODA desired to present to this court. But the litigation process that might have resolved these questions was short circuited by the ODA's insistence, with the panel's acquiescence, that Gamble would not be permitted to mount a genuine defense. So instead, the parties used our summary submission process to create a pastiche of a real disciplinary case, all while avoiding saying anything at all. A fact that became apparent during the oral argument before us. And to all counsels' credit—and to Gamble's credit—they all made a herculean effort before us to stick to the four corners of the Agreement without admitting anything beyond it. The problem here, however, is that the four corners bound nothing but a vacant lot.

For example, when pressed for any specific facts that might support the stipulated rule violations, Gamble's counsel could not come up with any. He made it clear, in fact, that Gamble and the ODA could not agree on *any* specific facts that might weigh on the legal issues before us. Gamble's counsel was asked, "Counsel, was there any effort among the parties to specifically identify those things that occurred that were over the line" or was this just an agreement that "some things . . . went too far" so that the parties could "go on down the road?" He replied: "It was very much the latter. For better or for worse, we did make that effort. There wasn't a common ground there, and we needed to get to a resolution that made sense to everyone. So we made that a little vague, I'm afraid." And in keeping with that vagueness, when challenged by the court to identify Gamble's rule violations, his counsel variously described them as Gamble going "overboard"; going "too far"; "stepp[ing] over the line"; and being "too aggressive." And

yet, counsel maintained, "I cannot identify specifically the straw that broke the camel's back here."

Here is how Gamble himself put it when he was in front of us:

"I chose to agree to the stipulation, to a violation in this case because I thought it was the best thing to do for not only myself, my family, my practice, my clients that I represent, for a resolution that would allow me to accept responsibility for some of the language that I used, overzealousness you can call it. Being a little too aggressive, not being as sensitive to intricacies and the emotional views that were present in this representation of my particular client."

When asked by the court, "[H]ow . . . would say you engaged in conduct that was prejudicial to the administration of justice?" Gamble replied:

"I believe I caused . . . highly intense emotions, by having to state facts, make arguments, and it put a lot of pressure on people. I didn't do it to be mean or to be spiteful because I thought those facts were relevant to advocating my client's position. . . . I think I went a little too far . . . and I accept that. I'm not perfect."

In similar fashion, counsel for the ODA struggled to identify any specific fact that rose to the level of an ethical violation. Counsel admitted that the arguments and evidence concerning whether "venue and jurisdiction [were] proper under the UCCJEA or the charged family concerns with what was going on in Mexico" were appropriate for Gamble to raise. But the ODA insisted Gamble "did go too far" in making those arguments. Specifically, the ODA cited to Gamble's inclusion of press reports about the murders in Mexico and inclusion of Jane's sister's home address, where Jane was living. Counsel argued:

"There was, therefore, not a necessary reason, a legal purpose for bringing up the social and religious views of the extended family, of attaching newspaper articles, one of which included a family incident from the '70s that is potentially controversial and not from the record before us, linked to what had happened in November with the violent incident. Which seemed to be a random act of violence. There were ways to bring up, not knowing what the confidential address is, because in PFAs, the addresses are confidential of the protected party. And whether it truly was Wyandotte County without rising to the level of the personal accusations of forum shopping, and there's a level of essentially suggesting that the sister was meddling in the affairs of this family improperly. In emotionally charged cases, it is natural that parties will become very heightened and often times add information that perhaps is only—unless you're living the case, does not seem to be relevant. But this is beyond that because it was very personal, it

was potentially controversial, and again the PII is also an important aspect of it, is that the necessity of including her home address. There really was none."

The ODA's claim, then, was that Gamble's arguments and evidence about Jane's extended family in Mexico and about where Jane and the children were living was appropriate, but somehow bringing up press reports about Jane's extended family in Mexico and Jane's actual address were beyond the ethical pale. Why? Because "it was very personal" and was "potentially controversial" and it suggested that Jane's sister and her lawyer were "meddling in the affairs of this family improperly." This is, frankly, a nonsensical argument. And when challenged to defend it by the court, the best counsel for the ODA could do was to say that Gamble mentioned Jane's sister "20 times" which was "an overwhelming amount" and "you can see the link to [the] personal, [and] I think that's when we're talking about an ethical violation."

It is rich indeed that, in order to deny Gamble the opportunity to mount a meritorious defense, the ODA took the position before the disciplinary panel that all of Gamble's expert witness opinions about the necessity, propriety, and relevance of these matters were legal conclusions and thus impermissible. But before us, the ODA insists the precise same claims repeated in the Agreement are somehow stipulations of fact. The blatantly unfair twists and turns of this prosecution and the ODA's outlandish logic—coupled with its grasping at phantom straws to prove up an allegedly broken camel's back—will terrify any member of the Kansas bar. Understandably so.

Nonetheless, the majority here, keen to ratify the Agreement, does identify factual stipulations that do exist in the Agreement. First, the majority identifies as a category of fact the "fact" that the Wyandotte County District Court reached certain legal conclusions. The record on that score speaks for itself. The Wyandotte County District Court did make certain legal conclusions. So what? The mere fact that a lower court made legal findings is not an end run around the rule that parties cannot stipulate to legal conclusions. The question begging and circular reasoning on display is enough to make one dizzy.

Leaving these non-fact facts aside, the majority attempts to identify three concrete and distinct *actual* facts which Gamble

stipulated to, and upon which the majority hangs its legal conclusion that Gamble violated our Rules. They are: (1) Gamble "made unnecessary and objectionable remarks about [Complainant] and her family, and he attached newspaper articles regarding [Complainant's] extended family. [Gamble] could have effectively argued his client's position without including that information"; (2) Gamble "pushed for an expedited hearing on a motion, and then 'did not call any witnesses or offer any exhibits to further establish the contentions that he made in the second amended omnibus motion. Further, [Gamble] did not withdraw the objectionable statements made about [Complainant]'"; and (3) Gamble "included in a pleading the personally identifiable information (PII) of opposing counsel's home address." 319 Kan. at 694.

I will address each of these pillars of the majority's case in turn. First, the majority states that Gamble stipulated he "made unnecessary and objectionable remarks about [Complainant] and her family, and he attached newspaper articles regarding [Complainant's] extended family. [Gamble] could have effectively argued his client's position without including that information." 319 Kan. at 693. Let's break this down. At the outset, it is clear this statement of "fact" both includes irrelevant information and legal conclusions. For we still do not know what the "unnecessary and objectionable remarks" about Complainant were. Indeed, the characterization of remarks as "unnecessary and objectionable" in this disciplinary case amounts to nothing but legal conclusions with no factual basis. And whether Gamble could have effectively represented his client in some other fashion is completely irrelevant. Of course he could have. There are a thousand-and-one ways to try any case. This fact has no bearing on whether the manner Gamble chose to litigate it was ethical or not.

So finally, we are left with one actual factual stipulation remaining from the majority's first pillar—that Gamble "attached newspaper articles regarding [Complainant's] extended family." 319 Kan. at 693. This is true and is a genuine stipulation of fact. Of course, the articles also happened to be about the extended family of Jane and her children, and only involved Complainant because she was Jane's sister! The majority ignores this detail. Ev-

idence and argument concerning the marital dispute—which centered on the relative dangers of taking the children to visit Jane's extended family in Mexico—were directly relevant to the case Gamble was litigating. It *cannot* be the rule that attaching press reports about circumstances directly relevant to a case are *ethical violations* simply because they give rise to strong emotions. And yet, this is what the ODA has proposed, and the majority is willing to turn a blind eye simply because Gamble was effectively coerced into "stipulating" that this is the rule.

The second pillar of the majority's case is the factual stipulation that Gamble "pushed for an expedited hearing on a motion, and then 'did not call any witnesses or offer any exhibits to further establish the contentions that he made in the second amended omnibus motion. Further, [Gamble] did not withdraw the objectionable statements made about [Complainant].'" 319 Kan. at 693. Gamble's failure to withdraw unnamed and unknown "'objectionable statements'" is, as above, irrelevant when there is no factual basis to establish that the statements were legally "objectionable" to the extent of a Rule violation. So, the majority is left with Gamble's stipulation to the fact that he "'pushed for an expedited hearing'" and then simply argued his case rather than putting on additional evidence. Again, this *cannot* be the rule. Every time someone asks for an expedited hearing and then shows up and argues without putting on evidence, they are being *unethical*!? And yet, this is what the ODA has proposed, and the majority is again willing to turn a blind eye simply because Gamble was effectively coerced into "stipulating" that this is the rule.

The third pillar of the majority's case is the factual stipulation that Gamble "included in a pleading the personally identifiable information (PII) of opposing counsel's home address." 319 Kan. at 694. True. He did. Opposing counsel just happened to be Jane's sister, the person assisting Jane to secret away John's children to Kansas and shelter them in her home. Opposing counsel's home address in Johnson County also happened to be the residential address of Jane and her children, a fact directly relevant—supremely relevant—to the contested legal questions of jurisdiction and venue in Wyandotte County. And yet, this is unethical? Again, for the third time, this *cannot* be the rule. It simply doesn't pass the

blush test. But this is what the ODA has proposed, and the majority for a third time is willing to go along with it simply because Gamble was effectively coerced into "stipulating" that this is the rule.

This case involved a highly contentious family dispute, which in the best of circumstances is hard. And these were not the best of circumstances. Not only did the case entail a complex history including the murder of children in a foreign nation, it featured a mother who absconded with her children to another state to stay with her lawyer sister, who happened to end up representing her and made the questionable decision to file legal actions in that other state (Kansas), and who then ended up as the Complainant against the husband's lawyer when he vigorously defended the cases. But this case also involves big themes about attorney conduct, the nature of our adversarial process itself, and what exactly constitutes the "administration of justice." Kansas Rules of Professional Conduct (KRPC) 8.4(d) (2024 Kan. S. Ct. R. at 430).

Of course it is true, as the majority states, that the "administration of justice . . . requires that attorneys act with restraint proportional to the situation before them." 319 Kan. at 691. But it is equally true that a desire to quench the "ardor" of dissonant voices in the name of protecting "the very fabric" of "civil society" can lead to ethics rules wielded as a cudgel to suppress dissent and keep the weakest and most disadvantaged members of that society in their place. 319 Kan. at 690. See *Spevack v. Klein*, 385 U.S. 511, 516, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (acknowledging that the threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion); *Grievance Administrator v. Fieger*, 476 Mich. 231, 361, 719 N.W.2d 123 (2006) (Kelly, J., dissenting) ("The possibility of selective or discriminatory enforcement [of challenged MRPC 3.5(c)] occurring is enhanced when an attorney represents unpopular clients or presents controversial issues."); *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 459 (Tex. 1998) (Baker, J., dissenting) (arguing ethics rule was vague because it utilized a subjective standard of conduct and did "not specify by whose sensitivities a lawyer's actions are judged").

How is a court to tell the difference between the two? I don't deny it is a difficult question—one on which judges of good faith may disagree. But at a minimum, it requires clear facts and precise reasoning. And in this case, the Agreement advanced by the parties denies the court clear facts and short circuits our ability to decide this case with precise reasoning.

Lawyers are expected to take their advocacy seriously and to also refrain from conduct "prejudicial to the administration of justice." KRPC 8.4(d). The majority characterizes this balance as representing "clients with zeal . . . tempered with an appreciation for [the attorneys'] role as stewards of civil society." *In re Gamble*, 319 Kan. at 690. Rather than expecting lawyers to know this balance when they see it at the risk of losing their livelihood, I suggest that non-disciplinary court sanctions—such as contempt proceedings or Rule 11 hearings—are a better way for courts to police incivility or stubbornness. *In re Davis*, 318 Kan. 199, 247, 542 P.3d 339 (2024) (Stegall, J., concurring) ("I would give significantly more ethical latitude to attorneys arguing their clients' causes in court. And when lines are crossed, contempt proceedings are a better tool in the judge's tool-belt for maintaining the dignity and decorum of the judicial system."). And even in the case of contempt, wise trial judges will be cognizant of the need to exercise restraint due to the potential for chilling the adversarial process. See *State v. Marine*, No. IK87-12-0847, 1989 WL 40919, at *3 (Del. Super. Ct. 1989) (unpublished opinion) (The court denied the State's motion to hold defense counsel in contempt by observing that the court's "inherent power to discipline attorneys for serious performance deficiencies should not be exercised lightly. [The court is] cognizant of the chilling effect which the threat of overreactive discipline could have on counsel for both the State and the defendant when they undertake to fulfill their respective functions within the adversary system.").

Consider the mythical lawyer—so deeply respected and even beloved not so long ago—who packs a proverbial toothbrush in the briefcase just in case he or she is required to spend a night in lock-up for pushing their clients' causes too hard against official resistance. See *Pack a Toothbrush*, 198 New Jersey L.J. 18 (2009) (Commenting on *Mohawk Industries, Inc. v. Carpenter*, 558 U.S.

100, 110, 130 S. Ct. 599, 175 L. Ed. 2d 458 [2009] and noting that lawyers who are "vigilant" when protecting the attorney-client privilege "might . . . need to carry a toothbrush."); *Symposium: Justice in the Spotlight,* 21 T.M. Cooley L. Rev. 337, 345 (2004) (similarly praising New York Times reporters who may be "packing their toothbrushes and heading off to jail" after refusing to disclose their sources pursuant to a court order).

This legal archetype suggests a long-standing recognition that the disputes contested in courts of law are of such importance that we accept a high degree of contentiousness, emotion, stubbornness, upset feelings—and yes, even incivility—simply because we value so highly the singular role of the adversarial system to resolve society's most difficult and trying conflicts. See *Penson v. Ohio*, 488 U.S. 75, 84, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) ("[V]igorous representation follows from the nature of our adversarial system of justice."); *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (Our legal "system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."). It also suggests a recognition that the proper deterrent for uncivil lawyerly behavior is in the hands of individual judges, granted the authority to sanction attorney behavior and even hold unruly counsel in contempt. These are the appropriate remedies for the ills of incivility.

Our ethics code, on the other hand, ought to function as a shield, not a sword. See Bowman, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 Geo. J. Legal Ethics 665, 671 (1996) (The "formalization of ethical standards into enforceable disciplinary rules, administered by ethics regulators who exercise control over individual livelihoods, can [be] transform[ed] . . . into an offensive weapon . . . ."). The code protects the administration of justice by guaranteeing lawyers are scrupulously truthful in their dealings with our courts—even when those truths are hard and come cloaked with disrespect, contempt, or sheer stubborn insistence. But when the code is wielded as a tool to enforce civility, the potential for abuse is high and the chilling effect on what may be explosive or uncomfortable allegations made on behalf of un-

popular people or causes is very real. See *Kentucky Bar Association v. Boling*, 670 S.W.3d 845, 860 (Ky. 2023) (Thompson, J., concurring in part and dissenting in part) (censure of an attorney for a robust closing argument is not appropriate because such discipline could have "a chilling effect on attorneys serving as vigorous advocates"); Communications With Represented Persons, 59 Fed. Reg. 39910-01 (Aug. 4, 1994) (Janet Reno observing that "the heightened threat of disciplinary action that accompanies the expansive application of [ethics] rules has created a chilling effect on prosecutors.").

The idea animating the majority opinion seems to be that attorneys are above all stewards of the "very framework of justice within which litigation operates." *In re Gamble*, 319 Kan. at 691. Of course this is true in the abstract. But as high-minded as these words sound, they do beg certain questions. What exactly is the "framework of justice"? Elsewhere I have similarly questioned the idea that other legal actors—judges—ought to be role models who exemplify the dominant cultural mode of genteel behavior. *In re Clark*, 314 Kan. 814, 828-29, 502 P.3d 636 (2022) (Stegall, J., concurring).

Within this "framework of justice," what is the "role" we presume lawyers must "model" lest they fall into ethical disfavor? I fear many of the lawyer-heroes touted in inspirational accounts of long-shot legal victories (common in our profession—a fact we should celebrate) would not survive the kind of ethics inquiry conducted here. Such lawyers would likely have run afoul of recent applications of our ethics code. They were far too insistent that the interests and claims of their clients—usually voiceless and often powerless individuals—will be heard over and against any obstacle. They were not "respectful." They believed civil society is held together by an unrelenting pursuit of the truth, not by tacit agreements among the powerful to be "reasonable."

In my judgment, a pattern has emerged in recent years of the Disciplinary Administrator's office wielding the code as a sword rather than a shield. And beyond that, after a thorough review of the record, I have never seen such a blatantly unfair and illogical prosecution in a disciplinary matter. Given this, it is not surprising that the attorney discipline defense bar has embraced a strategy of

falling on that sword to achieve a favorable recommendation from the ODA or to avoid facing additional allegations. See *In re Spencer*, 317 Kan. 70, 85-86, 524 P.3d 57 (2023) (rejecting the jointly agreed to sanction of a 90-day suspension because of the Disciplinary Administrator's faulty legal theory of liability); *In re Huffman*, 315 Kan. 641, 682-83, 509 P.3d 1253 (2022) (stating that harsh criticism of a judge demonstrated "a serious lack of judgment" but did not rise to the level of an ethical violation under either KRPC 3.5[d] or KRPC 8.2[a]); *In re Todd*, 308 Kan. 133, 136, 418 P.3d 1265 (2018) (rejecting the disciplinary panel's conclusion that respondent had violated KRPC 8.1[b] despite respondent filing no exceptions).

Now, there is no question that bare-knuckle plea bargaining is common and is the prerogative of prosecutors. When respondents admit to facts—even if they do so under undo pressure—they are stuck with those admissions. The existence of this practice does, however, impose a high responsibility on courts to thoroughly evaluate the struck bargain for both factual and legal appropriateness. We are not a rubber stamp. See K.S.A. 22-3210(a)(4) (requiring courts in criminal matters to be "satisfied that there is a factual basis for the plea" before accepting a guilty plea); *State v. Ebaben*, 294 Kan. 807, 812-13, 816, 281 P.3d 129 (2012) (finding an insufficient factual basis for a guilty plea).

This is a case that should never have been prosecuted, let alone result in a six-month suspension. Given this, it is hard to avoid the conclusion that once again our ethics rules are being used to chill and discourage the kind of vigorous advocacy that our system of justice needs to ensure the rights of *all* litigants in our courts of law are protected. More importantly, the Summary Submission Agreement does not actually include any facts that support the legal conclusion the parties agreed to. As such, contrary to the majority, I would find no rule violation on this record.

WALL and STANDRIDGE, JJ., join the foregoing dissenting opinion.

No. 124,913

PATRICIA NICHOLSON, Individually, and on Behalf of the HEIRS-AT-LAW OF MARK NICHOLSON, Decedent, *Appellee*, v. AVA MARIE MERCER, *Defendant*, and KEY INSURANCE COMPANY, *Appellant.*

(559 P.3d 350)

SYLLABUS BY THE COURT

JURISDICTION—*Subject-matter Jurisdiction Is Constitutional Power of Courts to Decide Disputes.* Subject-matter jurisdiction is the constitutional power of courts in this state to decide disputes. Once properly invoked, that power does not go away simply because a claim is flawed.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 14, 2023. Appeal from Leavenworth District Court; DAVID J. KING, judge. Oral argument held March 28, 2024. Opinion filed November 27, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

James P. Maloney, of Baker, Sterchi, Cowden & Rice, LLC, of Kansas City, Missouri, argued the cause, and *Abbigale A. Gentle*, of Foland, Wickens, Roper, Hofer & Crawford, P.C., of Kansas City, Missouri, and *James D. Oliver*, of Foulston Siefkin LLP, of Overland Park, were with him on the briefs for appellant.

Dustin L. Van Dyk, of Palmer Law Group, LLP, of Topeka, argued the cause, and *LJ Leatherman*, of the same firm, was with him on the briefs for appellee.

Jeffrey A. Wilson, of DeVaughn James Injury Lawyers, of Wichita, was on the brief for amicus curiae Kansas Trial Lawyers Association.

The opinion of the court was delivered by

STEGALL, J.: This is an appeal of a garnishment order entered in the district court and affirmed by a panel of our Court of Appeals. Key Insurance Company—the party being garnished—successfully petitioned this court for review. Key raised only the question of subject-matter jurisdiction in its petition. Indeed, in briefing, Key asks that we "go no further than to decide as a matter of law [whether] the district court lacked jurisdiction, without commenting further as to the merits of the case." Because we find answering this question is determinative of the case, we oblige Key's request.

The garnishment action was filed by Patricia Nicholson. Prior to the garnishment, Nicholson's husband was killed in an accident when he was struck on his bicycle by a car driven by Ava Mercer. Mercer was insured by Key. Following the accident, Key provided Mercer with an attorney, but effectively took no other action to defend Mercer. While Nicholson made timely attempts to settle the case for the policy limit, Key drug its feet, requesting multiple extensions. Nicholson finally filed a wrongful death suit, and only then did Key finally offer to settle for the policy limit of $25,000.

Rather than settle, however, Nicholson and Mercer negotiated a pre-judgment assignment to Nicholson of Mercer's rights to sue Key for bad faith (stemming from Key's alleged failure to defend and settle). In consideration, Nicholson agreed not to execute any judgment awarded at trial and Mercer agreed to waive her right to a jury trial. Mercer did not present a defense at trial on the wrongful death action. Key moved to intervene, but its motion was denied. Ultimately, Nicholson won a $3 million verdict against Mercer.

With the assignment of rights in hand, Nicholson asserted Mercer's bad faith claim against Key in a garnishment action. The case went to a bench trial and Key presented a defense on the merits, claiming no bad faith. Key did not file a motion to dismiss or any other dispositive motions arguing that garnishment was statutorily unavailable due to the assignment of rights. The district court ruled against Key on the merits; found that Key's actions, or lack thereof, in handling Mercer's case were in bad faith; and ordered garnishment in the approximate amount of the $3 million judgment.

On appeal, Key raised for the first time its subject-matter jurisdiction defense. Essentially, Key asserts that because garnishment is statutorily impossible following an assignment of rights, the district court lacked subject-matter jurisdiction to entertain Nicholson's garnishment action. The Court of Appeals considered and rejected Key's arguments, relying on over 30 years of precedent from this court. *Nicholson v. Mercer*, No. 124,913, 2023 WL 2941544, at *6-7 (Kan. App. 2023) (unpublished opinion). We agree with the Court of Appeals, but for different reasons. As explained below, we clarify the nature of subject-matter jurisdiction

and explain why it exists in this case. Because this is the only issue before us, we affirm the lower courts.

ANALYSIS

Although Key did not raise its jurisdictional arguments before the district court, subject-matter jurisdiction may be raised at any time, whether for the first time on appeal or even on the appellate court's own motion. *Baker v. Hayden*, 313 Kan. 667, 673, 490 P.3d 1164 (2021). If the district court lacked jurisdiction to enter an order, an appellate court does not acquire jurisdiction over the subject matter on appeal. *In re Care & Treatment of Emerson*, 306 Kan. 30, 39, 392 P.3d 82 (2017). Parties cannot confer subject-matter jurisdiction by consent, waiver, or estoppel; a failure to object to the court's jurisdiction does not invest the court with the requisite subject-matter jurisdiction. *Chalmers v. Burrough*, 314 Kan. 1, 7, 494 P.3d 128 (2021). Whether jurisdiction exists is a question of law, subject to unlimited appellate review. *City of Wichita v. Trotter*, 316 Kan. 310, 312, 514 P.3d 1050 (2022).

The "judicial power" granted to the courts under article 3, section 1 of the Kansas Constitution is the power to hear, consider, and determine controversies between rival litigants. "Having an actual controversy is key; an abstract controversy does not meet the constitutional standard because courts do not give advisory opinions." *Baker*, 313 Kan. at 672. It is worth noting that identifying controversies often involves the interpretation of statutes—and statutory interpretation presents a question of law over which appellate courts have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Key argues that the garnishment statutes—K.S.A. 60-719 et seq.—cannot, as a matter of law, apply to parties following an assignment of rights. "[G]arnishment is an extraordinary remedy and may be resorted to only under the conditions and procedures expressly authorized by statute." *Ray v. Caudill*, 266 Kan. 921, 925, 974 P.2d 560 (1999). At issue is the language of K.S.A. 60-732(c)(1) which states:

"(c) The order of garnishment shall have the effect of attaching:

(1) All intangible property, funds, credits or other indebtedness *belonging to or owing the judgment debtor, other than earnings, which is in the possession*

or under the control of the garnishee, and all such credits and indebtedness due from the garnishee to the judgment debtor at the time of service of the order." (Emphasis added.)

Key claims that due to the unique nature of the assignment of rights, there is no property available for attachment. Essentially, Key suggests the assignment of rights from Mercer to Nicholson deprives Mercer of any contractual rights under the insurance agreement, and therefore Key no longer owes anything to Mercer. Because Key does not owe Mercer, the argument proceeds, Key cannot owe Nicholson. Instead, Key insists that any liability it may have to Nicholson can only be recovered directly. And importantly, Key makes the point that in a direct action, it would be entitled to a jury trial on the merits. Put another way, Key is asserting that Nicholson's square peg cannot fit into garnishment's round hole, and such mismatch deprives a court of jurisdiction to hear the claim.

Nicholson responds that garnishment following an assignment is proper based on our court's precedent. See *Glenn v. Fleming*, 247 Kan. 296, 313-19, 799 P.2d 79 (1990) (holding a plaintiff with an assignment of a bad faith claim and covenant not to execute may garnish the insurer for an excess judgment). Nicholson points out that Key's interpretation may create an absurd result: "[*B*]*ecause of the assignment, the only party* [Key] *could owe anything to is Nicholson; and for that reason, it shouldn't owe anything to Nicholson*."

These are interesting arguments, but as we will explain, they have nothing to do with subject-matter jurisdiction. We recognize some imprecise language in our historical precedent which may have led to confusion by the parties and lower courts—and may even be favorable to Key's arguments about jurisdiction. In recent years, however, we have refined and clarified the true nature of subject-matter jurisdiction in Kansas.

In *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016), we reversed a long line of precedent and held that deficiencies in an indictment, complaint, or information did not deprive Kansas courts of subject-matter jurisdiction over criminal cases. Instead, we emphasized that subject-matter jurisdiction is extended to

courts by the Kansas Constitution itself, and an insufficient charging document merely fails to procedurally demonstrate its existence. 304 Kan. at 810-12; see also Kan. Const. article 3, § 6 (vesting district courts with subject-matter jurisdiction as provided by law); K.S.A. 20-301 (granting district courts subject-matter jurisdiction over garnishment actions). Stated another way, under *Dunn*, the State must establish that it has invoked the court's jurisdiction. *State v. Jordan*, 317 Kan. 628, 643, 537 P.3d 443 (2023) (substitution of indictment in place of original complaint was sufficient under *Dunn*); *State v. Scuderi*, 306 Kan. 1267, 1272, 403 P.3d 1206 (2017) (charging document sufficiency does not implicate subject-matter jurisdiction). Thus, charging failures are not of *jurisdictional* significance. *Jordan*, 317 Kan. at 644.

Applying *Dunn* to the question of subject-matter jurisdiction in civil matters, courts must be precise to delineate genuine subject-matter jurisdiction defects from fact-or law-based defenses on the merits of an action. *Towne v. U.S.D. No. 259*, 318 Kan. 1, 5, 540 P.3d 1014 (2024) ("Any contract claim may fail for any number of reasons, and the same can be said of the contract claim made in this case. But that does not mean courts do not have jurisdiction to hear them."). With this in mind, today's case becomes relatively straight-forward. Key's statutory argument may have merit. But we need not, and do not, address it. This is because it is a claim that even if everything Nicholson asserted in the garnishment action were true, she could not obtain the relief sought as a matter of law. This formulation should sound familiar because it is the *sine qua non* of a motion to dismiss.

K.S.A. 2023 Supp. 60-212(b)(6) provides an avenue for litigants to assert that a plaintiff has failed to state a claim. Failing to state a claim, however, *cannot* deprive a court of subject-matter jurisdiction to rule on a 60-212(b)(6) motion. Because Nicholson properly invoked the jurisdiction of the district court to resolve her garnishment claim, the court properly exercised its constitutional jurisdiction to entertain that claim. But entertaining a claim, as all seasoned lawyers know, will often result in a quick dismissal of the claim if the statutory underpinnings of the claim do not afford relief as a matter of law.

Crucially in this case, Key never presented its statutory arguments to the district court. Key is essentially asking us to permit an end-run around our preservation rules by considering legal defenses raised for the first time on appeal under the cloak of a jurisdictional argument. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020) (generally, issues not raised before the district court cannot be raised for the first time on appeal). Such a limited view of subject-matter jurisdiction would in fact swallow up all merits-based defenses. Anytime a party was entitled to be relieved of liability—either for factual or legal reasons—that party could claim the deciding court lacked subject-matter jurisdiction. But as we have made clear, subject-matter jurisdiction is simply the constitutional power of courts in this state to decide disputes. Once properly invoked, that power does not go away simply because the claim is fatally flawed.

We hold the district court had jurisdiction to hear Nicholson's garnishment action on the merits. The Court of Appeals is affirmed as being right for the wrong reason. See *State v. Brown*, 314 Kan. 292, 306, 498 P.3d 167 (2021) (affirming Court of Appeals as right for the wrong reason).

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

BILES, J., not participating.

State v. Mendez

No. 125,241

STATE OF KANSAS, *Appellee*, v. FRANCISCO ALEJANDRO MENDEZ, *Appellant.*

(559 P.3d 792)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Support to Prove Aggravated Robbery Conviction for Taking Vehicle.* When the property taken is a vehicle, an aggravated robbery conviction can be supported by a showing that the driver or any passengers would have remained in possession or control of the vehicle but for being overcome by violence or intimidation.

2. MOTOR VEHICLES—*Statute Requires Light Display Only Red Color on Rear of Vehicle*. K.S.A. 8-1729(e)—which provides that "[a]ll lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color"—requires that the light must display *only* a red color.

3 TRIAL—*Time Period for Premeditation to Be Formed—No Error by Prosecutor to State Premeditation Formed in Five Seconds*. Though it is prosecutorial error for the State to assert premeditation can be formed in one second, it is not error for the prosecutor to state that premeditation can be formed in five seconds, because five seconds can be enough time for an internal second thought or hesitation to arise.

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Oral argument held March 29, 2024. Opinion filed November 27, 2024. Affirmed in part and reversed in part.

James M. Latta, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Francisco "Frankie" Alejandro Mendez was charged with various crimes after a days-long crime spree in Topeka where he and others stole a car from a driver and passenger at gunpoint; shot at Washburn partygoers, killing one; and robbed a group of people at gunpoint. A jury convicted him of one count of premeditated first-degree murder, four counts of attempted first-degree premeditated murder, and seven counts of aggravated

robbery. Mendez directly appeals, raising nine claims of error. Today we reverse three of Mendez' aggravated robbery convictions and affirm all other convictions.

FACTS AND PROCEDURAL BACKGROUND

Mendez' convictions arose out of three separate events that spanned several days in April 2019.

On the evening of April 27, 2019, Lindsay Koch picked up Will Clark in her 2016 white Chevy Cruze to go buy marijuana. Koch picked up Clark from his house, went to make the purchase, and returned to Clark's house. As Koch pulled into Clark's driveway, they saw three men standing by Clark's garage who Clark did not recognize.

The men quickly flanked the sides of Koch's car. One of the men asked, "Where's the money at?" Mendez, holding a revolver on Koch's side of the car, demanded that she get out. Koch refused. Mendez hit her window with the revolver, and it fired off a round. On the passenger side, one of the men shouted "Get him," at which point Clark burst out of the car, pushed the men out of his way, and ran inside the house to retrieve his own gun.

While Clark was inside, Koch got out of the car with her cell phone in hand. Koch's purse and wallet remained in the car. Mendez told Koch to toss her phone back inside the car and to lie on the ground. Koch threw her phone back into the car, but she refused to lie down. Mendez kept his gun trained on her while he and his comrades got into her car and drove away. After they drove away Koch ran to a nearby Walgreens to call 911. By the time Clark came back outside, everyone was gone, and he met up with Koch at Walgreens where they spoke with police.

Law enforcement found Koch's car a day later in a parking lot. A cigarillo butt and wrapper were retrieved from the middle console area that had DNA on it consistent with Mendez' DNA.

On the evening of the carjacking, students at Washburn University threw a house party. Party guests included Washburn football players Corey Ballentine, Dwane Simmons, Channon Ross, Kevin Neal, and James Letcher Jr. Many of the partygoers were celebrating Ballentine's draft into the NFL earlier that day.

Around 1 a.m., Ballentine, Simmons, Ross, Neal, and Letcher made their way outside and were getting ready to leave. They were standing near the street talking to one another when Koch's stolen white Chevy Cruze pulled up to them, with Mendez at the wheel. Three or four other men were inside the car.

One of the men in the car asked the group of football players if they had any marijuana. The group responded that they did not. One of the men then asked, "What's y'all names?" One of the football players told the men to not worry about their names.

The car then began to drive away, and the football players resumed their conversation. Moments later the car screeched to a halt, and the men in the car began shooting at the football players. One partygoer witness later said that he saw the men getting out of the car as they turned back to shoot into the group.

Witnesses described the shots sounding "slow" at first but then started "picking up." The football players and other witnesses at the party heard at least a dozen or more shots. The car then sped off.

Once the gunshots began, the victims scattered. Ballentine turned and ran and got shot in the backside while he was running away. Neal ran and hid behind a nearby car. Ross ran back to his nearby apartment that he shared with Letcher and Neal. Letcher and Neal initially ducked behind cars but then also made it back to their apartment after the shooting stopped. Ross called Ballentine, who answered and told Ross that he had been shot. Ross picked Ballentine up and took him to the hospital, where doctors discovered that Ballentine's pelvic bone was fractured. The bullet was never recovered from his pelvis because doctors determined that removing it would have caused more damage.

Ross also called Simmons, who did not answer. Simmons had been fatally shot in the head. The bullet that law enforcement eventually collected from Simmons' head was from a Colt revolver.

Eighteen shell casings from three different semiautomatic guns were found at the scene. Since a revolver does not automatically eject shell casings, no shell casings from a revolver were found. No guns were found at the scene.

Two evenings after the shooting at the Washburn party, Kathy Cool drove Vladimir Stryka, Demetrius Hodge, Dmitri Farafontoff, and Lisa Hicks from Lawrence to Topeka to hang out. Hicks, who was nearly five months pregnant, was in the front passenger seat, and the three men were in the backseat. The group eventually went to Central Park to meet some friends of Hodge.

Cool pulled into a parking spot. A few minutes later a white four-door Nissan Altima pulled up behind them, containing Mendez and three other men. Hodge and Farafontoff got out to talk to Mendez, who Hodge knew. Everyone else stayed in the car.

Suddenly and without provocation, Mendez and his comrades pulled guns, pistol whipped Farafontoff, and got Farafontoff and Hodge to the ground. One of the men put a gun in Stryka's face and told him to give him everything in his pockets. Stryka told him "to get the gun the fuck out of [his] face," and the man hit him with the gun. Stryka had his own wallet and Hicks' wallet on him, and the man took both wallets from Stryka after striking him with the firearm. That same man then put his gun in Hicks' face and told Hicks to shut her mouth. He told Hicks he would shoot her if she did not shut up. He also demanded Hicks give him her phone, and Hicks complied.

Mendez, armed with a revolver, approached the driver's side where Cool was sitting. Mendez shouted at Cool to give him her phone, but she refused. Mendez told Cool, "One more time, if you don't give me the phone, I'm going to shoot you in the face you fat bitch." Cool again refused. Mendez then shot the gun through her window. The window shattered, and the bullet hit the steering wheel, then bounced off and hit the dash, and then landed in the passenger seat next to Hicks. The victims heard someone say "Frankie, come on." Mendez and the men rushed back into their car and drove off.

Based on these three events, the State charged Mendez with the premeditated first-degree murder of Simmons, the attempted first-degree premeditated murder of Ballentine, Neal, Ross, and Letcher, and the aggravated robbery of Koch, Clark, Cool, Hicks, Stryka, Hodge, and Farafontoff.

During the ensuing investigation, law enforcement learned that Mendez had been a passenger in a traffic stop two weeks prior

to these events. During that stop, police found a revolver in the backseat, and Mendez told the officers that it was his and that he had recently bought it off the street. After completing the stop, the officers put the gun in the trunk of the car and released it back to Mendez.

That same firearm, a Colt Trooper .38 caliber revolver, was eventually recovered over a year later at a firearm dealer's home in Topeka. The dealer had killed himself by accidentally discharging a firearm, and while responding to the scene law enforcement found a bundle of firearms under his bed which included the revolver. Police test fired that gun and concluded it was the same gun that killed Dwane Simmons as well as the gun that was fired into Cool's car in Central Park.

After Mendez was arrested, he called his brother from jail and they discussed how police had searched their house. His brother told Mendez that law enforcement "didn't find my thing." Mendez' brother then asked Mendez, "Where's your shit at?" Mendez responded, "Don't worry about it," and said that it was not there. Police believed that Mendez was referring to his revolver.

A jury ultimately convicted Mendez of the premeditated first-degree murder of Simmons, the attempted premeditated first-degree murder of Ballentine, Neal, Ross, and Letcher, and the aggravated robbery of Koch, Clark, Cool, Hicks, Stryka, Hodge, and Farafontoff. The district court sentenced Mendez to a hard 50 life sentence plus 492 months in prison. Mendez directly appeals.

DISCUSSION

Mendez raises nine claims of error: (1) the evidence of premeditation was insufficient; (2) the aiding and abetting instruction was clearly erroneous; (3) pre-meditated first-degree murder is unconstitutionally vague; (4) sufficient evidence does not support the aggravated robbery convictions of victims who had nothing taken from them; (5) the aggravated robbery convictions are multiplicitous; (6) the district court erred in denying the motion to suppress; (7) the State committed reversible prosecutorial error; (8) the instruction of "knowingly" in the aggravated robbery instruction was clearly erroneous; and (9) cumulative error deprived Mendez of a fair trial. We address each in turn.

Sufficient evidence supports a finding of premeditation.

When a defendant challenges the sufficiency of the evidence, we 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. We do not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). "[E]ven the gravest offense can be based entirely on circumstantial evidence. Sufficient circumstantial evidence does not need to exclude every other reasonable conclusion to support a conviction. [Citations omitted.]" *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022); see also *State v. Phillips*, 299 Kan. 479, 498, 325 P.3d 1095 (2014) ("[I]t is not necessary that there be direct evidence of either intent or premeditation. Instead, premeditation, deliberation, and intent may be inferred from the established circumstances of a case, provided the inferences are reasonable.").

"Both intent and premeditation may be inferred from circumstantial evidence. Juries presume a person intends all the natural consequences of his or her acts." *State v. Frantz*, 316 Kan. 708, 741, 521 P.3d 1113 (2022). We have identified nonexclusive factors to consider in determining whether circumstantial evidence gives rise to an inference of premeditation. These factors include the: (1) nature of the weapon used; (2) lack of provocation; (3) defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) dealing of lethal blows after the victim was rendered helpless. The number of factors present does not affect the analysis of what inferences can be reasonably drawn, because in some cases one factor alone may be compelling evidence of premeditation. However, use of a deadly weapon by itself is insufficient to establish premeditation. *State v. Killings*, 301 Kan. 214, Syl. ¶ 3, 340 P.3d 1186 (2015).

First, we are not persuaded by Mendez' argument that there was not enough time from the "disrespect" of the football players saying not to worry about their names to the shooting to have formed premeditation. In *State v. Stanley*, 312 Kan. 557, 572-73,

478 P.3d 324 (2020), we discussed how the hallmark of premeditation is the internal "'second thought'" or the time it takes for a "'hesitation'" to arise. "The temporal space required to complete that process may be very short—a mere hesitation, perhaps, as . . . I complete the internal double-check." 312 Kan. at 573.

The evidence showed there was sufficient time for Mendez to have had an internal second thought or hesitation arise and complete a "double-check." The victims testified that it was maybe 10 to 15 seconds after the car started pulling away before it stopped and gunfire began. They agreed it was not as long as "minutes" later, but it certainly was not instantaneous given that the car first pulled away and the victims had time enough to go "back to talking . . . to each other" before they were shot at. Ten to fifteen seconds is enough time for Mendez to have had an "internal second thought" before stopping the car, looking back, and firing.

Moreover, to the extent Mendez argues that driving a car is such a cognitively challenging, all-consuming activity so as to prevent him from being mentally capable of forming premeditation, that same fact, when viewed in the light most favorable to the State, actually favors a finding of premeditation. Mendez would have had to decide to continue driving the car after the initial encounter, then make the decision to stop the car, pull his gun, turn, and begin shooting. The shooting does not appear to be the kind of "internal, snap decision" that was made on "'impulse'" without any "cognitive moment of reflection or pondering" which would show a lack of premeditation as we contemplated in *Stanley*, 312 Kan. at 572.

Furthermore, though the time between the initial encounter and the gunfire was short, the shooting itself lasted several minutes. Evidence showed that the shooters fired well over a dozen shots. The shooting involved 3 different guns, with 18 shell casings found at the scene. See *Frantz*, 316 Kan. at 741 (shooting victim six times supported inference of premeditation); *State v. Salary*, 301 Kan. 586, 601, 343 P.3d 1165 (2015) (shooting victim multiple times supported inference of premeditation). What is more, the shooting started off slowly at first, then started picking up speed. Letcher testified that after "the first shot there was little

pause . . . [a]nd then multiple shots were followed by that." Ballentine similarly testified that the shots sounded "slow," and "then about halfway through it started, like, picking up." See *Frantz*, 316 Kan. at 741 ("Witnesses heard several shots, a pause, and then more shots."); *State v. Cosby*, 293 Kan. 121, 134-35, 262 P.3d 285 (2011) (finding evidence supporting premeditation included the defendant firing multiple shots with a pause between the first and second shot).

As soon as the shooting started, the football players ran. Ballentine was already running and had nearly made it to the street corner before he was shot in the backside, and even then, the shots continued until after he got around the corner. Similarly, Neal stated it felt like the gunfire lasted "forever," even though in reality it was more like "a couple minutes." While the shooting was occurring, Neal "laid[] parallel underneath [a] car." Ross gave similar testimony; he stated that after the first shot, he took off running, and that there were "a lot more [shots fired] while [he] was running." These facts show that the shooters continued to fire at the football players for potentially several minutes as they were fleeing from the scene.

Moreover, the victims did not provoke the shooters. The football players were all outside getting ready to leave the party when Mendez pulled up to them. Someone in the car asked if they had any weed, and the group responded "no." One of the men inside the car asked their names, and one of the football players told the men to not worry about their names. The car then pulled away, but stopped and then the shooting began. As the State argues, refusing to tell a car full of strangers your name after they pull up at 1 a.m. and ask for weed is not provocation to be shot. The victims agreed that the exchange was not "heated" or "angry" and there were no threats made during the brief encounter. See *State v. Pabst*, 268 Kan. 501, 513, 996 P.2d 321 (2000) (finding sufficient evidence of premeditation in part because although defendant and victim were engaged in a "mild, nonviolent argument," defendant was not provoked).

Additionally, firearms were used to commit the murder and attempted murders, with the fatal bullet coming from Mendez' re-

volver. And finally, Mendez' conduct after the shooting also supports a finding of premeditation. Once the men stopped shooting, they fled the scene and did not attempt to call for or render aid. See *Frantz*, 316 Kan. at 741-42 (fleeing scene without calling for or rendering aid could support inference of premeditation); *State v. Carter*, 305 Kan. 139, 153, 380 P.3d 189 (2016) ("[A] defendant's conduct after a killing indicative of earlier premeditation has included failure to seek medical attention for the victim.").

Mendez was "free to argue to the jury that the circumstantial nature of much of the evidence created reasonable doubt, but on appeal we accept the circumstantial evidence in the light most favorable to the State when assessing sufficiency." *State v. Ward*, 292 Kan. 541, 581-82, 256 P.3d 801 (2011). Mendez' jury was given options for premeditated first-degree as well as second-degree intentional murder, second-degree reckless murder, and involuntary manslaughter for the murder of Simmons, and the attempted version of each of those crimes with respect to the remaining four victims. The district court also specifically instructed the jury that if there was a "reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only, provided the lesser offense has been proven beyond a reasonable doubt." To reach the result Mendez requests, we would have to make our own credibility determinations and reweigh the evidence, but these are not tasks an appellate court performs when conducting a sufficiency review. Instead, we consider all evidence—even if there is conflicting evidence or reasons to question its credibility—and do so in the light most favorable to the State. *Phillips*, 299 Kan. at 500-01. Viewing the evidence in a light most favorable to the State, we conclude that the evidence establishing premeditation is sufficient.

The aiding and abetting instruction was not clearly erroneous.

The district court provided the aiding and abetting jury instruction at the State's request, and without defense objection. That instruction read in pertinent part:

"A person is criminally responsible for a crime committed by another if the person, either before or during its commission, and

with the mental culpability required to commit the crime, intentionally aids the other person to commit the crime.

"The person who is responsible for a crime committed by another is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the person could reasonably foresee the other crime as a probable consequence of committing or attempting to commit the intended crime."

The district court then instructed the jury on the elements of the substantive offenses: first-degree premeditated murder, attempted first-degree premeditated murder, and aggravated robbery, as well as the lesser included offenses of second-degree intentional murder, second-degree reckless murder, involuntary manslaughter, attempted second-degree intentional murder, attempted second-degree reckless murder, and attempted involuntary manslaughter.

When analyzing jury instruction issues on appeal, appellate courts follow a three-step process: (1) determining whether the issue is preserved for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021).

At the second step, we consider whether the instruction was both legally and factually appropriate, using an unlimited standard of review of the entire record. In determining whether an instruction was factually appropriate, we must determine whether there was sufficient evidence, viewed in the light most favorable to the requesting party, that would have supported the instruction. 313 Kan. at 254-55.

When, as here, a party fails to object to a jury instruction before the district court, we review the instruction to determine if it was clearly erroneous. K.S.A. 22-3414. For a jury instruction to be clearly erroneous, the instruction must be legally or factually inappropriate and the court must be firmly convinced the jury would have reached a
different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error

and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021).

Mendez contends the aiding and abetting instruction—particularly the portion regarding foreseeability—improperly lowered the State's burden of proof on the specific intent crimes with which he was charged. He is correct that given the set of crimes charged in his case, this instruction was erroneous.

In *State v. Engelhardt*, the defendant was convicted of premeditated first-degree murder under an aiding and abetting theory after he and an accomplice stabbed the victim multiple times. 280 Kan. 113, 115, 131-34, 119 P.3d 1148 (2005). He argued that the foreseeability instruction impermissibly lowered the State's burden of proof on the element of intent, since the instruction stated that the prosecution only had to show that the murder was a foreseeable consequence of another criminal act—not that it was premeditated. This court agreed that the instruction negated the intent element of premeditated murder and was confusing because he was also charged with other counts such as kidnapping, criminal threat, and battery. 280 Kan. at 132-33. Though the instruction in that case was error, the court held it was harmless because the evidence against Engelhardt was overwhelming. 280 Kan. at 133-34.

We reaffirmed this holding in *State v. Overstreet*, 288 Kan. 1, 9, 200 P.3d 427 (2009). Overstreet was charged with attempted premeditated first-degree murder and aggravated assault under an aiding and abetting theory after he drove a vehicle involved in a drive-by shooting. We declared that "*Engelhardt* makes it clear that to be successful on this theory, the State was required to prove that the defendant shared in the specific intent of premeditation and thus promoted or assisted in the commission of the specific crime of premeditated first-degree murder." 288 Kan. at 11. Yet by giving the foreseeability instruction, the district court diminished the State's burden because it indicated to the jurors that they "need not find that Overstreet possessed the specific intent of premeditation if it found that premeditated murder was a reasonably foreseeable consequence of aggravated assault," and "the fact that

it may be foreseeable that someone may die as a result of a particular course of action does not give rise to the conclusion that the cause of death was premeditated." 288 Kan. at 11-12.

And recently in *State v. Gonzalez*, 311 Kan. 281, 460 P.3d 348 (2020), the defendant was convicted of felony murder, attempted aggravated robbery, and conspiracy to commit aggravated robbery after a passenger in a car he was driving shot and killed a man. This court once again declared that the instruction was legally inappropriate as given because its use must be limited when defendants are charged with aiding and abetting specific intent crimes. 311 Kan. at 291.

Though we agree with Mendez that the instruction was legally inappropriate, we conclude the foreseeability instruction was not clearly erroneous.

In Mendez' case, the main charges relating to the murder and attempted murders require a finding of specific intent, as did some of the lesser included offenses. See *Overstreet*, 288 Kan. at 11 (premeditated first-degree murder is a specific intent crime); *State v. Mora*, 315 Kan. 537, 543, 509 P.3d 1201 (2022) (any form of "attempted" crime requires specific intent); *State v. Deal*, 293 Kan. 872, 883, 269 P.3d 1282 (2012) (intentional second-degree murder is a specific intent crime). Yet the aggravated robberies require general intent as they needed only to be committed "knowingly." See K.S.A. 21-5202(i) (any crime with a "knowingly" mens rea is a general intent crime). So, Mendez argues that the instructions failed to "inform the jury which of the crimes submitted to it for deliberation was an 'intended' crime and which might have been the 'other crime' committed while carrying out the intended crime." *Gonzalez*, 311 Kan. at 293.

The crimes for which Mendez was charged spanned several days, and included three distinct sets of criminal acts that were physically and temporally separated. The first was the aggravated robbery of Koch and Clark; the second—approximately four hours later at a different location—was the murder and attempted murders of the Washburn football players; and the third was the Central Park aggravated robbery two days later. Significantly, the murder and attempted murders at the Washburn party did not involve a robbery. The only specific intent crimes that Mendez was

charged with arose from that encounter, and the only crimes charged based on that encounter were the murder and attempted murders—both specific intent crimes.

Given the separation of the three criminal acts, the aiding and abetting instruction would not have confused the jurors and made them think they could convict Mendez of premeditated murder if the murder was a reasonably foreseeable consequence of the aggravated robberies. This is especially true considering that the prosecutor was clear in making this temporal distinction between the three crimes when discussing the aiding and abetting instruction. Mendez' case is thus inapposite to *Overstreet*, where we found clear error because there was "a real possibility that the jury, following this [foreseeability] instruction . . . convicted Overstreet of the attempted premeditated murder not because the defendant aided or abetted in the attempted premeditated murder *but because the murder was a reasonably foreseeable consequence of the aggravated assault*." (Emphasis added.) 288 Kan. at 14-15. But here, there is no such "real possibility" that the jury convicted Mendez of the murder and attempted murders only because it found them to be a reasonably foreseeable consequence of the aggravated robberies that occurred at different times and places. As such, Mendez has not met his burden of convincing this court that the instruction was clear error.

We decline to reach Mendez' challenge to the constitutionality of premeditated first-degree murder.

Mendez acknowledges he did not raise this issue below. We generally do not address legal theories raised for the first time on appeal, even those of constitutional dimension. *State v. Gutierrez-Fuentes*, 315 Kan. 341, 347, 508 P.3d 378 (2022). A defendant may however persuade us to review the new issue by invoking one of our three exceptions to the general preservation rule. Mendez invokes two such exceptions, arguing that this issue presents only a question of law on admitted facts, and that consideration of the theory is necessary to serve the ends of justice and prevent a denial of fundamental rights. See *Phillips*, 299 Kan. at 493. Nevertheless, our review is prudential, and even if an exception may apply, we may still decline to review the question. *State v. Gray*, 311 Kan.

164, 170, 459 P.3d 165 (2020) ("Even if an exception would support a decision to review a new claim, we have no obligation to do so."). We decline Mendez' invitation to review this new claim for the first time on appeal.

We reverse three of Mendez' convictions for aggravated robbery as they are not supported by sufficient evidence.

Aggravated robbery is "knowingly *taking property* from the person or presence of another by force or by threat of bodily harm to any person . . . when committed by a person who . . . [i]s armed with a dangerous weapon[.]" (Emphasis added.) K.S.A. 21-5420(a), (b)(1). An essential element of this crime is that property was taken from the victim's person or presence. Mendez argues that his convictions for aggravated robbery with respect to Clark, Cool, Hodge, and Farafontoff must be reversed because none of those four individuals had anything taken from them, and so they never had possession or control so immediate of any of the stolen property that force or fear was needed to get them to give it up.

This issue is governed by the same standard of review set forth above. We 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. *Aguirre*, 313 Kan. at 209.

First, with respect to the carjacking, Mendez argues that Clark, as a passenger, never had possession or control so immediate of Koch's car that force or fear was needed to get him to give up the property. The State disagrees, arguing that the car was taken in the presence of both Koch and Clark. Specifically, the State points out that Clark was forced out of the car by armed men: "Had Clark not been overcome by violence, he would have remained in Koch's car and retained possession of it."

We agree that even as a passenger, Clark did have some degree of possession and control of Koch's car, because "'violence or intimidation [was] essential to sunder it.'" *State v. Dale*, 312 Kan. 174, 189, 474 P.3d 291 (2020). Clark was an invited guest of Koch, was seated in the passenger seat, and had he not been "overcome by violence" or intimidation, he could have remained in the car. We reject Mendez' notion that in a carjacking, the

driver/owner of the vehicle is the only individual that can legally be said to be the victim. Rather, K.S.A. 21-5420 permits the State to obtain a conviction for aggravated robbery if it can prove that any person—driver or passenger—in the vehicle was forced out "by force or by threat of bodily harm" by a person "armed with a dangerous weapon." K.S.A. 21-5420(a), (b)(1). We thus affirm Mendez' conviction for aggravated robbery with respect to Clark.

With respect to the Central Park robbery, the State agrees that Cool did not have anything taken from her person, and therefore does not dispute that Mendez' conviction for the aggravated robbery of Cool is reversible as it is not supported by sufficient evidence. But the State insists that Hodge and Farafontoff did have items taken from their possession. The State relies on Stryka's testimony that "as far as [he] knew, [Hodge], he got his pockets ran, so did [Farafontoff]." The State suggests getting one's "pockets ran" is a street colloquialism for having the contents of one's pockets stolen. This may be true, however, it remains unproven that Hodge had any items in his pockets to begin with. The State also points to Cool's testimony that she saw Mendez and his comrades demanding money from others and "picking pockets on other people to see what they had." According to the State, "[t]his evidence establishes that Hodge and Farafontoff had property taken from their person."

We disagree. This testimony does not establish that any items were actually taken from Hodge or Farafontoff. Unlike the other victims, no evidence was shown that those two gave up their wallets, phones, cash, or anything at all. Stryka testified that he did not see any items get taken from Hodge and Farafontoff. And neither Hodge nor Farafontoff testified at trial. Though their testimony is not specifically necessary to support the convictions, the State must have presented *some* evidence that property was removed from their person or presence, as the "taking" of "property" is an essential element of the crime of aggravated robbery. K.S.A. 21-5420.

All the elements of robbery must be proven to obtain a conviction of completed aggravated robbery. That did not happen

here with respect to Cool, Hodge, and Farafontoff. As such, Mendez' aggravated robbery convictions with respect to these three victims must be reversed.

Because we reverse Mendez' convictions with respect to Cool, Hodge, and Farafontoff as lacking sufficient evidence, we need not consider Mendez' alternative arguments that those convictions are multiplicitous. See *State v. Keyes*, 312 Kan. 103, 111, 472 P.3d 78 (2020) (declining to reach further claims of error after identifying reversible error; "[t]o do so would be to render an advisory opinion").

Mendez' conviction for aggravated robbery with respect to Clark is not multiplicitous.

As above, Mendez acknowledges he did not raise this issue below, but asks us to review it under the first and second preservation exceptions. Once again, we may decline to do so. *Gray*, 311 Kan. at 170. We will proceed to consider the claim under the exceptions Mendez asserts. In so doing, we exercise unlimited review, as this presents a question of law regarding whether a conviction violates the Double Jeopardy Clause. *Dale*, 312 Kan. at 178.

"[T]he Double Jeopardy Clause of the Fifth Amendment 'protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.'" 312 Kan. at 178. Mendez asserts that his aggravated robbery convictions fall within the third category. This category only applies if the crimes arise from the "same offense." "Determining whether the State has charged a defendant with multiple counts of the same offense requires a multilayered analysis." 312 Kan. at 178.

The first layer requires examining whether the charges arise from "'discrete and separate acts or courses of conduct' or unitary conduct arising from 'the same act or transaction' or a 'single course of conduct.' Double jeopardy concerns arise only if unitary conduct is at issue." 312 Kan. at 178. Mendez claims that the carjacking of Koch and Clark constitutes an instance of "unitary conduct." The State agrees with Mendez on this point, as the acts occurred at the same time and location, there was no intervening

event, and there was no fresh impulse motivating some of the conduct. See 312 Kan. at 179.

At the second layer of the analysis, when the charges arise from the same statute (as they do here), we determine whether there are two offenses or only one based on the statutory definition. To do so we utilize the "unit of prosecution" test.

"Under that test, 'the statutory definition of the crime determines what the legislature intended as the allowable unit of prosecution. There can be only one conviction for each allowable unit of prosecution. The determination of the appropriate unit of prosecution is not necessarily dependent upon whether there is a single physical action or a single victim. Rather, the key is the nature of the conduct proscribed.' [Citations omitted.]" 312 Kan. at 184.

We therefore must determine the allowable unit of prosecution for aggravated robbery.

Aggravated robbery is "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person . . . when committed by a person who . . . [i]s armed with a dangerous weapon[.]" K.S.A. 21-5420(a), (b)(1). *Dale* employed the unit of prosecution test for aggravated robbery, and both Mendez and the State claim that *Dale* supports their respective positions.

In *Dale*, the defendant and his co-defendant approached three skateboarders at a park. Two of the skateboarders were sitting beside a pile of belongings that included the cell phones of all three skateboarders. The third skateboarder was skateboarding about 20 to 30 feet away while wearing headphones. Dale pulled a BB gun on the two seated skateboarders, and during the altercation physically assaulted them both—grabbing them, pressing the gun against them, and hitting them with the gun while Dale's co-defendant grabbed the phones. Based on these events, the State charged Dale with the aggravated robbery of the two skateboarders' cell phones and the theft of the third skateboarder's cell phone. 312 Kan. at 175-76.

This court held that the convictions were not multiplicitous, because despite Dale's aggravated robbery convictions arising from unitary conduct, that conduct involved two victims, each of whom had a claim to the control and possession of their property that Dale stole from them at gunpoint. 312 Kan. 174, Syl. ¶ 2.

"'The general rule is that "presence," as that word is used in defining robbery, means a possession or control so immediate that violence or intimidation is essential to sunder it. . . . . A thing is in the presence of a person with respect to robbery, which is so within his control that he could, if not overcome by violence or prevented by fear, retain his possession of it.'" 312 Kan. at 189.

Mendez asserts that, unlike Dale, Clark never had possession or control so immediate of the car that force or fear was needed to get him to give up the property. The State disagrees, arguing that the car was taken in the presence of both victims, and that Clark was forced out of the car by armed men. The State argues that the unit of prosecution for an aggravated robbery is not focused on the ownership of the property taken; rather, the focus is on the individual from whose presence property is taken.

As discussed in the preceding issue, Clark, as a passenger, did have legal possession and control of Koch's car because his possession or control was "'so immediate that violence or intimidation [was] essential to sunder it.'" 312 Kan. at 189. As we described above, Clark was a guest of Koch, seated in the passenger seat, and had he not been "overcome by violence" or intimidation, he could have remained in the car. Mendez' conviction on this count is not multiplicitous.

The district court did not err in denying the motion to suppress.

The United States Constitution under the Fourth Amendment

"guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' and a traffic stop is considered a seizure . . . . Compliance with the Fourth Amendment requires the officer conducting the stop to 'have a reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime.'" *State v. Sharp*, 305 Kan. 1076, 1081, 390 P.3d 542 (2017).

A traffic violation provides an objectively valid reason to effectuate a traffic stop, even if the stop is pretextual. *State v. Jones*, 300 Kan. 630, 638, 333 P.3d 886 (2014).

In reviewing a district court's decision on a motion to suppress, we review the factual underpinnings of the decision by a substantial, competent evidence standard and the ultimate legal conclusion by a de novo standard. When, as here, the material facts supporting a district court's decision are not in dispute, the ultimate question of whether to suppress is a question of law over

which we exercise unlimited review. When applying this standard, we do not reweigh evidence, assess witness credibility, or resolve conflicting evidence. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). To the extent that we must engage in statutory interpretation to resolve this question, this likewise presents a question of law subject to unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022).

Sheriff's deputies stopped the car in which Mendez was a passenger because the deputies believed the car's rear passenger light violated K.S.A. 8-1729(e), which provides:

> "All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stop light or other signal device, which may be red, amber or yellow, and except that the light illuminating the license plate shall be white and the light emitted by a back-up lamp shall be white or amber."

The deputies believed this statute meant that only red light can be emitted from the rear light. Because they saw white light in the rear passenger light, they effectuated a traffic stop. The district court, after viewing the evidence presented at the suppression hearing, agreed with the officers that because a white light was apparent from the right rear taillight, they had reasonable suspicion that the car was in violation of K.S.A. 8-1729(e).

Mendez contends there was no violation of K.S.A. 8-1729(e) because that statute merely requires *some* red light to be displayed from a rear taillight and does not require *only* red light be displayed. Mendez asserts that because the evidence showed some red light from the rear taillight, there was no violation, and the officers lacked authority to initiate the stop.

We are unpersuaded by Mendez' argument. The statute provides that "[a]ll lighting devices . . . shall display . . . a red color." While Mendez appears to argue that the light does not need to be exclusively red—and that the statute could be read to mean the light "shall display a red color in addition to other colors"—that is an unreasonable reading of the statute, because that would indicate that a person could put just any color back there as long as there was some red in it. But the statute's directive that "all" lighting devices must display red forecloses Mendez' argument.

Moreover, K.S.A. 8-1729(e) makes an explicit exception for the stop light or signal device, which it says "*may* be red, amber or yellow." (Emphasis added.) In other words, K.S.A. 8-1729(e) gives opportunity for certain, specific lights to have a different—but still specified—color, whereas "all" remaining lights "shall" be "red," with no exceptions provided. As such, the district court did not err in denying Mendez' motion to suppress.

The State did not commit reversible prosecutorial error.

In closing argument, the State asserted:

"And that is all it takes to form premeditation if the evidence supports it. To have thought the matter over beforehand and then acted on it, that's what premeditation is. It can be a second. It could be five seconds. It could be two weeks of premeditation. The evidence has to support that the defendant thought the matter over beforehand and then acted on it, just as that instruction tells you."

Mendez argues it was error for the State to claim that premeditation could be formed in one second or five seconds.

We employ a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sieg*, 315 Kan. 526, 535, 509 P.3d 535 (2022).

"To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

Mendez did not object to any of the errors he now complains of on appeal. Yet we will review claims of prosecutorial error made in closing argument even in the absence of a contemporaneous objection. But the presence or absence of an objection can be factored into our analysis of an alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Our first step in analyzing a claim of prosecutorial error is to decide whether the prosecutor's comments were outside the wide latitude allowed in discussing the evidence. A defendant meets the first prong by establishing the prosecutor misstated the law or argued a fact or factual inferences outside of what the evidence showed. *State v. Ballou*, 310 Kan. 591, 596, 448 P.3d 479 (2019). In determining whether a particular statement falls outside of the wide latitude given to prosecutors, we consider the context in which the statement was made, rather than analyzing the statement in isolation. *State v. Becker*, 311 Kan. 176, 182, 459 P.3d 173 (2020).

The State agrees it was error to claim premeditation could be formed in one second. And indeed, our precedent is clear on that point. See, e.g., *Phillips*, 299 Kan. at 504-05 (finding prosecutorial error based on prosecutor's statement that premeditation could be formed in a "half second," because "this court has repeatedly warned prosecutors about . . . making comments that are analogous to stating premeditation can occur in the same instant as the act that results in a death"); *State v. Kettler*, 299 Kan. 448, 474, 325 P.3d 1075 (2014) (erroneous "'half second'" description of premeditation); *State v. Holmes*, 272 Kan. 491, 497-500, 33 P.3d 856 (2001) (prosecutor's statements that "'premeditation can take a second . . . [i]t can happen in a second'" were misstatements of law); *State v. Cosby*, 285 Kan. 230, 248, 169 P.3d 1128 (2007) ("We have consistently found reversible misconduct when a prosecutor states or implies that premeditation can be instantaneous.").

However, the State disagrees with Mendez' claim that it was error to state premeditation could be formed in "five seconds." Mendez does not cite any caselaw supporting his claim that "[f]ive seconds is too close to instantaneous."

As we explained in our cookie analogy in *Stanley*, 312 Kan. at 572-73, we conclude that five seconds is enough time for an internal "second thought" or a hesitation to arise—such as when I see a cookie, reach for it, and momentarily hesitate as I ask myself if I really want to eat the cookie before dinner. "The temporal space required to complete that process may be very short—a mere hesitation, perhaps, as my hand hovers over the cookie and I complete the internal double-check." 312 Kan. at 573. While the

temporal space required to complete the internal double-check cannot happen in "one second" or "instantly," it may very well occur within five seconds. See *State v. Hall*, 292 Kan. 841, 850, 257 P.3d 272 (2011) (finding no error when prosecutor said premeditation could be formed in "'seconds, minutes, days'" when reference was preceded with "'there's no element of time necessary'").

Having found one error with respect to the State's comment that premeditation could be formed in "one second," we now turn to analyzing harmlessness. In arguing that the error was not harmless, Mendez relies on the same arguments made above regarding the sufficiency of the evidence of premeditation, "specifically that premeditation couldn't have been formed in the few seconds from the 'disrespect' to the shooting," and that the prosecutor's misstatement of the law caused the jury to convict even though there was no evidence of premeditation. However, as we discussed above, though the interval from the "disrespect" to the shooting was brief, it was long enough for Mendez to form premeditation, and the State presented sufficient evidence of premeditation.

Moreover, the jury received accurate instructions on the law of premeditation. And the prosecutor's closing argument correctly and accurately stated the law regarding premeditation and what it requires, and referred the jury to the definition in the instructions. As such, we conclude the prosecutor's "one second" statement was harmless.

The instruction of "knowingly" in the aggravated robbery instruction is not clearly erroneous.

This issue is likewise governed by our three-step standard of review for jury instruction issues as set forth above. *Holley*, 313 Kan. at 253. Mendez did not object to the instruction at trial, so we review for clear error.

Mendez claims the definition of "knowingly" in the aggravated robbery instruction was clearly erroneous because it used an "or" when it should have used an "and." The instruction as given read:

"A defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about, or of the circumstances in which he

was acting, *or* that his conduct was reasonably certain to cause the result complained about by the State." (Emphasis added.)

Mendez relies on *State v. Hobbs*, 301 Kan. 203, 340 P.3d 1179 (2015), and *State v. Thomas*, 311 Kan. 905, 468 P.3d 323 (2020), to argue that the knowingly instruction here was erroneous. Those cases involved the crime of aggravated battery, the statutory definition of which we found to be "less than precise" and therefore looked beyond the plain language of the statute. *Hobbs*, 301 Kan. at 207. Specifically, we found that "'knowingly,' as used in the context of the elements of aggravated battery, means more than just proving that the defendant intended to engage in the underlying conduct. The State must prove the defendant acted when he or she was aware the conduct was reasonably certain to cause the result." *Thomas*, 311 Kan. at 908. Mendez cites those cases then simply asserts that the knowingly instruction as given in his case was likewise error. But notably, those cases were limited to the "context of the elements of aggravated battery." 311 Kan. at 908. And unlike the battery statute, the robbery statute contains no ambiguity about what resulting harm is required—it requires "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. 21-5420. Mendez fails to explain how that language is unclear.

Moreover, as the State points out, the instruction as given matched the PIK:

"[A defendant acts (knowingly) (with knowledge) when the defendant is aware *insert one or more of the following as appropriate for the crime charged*:

- of the nature of (his) (her) conduct that the State complains about.

  or

- of the circumstances in which (he) (she) was acting.

  or

- that (his) (her) conduct was reasonably certain to cause the result complained about by the State.]" PIK Crim. 4th 52.010 (2021 Supp.).

The PIK instruction accurately reflects the definition of "knowingly" in K.S.A. 21-5202(i), which provides:

"A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct

when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result."

And the PIK uses "or" in between each of the three options, and specifically instructs the court to "insert one or more of the following as appropriate." We "strongly recommend[] use of the pattern instructions because they '"have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions."'" *State v. Wimbley*, 313 Kan. 1029, 1031, 493 P.3d 951 (2021). And "if a court follows the PIK instructions, more than likely the instruction will be legally correct, not because of any independent legal significance of the pattern instruction, but because the committee usually writes an instruction that accurately reflects the law." 313 Kan. at 1031. Because PIK Crim. 4th 52.010 accurately states the law and the instruction used by the district court mirrored the PIK instruction, there was no instructional error.

Cumulative error did not deprive Mendez of a fair trial.

Cumulative trial errors, when considered together, may require a defendant's conviction to be reversed when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of trial errors, appellate courts examine the errors in context and consider how the trial judge dealt with the errors as they arose; the nature and number of errors and whether they are interrelated; and the overall strength of the evidence. If any of the errors being aggregated are constitutional in nature, the party benefitting from the error must establish beyond a reasonable doubt that the cumulative effect did not affect the outcome. *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022).

Here, only one error has been identified: A single prosecutorial error in stating premeditation could be formed in "one second." Though we concluded the foreseeability instruction was legally inappropriate, we held that it did not amount to clear error. As such, it is not a part of our cumulative error review. See *State v. Waldschmidt*, 318

Kan. 633, 662, 546 P.3d 716 (2024) (holding "an unpreserved instructional issue that is not clearly erroneous" is not "considered in a cumulative error analysis"). Accordingly, since there is only one error here—the prosecutorial error—we need not conduct a cumulative error analysis. See *State v. White*, 316 Kan. 208, 217, 514 P.3d 368 (2022) (cumulative error doctrine inapplicable if only one error is identified).

CONCLUSION

Mendez' aggravated robbery convictions with respect to Cool, Hodge, and Farafontoff are reversed as lacking sufficient evidence. All other convictions are affirmed.

Affirmed in part and reversed in part.

* * *

WILSON, J., concurring: I concur with the majority's analysis and holdings in all but one matter. I write separately to reiterate my disagreement with the majority's recent sua sponte shift away from considering unpreserved jury instruction errors within our cumulative error framework. *State v. Waldschmidt*, 318 Kan. 633, 669-70, 546 P.3d 716 (2024) (Wilson, J., dissenting). Because our cumulative error analysis ultimately asks, as a constitutional matter, "whether an accused has been afforded a fair trial," I continue to question our unprompted and unbriefed embrace of "simple statutory construction" over core constitutional concerns. 318 Kan. at 670 (Wilson, J., dissenting).

Even so, the result would not be changed here even if we were to aggregate the instructional error with the prosecutorial error. For reasons the majority deems the instructional error was not clearly erroneous, I would also conclude that the error was harmless beyond a reasonable doubt—as required when cumulative error encompasses an issue of constitutional concern. E.g., *State v. Carr*, 314 Kan. 615, 723, 502 P.3d 546 (2022), *cert. denied* 143 S. Ct. 581 (2023). And although both the foreseeability instruction error and the prosecutor's "one second" error broadly touch upon the issue of intent, they were ultimately unrelated and, in my view, could not have compounded one another. Cf. *State v. Tully*, 293 Kan. 176, 205-06, 262 P.3d 314 (2011). Thus, I concur in the majority's result.

No. 125,455

STATE OF KANSAS, *Appellant*, v. MATTHEW MUNOZ, *Appellee.*

(559 P.3d 347)

SYLLABUS BY THE COURT

1. UNIFORM MANDATORY DISPOSITION OF DETAINERS ACT—*Strict Compliance May Be Excused—Prison Officials' Failure to Do Required Acts.* When an inmate does what the Uniform Mandatory Disposition of Detainers Act (MDDA) requires, strict statutory compliance may be excused if a defect arises because prison officials failed to do the things required of them.

2. SAME—*Statutory Time Limitation Does Not Run Until Receipt of Certificate by Court and County Attorney.* Under the MDDA's plain language, the 180-day clock does not begin to run until the receipt of the certificate by the court and county attorney from the Secretary of Corrections.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 29, 2023. Appeal from McPherson District Court; JASON R. LANE, judge. Oral argument held March 27, 2024. Opinion filed November 27, 2024. Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded with directions.

Steven J. Obermeier, assistant solicitor general, argued the cause, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellant.

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

The opinion of the court was delivered by

STEGALL, J.: The Uniform Mandatory Disposition of Detainers Act (MDDA), K.S.A. 22-4301 et seq., provides a way for people held in Kansas penal or correctional institutions to request final disposition of other criminal charges pending against them within the state. Matthew Munoz was one such person. While he was being held in the Mitchell County jail, he tried to invoke the provisions of the MDDA to dispose of a theft charge pending against him in McPherson County. There is no dispute that he filed this request with the McPherson County District Court. There is no dispute that the Secretary of Corrections did not have notice of the filing and did not issue a statutory certificate. But it is also not

disputed that the McPherson County Attorney did have actual notice of the filing. Finally, there is no dispute that McPherson County failed to bring the theft charge to trial within the statutorily prescribed 180 days.

The parties have contested—throughout the case—whether Munoz was in the custody of Kansas Department of Corrections (KDOC) when he filed his MDDA request and whether the steps he took were sufficient to qualify as substantial compliance. At a hearing on Munoz' motion to dismiss the theft charge for untimeliness, he testified that while he was physically in the Mitchell County jail when he filed his MDDA request, he had received a KDOC warrant that same day. Munoz also testified that after he filed his MDDA request, he received a letter from the McPherson County Attorney that told him the county attorney had received the MDDA request and would act on it as soon as Munoz was transferred from the Mitchell County jail to a KDOC facility. He understood this to mean that he had substantially complied with the MDDA. Neither the KDOC warrant nor the letter from the county attorney were entered into evidence in the trial court, and they are not included in the record on appeal.

Despite these evidentiary gaps, the trial court ruled that the evidence was sufficient to show that Munoz had substantially complied with the MDDA, and that the State was time-barred from continuing to prosecute the theft charge. The State appealed. The Court of Appeals reversed the dismissal, holding that the record did not contain sufficient evidence to show Munoz was in the custody of KDOC when he filed his MDDA motion and that actual notice on the part of the McPherson County Attorney was not sufficient to establish substantial compliance. *State v. Munoz*, No. 125,544, 2023 WL 6324275, at *8 (Kan. App. 2023) (unpublished opinion). We granted Munoz' petition for review. Because we agree with the Court of Appeals that Munoz did not substantially comply with the MDDA, we affirm. As such, we do not reach the other issues presented in this appeal.

The rights created by the MDDA are purely statutory and are conditioned by the terms of the statute itself. *State v. Griffin*, 312 Kan. 716, Syl. ¶ 1, 479 P.3d 937 (2021). For example, an inmate requesting final disposition must be in the custody of KDOC, and

the inmate must deliver the request to the court, county attorney, and the Secretary of Corrections:

"(a) Any inmate *in the custody of the secretary of corrections* may request final disposition of any untried indictment, information, motion to revoke probation or complaint pending against such person in this state. The request shall be in writing, addressed and *delivered to the court* in which the indictment, information, motion to revoke probation or complaint is pending, *to the county attorney* charged with the duty of prosecuting it *and to the secretary of corrections*. Such request shall set forth the place of imprisonment.

"(b) *The secretary shall* promptly inform each inmate in writing of the source and nature of any untried indictment, information, motion to revoke probation or complaint against such inmate of which the secretary has knowledge or notice, and of such inmate's right to make a request for final disposition thereof.

"(c) Failure of the secretary to inform an inmate, as required by this section, within one year after a detainer has been filed at the institution shall entitle such inmate to a final dismissal of the indictment, information, motion to revoke probation or complaint with prejudice." (Emphases added.) K.S.A. 22-4301.

Next, K.S.A. 22-4302 explains that KDOC's duties to certify an inmate's request are only triggered after the Secretary received such a request.

"*Upon receipt of a request* made pursuant to K.S.A. 22-4301, and amendments thereto, *the secretary of corrections* shall promptly:

"(a) Certify the term of commitment under which the inmate is being held, the time already served on the sentence, the time remaining to be served, the good time earned, the time of parole eligibility of the inmate, and any decisions of the prisoner review board relating to the inmate;

"(b) for crimes committed on or after July 1, 1993, certify the length of time served on the prison portion of the sentence, any good time earned and the projected release date for the commencement of the postrelease supervision term; and

"(c) send by registered or certified mail, return receipt requested, one copy of the request and certificate to the court and one copy to the county attorney to whom it is addressed." (Emphases added.) K.S.A. 22-4302.

Lastly, K.S.A. 22-4303 explains that the 180-day clock begins to tick only after the district court and county attorney receive the certificate from the Secretary of Corrections. K.S.A. 22-4303 makes clear that the clock does not start merely because the inmate has mailed a writ to the district court.

"(b)(1) *Following the receipt of the certificate by the court and county attorney from the secretary of corrections*, the indictment, information or complaint shall be brought to trial, or the motion to revoke probation shall be brought for a hearing:

(A) If the inmate has one detainer, *within 180 days*;

(B) if the inmate has detainers from multiple jurisdictions, the first detainer shall be brought within 180 days and each subsequent detainer shall be brought within 180 days after return of the inmate to the secretary or transportation of the inmate to the jurisdiction following disposition of a previous detainer; or

(C) within such additional time as the court for good cause shown in open court may grant.

. . . .

"(4) If, after receipt of such certificate, the indictment, information or complaint is not brought to trial within the time period specified in this subsection, or the motion to revoke probation is not brought for a hearing within that period, *no court of this state shall any longer have jurisdiction thereof*, nor shall the untried indictment, information, motion to revoke probation or complaint be of any further force or effect, and *the court shall dismiss it with prejudice*." (Emphases added.) K.S.A. 22-4303.

Munoz argues that because the McPherson County Attorney had actual notice of Munoz' MDDA request, the statutory requirement that the Secretary of Corrections issue a certificate to the court and the county attorney is effectively rendered superfluous, as its purpose was achieved through different means. We note that at first blush, this argument appears seductive. It is not strictly accurate, however, because there is nothing in this record to indicate that the Secretary of Corrections ever had notice of Munoz' request. More importantly though, the argument is foreclosed by our recent decision in *Griffin*.

In *Griffin*, the defendant properly addressed his MDDA request to the district court, district attorney, and Secretary of Corrections; however, the document was only delivered to the district court and district attorney. The district attorney responded and told the defendant he needed to contact prison officials to request the proper documents be prepared and delivered. The mistake caused a two-week delay, but ultimately the Secretary of Corrections received the MDDA request and filed its required certificate. The defendant did not allege any wrongdoing by prison officials. 312 Kan. at 717-18, 724. We stated:

"[T]o be complete, a UMDDA request requires contributions from both the inmate and corrections officials, so the caselaw applying the UMDDA examines both.

"Any exception to statutory compliance requires a court to first decide whether the inmate followed the UMDDA's requirements. . . .

. . . .

". . . [W]hen the inmate does what the UMDDA requires, statutory compliance may be excused when a defect arises because prison officials failed to do those things required of them. In those instances, the UMDDA's time limit may be triggered because it is a 'right to which [the inmate] "cannot be deprived by the laches of public officials."'

. . .

". . . 'Accordingly, if there was a deficiency in the execution of those statutory responsibilities, that failure is not attributable to [the inmate], nor should it prejudice his ability to invoke the statute.'

. . . .

". . . [T]he UMDDA and its caselaw turn on both the inmate's actions and those of prison officials, and the statute controls absent some claim that prison officials thwarted the inmate's request by misfeasance or malfeasance. [Citations omitted.]" 312 Kan. at 722-24.

Munoz makes no claim that KDOC officials thwarted his request. It is undisputed in this case that they never received his request. *Griffin* allows for substantial compliance only "when the inmate does what the UMDDA requires" and yet "a defect arises because prison officials failed to do those things required of them." 312 Kan. at 723. In the absence of malfeasance, "[u]nder the statute's plain language, the 180-day clock does not begin to run until the 'receipt of the certificate by the court and county attorney from the secretary of corrections.'" 312 Kan. at 725. That did not happen in this case, so the MDDA clock never began to run. The case is remanded with directions to reinstate the theft charge.

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

No. 123,710

In the Matter of the Parentage of E.A., a Minor Child.

No. 125,994

In the Matter of the Adoption of E.A., a Minor Child.

(560 P.3d 1149)

SYLLABUS BY THE COURT

1. JURISDICTION—*Appellate Jurisdiction Defined by Statute—Appellate Review*. Appellate jurisdiction is defined by statute; the right to appeal is neither a vested nor a constitutional right. Whether appellate jurisdiction exists is a question of statutory interpretation over which an appellate court has unlimited review.

2. SAME—*Decision by District Court Denying Standing at Pleading Stage—Appellate Review*. When reviewing a district court's decision denying a party's standing at the pleading stage, an appellate court must accept the facts alleged in the pleadings as true, along with any inferences reasonably drawn therefrom. If those facts and inferences demonstrate the party has standing, the district court must be reversed.

Review of the judgments of the Court of Appeals in 62 Kan. App. 2d 507, 518 P.3d 419 (2022), and an unpublished opinion filed April 5, 2024. Appeals from Shawnee District Court; EVELYN WILSON. RACHEL L. PICKERING, and MERYL D. WILSON, judges. Oral argument held October 29, 2024. Opinion filed December 27, 2024. Judgment of the Court of Appeals in No. 123,710 affirming the district court is reversed. Judgment of the district court in that case is reversed and the case is remanded with directions. Judgment of the Court of Appeals in No. 125,994 reversing the district court is affirmed. Judgment of the district court in that case is reversed, the adoption decree is vacated, and the case is remanded with directions.

Joseph W. Booth, of Lenexa, argued the cause and was on the briefs for appellant D.A.

Rebekah A. Phelps-Davis, of Phelps-Chartered, of Topeka, argued the cause and was on the briefs for appellees D.P. and S.P.; *Allan A. Hazlett*, of Topeka Family Law, of Topeka, was on the briefs for appellees C.A., D.P., and S.P.; and *Martin W. Bauer*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, was on the briefs for appellees D.P. and S.P.

Linus L. Baker, of Stilwell, was on the brief for amicus curiae The National Association for Grandparenting in No. 123,710.

Lindsee A. Acton and *Warren H. Scherich III*, of Scherich Family Law, PC, of Shawnee, were on the brief for amicus curiae National Association of Social Workers in No. 123,710.

The opinion of the court was delivered by

BILES, J.: These consolidated cases arise from a prolonged legal battle between divorced paternal grandparents who each want to adopt their grandson. The boy lived exclusively with grandfather for his first six years until 2019, when grandmother and her husband launched a preemptive adoption proceeding under false pretenses by taking the boy as part of an arranged visitation. He never returned. Grandfather tried intervening in the adoption, but the court denied him "party in interest" status under K.S.A. 2018 Supp. 59-2112(h). He also initiated an unsuccessful paternity case, alleging he was the boy's presumed "father" under the Kansas Parentage Act. See K.S.A. 23-2208(a)(4) ("A man is presumed to be the father of a child if . . . [t]he man notoriously or in writing recognizes paternity of the child."). The adoption court issued its decree 25 days after the case began, awarding the boy to grandmother and her husband. Three years later, the adoption court issued a final order in which it reconsidered grandfather's motion to intervene and again denied it.

Grandfather separately appealed both district court rulings with partial success. One Court of Appeals panel denied him relief in *In re Parentage of E.A.*, 62 Kan. App. 2d 507, 509, 518 P.3d 419 (2022). But another Court of Appeals panel held in his favor, reversing the adoption court. *In re Adoption of E.A.*, No. 125,994, 2024 WL 1476802, at *1 (Kan. App. 2024) (unpublished opinion) ("Because we find the court's holding contrary to justice and our traditional notions of fair play, we reverse and remand with directions to the court to allow the grandfather to present his case to the court as an interested party."). The losing sides asked for our review in each case.

We reverse the parentage panel and affirm the adoption panel—meaning both district court judgments must be reversed. We hold grandfather pled sufficient facts to advance a colorable party-in-interest claim in the adoption proceeding under K.S.A. 2023 Supp. 59-2112(h)(1) (parent), (h)(2) (prospective adoptive parent), (h)(3) (adoptive parent), and (h)(4) (legal guardian). Likewise, he pled sufficient facts under K.S.A. 23-2208(a)(4) (notorious recognition) to prosecute his parentage claim. Either way, grandfather should have been allowed to intervene in the adoption

case, so the competing interests could be adequately addressed. See K.S.A. 2023 Supp. 59-2136(h)(1) ("When a father or alleged father appears and claims parental rights, the [adoption] court shall determine parentage . . . ."); K.S.A. 23-2210(a) (parentage case may be joined with an adoption proceeding). As the adoption panel succinctly put it,

> "When there is much love, there can be much struggle. This adoption case is an example. The appearance of this case to an observer could lead to the conclusion that Grandmother simply won the race to the courthouse and snatched her grandson away from Grandfather. Claims of six years of custody should not be ignored when deciding the propriety of an adoption." *In re Adoption of E.A.*, 2024 WL 1476802, at *11.

Like the adoption panel, we underscore that we are not deciding who has the better case on the merits. This is a dispute that should be properly resolved by the district court. See 2024 WL 1476802, at *1 ("[We] are simply ruling that the grandfather should be afforded an opportunity to present his case.").

We remand the parentage case to the district court with directions that it be consolidated with the adoption case, which is also remanded for further proceedings consistent with this opinion. We vacate the adoption decree and direct that the adoption case return to its status on May 31, 2019, when the adoption court placed the boy in the temporary custody of grandmother and her husband. We do this with the understanding that temporary custody may be subject to reconsideration after remand to determine what is in the boy's best interests given the passage of time and in accordance with K.S.A. 59-2131 and K.S.A. 2023 Supp. 59-2132. See *In re Adoption of Baby Girl P.*, 291 Kan. 424, 436-37, 242 P.3d 1168 (2010) (directing court to carefully consider potential distress from child's custody transitions). We enter these orders "fully aware that painful challenges and traumas lie ahead for those involved." *In re Adoption of C.L.*, 308 Kan. 1268, 1269, 427 P.3d 951 (2018).

FACTUAL AND PROCEDURAL BACKGROUND

E.A. was born to an unmarried couple in December 2012. When he was seven months old, his birth parents—C.A. and J.B.—permitted his paternal grandfather, D.A., to take physical

custody and raise the boy as his own child. In October 2013, grandfather arranged for a court to declare C.A. to be the biological father and J.B. to be the biological mother. The court also granted C.A. temporary sole custody with supervised visitation for the mother.

In January 2014, the biological father signed a document entitled "Custody Relinquishment" agreeing he was transferring E.A.'s physical custody to grandfather and granting grandfather sole responsibility to make medical, educational, financial, and "any other type of decisions" in the boy's best interests.

In August 2018, E.A.'s biological father signed a "Consent to Adoption of Minor Child," in which he agreed to "permanently" give up "all custody and other parental rights" over E.A. and consented to the boy's adoption by grandfather. But this document was never filed with any court and effectively expired after six months. See K.S.A. 2023 Supp. 59-2114(b). Mother was not a party to this consent or the custody relinquishment.

From August 2013 to May 2019, the boy lived continuously and exclusively with grandfather and his family. He was integrated as a household member, which included a mother and three siblings. Throughout this time, E.A. knew grandfather as his father. The boy was widely known by friends, neighbors, teachers, and acquaintances as the family's youngest child. The biological mother had no contact with the boy and provided no support. The biological father had only incidental contact with E.A., as a sort of older brother, but not as a parent.

Everything changed on May 31, 2019, when paternal grandmother, S.P., and her husband, D.P., asked for visitation with E.A. and did not bring him back. Unbeknownst to grandfather, they had filed the week before a petition in Shawnee County District Court to adopt E.A., terminate the biological parents' rights, and place the boy in their temporary custody. Their pleadings included signed consents by E.A.'s biological parents to this adoption. The petition falsely asserted the boy had been living with grandmother and her husband for "the past five years." See K.S.A. 2023 Supp. 59-2128(a)(4) (requiring petitioners to provide a sworn account of the child's residence over the last five years). The adoption court

placed E.A. in their temporary custody on May 31, and they cut off all contact with grandfather's family.

When he learned of this because of K.S.A. 2023 Supp. 59-2133(b) (mandating notice of adoption proceedings to "any person who has physical custody of the child"), grandfather filed multiple motions to stop what was happening. On June 4, he tried to set aside the temporary custody order and requested an emergency hearing. On June 5, he moved to confirm what he described as his existing de facto custody of E.A. On June 6, he filed a cross-petition in the adoption case to establish his parentage of E.A. and object to S.P. and D.P.'s third-party adoption. On June 13, he sought to intervene as a party in interest in the adoption case. On that same date, he commenced a separate paternity action in Shawnee County District Court, alleging he was E.A.'s presumed father for purposes of the Kansas Parentage Act, K.S.A. 23-2201 et seq. See K.S.A. 23-2208(a)(4) ("A man is presumed to be the father of a child if . . . [t]he man notoriously or in writing recognizes paternity of the child.").

On June 17, the adoption court denied grandfather's petition to intervene. It reasoned the biological father's paternity was already established, and that the biological father's previous consent to have grandfather adopt E.A. had expired under K.S.A. 2018 Supp. 59-2114(b). It also noted K.S.A. 2018 Supp. 59-2112(h) specifies who qualifies as a "party in interest" in adoption proceedings, and that it does not list grandparents. The court found grandfather lacked statutory standing and denied his petition to intervene. Later that day, it issued another order denying all other pending motions and petitions.

The following day, June 18, the adoption court issued an adoption decree favoring grandmother and her husband and terminating the biological parents' parental rights. On June 21, grandfather asked the court to reconsider those rulings, moved to stay the adoption, or, alternatively, gave notice of appeal. In this filing, he expressed frustration with the adoption court's "huge rush" to proceed. Those motions, however, languished on the court's docket until July 2022 when the adoption court denied them and entered a final adoption order.

Meanwhile, the separate parentage action moved ahead. Grandfather argued he had established a parental relationship and legal custody with E.A. through the biological father's consent and the biological mother's acquiescence. Grandfather admitted he was not the biological father but claimed the child regarded him as his father. From all that, grandfather contended he should be presumed to be E.A.'s father under K.S.A. 23-2208(a)(4) (notorious recognition of paternity). He also claimed the biological parents were unfit, even though he had never formally pursued terminating their parental rights under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq. Finally, grandfather conceded "the natural parents were still the legal parents" when he filed the parentage action.

The parties both moved for summary judgment, and the parentage court held a hearing in August 2020. The court asked if the adoption had been finalized, and grandfather's attorney confirmed it had not because the reconsideration motion remained pending. Nevertheless, the court did not consolidate the two cases, nor did either party request consolidation. See K.S.A. 23-2210(a) (allowing a parentage action to "be joined with" an adoption action).

In its written ruling denying grandfather relief, the parentage court noted grandmother and her husband did not dispute grandfather's factual assertions, including that E.A. had lived continuously and exclusively with the grandfather's family and that the boy believed grandfather was his father. Even so, the court dismissed the paternity petition for three reasons. First, it held grandfather lacked statutory standing in the adoption case under K.S.A. 2020 Supp. 59-2112(h). Second, collateral estoppel, res judicata, and the law-of-the-case doctrine prevented grandfather from "getting a second bite at the same apple" because of the adoption court's earlier rulings in June 2019. Third, it held that no presumptive parentage could exist under the Parentage Act when legal parentage had already been established in the adoption case.

Grandfather appealed the parentage court's ruling while the adoption case remained stuck in district court.

The Parentage Case Appeal

The parentage panel affirmed the parentage court's outcome but for different reasons. It held the lower court should not have based its denial of grandfather's claims on preclusion doctrines but on the reasoning from *In re M.F.*, 312 Kan. 322, 475 P.3d 642 (2020), in which a nonbiological mother sought to establish maternity of her former same-sex partner's child under K.S.A. 2019 Supp. 23-2208(a)(4). The *M.F.* court remanded to consider evidence of when exactly the birth mother allegedly consented to sharing parental rights. See *In re M.F.*, 312 Kan. at 323 ("We rule that such a partner can be recognized as a legal parent through use of K.S.A. 2019 Supp. 23-2208[a][4] when the birth mother has consented to shared parenting at the time of the child's birth.").

The panel majority applied *M.F.*'s timing factor to uphold dismissing grandfather's parentage case, because he "did not claim paternity at the time of the boy's birth" but only did so months later. *In re Parentage of E.A.*, 62 Kan. App. 2d at 509. The majority then summarized its thoughts, expressing empathy for the case's outcome under the facts:

> "We hold that Grandfather is not entitled to summary judgment and the district court was correct to dismiss the case because he has failed to show the timeliness of his 'notoriously or in writing' acknowledgment of his paternity of E.A.
>
> "Turning to his claims of paternity, we are struck by the number of years that Grandfather has fulfilled the role of parent for E.A. and the suddenness of Grandmother's and D.P.'s taking the child, denying Grandfather access to the boy, and then quickly filing for adoption. We have no insight into the reasoning of the adoption court because of our very limited record. Had these facts been presented, would they have made any difference in the adoption court's ruling? We do not know.
>
> "But we do know that Grandfather had several years to adopt this child and did not. The consent to adopt that he had from E.A.'s father expired after six months. Given the facts here, the birth parents—the only two who could consent to an adoption—could have consented to Grandfather's adoption of their son earlier. But the fact remains, they did consent to Grandmother's and D.P.'s desire to adopt.
>
> "We recognize that fact patterns similar to these will arise again, given the nature of human relationships. The only reasonable way to litigate these issues, given the nature of the Parentage Act and the Adoption and Relinquishment Act, is for them to be decided in the same action. We hold that the proper action must be brought under an adoption case." *In re Parentage of E.A.*, 62 Kan. App. 2d at 526-27.

Judge Gordon Atcheson concurred in the result, pointedly observing "this case is a something of a procedural mess." 62 Kan. App. 2d at 528 (Atcheson, J., concurring). He criticized the panel majority for what he saw as an "unwarranted expansion" of *M.F.* and noted two reasons why grandfather's statutory paternity presumption failed. 62 Kan. App. 2d at 530. First, he said the record plainly established grandfather was not E.A.'s biological parent and, to his detriment, grandfather never initiated adoption proceedings himself. Second, even if grandfather established a parentage presumption, it was rebutted by the 2013 journal entry declaring grandfather's son to be the boy's biological father. 62 Kan. App. 2d at 533-34.

Grandfather requested our review of the parentage panel's decision, raising two questions: Whether the panel erred in applying the holding from *In re M.F.*, 312 Kan. 322, Syl. ¶ 5 (introducing a timing requirement for the notorious recognition of parentage under K.S.A. 2019 Supp. 23-2208[a][4] in the context of same-sex parents); and whether his status as de facto parent should allow him to intervene in the adoption proceeding. We granted review but delayed our consideration pending decisions in the still lingering adoption case.

The Resumed Adoption Case and Its Appeal

After a three-year dormancy it attributed to a mistake, the adoption court finally took up in 2022 grandfather's 2019 reconsideration motion and rejected it. The court found consideration of his arguments at this time "would create an unnecessary controversy" and reaffirmed the earlier ruling that grandfather lacked standing. In doing so, the court primarily relied on K.S.A. 2022 Supp. 59-2112(h), which defines a "party in interest," and K.S.A. 2022 Supp. 59-2134(a), which directs the court to consider evidence "offered by any party in interest." The court also found the birth parents were the judicially determined biological parents, emphasizing Kansas law recognizes only two parents.

Grandfather filed another notice of appeal in the adoption case, contending his earlier 2019 notice of appeal should have been effective once the court issued its final order in 2022, citing Supreme Court Rule 2.03(a) (2022 Kan. S. Ct. R. at 15) (providing

a premature notice of appeal ripens into a valid notice of appeal once "the actual entry of judgment" is filed). The adoption panel exercised appellate jurisdiction over grandmother and her husband's objection. *In re Adoption of E.A.*, 2024 WL 1476802, at *4.

The adoption panel then reversed the district court, vacated the decree, and remanded the case for another hearing on the adoption after granting grandfather interested party status under K.S.A. 2023 Supp. 59-2401a(e)(8) (giving the court the legal authority to grant party "interested party status"). It also directed the district court to allow grandfather a chance on remand to present evidence supporting his paternity claim. Finally, it instructed the court "to make further inquiry on whether there was a fraud committed here." 2024 WL 1476802, at *11. Its decision is best understood by this passage:

> "While the statutory analysis may not fall in Grandfather's favor, the idea that an adoption court *could not* hear from a person with relevant evidence if the child's best interests were in question has the potential to lead to absurd results. We presume the Legislature does not intend absurd or unreasonable results. *In re M.F.*, 312 Kan. at 351. The district court's decision that K.S.A. 2018 Supp. 59-2134(a) was written to purposely preclude presentation of relevant evidence in all adoption cases is an absurd result and cannot be the intent of the Legislature. We do not interpret the statute to mean that all grandparents can intervene in their grandchild's adoption. These cases are fact driven." 2024 WL 1476802, at *9.

Grandmother and her husband petitioned this court for review of the adoption panel's decision reversing their adoption decree, arguing the panel ignored the statutory definition of "party in interest" provided in K.S.A. 2023 Supp. 59-2112(h). We granted review and consolidated this case with the parentage case.

We have jurisdiction over both appeals. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 2023 Supp. 60-2101(b) (providing Supreme Court has jurisdiction "to correct, modify, vacate or reverse any act, order or judgment of a district court or court of appeals" to ensure it is "just, legal and free of abuse").

APPELLATE JURISDICTION

Despite having previously objected to the panel's appellate jurisdiction under K.S.A. 2023 Supp. 59-2401a, grandmother and

her husband do not contest it now. Still, we have an obligation to ensure our jurisdiction, so we consider first whether grandfather has standing to appeal the adoption action. See *Kaelter v. Sokol*, 301 Kan. 247, Syl. ¶ 1, 340 P.3d 1210 (2015). We hold we have jurisdiction.

Standard of Review

In Kansas, appellate jurisdiction is defined by statute. Kan. Const. art. 3, § 3 ("The supreme court shall have . . . such appellate jurisdiction as may be provided by law."); *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 609, 244 P.3d 642 (2010) ("Appellate jurisdiction is defined by statute; the right to appeal is neither a vested nor a constitutional right."). As such, appellate courts only exercise jurisdiction in circumstances the Legislature permits; they do not have discretionary power to hear appeals from all district court orders. *Svaty*, 291 Kan. at 609-10.

In adoption appeals, two statutes are relevant to jurisdiction. K.S.A. 60-2101 governs generally, and K.S.A. 2023 Supp. 59-2401a applies specifically to adoptions. Here, the key issue is whether K.S.A. 2023 Supp. 59-2401a allows grandfather to challenge the adoption court's ruling, which denied him standing. Answering that question requires statutory interpretation, so our review is unlimited. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 908, 416 P.3d 999 (2018).

Discussion

K.S.A. 2023 Supp. 59-2401a sets the rules for appealing adoption cases. The relevant provisions are:

"(b) An appeal by *an interested party* from a district judge . . . to an appellate court shall be taken pursuant to article 21 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, *from any final order, judgment or decree* entered in any proceeding pursuant to:

(1) *The Kansas adoption and relinquishment act*, K.S.A. 59-2111 et seq., and amendments thereto;

. . . .

"(e) As used in this section, '*interested party*' means:

(1) *The parent* in a proceeding pursuant to the Kansas adoption and relinquishment act, K.S.A. 59-2111 et seq., and amendments thereto;

. . . .

(7) *the petitioner* in the case on appeal; and

(8) *any other person granted interested party status* by the court from which the appeal is being taken." (Emphases added.) K.S.A. 2023 Supp. 59-2401a.

Before the panel, grandmother and her husband argued grandfather lacked statutory standing to appeal the adoption case because he was not E.A.'s parent or the petitioner in the adoption action, nor was he granted interested party status by the court. Grandfather countered, arguing he could not be barred from appealing denial of his standing merely because the adoption court determined he lacked it. He urged the adoption panel to ignore this circular reasoning and exercise *parens patriae* authority based on the case's extraordinary circumstances, citing *In re M.M.L.*, 258 Kan. 254, 264, 900 P.2d 813 (1995).

The adoption panel accepted grandfather's invitation to exercise *parens patriae* authority, relying on *Frazier v. Goudschaal*, 296 Kan. 730, 747, 295 P.3d 542 (2013) (upholding jurisdiction on various grounds, including Kansas courts' "*parens patriae* function of protecting our children"). *In re Adoption of E.A.*, 2024 WL 1476802, at *7. But doing so was both unnecessary and wrong. It was unnecessary because grandfather already has the right to appeal as an "interested party" under K.S.A. 2023 Supp. 59-2401a, since he qualifies as both "[t]he parent" and "the petitioner" in subsections (e)(1) and (e)(7). And it is mistaken because the right to appeal is "entirely statutory," so no other avenue for appeal—including *parens patriae*—exists. See *In re Care & Treatment of Emerson*, 306 Kan. 30, 34, 392 P.3d 82 (2017).

K.S.A. 2023 Supp. 59-2401a(e)(1) provides grandfather a basis to appeal under the "parent" category, as an "alleged father," since he claimed parental rights in the district court. See K.S.A. 2023 Supp. 59-2136(h)(1). This aligns with the Kansas Adoption and Relinquishment Act's recognition of various types of "parents" such as: a "parent whose parental rights have not been terminated," "a prospective adoptive parent," "an adoptive parent," and "a birth parent." K.S.A. 2023 Supp. 59-2112(h)(1)-(3); K.S.A. 59-2118(b). Unlike *T.M.M.H.*, in which the appellate court could not consider a parentage claim that was raised for the first time on appeal and supported by a theory not recognized in Kansas, E.A.'s grandfather properly asserted his parentage claims to the district

court under the statutorily based "presumed father" theory. See *In re Adoption of T.M.M.H.*, 307 Kan. at 912-13, 918-19.

Grandfather also achieved "petitioner" status under K.S.A. 2023 Supp. 59-2401a(e)(7) by filing a cross-petition claiming to be E.A.'s de facto adoptive father. While this cross-petition primarily sought a declaration recognizing his existing relationship with the child, it also operates as a separate adoption claim that competes with the one filed by grandmother and her husband. We hold we have jurisdiction over grandfather's appeal.

STANDING TO INTERVENE

Having considered who may appeal adoption rulings as an "interested party" under K.S.A. 2023 Supp. 59-2401a, we now shift to who may offer evidence during an adoption hearing as a "party in interest" under K.S.A. 2023 Supp. 59-2112(h). See K.S.A. 2023 Supp. 59-2134(a). The statute provides:

> "(h) 'party in interest' means:
> (1) A parent whose parental rights have not been terminated;
> (2) a prospective adoptive parent;
> (3) an adoptive parent;
> (4) a legal guardian of a child;
> (5) an agency having authority to consent to the adoption of a child;
> (6) the child sought to be adopted, if over 14 years of age and of sound intellect; or
> (7) an adult adoptee." K.S.A. 2023 Supp. 59-2112(h).

Standard of Review

Whether a party has standing is usually a legal question, although it can involve factual determinations depending on the stage in the proceedings. Here, both district courts rejected grandfather's standing at the pleading stage where his burden was simply to demonstrate a prima facie case for standing when viewed in the light most favorable to the party asserting standing. See *In re Adoption T.M.M.H.*, 307 Kan. at 915-16.

To address standing based on the stage at which the adoption court ruled as a matter of law, we must accept as true grandfather's allegation that he was the only father figure E.A. knew. See *Board of County Commissioners of Sumner County v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008) (In a motion to dismiss based on

standing, a court must "accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom. If those facts and inferences demonstrate that the appellants have standing to sue, the decision of the district court must be reversed."). This purely legal question is subject to de novo review. And the impact of relevant statutes and the agreements with the biological father on grandfather's standing are also legal questions, subject to unlimited review. See *In re Adoption of T.M.M.H.*, 307 Kan. at 908.

Discussion

When denying grandfather's motion to intervene, the adoption court reasoned he was not among the enumerated individuals allowed to present evidence, and, as a result, lacked standing to intervene. But this overlooks the appropriate task for this stage of the proceedings. Grandfather needed only to present a prima facie case for standing to meet his burden. And taking his allegations at face value—that he was E.A.'s only father figure—the adoption court prematurely denied him standing.

Grandfather pled sufficient facts supporting his claim that he was a party in interest. He asserted he was E.A.'s father and implied his parental rights had not been terminated. He also claimed he was a de facto or prospective adoptive father by referencing the agreements with E.A.'s biological father. And according to the documents accompanying his pleadings, the biological father, who had temporary sole custody under the 2013 court order, permanently relinquished his parental rights and provided for the transfer of E.A.'s physical custody granting exclusive authority over his medical, educational, and financial decisions to grandfather in 2014.

Accepting these allegations as true, grandfather qualifies as a party in interest under K.S.A. 2023 Supp. 59-2112(h)(1) (parent), (h)(2) (prospective adoptive parent), (h)(3) (adoptive parent), and (h)(4) (legal guardian). Additionally, grandfather appeared and claimed parental rights pursuant to K.S.A. 2023 Supp. 59-2136(h)(1), seeking to establish paternity under K.S.A. 23-2208(a)(4) (notorious recognition). In such a circumstance, the adoption court was obliged to determine parentage before ruling

on the adoption petition. As a result, K.S.A. 2023 Supp. 59-2136(h)(1) further grants him standing to intervene.

Viewing the factual allegations in the light most favorable to grandfather, he established a prima facie case for standing. The adoption court should have allowed him to intervene and present evidence in the adoption proceeding and permit full consideration of his paternity claim. Denial of his intervention was premature.

We remand both the parentage and adoption cases to the district court. The parentage case is to be consolidated with the adoption case for further proceedings consistent with this opinion. We vacate the adoption decree and direct the adoption case rewind to its status on May 31, 2019, when the boy was placed in the temporary custody of grandmother and her husband. As such, the remaining appealed issue of *M.F.*'s applicability is moot. This decision comes with the understanding that temporary custody may be subject to reconsideration after remand to determine what is in the boy's best interests given the passage of time in accordance with K.S.A. 59-2131 and K.S.A. 2023 Supp. 59-2132.

We further direct that a new senior judge be appointed to hear the consolidated cases on remand to the district court. After the appointment, the new judge may wish to consider a guardian ad litem appointment under K.S.A. 23-2219(b).

Finally, we address the adoption panel's concerns "about the events surrounding the filing of the [adoption] petition" by grandmother and her husband that led it to ask the district court on remand "to make further inquiry on whether there was a fraud committed here." *In re Adoption of E.A.*, 2024 WL 1476802, at *11. We share those concerns, but rather than direct such an inquiry as the panel's language suggests, we leave it to the district court's sound discretion as the proceedings continue.

Judgment of the Court of Appeals in No. 123,710 affirming the district court is reversed. Judgment of the district court in that case is reversed and the case is remanded with directions. Judgment of the Court of Appeals in No. 125,994 reversing the district court is affirmed. Judgment of the district court in that case is reversed, the adoption decree is vacated, and the case is remanded with directions.

WILSON, J., not participating.

* * *

STEGALL, J, concurring in part and dissenting in part: I concur with the majority that grandfather had interested party status in the adoption case under K.S.A. 2023 Supp. 59-2112(h)(2) and (h)(4) as both a prospective adoptive parent and as a legal guardian. He therefore had standing and should have been permitted to intervene in that case. I disagree, however, with the conclusion that grandfather had interested party status under either subsections (h)(1) or (h)(3) as a parent or an adoptive parent.

I will not belabor here my longstanding disagreement with our interpretation of the Kansas Parentage Act. "Under Kansas law, biology and adoption are the only two ways a parent-child relationship can be forged. . . . The [Kansas Parentage Act, K.S.A. 23-2201 et seq.] succeeds in creating a coherent whole by ending where it begins—that in Kansas, the exclusive routes to parenthood are biology and adoption." *In re Adoption of T.M.M.H.*, 307 Kan. 902, 927, 930, 416 P.3d 999 (2018) (Stegall, J., concurring in result and dissenting). Here, the record is clear that grandfather cannot be E.A.'s biological father in fact or via a legal presumption. The record also establishes that grandfather is not currently an adoptive parent.

The majority's analysis of grandfather's status as an "alleged father" under K.S.A. 2023 Supp. 59-2112(h)(1) continues to display a misguided interpretation of the Kansas Parentage Act and the Kansas Adoption and Relinquishment Act by beginning and ending with the observation that grandfather "asserted he was E.A.'s father." 319 Kan. at 760. I recently predicted that the majority's approach to these issues would lead to cases such as this where "people in Grandparents' situation (and the attorneys who represent them) will simply assert loudly and often that, yes, they are also legal parents of the child in question." *In re L.L.*, 315 Kan. 386, 398, 508 P.3d 1278 (2022) (Stegall, J., concurring). Today's decision only endorses this practice of "'saying it makes it so.'" *In re W.L.*, 312 Kan. 367, 386, 475 P.3d 338 (2020) (Stegall, J., dissenting).

I have written extensively on these problems in this now long line of cases. See *In re Parentage of R.R.*, 317 Kan. 691, 711, 538

P.3d 838 (2023) (Stegall, J., dissenting); *In re L.L.*, 315 Kan. at 398; *In re M.F.*, 312 Kan. 322, 353, 475 P.3d 642 (2020) (Stegall, J., dissenting); *In re W.L.*, 312 Kan. at 385 (Stegall, J., dissenting); *In re Adoption of Baby Girl G.*, 311 Kan. 798, 808, 466 P.3d 1207 (2020) (Stegall, J., dissenting); *In re Adoption of T.M.M.H.*, 307 Kan. at 927 (Stegall, J., concurring in result and dissenting). Consistent with my prior opinions, I dissent from the portion of today's decision concerning both the underlying paternity action and grandfather's interested party status in the adoption action under K.S.A. 2023 Supp. 59-2112(h)(1) and (h)(3).

POM of Kansas v. Kobach

No. 126,037

POM OF KANSAS, LLC, *Plaintiff-Appellant*, v. KRIS KOBACH, Kansas Attorney General, KANSAS RACING AND GAMING COMMISSION, and SUZANNE VALDEZ, Douglas County District Attorney, *Defendants-Appellees*, and BHCMC, LLC, BOYD GAMING CORPORATION, and KANSAS ENTERTAINMENT, LLC, *Intervenors-Appellees*.

(561 P.3d 506)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Declaratory Judgment Actions—Must Satisfy Kansas' Case-or-Controversy Requirement*. K.S.A. 60-1701 empowers courts to declare rights, statuses, and other legal relations whether or not further relief is or could be sought. But declaratory judgment actions, like all suits, must still satisfy Kansas' case-or-controversy requirement.

2. JURISDICTION—*Establishing Standing by Plaintiffs—Two-Part Test.* To establish standing, plaintiffs in Kansas courts must satisfy a two-part test: they must demonstrate a cognizable injury and a causal connection between the injury and the challenged conduct. A cognizable injury need not be current—an impending, probable future harm can suffice. Whether a future harm is impending and probable turns on the case-specific facts.

3. SAME—*Motion to Dismiss for Lack of Subject-Matter Jurisdiction—Plaintiff Must Make Prima Facie Showing of Jurisdiction – Appellate Review*. When a district court rules on a defendant's K.S.A. 60-212(b)(1) motion to dismiss for lack of subject-matter jurisdiction before trial based on the pleadings, affidavits, and other written materials without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor, and the plaintiff need only make a prima facie showing of jurisdiction. Appellate courts then exercise unlimited review, examining these materials anew rather than deferring to the district court's evaluation.

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Oral argument held October 30, 2024. Opinion filed December 27, 2024. Affirmed in part, vacated in part, and remanded with directions.

Thomas J. Hamilton, of Duggan Shadwick Doerr & Kurlbaum LLC, of Overland Park, argued the cause, and *Jay T. Shadwick*, *John M. Duggan*, and *Dustin D. Rucinksi*, of the same firm, were with him on the briefs for appellant.

Dwight R. Carswell, deputy solicitor general, argued the cause, and *Kris W. Kobach*, attorney general, was with him on the brief for defendants-appellees.

Ryan J. Loehr, of The Edgar Law Firm LLC, of Kansas City, Missouri, argued the cause, and *Matthew R. Watkins*, of the same firm, was with him on the brief for intervenors-appellees.

The opinion of the court was delivered by

WALL, J.: POM of Kansas owns and distributes Dragon's Ascent, an arcade game that challenges players to shoot dragons for prizes that they can redeem for cash. Concerned their game might be labeled an illegal gambling device, POM sought state agencies' approval before launching in Kansas. When the agencies declined to weigh in, POM moved forward anyway and filed this lawsuit.

The lawsuit seeks a judgment declaring that the Kansas Expanded Lottery Act does not apply to Dragon's Ascent, that the game complies with Kansas' criminal gambling statutes, and that those statutes are unconstitutionally vague. But before reaching these questions, we must consider our constitutional authority to answer them. And that consideration resolves this case.

The Kansas Constitution places limits on judicial power. One such limit requires courts to interpret and apply laws only in actual cases or controversies. To satisfy this case-or-controversy requirement, a party must have legal standing to sue. Because POM has not shown any credible threat of prosecution or injury traceable to the parties they sued, the company lacks standing. We understand POM's desire to confirm that Dragon's Ascent complies with Kansas law. But we cannot expand our judicial power simply because an answer would be helpful. Thus, we dismiss this appeal for lack of jurisdiction.

FACTS AND PROCEDURAL BACKGROUND

POM began its Kansas operations with a prudent first step. Rather than simply launching Dragon's Ascent in Kansas, the company approached the Kansas Racing and Gaming Commission in early 2019 seeking guidance. Specifically, POM wanted to know whether Dragon's Ascent violated Kansas' criminal gambling statutes. Those statutes generally prohibit using, possessing, manufacturing, or distributing a "gambling device." A gambling device is one that enables an operator to receive money or property as the result of chance. See K.S.A. 21-6403 to K.S.A. 21-6408.

The Commission agreed to test the game, but it set strict boundaries. It would offer no formal opinion on the game's legality, and POM could neither treat the review as an endorsement nor use it for marketing purposes.

Impatient with the pace of review, POM chose to move forward. POM informed the Racing and Gaming Commission that it would launch Dragon's Ascent, which prompted the Commission to halt its evaluation. POM then began demonstrating the game to various law-enforcement agencies. These efforts complicated matters.

The Racing and Gaming Commission believed POM was using its prior interactions with the Commission to suggest to the law-enforcement agencies that Dragon's Ascent was legal. In response, POM wrote to Kansas district attorneys, sheriffs, and police chiefs to clarify the situation. It stated that the Commission "has not made a determination that the [g]ame is skill-based nor has it determined that the [g]ame is an illegal gambling device."

The Racing and Gaming Commission countered with its own letter to law-enforcement organizations. It said that several Commission staff members had tested Dragon's Ascent and found that it "involved some skill, but contained too many non-skill features, to allow mastery." The Commission also reported that one player had "placed a heavy can on the joy stick, which allowed continuous firing, and beat all of the staff members attempting to win with skill."

Yet the Racing and Gaming Commission's letter did not declare the game illegal. It emphasized that no formal opinion had been provided on whether Dragon's Ascent "was predominantly skill-based or predominantly chance-based." And it suggested that such a determination was "not feasible" because the game's "source code can be easily changed and downloaded to the game machine without anyone being aware." The letter concluded by reminding officers that seizing any suspected gambling device required probable cause—which meant playing the game and "watching for signs that the prize is awarded predominantly as a result of chance."

In a final effort to have Dragon's Ascent deemed a legal game, POM met with then-Attorney General Derek Schmidt and his

staff. The discussion revealed that Kansas lacked a formal process to certify games as skill-based rather than chance-based. When an assistant attorney general suggested filing for declaratory judgment, the company apparently took the advice.

One month later, POM filed this action in Douglas County District Court seeking a declaration that Dragon's Ascent did not violate Kansas' criminal gambling statutes. POM argued that its game was purely skill-based—players could learn the dragons' fixed, pre-set patterns.

The case has followed a winding procedural path. Though POM initially sued many government entities, the list eventually narrowed to three defendants: the Attorney General, the Racing and Gaming Commission, and the Douglas County District Attorney. POM's claims expanded too. What began as a request for a declaration about Dragon's Ascent's legality grew to include constitutional challenges to criminal gambling statutes and questions about whether the Kansas Expanded Lottery Act applied.

Also, three companies that operate casinos in Kansas sought to join the fray. They moved to intervene, arguing that Dragon's Ascent was not only illegal but also causing them financial harm. And they simultaneously filed a separate action against POM in Wyandotte County, claiming Dragon's Ascent tortiously interfered with the casinos' business interests.

The Racing and Gaming Commission and the Douglas County District Attorney moved to dismiss. Through affidavits, they sought to establish that they had neither investigated Dragon's Ascent nor formed any opinion on its legality. And without a credible threat of prosecution, they argued, POM lacked standing to sue them. The Attorney General charted a slightly different course. While challenging standing on some claims, the Attorney General opted to defend the constitutionality of the criminal gambling statutes on the merits.

The district court addressed the motion to intervene and the motions to dismiss in the same order. It dismissed the Racing and Gaming Commission and Douglas County District Attorney, ruling that no real controversy existed because neither defendant had investigated the game nor threatened prosecution. But the court kept the Attorney General in the case because he had "conceded"

that the constitutional challenges raised "'a justiciable controversy.'" Finally, the court granted the casinos' motion to intervene, though only as to POM's constitutional challenges. The district court then transferred the case to Shawnee County.

Once transferred, the Attorney General moved to dismiss POM's Expanded Lottery Act claim under K.S.A 2021 Supp. 60-212(b)(1) for lack of subject-matter jurisdiction. And he sought judgment on the pleadings under K.S.A. 2021 Supp. 60-212(c) on the constitutional claims. The Attorney General also asserted that the Douglas County District Court's previous order had dismissed POM's claim for a declaratory judgment on the legality of Dragon's Ascent.

The court granted the Attorney General's motion. It dismissed POM's Expanded Lottery Act claim for lack of jurisdiction after finding that POM had failed to establish standing. It rejected the constitutional challenges on the merits. And it concluded that the Douglas County District Court had already dismissed POM's request for a declaratory judgment on the legality of Dragon's Ascent for lack of jurisdiction.

POM appealed directly to our court under K.S.A. 2023 Supp. 60-2102(b)(2). That provision allows a party to appeal directly to our court in cases "arising out of any provision of the Kansas expanded lottery act." In the district court, POM had sought a declaration that Dragon's Ascent was not an "electronic gaming device" under K.S.A. 2022 Supp. 74-8702(d), part of the Expanded Lottery Act. Although that claim was dismissed without reaching the merits, it arose from the Act's provisions, and POM continues to contest the dismissal. This connection to the Expanded Lottery Act establishes that our court is the proper forum for this appeal.

We heard oral argument from the parties and intervenors on October 30, 2024.

ANALYSIS

This case turns on standing. POM raises three of its original claims in this appeal: first, that the Kansas Expanded Lottery Act does not apply to its arcade game; second, that its arcade game does not violate Kansas' criminal gambling statutes; and third, that

the word "chance" in those gambling statutes renders them unconstitutionally vague. But before reaching the merits of any of these claims, we must consider whether POM has standing to bring them at all. That question is jurisdictional—if the plaintiff lacks standing to bring a claim, Kansas courts lack authority to resolve it, even if all parties seek resolution. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896-98, 179 P.3d 366 (2008).

We begin by explaining the standing principles that govern this appeal. We then examine the framework guiding a court's analysis of subject-matter jurisdiction at the motion-to-dismiss stage. And finally, applying these principles and frameworks, we analyze POM's legal standing and conclude that the courts lack jurisdiction.

I. *Kansas recognizes both present and "impending, probable" future harm as a cognizable injury when deciding a party's legal standing.*

POM seeks review of three claims raised under Kansas' declaratory-judgment statute. That statute gives courts authority to "declare the rights, status, and other legal relations whether or not further relief is, or could be sought." K.S.A. 60-1701. But this statutory authority does not confer jurisdiction over cases that Kansas courts could not otherwise hear.

The Kansas Constitution, through its implicit separation of powers, limits a court's exercise of judicial power to actual cases or controversies. 285 Kan. at 896. Declaratory-judgment actions, like all suits, must satisfy this case-or-controversy requirement. 285 Kan. at 897-98. Absent "'controversies between rival litigants,'" Kansas courts lack authority to issue advisory opinions in declaratory judgment actions. 285 Kan. at 896-98 (quoting *State, ex rel. Brewster v. Mohler*, 98 Kan. 465, 471, 158 P. 408 [1916]).

The case-or-controversy requirement at issue here is standing. See *Sebelius*, 285 Kan. at 896 (listing four case-or-controversy requirements). To establish standing, plaintiffs in Kansas courts must satisfy a two-part test: they must demonstrate a "'cognizable injury'" and "'a causal connection between the injury and the challenged conduct.'" *League of Women Voters of Kansas v. Schwab*, 317 Kan. 805, 813, 539 P.3d 1022 (2023). A cognizable injury

need not be current—our cases recognize that an "'impending, probable'" future harm can suffice. 317 Kan. at 813 (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 [2013]). Whether a future harm is "impending" and "probable" turns on case-specific circumstances rather than any categorical rule.

With these standing principles in mind, we turn to a preliminary question: what framework guides our review of standing at the motion-to-dismiss stage?

II. *When a district court rules on a defendant's K.S.A. 60-212(b)(1) motion to dismiss for lack of subject-matter jurisdiction before trial based on the pleadings, affidavits, and other written materials, any factual disputes must be resolved in the plaintiff's favor, and the plaintiff need only make a prima facie showing of jurisdiction.*

When moving to dismiss POM's claims under K.S.A. 2023 Supp. 60-212(b)(1), the defendants argued that the district court could look beyond the pleadings to evaluate jurisdiction without converting the motion to dismiss into one for summary judgment. They relied on federal caselaw and *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 263-65, 275 P.3d 869 (2012). In *Aeroflex*, the court recognized a district court's broad discretion to examine documents, permit jurisdictional discovery, or hold an evidentiary hearing when ruling on motions to dismiss for lack of personal jurisdiction under K.S.A. 2011 Supp. 60-212(b)(2). The district court followed a Court of Appeals decision that had extended *Aeroflex*'s principles to motions challenging subject-matter jurisdiction under K.S.A. 2017 Supp. 60-212(b)(1). See *Parisi v. Unified Gov't of Wyandotte County*, No. 118,284, 2018 WL 5728439, at *3-5 (Kan. App. 2018) (unpublished opinion). Applying that framework, the court considered both POM's well-pleaded facts and additional materials like affidavits and the Racing and Gaming Commission's letter to law enforcement.

We need not look to the Court of Appeals or federal caselaw. Our court has already extended *Aeroflex* to a court's evaluation of subject-matter jurisdiction at the motion-to-dismiss stage. See *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1122, 307 P.3d 1255 (2013) (applying *Aeroflex* because "we see no basis for an analytical

distinction in how an appellate court should review a district court's order on a motion to dismiss based on standing from one regarding personal jurisdiction").

Under this framework, district courts may handle motions to dismiss in several ways. Before trial, a court may rely on pleadings alone, consider affidavits, permit jurisdictional discovery, or hold an evidentiary hearing. *Aeroflex*, 294 Kan. at 263-65. If the court rules on the motion based on the pleadings and written materials without conducting an evidentiary hearing, it must resolve factual disputes in the plaintiff's favor. 294 Kan. at 270. And the plaintiff need only make a prima facie showing of jurisdiction. 294 Kan. at 270. Appellate courts then exercise unlimited review, examining these materials anew rather than deferring to the district court's evaluation. 294 Kan. at 270.

Having established these principles, we can define our task. The district court assessed jurisdiction before trial based on the pleadings and written materials alone, without an evidentiary hearing. So our charge is straightforward: we must examine those same materials, resolving any factual disputes in POM's favor, to determine whether POM has made a prima facie showing of standing. That showing requires either a present injury or an "impending, probable" future harm, plus a causal connection between that harm and the defendants' conduct.

We now examine each of POM's three claims through this lens.

III. *The courts lack jurisdiction over POM's claims.*

POM argues that the courts have jurisdiction over three claims. The first claim asks the court to declare that the Expanded Lottery Act does not apply to Dragon's Ascent. The second claim asks the court to declare that Dragon's Ascent does not violate Kansas' criminal gambling statutes. The final claim seeks a judgment declaring that those gambling statutes are unconstitutionally vague. Though each claim presents distinct standing issues, none survives scrutiny.

A. *POM lacks standing to seek a declaratory judgment about the Kansas Expanded Lottery Act.*

We begin with POM's request for the court to declare that the Expanded Lottery Act does not apply to Dragon's Ascent because the game is not an "electronic gaming machine" under K.S.A. 2023 Supp.

74-8702(d). POM does not allege that the Act currently affects its operations. Instead, it worries that someday these defendants might argue the Act applies. But this concern is purely speculative.

No defendant has suggested the Expanded Lottery Act applies to Dragon's Ascent. In fact, they agree it does not. And the possibility that some third party might take a different view cannot establish standing to sue these defendants. Without any allegation or evidence that defendants intend to apply the Act to Dragon's Ascent, POM cannot show the "impending, probable" future harm our standing doctrine requires. See *Sierra Club*, 298 Kan. at 33 (injury must be "impending" and "probable," rather than speculative and conjectural to confer standing); see also *Baker v. Hayden*, 313 Kan. 667, 681, 490 P.3d 1164 (2021) ("speculative allegations about possible future injury" were insufficient to confer plaintiff with standing).

B. *POM lacks standing to seek a declaratory judgment that Dragon's Ascent is lawful under Kansas criminal gambling statutes.*

We next address POM's request for a declaration that Dragon's Ascent is legal. Kansas criminal gambling statutes generally prohibit using, possessing, manufacturing, or distributing a "gambling device," a device enabling an operator to receive money or property as the result of chance. See K.S.A. 21-6403(e); K.S.A. 21-6404(a)(2); K.S.A. 21-6407; K.S.A. 21-6408. POM seeks a declaration that Dragon's Ascent does not violate these statutes. It argues the game is purely skill-based—players can learn the dragons' fixed, pre-set patterns, making success dependent on skill rather than chance. POM argues that it has alleged both present and future injuries.

As to present harm, POM alleges that it has had trouble placing Dragon's Ascent in new establishments due to legal uncertainty. According to POM, this uncertainty stems from the refusal of the Racing and Gaming Commission and Attorney General to opine on the game's legality. POM also alleges that Division of Alcohol Beverage Control agents have told bars not to operate the game without official approval.

These allegations might establish cognizable financial injury, but they fail to show the required causal connection to the challenged conduct—the defendants' acts or omissions. The Division of Alcohol Beverage Control is not a defendant—POM dismissed the Division by stipulation earlier in this litigation. POM cannot establish standing by showing a financial injury traceable to the conduct of a nonparty. See *Gannon v. State*, 298 Kan. 1107, 1130-31, 319 P.3d 1196 (2014) (to satisfy causal-connection requirement, injury must be traceable to defendant's conduct, not the result of action of a third party not before the court). And POM's only theory connecting the Commission and Attorney General to this harm is that they created uncertainty by declining to issue a legal opinion. But as POM acknowledges, these entities have no duty to provide such opinions. Indeed, the absence of any regulatory framework for doing so prompted this declaratory-judgment action. Without such a legal duty, POM cannot establish legal standing to sue these defendants. See *Doe No. 1 v. Secretary of Education*, 479 Mass. 375, 386, 95 N.E.3d 241 (2018) (To show standing, it is not enough to show injury from defendant's act or omission; "the defendant must additionally have violated some duty owed to the plaintiff.").

POM also alleges future injuries: potential prosecution or seizure of its devices. To establish these as cognizable injuries, POM points to two things: the Racing and Gaming Commission's letter to law-enforcement agencies and the defendants' refusal to disavow future prosecution. We have recognized that threatened prosecution can satisfy our standing requirements, but only if that threat is impending and probable. See *League*, 317 Kan. at 813 ("[A] plaintiff is not required to 'expose himself to liability before bringing suit to challenge the basis for the threat.'"). So we examine the pleadings, affidavits, and other documents—resolving all factual disputes in POM's favor—to determine whether they show such a threat here.

The Racing and Gaming Commission's letter did note that some staff members thought Dragon's Ascent "involved some skill, but contained too many non-skill features, to allow mastery of the game." And it reported that one player had beaten players trying to use skill simply by placing a heavy can on the joystick.

But the letter then emphasized that the Commission had formed no opinion on whether skill or chance predominated. Indeed, the Commission stated it was "not feasible to give" such an opinion because the game's software could be updated at any time.

More telling is what hasn't happened. Dragon's Ascent has operated throughout Kansas for several years without incident. No devices have been seized. No prosecutions have been initiated. No cease-and-desist orders have been issued. And neither the Racing and Gaming Commission nor the Attorney General has opined that the game is illegal. Against this backdrop, we conclude POM cannot make a prima facie showing that prosecution or seizure is impending and probable.

POM argues that this jurisdictional conclusion fails to resolve disputed facts in the company's favor. It focuses on the statements in the letter describing the views of some Commission staff who played the game. The argument is unfounded. Rather than resolving disputed facts, our conclusion simply acknowledges the letter's uncontested content: that the Commission expressed no opinion on the game's legality, notwithstanding remarks made by some staff members who played the game.

POM also emphasizes that the defendants have not explicitly disavowed prosecution and points to federal cases suggesting this silence could create a credible threat. But those cases differ markedly from this one. They involved situations where police had already made arrests (*Seals v. McBee*, 898 F.3d 587, 592 [5th Cir. 2018]), where plaintiffs intended to violate the challenged statutes (*Aptive Environmental, LLC v. Town of Castle Rock*, 959 F.3d 961, 974-76 [10th Cir. 2020]; *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695-96 [6th Cir. 2015]), or where an agency had issued, then withdrawn, an opinion declaring the conduct illegal (*New Hampshire Lottery Com'n v. Rosen*, 986 F.3d 38, 50-52 [1st Cir. 2021]).

POM's situation is vastly different. Unlike those plaintiffs, POM maintains that its conduct is lawful and seeks only judicial confirmation of that position. Dragon's Ascent operates in Kansas without interference. And neither the Attorney General nor the Racing and Gaming Commission has issued opinions declaring

the game illegal. Nor have they taken enforcement action—no seizures, no cease-and-desist letters, no investigations, no prosecutions. Under these circumstances, the defendants' mere failure to disavow future prosecution does not establish an "impending, probable" threat.

C. *POM lacks standing to raise a constitutional vagueness challenge to Kansas criminal gambling statutes.*

POM's final claim asserts that the Kansas criminal gambling statutes are unconstitutionally vague because they fail to provide fair notice of whether a device provides an award "as the result of chance." While the lower courts carefully examined POM's standing to bring its other claims, they gave this one only passing attention. The Douglas County District Court simply noted that the Attorney General had "conceded" the challenge raised "a justiciable controversy." And the Shawnee County District Court then resolved this claim on the merits. The parties' appellate briefs did not address standing, though both maintained at oral argument that jurisdiction exists.

But our precedent is clear: parties cannot create subject-matter jurisdiction through concession. See *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 752, 199 P.3d 781 (2009) (jurisdiction cannot be conferred by consent, waiver, or estoppel, including failure to object). And we must examine standing at every stage of litigation. See *Ryser v. Kansas Bd. of Healing Arts*, 295 Kan. 452, 456, 284 P.3d 337 (2012) (reviewing court obligated to examine standing in lower court and on appeal). We do so now.

The two claims we have already addressed seek pre-enforcement review—asking us to consider how statutes might apply to POM before they are enforced. This final claim is also a pre-enforcement challenge, but with a constitutional dimension. Rather than asking about a statute's application, POM questions the statute's very validity. It seeks to strike down as unconstitutional a criminal law that has not yet been enforced against it.

A pre-enforcement constitutional challenge triggers its own standing framework. Like all claims, they must satisfy our traditional requirements: cognizable injury and causal connection. But

to determine what qualifies as a cognizable injury, we have recently looked to federal law. See *Hodes & Nauser v. Stanek*, 318 Kan. 995, 1003, 551 P.3d 62 (2024); *League*, 317 Kan. at 813. Under that framework, plaintiffs must establish three elements: (1) they intend to engage in conduct that arguably implicates a constitutional interest, (2) that conduct is arguably prohibited by the challenged statute, and (3) they face a "credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 161, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

We need not look beyond that third element here. Having already established that POM failed to make a prima facie showing that prosecution is impending and probable, we readily conclude there is no "credible threat of prosecution." We note some tension in the Attorney General's position: having argued that POM lacked standing for its previous claim because there was no threat of prosecution, the office nonetheless maintains that there is standing for this claim. When pressed at oral argument, appellate counsel suggested that a statute's sheer ambiguity might itself constitute an injury because one cannot conform conduct to an indecipherable law. But absent concrete present or future harm, even the most perplexing legislative provision cannot create standing. To hold otherwise would render the case-or-controversy requirement meaningless.

In sum, none of POM's three claims meet our standing requirements. Though uncertainty about the legal status of Dragon's Ascent may create practical difficulties for POM, those difficulties do not establish jurisdiction when our state Constitution requires an actual case or controversy. We therefore affirm the order of the district court dismissing POM's claims on the Expanded Lottery Act and the legality of Dragon's Ascent for lack of subject-matter jurisdiction. We also vacate the district court's ruling on whether the criminal gambling statutes are unconstitutionally vague for failing to provide fair notice of whether a device provides an award "as the result of chance," and we remand the matter for the district court to dismiss that claim.

Affirmed in part, vacated in part, and remanded with directions.

No. 126,288

STATE OF KANSAS, *Appellee*, v. BRENTON S. COOK, *Appellant*.

(560 P.3d 1188)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Illegal Sentence Defined under K.S.A. 22-3504(c)(1).* K.S.A. 22-3504(c)(1) defines an illegal sentence as one imposed by a court without jurisdiction, one that does not conform to the applicable statutory provision, or one that is ambiguous.

2. SAME—*Illegal Sentence Statute—Limitations of Phrase "applicable statutory provision."* As used in 22-3504(c)(1), the phrase "applicable statutory provision" is limited to those statutory provisions that define the crime, assign the category of punishment, or involve the criminal history classification.

Appeal from Saline District Court; JARED B. JOHNSON, judge. Submitted without oral argument December 11, 2024. Opinion filed December 27, 2024. Affirmed.

Gerald E. Wells, of Jerry Wells Attorney-at-Law, of Lawrence, was on the brief for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: Brenton S. Cook appeals the district court's summary denial of his motion to correct an illegal sentence. Although Cook refers to his motion as one to correct an illegal sentence, his arguments focus on the underlying convictions, and he requests a new trial. But convictions generally may not be attacked using a motion to correct an illegal sentence, and the remedy for an illegal sentence is a new sentence not a new trial. We thus conclude the district court correctly denied Cook's motion, which asserts claims that cannot be considered and seeks relief that cannot be granted under the procedural vehicle of K.S.A. 22-3504.

FACTS AND PROCEDURAL HISTORY

Brenton S. Cook fired three shots and killed Dean Endsley in Endsley's Salina residence while attempting to collect on a drug debt. A jury convicted Cook of premeditated first-degree murder,

aggravated burglary, and criminal possession of a firearm. The district court sentenced Cook to a hard 25 life sentence for premeditated first-degree murder, plus 60 months on the remaining counts. This court affirmed his convictions and sentences on direct appeal. *State v. Cook*, 286 Kan. 1098, 1099-1101, 191 P.3d 294 (2008).

Several years later, Cook filed a pro se motion to correct an illegal sentence that is now before us. In the motion, he argues his convictions are multiplicitous and violate the "double jeopardy clause 21-3107(2)(D)" because insufficient time passed between when he pulled the gun from his coat pocket and when he fired it for him to form the required mental state and to premeditate murder. He concludes the court should "correct Mr. Cook's sentence because the trial court erred in allowing these charges to be presented to a jury when these charges and instructions clearly violate state and federal laws including the merger doctrine, multiplicity, and double jeopardy statutes. Mr. Cook should be granted a new trial, or resentenced."

The State replied to this motion by noting that Cook focused his arguments on his convictions rather than his sentences. It also pointed out that Cook failed to address the statutory definition of an illegal sentence. In sum, the State argued Cook requested a remedy that was not available under the illegal sentence statute, K.S.A. 22-3504.

The district court agreed with the State's arguments, noting that Cook "does not challenge the legality of his sentence." The district court explained that Cook does "not allege that the District Court was without jurisdiction to impose the sentence, nor [did] he allege that the sentence was ambiguous with respect to time and manner in which the sentence was to be served [nor] that the sentence imposed fails to conform to the statutes in effect at the time." The district court characterized Cook's motion as complaining "of trial errors that should have been asserted in his direct appeal." It also concluded that Cook's claims were barred under res judicata principles.

Cook requested and was appointed counsel. He filed a timely notice of appeal before counsel was appointed. This is his appeal, and we have jurisdiction to consider it. See *State v. Gilbert*, 299

Kan. 797, 800, 326 P.3d 1060 (2014) (court that had jurisdiction over original, direct appeal has appellate jurisdiction over a subsequent motion to correct an illegal sentence); see also *Cook*, 286 Kan. at 1101.

ANALYSIS

The issue we have before us is whether the district court correctly denied Cook's motion to correct illegal sentence. We review the district court's decision de novo—that is, we exercise unlimited review. *State v. Collier*, 316 Kan. 109, 111, 513 P.3d 477 (2022). In doing so, we apply the illegal sentence statute, which defines an illegal sentence as one "[i]mposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced." K.S.A. 22-3504(c)(1).

In conducting our unlimited review, we, like the district court, discern no argument in Cook's briefing that suggests his sentences fall under the statutory definition of an illegal sentence. He does not suggest that the district court lacked jurisdiction to sentence him or that the sentence imposed was ambiguous with respect to the time and manner it was to be served. This leaves only one statutory basis that might support the conclusion that Cook suffered an illegal sentence: that the sentence does not conform to the applicable statutory provision.

The phrase "applicable statutory provision" as used in K.S.A. 22-3504 means a provision defining the crime, assigning the category of punishment, or involving the criminal history classification, including whether a prior conviction was properly classified under the Kansas Sentencing Guidelines Act. *State v. Johnson*, 317 Kan. 458, 461-62, 531 P.3d 1208 (2023). In other words, K.S.A. 22-3504 does not open the doors to correct a sentence when a defendant argues *any* statute was violated.

Cook here challenges the convictions and sentences imposed for the crimes of first-degree premeditated murder and aggravated burglary. The applicable statutory provisions for these crimes and sentences at the time he committed those acts include K.S.A. 21-3401(a) (Furse 1995) (premeditated first-degree murder); K.S.A.

21-3716 (Furse 1995) (aggravated burglary is a severity level 5, person felony); K.S.A. 2005 Supp. 21-4635(b)-(d) (sentencing premeditated first-degree murder); K.S.A. 2005 Supp. 21-4704 (sentencing grid); K.S.A. 2005 Supp. 21-4711 (criminal history classification); K.S.A. 2005 Supp. 21-4716 (presumptive sentences). Cook does not argue the judge violated any of these statutes when imposing his sentences.

Rather, to the extent Cook argues his sentences violate a statute, he points to the statutory limitations on double jeopardy in K.S.A. 2005 Supp. 21-3107(2). But this prohibition does not define a crime of conviction, assign the punishment, or address criminal history classification—the reviewable items under the illegal sentence statute, K.S.A. 22-3504. The double jeopardy provision is thus not an applicable statutory provision that supports a conclusion that Cook received an illegal sentence amenable to correction as an illegal sentence under K.S.A. 22-3504(a).

The district court correctly noted that Cook did not challenge the legality of his sentence as permitted by K.S.A. 22-3504(a). Cook's argument that his convictions and resulting sentences are illegal under K.S.A. 2005 Supp. 21-3107 thus fails to properly invoke an applicable statutory provision that might afford him relief under the illegal sentence statute, and the district court appropriately denied Cook relief on this basis.

Because the district court's determination that Cook does not seek relief for an illegal sentence alone provides a valid basis for the district court's decision to deny his motion, we need not reach the district court's alternative ruling that Cook's motion was precluded under res judicata principles. We also decline to consider Cook's motion as a request for habeas relief under K.S.A. 2023 Supp. 60-1507 as we have sometimes done in other cases. See *State v. Redding*, 310 Kan. 15, 18-20, 444 P.3d 989 (2019) (considering whether district court abused its discretion by not construing 22-3504 motion as 60-1507 motion). We have several reasons we decline to make that conversion. First, K.S.A. 2023 Supp. 60-1507 is a separate avenue with its own procedures and rules that limit when its relief may be available to a petitioner and those rules have not been addressed by the parties. Second, Cook makes no argument that we should construe his motion as one for habeas

relief under K.S.A. 2023 Supp. 60-1507. Finally, he acknowledges he presently has a motion under 60-1507 pending. We therefore will not construe his motion to correct an illegal sentence as anything other than what it purports to be.

We conclude that the district court did not err in concluding that Cook failed to present an argument that his sentence was illegal as that term is defined in K.S.A. 22-3504(c)(1). He thus has used an improper procedural vehicle.

Affirmed.

No. 128,008

In the Matter of CAROLYN SUE EDWARDS, *Respondent*.

(560 P.3d 1159)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Six-month Suspension*.

Original proceeding in discipline. Oral argument held October 31, 2024. Opinion filed December 27, 2024. Six-month suspension.

Alice L. Walker, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

John J. Ambrosio, of Morris Laing Law Firm, of Topeka, argued the cause, and *Carolyn Sue Edwards*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline against the respondent, Carolyn Sue Edwards, of Wichita, an attorney admitted to practice law in Kansas in April 1986.

On April 17, 2024, Alice L. Walker, Deputy Disciplinary Administrator, filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). That same day, Walker filed a notice of hearing, confirming that a hearing on the formal complaint was scheduled for June 27, 2024.

On May 7, 2024, the respondent, through counsel John J. Ambrosio, filed an answer to the formal complaint. On May 9, 2024, the respondent filed a proposed probation plan.

On June 27, 2024, a panel of the Kansas Board for Discipline of Attorneys held a remote hearing on the formal complaint. The Disciplinary Administrator appeared by video through Walker. The respondent appeared by video with counsel, Ambrosio.

At the beginning of the hearing, the parties confirmed the written stipulation and amended stipulation they filed agreeing that the respondent's conduct in the DA13,809 matter violated KRPC 1.1 (2024 Kan. S. Ct. R. at 324) (competence), KRPC 1.3 (2024 Kan. S. Ct. R. at 328) (diligence), KRPC 1.4 (2024 Kan. S. Ct. R. at 329) (communication), KRPC 1.5 (2024 Kan. S. Ct. R.

at 330) (fees), KRPC 1.15 (2024 Kan. S. Ct. R. at 369) (safekeeping property), and KRPC 8.4(c) (2024 Kan. S. Ct. R. at 430) (misconduct involving dishonesty, fraud, deceit, or misrepresentation) and the respondent's conduct in the DA13,937 matter violated KRPC 1.1, KRPC 1.3, KRPC 1.4, KRPC 3.3 (2024 Kan. S. Ct. R. at 387) (candor toward the tribunal), and KRPC 8.4(c).

Upon consideration of the stipulations of the parties and the evidence and argument presented at the hearing, 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.

"*Findings of Fact*

. . . .

"DA13,809

"14. In September 2019, the respondent was retained by P.A.C. to represent her in the administration of her father's estate. The scope of representation and fee agreement was not reduced to writing until March 13, 2020.

"15. P.A.C.'s father passed away on July 31, 2019. He left a will listing P.A.C. as a co-administrator of his estate and one of three beneficiaries to his will and trust. P.A.C.'s mother proceeded her father in death.

"16. At the beginning of representation, P.A.C. understood the scope of representation to include representing her 'regarding administrative duties as post-death trustee of [her] father's revocable trust, fiduciary of both estates of [her] parents and also possibly in a guardianship for [her] sister, M.A.'

"17. The respondent viewed the initial scope of work 'to be the probate of the estate and pouring over of various assets into the trust.'

"18. At the time she retained the respondent, P.A.C. provided the respondent with a copy of her father's will. The original will was provided to the respondent in October 2019.

"19. The respondent did file initial probate documents on behalf of P.A.C. in both her mother's and father's estate matters in December 2019. These filings contained numerous errors, often interchanging executor and administrator.

"20. Despite opening estate cases for both P.A.C.'s mother and father, the respondent failed to file the will within the six-month statutory deadline.

"21. On February 19, 2020, the Sedgwick County District Court Clerk mailed a letter to P.A.C. (no address listed), copying the respondent. The letter indicated that P.A.C. had a duty to file an inventory within thirty (30) days of her

appointment as administrator and that to date, no inventory had been filed in her mother's estate case.

"22. On February 11, 2021, the Honorable Judge Robb Rumsey of the Eighteenth Judicial District entered a Notice and Order to Show Cause why P.A.C. should not be removed as administrator due to failure to provide an Inventory and Evaluation by January 27, 2020.

"23. The Notice and Order were mailed to the respondent. The Order further noted that no address for P.A.C. was provided by the respondent.

"24. On March 23, 2021, an inventory for P.A.C.'s mother's estate was filed by the respondent.

"*Failure to Correct Social Security Number*

"25. Early on in the representation, the respondent was made aware that P.A.C.'s father's social security number was incorrectly listed on his death certificate. It was determined the father sometimes used his military ID number for identification, which had been confused for his social security number.

"26. In October 2020, P.A.C.'s husband, D.C., contacted the Kansas Department of Health and Environment (KDHE) seeking guidance on how to correct the death certificate. KDHE relayed that a court order would be required.

"27. On October 5, 2020, D.C. forwarded his e-mail communication with KDHE to the respondent, to which the respondent replied: 'Thanks [D.C.]. I'll file the motion and get moving.'

"28. On October 23, 2020, the respondent emailed P.A.C., stating, 'I have filed the appropriate paperwork to make the change in the Soc. Security number; we don't have the finished product but should before too long.'

"29. On November 18, 2020, D.C. emailed the respondent asking the status of the court motion to correct the death certificate of P.A.C.'s father.

"30. On December 8, 2020, D.C. again emailed the respondent, saying: 'Forgot to ask about what you found out last week about the motion for correction of the death certificate for the incorrect SSN.'

"31. On December 11, 2020, the respondent emailed P.A.C. and D.C., stating: 'I do not yet have the order from the probate but have pressed the same with the court.' When the respondent made this statement, no motion or request had been made to the court to correct the death certificate.

"32. On February 4, 2021, P.A.C. again inquired of the respondent regarding the status of the corrected death certificate, asking: 'What is the status with the correction of the death certificate for the incorrect SSN? . . . The correction of this should open the door to finish the process of transferring the accounts to the trust.'

"33. A conference call between the respondent, P.A.C. and D.C. occurred on February 13, 2021. During the call, the respondent informed P.A.C., for the first time, of the duty to file an inventory in her mother's estate and that the probate court had signed an order to amend the death certificate.

"34. At the time of the call, no order had been issued by the Court because no motion to correct the death certificate had been filed by the respondent.

"35. On March 3, 2021, D.C. notified the respondent by email that he and P.A.C. were still waiting for the corrected death certificate.

"36. Again, on March 16, 2021, in response to another request for a retainer payment, P.A.C. asked if the respondent received the March 3, 2021, email indicating that they had not gotten the amended death certificate.

"37. On April 19, 2021, D.C. emailed KDHE inquiring of the status of the amended death certificate based on the information provided to him and P.A.C. by the respondent. D.C. received a response asking for a copy of the court order, as KDHE had not received any such order. This response was forwarded to the respondent seeking a copy of the court order.

"38. On May 19, 2021, the respondent emailed D.C. and P.A.C. stating she had gotten their calls and emails regarding the court order. She informed them she was not in the office but would respond that afternoon. The respondent did not provide any further response to P.A.C. or D.C.

"39. On June 23, 2021, P.A.C. emailed the respondent stating she was still waiting for a response from the May 19 email and again seeking information, including information regarding the amended death certificate.

"40. On Monday, June 28, 2021, the respondent set up a phone call with P.A.C. for Wednesday, June 30. On that date, the respondent's office communicated that the respondent would call P.A.C. on Friday.

"41. On July 27, 2021, P.A.C. sent the following email to the respondent:

> 'I have attempted to contact you on number [*sic*] occasions since approximately the end of March 2021, by e-mail and phone, with regards to the status of the [*sic*] getting the court order for the [*sic*] amending the death certificate for [L.A.]. Every time I have called with regards to this with the exception of about two weeks ago, your office secretary or assistant has told me that you are not in the office or are with another client. With regards to the phone call about two weeks ago, you had stated you would contact me on Friday. I am therefore requesting that you present me with a copy of the court order, which according to a conference call approximately the second week of February of this year, was signed by the probate court judge back around approximately the time frame of the first week of February of this year. You stated that I should expect to see the amended death certificate around the middle to end of March of this year. It concerns me greatly that every

> time I have attempted to contact you about this matter that you have not tried to return my phone calls or reply to my e-mails.'

"42. The respondent responded that she would like to meet with P.A.C. in the next week to get things done. This meeting did not occur.

"*Failure to Correct Social Security Number*

"43. In the Fall of 2021, P.A.C. reached out to Tim O'Sullivan to represent her in these matters. Mr. O'Sullivan entered his appearance in the estate matters in February 2022.

"44. After receiving and reviewing the file from the respondent, O'Sullivan realized L.A.'s original will had never been filed with the probate court.

"45. On November 19, 2021, P.A.C. submitted a complaint to the disciplinary administrator regarding the representation of her by the respondent in her parents' estate matters. The complaint expressed concerns with not only the handling of the estate matters and lack of communication, but also raised concerns regarding the fee agreement and payments[.]

"46. The respondent timely responded to the disciplinary complaint by submitting an attorney response on February 11, 2022.

"*Fee Agreement*

"47. P.A.C. paid the respondent $1,000 at the commencement of representation. The respondent placed this payment directly into her operating account.

"48. In her response to the disciplinary complaint, the respondent stated:

> 'The estate was valued at $1.3 million dollars and I advised them of my hourly fee of $325 an hour, and my estimate that the estate/trust issues would run between $35,000 and $45,000. I discussed a contingent fee agreement with them at that time for the estate alone; they were not sure and wanted to think about it but it was on the table at that time.'

"49. At the commencement of representation, the respondent did not execute a written fee agreement with P.A.C.

"50. In December 2019, P.A.C. made two separate payments to the respondent totaling $17,000.

"51. On December 30, 2019, the respondent emailed P.A.C. stating she: 'Received $13,000.00 today as retainer payment on the estate account. Again, as previously discussed, I believe this matter will run approximately $35,000.00 to $45,000.00, including the conservatorship and the two estates.'

"52. On January 25, 2020, P.A.C. paid the respondent an additional $8,000.00.

"53. In her response to the disciplinary complaint, the respondent explained the scope of representation expanded in the first several months to include: (1) a potential conservatorship for P.A.C.'s sister, M.A.; (2) opening an estate for P.A.C.'s mother, P.A., to transfer property into the trust; (3) reconciling the two different social security numbers for P.A.C.'s father; and (4) addressing concerns of how P.A.C.'s brother, J.A., would spend his share of the estate.

"54. According to the respondent, P.A.C. and her husband were very concerned with how this increased scope of work would increase the cost of representation from the original quote of $35,000 to $45,000.

"55. The respondent agreed to cap her fees at 6% of the value of the father's estate, which at the time she believed to be $1.3 million.

"56. In her attorney response, the respondent asserted that she discussed this with P.A.C. and D.C., and 'they stated they understood, that my fees pursuant to this agreement, that their cost would be no more than the approximate $96,000 (6% of $1.3 million) for all that they had asked me to do.'

"57. During her interview with the disciplinary investigator, the respondent acknowledged that 6% of $1.3 million would have been $78,000.

"58. On March 13, 2020, the respondent produced a written fee agreement to P.A.C. The agreement indicated that P.A.C. had paid a fee of '$26,000.00 prior to today's date as a retainer. That amount shall be deducted from any contingency/percentage fee paid by the Client per Section IV of this Agreement.'

"59. Section IV of the agreement stated:

> 'Percentage Fee. It is understood and agreed that the Client will pay the Attorney the following fee for the Legal Matter to be rendered: 6% of the value of the Estates of [L.A.P.], for all the above matters combined. No additional attorney's fees will be charged for the conservatorship or the trust requirements. Payments on account shall be made as requested by the attorney.'

"60. Following execution of the agreement, the respondent would periodically contact P.A.C. and request additional installment payments. P.A.C. paid these installments as requested in the following amounts:

a. $8,000 on March 20, 2020
b. $8,000 on June 9, 2020
c. $10,000 on July 2, 2020
d. $8,000 on July 31, 2020
e. $4,500 on September 2, 2020
f. $3,000 on October 6, 2020
g. $6,500 on October 23, 2020
h. $6,500 on December 18, 2020
i. $3,500 on March 16, 2021

"61. P.A.C. paid the respondent a total of $84,000 in legal fees.

"62. The respondent placed all of these payments directly in her operating account.

"63. Further, the respondent indicated to the disciplinary investigator that at the time she did not have an attorney trust account.

"64. The respondent never submitted any of these fee payments to the probate court for approval.

"65. In her response to the disciplinary complaint, the respondent admitted she should have received court approval for attorney fees.

"66. The respondent explained in her interview with the disciplinary investigator that 'it was [her] understanding, right or wrong, it was [her] understanding that once a contingent fee agreement is put into place, you can ask for payment and that the fees are earned.'

"67. The respondent kept some time records at the outset of representation, but she did not continue with those records following the signing of the fee agreement.

"68. When requesting payments from P.A.C., the respondent did not send an invoice or any accounting explaining the fee request.

"69. During the disciplinary investigation, and at the request of the disciplinary investigator, the respondent created an invoice for time spent representing P.A.C. The respondent did not keep contemporaneous time records during representation; thus the invoice was an estimation based on file notes, emails, pleadings and other documentation of time spent on the representation. The invoice was estimated using the respondent's hourly rate of $325. The invoice totaled $43,013.75 in professional services rendered. It totaled an additional $943.70 for filing fees, copies, and publications.

"70. In her attorney response, the respondent indicated that '[i]t is [the respondent's] understanding, as well, that when an attorney's services under a contingent fee contract are no longer required, that the attorney may be entitled to a sum of money commensurate with the reasonable amount of work already provided, based in part on the hourly rate of the attorney.'

"71. The respondent further indicated in her response that she would 'refund any sum of money the Committee deems proper.'

"72. As of the date of the hearing, June 27, 202[4], no refund has been provided to P.A.C.

"*DA13,937*

"73. In April 2022, M.D.C. contacted the respondent's office seeking representation for a stepparent adoption of her daughter. M.D.C. informed the respondent's assistant, Blake Edwards (Blake), that the father of the child, J.S., lived in Europe and she does not have his address.

"74. On May 6, 2022, M.D.C. and her husband, J.C., retained the respondent to represent them in terminating the parental rights of J.S. and for a stepparent adoption.

"75. On January 18, 2023, the disciplinary administrator received a complaint from M.D.C. alleging lack of communication and lack of progress in the matter by the respondent.

"76. The respondent timely responded to the complaint on February 28, 2023.

"77. The disciplinary investigation revealed errors in the stepparent adoption petitions leading to rejections of the petitions, discrepancies in the respondent's billing practices, misstatements in communications to M.D.C. by the respondent, and inconsistencies in the respondent's answers to the disciplinary investigator.

"*Adoption Petitions*

"78. On June 24, 2022, the respondent met with M.D.C. and J.C. During this meeting, she requested a copy of the divorce decree for M.D.C. and J.S. The respondent further believed a protection order had been issued against J.S.; thus, the respondent requested a copy of that order as well.

"79. According to the respondent's attorney response, M.D.C. did not have copies of these orders and was unable to provide the county in which the orders were entered. The respondent and her assistant called several counties trying to locate the divorce decree with no luck.

"80. At the meeting, M.D.C. and J.C. signed a Petition for Termination of Parental Rights and Adoption. The petition listed Butler County Case Number 2018-DM-000166 as the matter providing primary residential custody to M.D.C.

"81. The petition also asserted that M.D.C. does not know the address, email, or phone number of J.S., only that he resides in Spain. Further, the petition asserted J.S. had only incidental contact with the child, paid child support sporadically, and had been the subject of a protection order filed by M.D.C. in 2018.

"82. Following the meeting, on the same date, M.D.C. emailed screen shots of her divorce decree involving J.S. to the respondent. The respondent responded: 'Thank you!'

"83. In her response to the disciplinary complaint, the respondent asserted that after receiving these documents: 'We emailed back saying we could not read it; and got no response nor did we get a clean copy.'

"84. In her interview with the disciplinary investigator, the respondent acknowledged the case caption of the document clearly stated 'Butler County,' although the case number was difficult to read. The respondent indicated there was no file stamp and she was wanting the final journal entry, so was merely assuming the divorce was final.

"85. During the disciplinary investigation, the investigator learned that the respondent had email correspondence with M.D.C.'s divorce attorney, Lynette Herman. The respondent explained initially she had forgotten about this contact because she relies heavily on her invoicing, and this communication was not listed on her invoicing. Further, the emails reference a former last name of M.D.C. and therefore did not come up when the respondent searched for correspondence related to this case.

"86. The contact with Herman showed that on June 29, 2022, the respondent was provided electronic filing notices showing the entry of the final Judgment and Decree of Divorce, a Child Support Worksheet, and Permanent Parenting Plan in Butler County Case 2018-DM-000166.

"87. On June 27, 2022, M.D.C. emailed the respondent informing her that she did not have a protection from abuse order against J.S. The respondent responded: 'Thanks so much.'

"88. In her response to the disciplinary complaint, the respondent stated that based on this email from M.D.C.: 'At this point I was baffled at the clients' misstatements and differing reports.'

"89. However, the respondent did not explain this to M.D.C. or change the verified petition prior to filing. Yet, throughout the disciplinary investigation, the respondent referred to the signed statements by M.D.C. as 'patently false.'

"90. Instead, the respondent asserted in her attorney response that at the end of July 2022 she was waiting for the 'actual divorce case number [. . .] the PFA filing which [she] was wanting to reference in the petition, and (again) the phone records to demonstrate the lack of contact over the past two years. None of this was supplied.'

"91. On July 26, 2022, M.D.C. emailed the respondent indicating that she and J.C. had moved. She provided the respondent her new address and informed the respondent that she had given J.S. the address via Facebook messenger, who acknowledged the move. In this same email, M.D.C. stated: 'Not sure it matters just letting you know the last time he has spoke [*sic*] to [minor child] and asked to speak to [minor child] was on Father's Day.'

"92. On August 23, 2022, the respondent filed the Petition signed by M.D.C. and J.C. on June 24, 2022. That same date, the petition was rejected by the court.

"93. The reason for rejection was noted 'per phone call with Blake.' The respondent explained during the disciplinary investigation that a typographical error regarding the child's last name resulted in the rejection.

"94. The rejection notice was sent to both the respondent and Blake. The respondent did not inform M.D.C. of the filing rejection.

"95. On August 30, 2022, M.D.C. forwarded a screen shot of a Facebook message to the respondent. The message was received by M.D.C. from J.S. indicating he will be back on September 23 for the foreseeable future. In her email to the respondent, M.D.C. stated: 'I guess he will be back September 24th and doesn't plan to go back.'

"96. In a subsequent email the same date, M.D.C. asked if 'there is anything visitation wise [M.D.C.] can put in place in the mean time [*sic*] during the court process?'

"97. On August 31, 2022, the respondent responded, stating: 'We may need to file something to keep him from seeing her; let's talk about that soon.'

"98. On September 6, 2022, M.D.C. emailed the respondent again asking if there was a time to meet and discuss filing something prior to J.S. returning. The respondent forwarded this message to Blake asking her to set something up.

"99. On September 13, 2022, the respondent contacted M.D.C. wanting to set up a meeting, as well as requesting an additional $3500 retainer, stating: '[M]y bill is past the retainer at this point.'

"100. M.D.C. responded that meeting was a good idea and 'would like to look over and talk about what all the retainer has been used for.'

"101. On September 15, 2022, the respondent again filed the petition for adoption. The respondent utilized the same verified petition signed by M.D.C. and J.C. on June 24, 2022. The respondent made no changes based on the subsequent emails sent by M.D.C.

"102. That same date, the petition was again rejected by the district court. The reasoning for rejection was listed as:

> 'Good Afternoon and thank you for your e-filing. I need to return this due to the Childs name is different in the header of the documents. The Consent of Natural Mother has the child as [Q.J.C.], the other 3 documents have her as [Q.J.S.]. Her party information lists her as [Q.C.]. Her name needs to be her current legal name on all documents and the party information. Please make changes & re-submit all documents.'

"103. Again, the rejection notice was sent to the respondent and Blake. Again, the respondent did not notify M.D.C. of the filing rejection.

"104. On September 20, 2022, M.D.C. responded to her own September 13 email checking in about a meeting to discuss what the retainer had been used for.

"105. Again on September 25, 2022, M.D.C. contacted the respondent by email, stating:

> 'Reaching out again because I am really needing to speak to someone asap about what needs to happen and what I can do/say when [J.S.] asks to see [the minor child] so I am prepared. Friday night [J.S.'s family member] messaged me to tell me [J.S.] had just then reached out to him to let him know he was coming back and in his text stated that he was landing sometime on Saturday (09/24). I have not heard from him yet still as of 9/25.'

"106. On September 27, 2022, the respondent, M.D.C., and J.C. spoke by phone. M.D.C. and J.C. recorded this phone conversation.

"107. In this phone call, M.D.C. again explained the information she received from [J.S.'s family member] about J.S.'s return. The respondent opined whether she could move up the hearing. She also affirmatively stated that she had 'already given notice as to the date, we've published.' M.D.C. requested a copy of the publication, to which the respondent stated, '[Y]eah, sure, it will probably be tomorrow, Blake is not in today. But yeah, I can send you the notice of publication.'

"108. At the time the respondent made this statement during the September 27, 2022[,] phone call, no hearing had been set due to the rejection of the filings. In addition, the respondent had not published any notice for the same reason.

"109. During a third interview with the disciplinary investigator, the respondent was asked specifically about the recorded phone call. The respondent could not fully explain why she told her clients publication had occurred. The respondent indicated she had been told by her assistant it had been filed, that she recalled telling her assistant to get it published, and that she must have been thinking that it had been done.

"110. On September 28, 2022, Blake reached out to M.D.C. and J.C. explaining she had been out of the office and was told by the respondent an appointment had been set up for them to come in, but Blake needed to confirm the date and time. J.C. responded that no appointment had been set up.

"111. On October 13, 2022, the respondent again filed the petition for adoption.

"112. At this time, the Honorable Judge Richard Macias called the respondent regarding the pleadings. In this conversation, Judge Macias discussed concerns with due diligence in publication of service and questioned child support

payments based on information he was able to retrieve from public Kansas Payment Center records. Judge Macias told the respondent he was going to reject the pleadings and gave her the opportunity to adjust the petition and refile.

"113. The petition was officially rejected, and the respondent received notice via email.

"114. The respondent did not notify M.D.C. of the rejection or the concerns of Judge Macias.

"115. The next documented communication came from M.D.C. on October 17, 2022, when she indicated she could drop off money the following day. The respondent responded asking M.D.C. to call ahead to ensure someone was at the office.

"116. On November 4, 2022, M.D.C. again emailed regarding dropping off money and asking about information regarding a home inspection. M.D.C. asked: 'Is there still time before our court date on Wednesday?'

"117. Blake responded to this email indicating there was an update on the case and wanting to set up a phone call the following day.

"118. On November 4, 2022, M.D.C. texted her sister following a conversation with the respondent. The text messages indicate that M.D.C. learned that the judge hearing the adoption matter wanted more due diligence to serve J.S. The text message further explained that the respondent suggested to M.D.C. to change the legal approach to seek sole custody in the domestic case before pursuing adoption.

"119. On November 20, 2022, M.D.C. contacted the respondent by email asking if the motion was ready for review.

"120. After no response, and due to frustrations with representation, M.D.C. and J.C. decided to terminate the respondent's representation of them.

"121. On November 25, 2022, J.C. called the respondent seeking a refund of the $2,000 paid in October and November. A refund was issued by the respondent on November 28, 2022.

"122. M.D.C. contacted the respondent three times by email seeking her case file between November 2022 and January 2023. Finally, on January 31, 2023, the respondent responded saying the file was too large to scan and it had been placed in the mail.

"123. On February 7, 2023, M.D.C. emailed indicating she had received the mailed documents but did not have the initial pleadings, updated pleadings, publication, or case number and was requesting those documents from the respondent.

"124. In the disciplinary investigation, the respondent indicated she had provided M.D.C. with everything in the client file, including work product notes, and there was nothing additional to provide.

"*Fee Agreement*

"125. On May 6, 2022, M.D.C. paid the respondent $3,500. The respondent did not execute a written fee agreement with M.D.C. at the commencement of representation.

"126. J.C.'s employer provided reimbursement for legal expenses. On May 19, 2022, M.D.C. emailed Blake indicating J.C.'s employer was requesting an invoice for the retainer payment of $3,500.

"127. Blake responded on May 23, 2022, that she would provide an invoice on Wednesday.

"128. On July 11, 2022, J.C. notified the respondent that his benefit provider needed a copy of 'the document showing [J.C. and M.D.C.] signed with [the respondent] to represent [J.C. and M.D.C.] in the adoption case.'

"129. The respondent responded the same date stating: 'I don't think we executed a formal fee agreement other than through email, but I can draft that and we can sign it.'

"130. The respondent created a fee agreement and back dated it to May 6, 2022. The agreement outlined that 'the hourly rate of Attorney Carolyn Sue Edwards is $325.00 per hour, with minimum billing for phone calls and emails at 2/10th's of an hour minimum; and $95.00 an hour for paralegal time, billed in minimum $15.00 minute [*sic*] increments.' The agreement further indicated '[t]he parties acknowledge the retainer payment of $3500.00 made by the parties of the second part and received by the party of the first part, for commencement of the legal work to be undertaken.'

"131. During the disciplinary investigation, the respondent confirmed that no prior email communication occurred regarding a fee agreement. Instead, the only prior communication was when Blake quoted M.D.C. and J.C. an estimate during their initial phone conversation in April 2022.

"132. On September 13, 2022, the respondent contacted M.D.C. requesting an additional $3,500 retainer stating: '[M]y bill is past the retainer at this point.'

"133. M.D.C. responded, stating she 'would like to look over and talk about what all the retainer has been used for.'

"134. Following this request from the clients the respondent produced an invoice dated October 6, 2022, showing use of the retainer.

"135. In the disciplinary investigation, the respondent was unclear on the request for additional funds, explaining that it was based on potentially going to

trial or switching gears to seeking sole custody rather than continuing to pursue the adoption case.

"136. Throughout the disciplinary investigation, the respondent's recollection of events during the representation of M.D.C. changed, and at times, the respondent provided explanations that were inconsistent with the clear evidence obtained by the disciplinary investigator. This included disagreeing with what was stated in the recorded phone call between the respondent and her client on September 27, 2022. Due to these discrepancies, the disciplinary investigator conducted three separate interviews and requested two additional responses from the respondent.

"137. The parties stipulated that the respondent violated the following rules in the DA 13,809 matter: KRPC 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.5 (fees); 1.15 (safekeeping property); and 8.4(c) (misconduct).

"138. The parties also stipulated that the respondent violated the following rules in the DA 13,937 matter: KRPC 1.1 (competence); 1.3 (diligence); 1.4 (communication); 3.3 (candor toward the tribunal); and 8.4(c) (misconduct).

"139. During the formal hearing, the respondent testified on topics relevant to mitigation. The respondent testified about horrific physical, sexual, and emotional abuse inflicted on her for years by adult members of her family. The hearing panel will not elaborate on the details of this testimony here out of respect for the respondent's privacy; however, the panel fully understands the magnitude of the impact this abuse may have had on the respondent.

"140. Through the testimony of the respondent and her therapist, Dr. Michael Leahy, after the trauma she endured in childhood, the respondent has been diagnosed with PTSD, depressive disorder, and anxiety. The respondent testified that her mental health conditions have caused her to feel as though she is walking 'up to her nostrils' through molasses, making it difficult to accomplish all necessary tasks. She also testified that she has experienced suicidal ideations, fugue states, and panic attacks.

"141. The respondent testified that, (a) she was conditioned as a child by her abusers to avoid unpleasant topics and maintain a facade that all was well; (b) as a result, as an adult she has a very difficult time disappointing people, including clients, or confronting unpleasant truths; and (c) as a result, she misled her clients in the two matters at issue here to avoid admitting that she did not perform the tasks she promised them she would do.

"142. After her diagnosis, the respondent has worked with her physician for months trying different combinations of medications to address her mental health conditions. She testified that she has finally found a combination of medications that work for her. She further testified that her depressive disorder has lifted, her mood is lighter, she feels happy, and is sleeping well.

"143. The respondent testified that one of the medications the respondent tried but that did not work for her was Klonopin. The respondent tried this medication through May 2023, which was the timeframe she was meeting with disciplinary investigators in these matters. Director of Investigations Crystalynn Ellis testified that, after three interviews with the respondent, Ms. Ellis was left with the impression that the respondent's inaccurate statements during the investigation reflected confusion and the respondent's inability to process information as opposed to intent to mislead. The respondent and Dr. Leahy both testified that a common side effect of Klonopin is memory loss, which the respondent said she experienced while on this medication.

"144. Dr. Leahy added that at the time of her misconduct, the respondent experienced a 'perfect storm' of substantial stressors including: the COVID pandemic, which presented economic stress as a solo practitioner and the respondent was at high risk for severe illness; loss of a close friend who she lived with to cancer; her colleague and mentor retired from the practice of law; and her adult sons moved to California, one of whom became estranged from her and her family.

"145. In addition to taking the above-mentioned medication, the respondent testified that she regularly attends therapy with Dr. Leahy, participates in a women's sexual assault group, participates in the KALAP resiliency group, and has a KALAP monitor.

"146. The respondent also has strong, consistent support from her proposed practice supervisor under her probation plan, Charles Harris. Mr. Harris testified that he has retired from practicing as an attorney but maintains an active law license, that he is ready and willing to supervise the respondent for the three years proposed in her probation plan, and that he is fully aware of the complaints in this matter and the issues the respondent is dealing with, including her prior dishonesty and her mental health diagnoses.

"147. Mr. Harris has been meeting with the respondent every week for 60-90 minutes since February 2, 2024. They meet at the respondent's office. Mr. Harris suggested to the respondent that she limit her practice to Sedgwick County, and not have cases in other counties to avoid extra travel time, having to learn various local court rules, and monitoring numerous court dockets. The respondent has taken this advice and, as of the date of the hearing, had only two cases pending in counties other than Sedgwick County. Mr. Harris has gone over the respondent's timekeeping and billing practices, and he monitors whether she is timely responding to discovery, motion, and other filing deadlines. He testified that since he began working with the respondent, she missed one court appearance, but called the judge and opposing counsel afterward and got the matter rescheduled without issue.

"148. Mr. Harris testified that the respondent can call him anytime 24-7 with any issues in her law practice, and that the respondent has been willing to let him look at anything in her files that he asks to see.

"*Conclusions of Law*

"149. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.5 (fees); 1.15 (safekeeping property); 3.3 (candor toward the tribunal); and 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation), as detailed below.

"KRPC 1.1

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

"151. The respondent failed to file the will in the probate matter for client P.A.C. in DA 13,809 within the statutorily required six (6) months. Further, the exhibits show numerous errors in the probate filings. In addition, the respondent failed to take action to obtain an order to correct the social security number on P.A.C.'s father's death certificate.

"152. The respondent made repeated errors in the DA 13,937 matter, many of which were fatal to getting the adoption petition filed and caused it to be repeatedly rejected by the district court.

"153. The respondent stipulated that her conduct violated KRPC 1.1.

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

"KRPC 1.3

"155. Attorneys must act with reasonable diligence and promptness in representing their clients.

"156. The respondent failed to diligently and promptly represent P.A.C. in the DA 13,809 matter by failing to promptly file P.A.C.'s father's will within the statutory deadline and failing to timely address the issue of the father's incorrect social security number on his death certificate.

"157. The respondent failed to diligently and promptly represent M.D.C. in the DA 13,937 matter by failing to properly input information in the adoption petition to get it filed, failing to timely obtain accurate information from M.D.C. and public information resources to put in the petition, and failing to timely correct errors in the petition to get it filed. Further, the respondent did not take appropriate measures to attempt to serve the biological father with the petition for stepparent adoption.

"158. The respondent stipulated that her conduct violated KRPC 1.3.

"159. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"160. 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.' Further, according to KRPC 1.4(b), '[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'

"161. The respondent failed to fully inform her client P.A.C. in the DA 13,809 matter of P.A.C.'s duty to file an inventory in the probate matter for a full year. Further, the respondent did not communicate accurate information to P.A.C. about the respondent's attempts (or lack thereof) to correct P.A.C.'s father's social security number on his death certificate. P.A.C. and her spouse were forced to contact the Kansas Department of Health and Environment themselves and thereby learned that the respondent had done nothing to correct the death certificate. There were periods of time when the respondent did not respond to requests for information from P.A.C. at all.

"162. The respondent repeatedly failed to respond to requests for information about the adoption case in the DA 13,937 matter from M.D.C. or her spouse. Further, the respondent failed to fully inform M.D.C. of the status of the adoption case, i.e., that the respondent had not been able to get the adoption petition filed due to the respondent's errors. Instead, the respondent led the clients to believe that the petition had been filed, publication service had been established, and a hearing was set, when none of this had occurred.

"163. The respondent stipulated that her conduct violated KRPC 1.4.

"164. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4.

"KRPC 1.5

"165. KRPC 1.5(a) provides that '[a] lawyer's fee shall be reasonable.'

"166. In the DA 13,809 matter, the respondent charged, and P.A.C. paid the respondent, $84,000.00 in return for the respondent providing very little service to P.A.C. in the probate matter. The respondent failed to notify P.A.C. of her statutory duty to file an inventory, failed to take any action to obtain a court order to correct P.A.C.'s father's social security number on his death certificate, and failed to complete the other services agreed to by the parties.

"167. Further, the respondent did not obtain court approval of her attorney fee as required by statute for such probate matters.

"168. The respondent stipulated that her conduct violated KRPC 1.5.

"169. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.5.

"KRPC 1.15

"170. Lawyers must properly safeguard their clients' property. 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.'

"171. In this case, the respondent failed to properly safeguard P.A.C.'s property in the DA 13,809 matter by failing to deposit the unearned fees into an attorney trust account. Rather, the respondent admitted that she did not have a trust account and she deposited the unearned fees directly into her operating account.

"172. The respondent stipulated that her conduct violated KRPC 1.15.

"173. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15.

"KRPC 3.3

"174. KRPC 3.3(a) provides:

> 'A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.'

"175. In the DA 13,937 matter, in August 2022, the respondent filed a version of the adoption petition maintaining within it that there was a protection from abuse order against J.S. despite the fact that the respondent had been notified on June 27, 2022, by M.D.C. that there was no protection order. Further, the respondent filed the same adoption petition three times without changing information within to comport with new information she had learned from her clients in the meantime. The respondent indicated during the disciplinary investigation

that she believed information provided to her by her clients was false but then included that same information in the adoption petition.

"176. The respondent stipulated that her conduct violated KRPC 3.3.

"177. Accordingly, the hearing panel concludes that the respondent violated KRPC 3.3.

"KRPC 8.4(c)

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

"179. The respondent engaged in conduct involving misrepresentation and dishonesty in the DA 13,809 matter when she told her clients she had taken certain actions in the probate representation, including that she had taken action to obtain a court order to get P.A.C.'s father's social security number corrected on his death certificate, when she had not.

"180. The respondent engaged in conduct involving misrepresentation and dishonesty in the DA 13,937 matter when she told her clients she had filed the adoption petition, she had obtained publication service, and a hearing had been set, when none of this had occurred.

"181. The respondent stipulated that her conduct violated KRPC 8.4(c).

"182. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"183. 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.

"184. *Duty Violated*. The respondent violated her duty to her clients.

"185. *Mental State*. The respondent knowingly violated her duty.

"186. *Injury*. The respondent's misconduct caused significant delay in the clients' cases in both the DA 13,809 matter and the DA 13,937 matter. Further, the respondent's misconduct caused the client in the DA 13,809 matter to pay an unreasonable fee, with no refund for the client to use to hire subsequent counsel. Finally, the respondent's misconduct negatively impacted her clients' trust in the respondent.

"187. In addition to the above-cited factors in Standard 3, 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 [or she] is dealing improperly 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.'

'4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.'

'4.53 Reprimand is generally appropriate when a lawyer:

'(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

'(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury 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.'

'6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.'

'6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld and causes injury or potential injury to a party

to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.'

'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.'

"*Aggravating and Mitigating Factors*

"188. 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 with regard to aggravating factors:

"189. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on two occasions. In 1999, the respondent received an informal admonition for violation of KRPC 1.3 and 1.4. In 2019, the respondent entered into a diversion agreement for violation of KRPC 1.4 and 1.5. This is an aggravating factor.

"190. *Pattern of Misconduct*. There is a pattern of misconduct between the DA 13,809 matter and the DA 13,937 matter. In both cases, the respondent showed issues with competence, diligence, and communication. Further, the respondent was dishonest with her clients in both cases. This is an aggravating factor.

"191. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1986. At the time of the misconduct, the respondent had been practicing law for over 34 years. The hearing panel concludes that the respondent had substantial experience in the practice of law when the misconduct occurred and that this is an aggravating factor.

"192. 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:

"193. *Absence of a Dishonest or Selfish Motive*. Other than her repeated requests for additional payments from her clients for work that had been performed incorrectly or that had not been completed, the respondent's misconduct does not appear to have been motivated by dishonesty or selfishness. While the respondent's conduct involved dishonesty to her clients, the hearing panel concludes that her misconduct was the result of her mental health diagnoses and,

except as noted above, not out of a motive for personal gain. This is a mitigating factor.

"194. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. The respondent experienced a large number of substantial personal and emotional problems during the several-year period that the misconduct occurred, as described in the findings of fact section above. Dr. Leahy described it as the 'perfect storm' of substantial stressors, which included the COVID pandemic, presenting economic stress and her high risk for severe illness; loss of a close friend who she lived with to cancer; her colleague and mentor retiring from the practice of law; and her adult sons moving to California, one of whom became estranged from her and her family. It appears that these problems, combined with her mental health condition at the time, contributed to her misconduct. This is a mitigating factor.

"195. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct*. The respondent refunded the fee paid to her by M.D.C. and her spouse. The respondent's effort to make restitution and resolve the consequences of her misconduct in the DA 13,937 matter is a mitigating factor.

"196. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions*. The respondent has cooperated in the disciplinary process, as evidenced in part by her entry into a joint stipulation to facts and that her conduct violated KRPC 1.1, 1.3, 1.4, 1.5, 1.15, 3.3, and 8.4(c). The hearing panel concludes that this is a mitigating factor.

"197. *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 in Sedgwick County, Kansas. The respondent also enjoys the respect of her peers as shown by the testimony of Mr. Harris and letters received by the hearing panel. The hearing panel concludes that this is a mitigating factor.

"198. *Mental Disability or Chemical Dependency Including Alcoholism or Drug Abuse*. The respondent is diagnosed with PTSD, depressive disorder, and anxiety. The respondent testified that her mental health conditions have caused her to feel as though she is walking 'up to her nostrils' through molasses, making it difficult to accomplish any necessary tasks. She also testified that she has experienced suicidal ideations, fugue states, and panic attacks. The respondent is working diligently to address these conditions, including taking medication, attending therapy and support groups, and seeking support through KALAP. The respondent reports she is doing much better with all of these supports in place. This is a mitigating factor.

"199. *Remoteness of Prior Offenses*. The informal admonition received by the respondent in 1999 was remote in time to the current misconduct. This is a mitigating factor.

"*Recommendation of the Parties*

"200. The disciplinary administrator recommended that the respondent's license be suspended for a period of six months. The disciplinary administrator further recommended that the respondent be required to undergo a reinstatement hearing under Rule 232.

"201. The respondent recommended that she be suspended for three years, with an immediate stay of the suspension while the respondent is placed on probation for three years according to the terms of her proposed probation plan.

"*Discussion*

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

> '(d) Restrictions on Recommendation of Probation. A hearing panel may not recommend that the respondent be placed on probation unless the following requirements are met:
>
> (1) the respondent complies with subsections (a) and (c) and the proposed probation plan satisfies the requirements in subsection (b)
>
> (2) the misconduct can be corrected by probation; and
>
> (3) placing the respondent on probation is in the best interests of the legal profession and the public.'

"203. The hearing panel concludes that the respondent complied with Rule 227(a) and (c) by filing and serving her proposed probation plan as required in subsection (a) and complying with each condition of the plan for at least 14 days prior to the formal hearing.

"204. Rule 227(b) requires that the probation plan meet the following requirements:

> '(1) be workable, substantial, and detailed;
>
> (2) contain adequate safeguards that address the professional misconduct committed, protect the public, and ensure the respondent's compliance with the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, and the attorney's oath of office;
>
> (3) include the name of a practice supervisor if practice supervision is proposed; and
>
> (4) include a provision that the respondent will not commit misconduct.'

"205. The respondent's proposed probation plan is workable, substantial, and detailed. The plan contains a provision that the respondent will not commit

misconduct. The respondent names Mr. Harris as her practice supervisor, and Mr. Harris's commitment and aptitude for serving as her practice supervisor was apparent to the hearing panel through his testimony. Mr. Harris is committed to helping the respondent stay on track, not violate the KRPC again, and perform well as a lawyer. Rule 227(b)(1), (3), and (4) are met here.

"206. The safeguards listed in the probation plan are adequate to address the professional misconduct committed, protect the public, and ensure the respondent's compliance with the rules. The hearing panel concludes that Rule 227(b)(2) is satisfied, and that the hearing panel may recommend the respondent be placed on probation.

"207. However, the hearing panel believes that the respondent and the public will be better served if Mr. Harris's supervision of the respondent does not taper off over the three years as proposed in her probation plan. The hearing panel recommends that Mr. Harris continue to meet with the respondent on a weekly basis throughout the three-year duration of the plan. Further, the hearing panel recommends that Mr. Harris periodically audit the respondent's communications with her clients to ensure that what the respondent reports to Mr. Harris and to her clients is accurate. The hearing panel believes that this added verification will provide further protection against possible mental health setbacks that may cause forgetfulness or temptation to conceal a mistake.

"208. The respondent testified that she has approximately $20,000 in her attorney's trust account to use to refund to P.A.C. once she knows how much she needs to pay to P.A.C. The hearing panel further recommends that the respondent be required to enter into a repayment plan to provide complete restitution to P.A.C. and J.C. in the amount of $40,986.25. This restitution amount represents the $84,000.00 paid to the respondent by P.A.C. and J.C. minus the amount of fees the respondent was able to retroactively ascertain was earned through legal services provided and expenses incurred in the case.

"*Recommendation of the Hearing Panel*

"209. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent's license be suspended for a period of three years. The hearing panel further recommends that the three-year suspension be stayed and the respondent be placed on probation for a period of three years under the terms of her proposed probation plan and the additional terms recommended by the hearing panel in the Discussion section above.

"210. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator. Dated this 2nd day of August, 2024."

DISCUSSION

In a disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020); see Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279). "'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. at 218.

The respondent was given adequate notice of the formal complaint, to which she filed an answer. The respondent filed no exceptions. Therefore, the panel's factual findings are considered admitted. Supreme Court Rule 228(g)(1), (2) (2024 Kan. S. Ct. R. at 285). The evidence also supports the panel's conclusions of law finding clear and convincing evidence supported the charged misconduct under KRPC 1.1 (2024 Kan. S. Ct. R. at 324) (competence), KRPC 1.3 (Kan. S. Ct. R. at 328) (diligence), KRPC 1.4 (2024 Kan. S. Ct. R. at 329) (communication), KRPC 1.5 (2024 Kan. S. Ct. R. at 330) (fees), KRPC 1.15 (2024 Kan. S. Ct. R. at 369) (safekeeping property), KRPC 3.3 (2024 Kan. S. Ct. R. at 387) (candor toward the tribunal), and KRPC 8.4(c) (2024 Kan. S. Ct. R. at 430) (misconduct involving dishonesty, fraud, deceit, or misrepresentation). We therefore adopt the panel's findings and conclusions.

The only remaining issue is to determine the appropriate discipline for the respondent's violations. The hearing panel followed the respondent's recommendation that she be suspended for three years, with an immediate stay of the suspension while the respondent is placed on probation for three years. The Disciplinary Administrator recommended that the respondent's license be suspended for six months and that she be required to undergo a reinstatement hearing under Rule 232 (2024 Kan. S. Ct. R. at 290).

This court is not bound by the recommendations made by the hearing panel or the Disciplinary Administrator. *In re Malone*, 316 Kan. 488, 499, 518 P.3d 406 (2022). After carefully considering the evidence presented, as well as the ABA Standards for Imposing Law-

yer Sanctions, the court follows the recommendations of the Disciplinary Administrator to suspend the respondent's license for six months and require her to undergo a reinstatement hearing under Rule 232.

In adopting the discipline recommended by the Disciplinary Administrator's office, we considered the mitigating factors, including mental disability and emotional trauma contributing to the respondent's violations, good faith efforts to make restitution in DA13,937, cooperation with the disciplinary process, acknowledgment of wrongdoing, genuine remorse, previous good character and reputation in the legal community, and remoteness of prior offenses.

Even so, we cannot overlook the fact that the respondent's misconduct caused actual harm to her former clients. In the DA13,809 matter, the respondent knowingly failed to file the will for probate within the six-month statutory deadline, placing the probate process in peril. The client became aware of the respondent's failure only after her newly retained attorney discovered the respondent had never filed the will for probate, which was over a year after the six-month deadline had passed. The respondent also failed to file the required inventory before the 30-day deadline. The district court sent a letter to the respondent shortly after the deadline expired notifying her of this failure and advising that a copy of the letter had not been sent to the administrator (the respondent's client) because the respondent had not provided the necessary contact information. Yet respondent knowingly did not provide the contact information, did not advise her client of the letter, and did not file the required inventory. Over a year after the 30-day deadline expired, the court issued an order for the client to show cause why she should not be removed as administrator for failing to file the inventory. It was only after having the show cause order issued that the respondent advised her client of her failure to file the required inventory. The respondent also failed to file the legal pleadings necessary to correct the incorrect social security number listed on the death certificate. When asked by the client about the status of the social security number correction, the respondent knowingly told her client that she would press the court for a ruling even though the respondent knew she had never filed a motion or request with the court to correct the death certificate. Finally, the respondent caused the client to pay an unreasonable fee of $84,000, and has failed to provide any refund, even though the respondent knew the client had to hire

subsequent counsel to provide the legal services the respondent failed to deliver in the 18 months she represented the client.

In the DA13,937 matter, the respondent told her clients by telephone that the adoption petition had already been filed, the hearing date set, and that publication had occurred, even though the respondent knew the filing was rejected almost two weeks before the phone call. Although the adoption petition was rejected two more times after this phone call, the respondent never advised her clients of this fact. It was only after the clients emailed the respondent a week before the fabricated hearing date that the respondent told them the judge had concerns over the stepparent adoption. The respondent suggested a motion to modify custody might be a better option. When the respondent failed to follow up on this motion, the clients terminated the respondent's representation. Although the clients contacted the respondent two times by email over a two-month period seeking the case file, the respondent failed to respond even though she knew the client had to hire subsequent counsel to provide the legal services the respondent failed to deliver. After three months, the respondent finally responded to another request and the clients received some documents in the mail a week later. Upon review, the clients emailed the respondent advising that the mailed documents did not have the initial pleadings, updated pleadings, publication, or a case number and requested those documents from the respondent. It was only after disciplinary proceedings were initiated that the clients discovered no petition or other pleadings had been filed and publication had never occurred.

While the respondent has made notable strides in understanding and addressing the personal issues that led to the ethical lapses and serious rule violations resulting in this complaint, there is clear and convincing evidence here to establish she knowingly engaged in much of the misconduct as found by the panel. The ABA Standards for Imposing Lawyer Sanctions differentiates between a lawyer's knowing misconduct on the one hand and a lawyer's negligent misconduct on the other. Compare ABA Standard 4.42 (Suspension is generally appropriate when a lawyer *knowingly* fails to perform services for a client and causes injury or potential injury to a client.) and ABA Standard 4.62 (Suspension is generally appropriate when a lawyer *knowingly* deceives a client, and causes injury or potential injury to the client.) with ABA Standard 4.43 (Reprimand is generally appropriate

when a lawyer is *negligent* and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.) and ABA Standard 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.). This supports our decision to follow the recommendations of the Disciplinary Administrator to suspend the respondent's license for six months and require her to undergo a reinstatement hearing.

Although the respondent's recommendation also includes a suspension component, she endorses a substantially longer period of suspension than that recommended by the Disciplinary Administrator and urges the court to stay the suspension while she is placed on probation for three years. As a general rule, however, this court is "reluctant to grant probation where the misconduct involves fraud or dishonesty because supervision, even the most diligent, often cannot effectively guard against dishonest acts." *In re Stockwell*, 296 Kan. 860, 868, 295 P.3d 572 (2013); see Rule 227 (2024 Kan. S. Ct. R. at 280) (requiring probation plans to provide adequate safeguards to protect against the misconduct).

For the reasons stated above, we decline to follow the hearing panel's recommendation that the respondent be suspended for three years, with an immediate stay of the suspension while the respondent is placed on probation for three years. Based on the evidence presented in this particular case and the ABA Standards for Imposing Lawyer Sanctions, we order the respondent's license be suspended for a period of six months and require her to undergo a reinstatement hearing under Rule 232.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Carolyn Sue Edwards is suspended for six months from the practice of law in the state of Kansas, effective from the date this opinion is filed.

IT IS FURTHER ORDERED that the respondent must undergo a reinstatement hearing under Rule 232.

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.

In re Solorio

No. 128,062

In the Matter of ALEJANDRO J. SOLORIO, *Respondent*.

(560 P.3d 1178)

ORIGINAL PROCEEDING IN DISCIPLINE

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

Original proceeding in discipline. Oral arguments held December 11, 2024. Opinion filed December 27, 2024. One-year suspension, stayed after 90 days, conditioned upon successful participation and completion of nine-month probation period.

Kate Duncan Butler, Deputy Disciplinary Administrator, argued the cause and was on the formal complaint for the petitioner.

Richard G. Guinn, of Colantuono Guinn Keppler LLC, of Overland Park, argued the cause, and *Alejandro J. Solorio*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Alejandro J. Solorio, of Mission. Solorio was admitted to practice law in Kansas on April 28, 2000. The following summarizes the history of this case before the court.

After the Office of the Disciplinary Administrator (ODA) filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC), Solorio timely responded. In due course, respondent filed a proposed probation plan. On May 28, 2024, respondent entered into a joint agreement with the Disciplinary Administrator's office stipulating to violations of KRPC 1.1 (competence) (2024 Kan. S. Ct. R. at 324), KRPC 1.3 (diligence) (2024 Kan. S. Ct. R. at 328), KRPC 1.4 (communication) (2024 Kan. S. Ct. R. at 329), and KRPC 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation) (2024 Kan. S. Ct. R. at 430).

Respondent personally appeared and was represented by counsel at the complaint hearing before a panel of the Kansas Board for Discipline of Attorneys, which was conducted on June 25, 2024. After the hearing, the panel determined that respondent had violated KRPC 1.1, KRPC 1.3, KRPC 1.4, and KRPC 8.4(c). 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.

"*Findings of Fact*

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

"19. In June 2022, A.E. and J.E., a married couple, filed complaints against the respondent along with their attorney, K.H. The complaint stems from the respondent's representation of A.E. and J.E. in an immigration matter.

"20. A.E. and J.E. originally retained the respondent in 2009 for assistance in their applications for U nonimmigrant status with United States Citizenship and Immigration Services ('USCIS'). U nonimmigrant status is valid for four years. Provided they meet certain requirements, individuals with this status may request an adjustment to lawful permanent resident status. The individual must still hold U nonimmigrant status at the time they request this adjustment.

"21. USCIS granted A.E. and J.E. U nonimmigrant status with an expiration date of July 13, 2014.

"22. In March 2014, and in anticipation of this expiration date, A.E. and J.E. hired the respondent to file an adjustment of status from U nonimmigrant to lawful permanent residence. Despite meeting with A.E. and J.E. in March, the respondent failed to file their adjustments until August 1, 2014, which was two weeks after their U nonimmigrant status had expired and after the deadline to file. In October 2014, A.E. and J.E. were issued an extension of their work visa cards. The respondent assumed that no further action was required to extend A.E. and J.E.'s existing status past the expiration date and that their requests for adjustments would be granted despite his late filing. The respondent took no additional effort to extend A.E. and J.E.'s existing status past the expiration date.

"23. The respondent acknowledged during his testimony that he missed the deadline and filed his clients' application two weeks late. The respondent testified that he misplaced the clients' file after he met with them in March 2014 and did not discover his error until the deadline had passed. Despite missing the deadline, he hoped that their application for adjustment of status would be granted.

"24. Because they no longer held U nonimmigrant status at the time of filing, USCIS denied A.E. and J.E.'s requests for adjustments on February 19, 2015.

"25. Because the respondent filed the application, albeit late, the clients' work status was automatically extended for one year. However, in October 2015, the clients received notice that their work authorization expired.

"26. The respondent met with A.E. and J.E. within a few weeks of their applications being denied. During the meeting, he informed them of the denial, but he did not tell them the reason for the denial—namely, that he filed the requests too late.

"27. From approximately February 2015 to June 2022, the respondent reassured A.E. and J.E. that he continued to work on their adjustments to lawful permanent resident status. The respondent believed that once the immigration court learned of the reasons for the denial (specifically, his late filings), an order would be issued placing A.E. and J.E. on the court docket for consideration of being granted permanent status.

"28. The respondent testified that he expected, based on his experience in past cases, that once the clients' application was denied due to the late filing, that their case would be referred to the immigration court. The respondent said that this was what he hoped for, because it was the only opportunity he saw to explain the clients' situation to immigration officials. Both the respondent and Ted Garcia, the respondent's proposed practice supervisor and also a longtime immigration law practitioner, testified that there would have been no way to present evidence of the clients' circumstances to immigration officials without a hearing before the immigration court.

"29. The respondent believed that his clients had a very good case for being allowed to remain in the U.S. lawfully. Mr. Garcia agreed with the respondent's assessment, testifying during the formal hearing that the following factors nearly guaranteed that the respondent's clients would be allowed to remain in the U.S.: (1) the clients had been present in the Unite[d] States for a sufficient amount of time; (2) the clients had good moral character and no arrests; (3) the clients had family who are United States citizens; and (4) the clients had a qualifying hardship. Mr. Garcia testified that most prosecutors would stipulate under these conditions and that it would be highly unusual for any immigration court to not grant cancellation of removal from the U.S., putting the clients back on track to apply for change of status.

"30. Due to significant delays in the immigration system, the respondent expected it could take as many as two years for A.E. and J.E. to receive notice to appear at a hearing before an immigration judge.

"31. Since A.E. and J.E. were never issued notices to appear, the respondent considered surrendering A.E. and J.E. to Immigration Customs Enforcement ('ICE') to place them in proceedings before an immigration court. However, based on the outcome of the 2016 presidential election and the new administration's stance on immigration, the respondent believed that surrendering A.E. and J.E. to ICE would have potentially resulted in a lengthy detention and potential removal from the United States because of their lack of legal immigration status. For that reason, he did not recommend to A.E. and J.E. that they surrender to authorities. The respondent did not complete additional affirmative work on the adjustments.

"32. On September 14, 2018, the respondent had A.E. and J.E. complete a second set of requests for adjustments, telling them in a voicemail that he had submitted them and needed to find out the case number. The respondent did not file these requests because he believes they would also be denied. He did not tell A.E. and J.E. about this decision.

"33. In another voicemail, the respondent informed A.E. and J.E. he had spoken to USCIS personnel about their cases. He had not.

"34. Part of the respondent's reason for inaction was that he believed A.E. and J.E.'s cases would be docketed for hearing. When the allotted time passed without a hearing being set, he did not take affirmative steps to set a hearing or resolve the issue.

"35. The respondent also believed that he might be able to involve ICE to assist with the adjustments. However, due to the COVID-19 pandemic, between the period of March 2020 through August 2021, the Kansas City ICE office limited their services to only address individuals who were detained. To approach ICE with the request during this period would have been summarily rejected since A.E. and J.E. were not detained.

"36. The respondent did not refer A.E. and J.E. to another attorney in this time period even though he came to believe they could successfully reapply with different counsel because new counsel could more effectively argue that A.E. and J.E.'s failure to timely file their adjustments was due to the respondent's failure to provide diligent representation. The respondent believed A.E. and J.E. retained alternate counsel based upon their letter to him dated May 7, 2020, which requested a copy of his file.

"37. A.E. and J.E. eventually investigated the issue independently and discovered that they no longer had a pending case before USCIS.

"38. In 2022, A.E. and J.E. hired K.H. to represent them. K.H. filed a Freedom of Information Act ('FOIA') request on their behalf and learned why the applications had been denied and that no additional efforts had been made in their cases.

"39. Because of the respondent's conduct, A.E. and J.E. lost the benefits associated with U nonimmigrant status, including their ability to work legally in the United States. This conduct seriously delayed their ability to become lawful permanent residents and eventually citizens if they choose to do so and pass the exam. Since retaining new counsel, A.E. and J.E. have regained lawful temporary status in the United States. They have also again requested an adjustment to lawful permanent resident status. Based on current information from USCIS, it is unlikely that J.E. and A.E. will learn whether their requests have been approved until 2025. A.E. and J.E. have also reapplied for work authorization and are waiting for their work visa cards.

"40. Based on the above-stipulated facts, the respondent stipulates that his conduct violated the following Kansas Rules of Professional Conduct: KRPC 1.1 (competence); KRPC 1.3 (diligence); KRPC 1.4 (communication); and KRPC 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation).

"*Conclusions of Law*

"41. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence); 1.3 (diligence); 1.4 (communication); and 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation), as detailed below.

"KRPC 1.1

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

"43. The respondent did not act competently on his clients' behalf, as he acknowledged that he set their file to the side and forgot about their case until two weeks after the deadline to file the adjustment of status had passed.

"44. The respondent stipulated that his conduct violated KRPC 1.1.

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

"KRPC 1.3

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

"47. The respondent failed to diligently and promptly represent his clients by failing to file the application for change of status on their behalf prior to the July 2014 deadline.

"48. The respondent stipulated that his conduct violated KRPC 1.3.

"49. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"50. 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.' Further, according to KRPC 1.4(b), '[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'

"51. The respondent failed to fully inform his clients about the reason for the denial of their application for change of status. Further, the respondent failed to clarify that the denial of their application was due to his filing the application late. Finally, the respondent failed to communicate with his clients regarding his strategy for not taking action in their immigration case due to external intervening factors, such as delays in the immigration court issuing a notice to appear, COVID-19 delay, and the change of presidential administration and, thus, change of executive branch policy regarding immigration.

"52. The respondent stipulated that his conduct violated KRPC 1.4.

"53. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4.

"KRPC 8.4(c)

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

"55. The respondent engaged in conduct involving misrepresentation and dishonesty when from 2015 on he told A.E. and J.E. that he continued to work on their adjustments to lawful permanent resident status when he did not, telling them in a voicemail that he had submitted a second set of requests for adjustments when he had not, and telling his clients that he had spoken to USCIS personnel about their case when he had not.

"56. The respondent stipulated that his conduct violated KRPC 8.4(c).

"57. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

"58. 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.

"59. *Duty Violated*. The respondent violated his duty to his clients, A.E. and J.E.

"60. *Mental State*. The respondent negligently violated the duty of competence and the duty of diligence. The respondent knowingly violated the duty of honesty.

"61. *Injury*. The respondent's failure to act competently and diligently by timely filing his clients' application for change of status caused significant injury to the clients, who lost their lawful status and work authorization in the United States as a result.

"62. In addition to the above-cited factors in Standard 3, the hearing panel has thoroughly examined and considered the following Standards:

'4.42 Suspension is generally appropriate when:

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

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

'4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.'

'4.53 Reprimand is generally appropriate when a lawyer:

'(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

'(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury 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.'

"Aggravating and Mitigating Factors

"63. 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 with regard to aggravating factors:

"64. *Vulnerability of Victim*. A.E. and J.E. were vulnerable to the respondent's misconduct as immigrants under U nonimmigration status, and later were made more vulnerable when their application for permanent residence was filed late and denied as a result. This is an aggravating factor.

"65. *Pattern of Misconduct*. The respondent's dishonesty was ongoing. The respondent continued to be dishonest with his clients and failed to communicate important information about their case for years. This is an aggravating factor.

"66. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 2000. At the time of the misconduct, the respondent had been practicing law for approximately 15 years. The hearing panel concludes that the respondent had substantial experience in the practice of law when the misconduct occurred and that this is an aggravating factor.

"67. 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:

"68. *Absence of a Prior Disciplinary Record*. The respondent has not been previously disciplined. This is a mitigating factor.

"69. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct. He fully understood the negative consequences his misconduct caused for his former clients and expressed that he would do things differently if he were able to go back and do everything over again. This is a mitigating factor.

"70. *Absence of Dishonest or Selfish Motive*. The respondent's initial failure to timely file his clients' adjustments was not motivated by dishonesty or selfishness. While the respondent's conduct in failing to inform his clients of his mistake involved dishonesty to his clients, the hearing panel concludes that his motive was to prevent his clients from feeling increased anxiety and fear about a situation over which they had virtually no control. This is a mitigating factor.

"71. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct*. The respondent refunded the fee paid to him by A.E. and J.E. and settled a malpractice claim filed by them through his malpractice insurance provider. The respondent's effort to make restitution and resolve the consequences of his misconduct is a mitigating factor.

"72. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent has cooperated in the disciplinary process, as evidenced in part by his entry into a joint stipulation to facts and that his conduct violated KRPC 1.1, 1.3, 1.4, and 8.4(c). The disciplinary administrator agreed that the respondent was cooperative in the disciplinary process. The hearing panel concludes that this is a mitigating factor.

"73. *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 immigration bar and his community in Kansas City, Kansas. The respondent also enjoys the respect of his peers and his clients as shown by the testimony of Ted Garcia and through letters received by the hearing panel. The hearing panel concludes that this is a mitigating factor.

"*Recommendation of the Parties*

"74. The disciplinary administrator recommended that the respondent's license be suspended for a period of one year. The disciplinary administrator further recommended that after the respondent has served 90 days of the suspension, the remaining nine months of the suspension be stayed, and the respondent be placed on probation for 18 months.

"75. The respondent recommended that he be suspended for six months, with an immediate stay of the suspension while the respondent is placed on probation for 18 months according to the terms of his proposed plan of probation.

"*Discussion*

"76. While the hearing panel reviewed ABA Standard 4.6, the panel concludes, based on the evidence presented, that this standard does not apply in this case. Application of ABA Standard 4.6 requires evidence that the lawyer's dishonest or deceptive conduct 'causes injury or potential injury to the client.'

"77. The hearing panel heard evidence that A.E. and J.E. 'lost the benefits associated with U nonimmigrant status, including their ability to work legally in the United States.' Further, the respondent's conduct 'seriously delayed [A.E. and J.E.'s] ability to become lawful permanent residents and eventually citizens if they choose to do so and pass the exam.'

"78. The deadline for A.E. and J.E. to file for permanent residency in the United States was in mid-July 2014. The respondent acknowledged during his testimony that he missed the deadline and filed his clients' application two weeks late. The respondent said that he misplaced the clients' file after he met with them in March 2014 and did not discover his error until the deadline had passed.

"79. The respondent expected, based on his experience in past cases, that once the clients' application was denied due to the late filing, that their case would be referred to the immigration court. The respondent said that this was what he hoped for, because it was the only opportunity he saw to explain his fault with the late filing and the clients' situation to immigration officials. Both the respondent and Mr. Garcia, both longtime immigration law practitioners, testified that there would have been no way to present evidence of this to immigration officials without a hearing before the immigration court.

"80. The respondent believed that his clients had a very good case for being allowed to remain in the U.S. lawfully. Mr. Garcia agreed with the respondent's assessment, testifying during the formal hearing that the four factors discussed above nearly guaranteed that the respondent's clients would be allowed to remain in the U.S. Mr. Garcia testified that most prosecutors would stipulate under these conditions and that it would be highly unusual for any immigration court to not grant cancellation of removal from the U.S.

"81. Due to significant delays in the immigration system, the respondent expected it could take as many as two years for A.E. and J.E. to receive notice to appear at a hearing before an immigration judge.

"82. In the meantime, 2016 was a presidential election year. The president of the United States oversees and directs the executive branch's enforcement of U.S. immigration laws and policies. The new presidential administration took an approach to immigration matters that resulted in greater risk for extended detentions and removal for persons like the respondent's clients. Further, the COVID-19 pandemic caused additional delays in the immigration system.

"83. The respondent analyzed these new circumstances and concluded that there was a significant possibility that if he recommended that A.E. and J.E. sur-

render themselves to immigration authorities, they would be detained for an extended period of time before their case could be heard by the immigration court. A.E. and J.E. had minor children, who were U.S. citizens, at home at this time.

"84. The respondent felt that his clients' immigration case was between a rock and a hard place. He felt the two choices before the clients were to (1) surrender to immigration officials and be detained for an extended period or be deported from the country, leaving their minor children without both of their parents, or (2) to wait and hope that the current presidential administration changed and enforcement of immigration regulations returned to the procedures the respondent had seen in the past. Return to past immigration procedures would allow for a hearing before the immigration court, offering his clients an opportunity to present what the respondent believed was a very good case for remaining in the U.S. and getting back on track for eventually obtaining permanent residence status.

"85. The respondent's failure to communicate the true situation to his clients, and his dishonest statements that misled them for years, constituted misconduct and was unacceptable. A.E. and J.E. should have been told the truth about the respondent's mistake in filing their application late and should have been able to make decisions about their case moving forward with full knowledge of the circumstances surrounding their case. The dishonesty, however, did not cause the clients' injury.

"86. Rather, the evidence presented at the formal hearing showed that the fundamental injury to the clients' immigration case resulted from the respondent's late filing of their application, which constituted violations of KRPC 1.1 and 1.3. This injury was then exacerbated by circumstances outside of the respondent's control, such as delays in the immigration authorities sending the clients a notice to appear before the immigration court, COVID-19 delays, and a change in the presidential administration and, thus, the executive branch policy on immigration. There was no evidence that, had the respondent accurately communicated to A.E. and J.E. the circumstances resulting in the denial of their application, the resulting delay in their change of immigration status would have been shorter.

"87. Also, the hearing panel concludes that the respondent did not mislead his clients for selfish reasons. The respondent saw an impossible situation before his clients and did not want them to experience anxiety about their situation. Further, he did not want his clients to lose hope before he could get their case in front of the immigration court. The respondent testified that he understands that despite his good intentions, it was wrong for him not to fully disclose all of the information about the case to A.E. and J.E.

"88. The hearing panel concludes that the appropriate standards to apply in this case are ABA Standards 4.43 and 4.53:

> '4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.'

'4.53 Reprimand is generally appropriate when a lawyer:

'(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

'(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.'

"89. The hearing panel concludes that ABA Standard 4.42 does not apply because the evidence showed the respondent's failure to timely file his client's application was a single mistake caused by misplacing the clients' file and not noticing his error until the filing deadline had passed. This misconduct was not knowing and was not the result of a pattern of neglect but instead a single occurrence of neglect. Additionally, while the respondent should have communicated his strategy to his clients, the respondent's decision to not take action in the clients' case after the late application filing was an appropriate strategic response to external factors outside of the respondent's control.

"90. Finally, the hearing panel concludes that the respondent was negligent in failing to provide his clients with accurate information about their case. His intentions may have been to help his clients feel less anxiety about what seemed to the respondent to be an impossible situation, but the clients were entitled to know the full truth about their case. ABA Standard 4.63 states that reprimand is generally appropriate under these circumstances.

"*Recommendation of the Hearing Panel*

"91. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be censured and that the censure be published in the Kansas Reports.

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

DISCUSSION

In an attorney disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279). 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).

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so the court must determine whether it is supported by clear and convincing

evidence. *In re Hodge*, 307 Kan. 170, 209-10, 407 P.3d 613 (2017). If so, the finding will not be disturbed. The court does not reweigh conflicting evidence, assess witness credibility, or redetermine questions of fact when undertaking its factual analysis. *In re Hawver*, 300 Kan. 1023, 1038, 339 P.3d 573 (2014).

The respondent was given adequate notice of the formal complaint and timely responded. The respondent was also given adequate notice of the hearing before the panel and the hearing before this court. He did not file exceptions to the hearing panel's final hearing report.

With no exceptions before us, the panel's factual findings and conclusions of law are deemed admitted by the respondent and ODA. Supreme Court Rule 228(g)(1), (2) (2024 Kan. S. Ct. R. at 285). We agree with the panel in holding that respondent violated KRPC 1.1 (competence), KRPC 1.3 (diligence), KRPC 1.4 (communication), and KRPC 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation).

The only remaining issue is to decide the appropriate discipline for these violations. The hearing panel recommended the respondent be censured and that the censure be published in the Kansas Reports. The Disciplinary Administrator recommended that Solorio be suspended for a period of one year and that after respondent has served 90 days of the suspension, the remaining nine months be stayed, and the respondent be placed on probation for 18 months. The respondent argued for a 6-month suspension immediately stayed while the respondent is placed on probation for 18 months.

This court is not bound by any recommendations. *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). The court is cognizant that "'[o]ur primary concern must remain protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar.' [Citation omitted.]" *In re Jones*, 252 Kan. 236, 241, 843 P.2d 709 (1992).

After considering the evidence presented, all recommendations, and aggravating and mitigating circumstances, we adopt the Disciplinary Administrator's recommendation with a slight modification in the length of the term of probation. We note the hearing panel's conclusion that respondent's deception in not disclosing to his clients his failure to file their adjustments to immigration status would typically result in

public reprimand, but several factors here have compounded the gravity of the violation independent of the initial deception.

First, the nearly eight-year duration of the repeated dishonesty unnecessarily prolonged harm to especially vulnerable clients. Second, the nature of the deception in failing to disclose the basis for the denial of A.E. and J.E.'s legal immigration status prevented A.E. and J.E. from being fully informed and autonomous decision makers regarding their legal status. Paragraph 36 of the hearing panel's findings exemplifies the impact of this harm by explaining the respondent did not refer A.E. and J.E. to another attorney even though he believed they could successfully reapply with different counsel who could more effectively argue the failure to timely file their adjustments was due to the respondent's lack of diligent representation. This clearly deprived A.E. and J.E. of their ability to be fully informed in considering the best legal avenue to pursue their claims.

We conclude the appropriate discipline is that the respondent be suspended for a period of one year. After the respondent has served 90 days of the suspension, the respondent will be placed on probation for the remaining 9 months, subject to the terms and conditions of the amended probation plan. No reinstatement hearing is required upon successful completion of probation.

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

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Alejandro J. Solorio is suspended for a period of one year, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2024 Kan. S. Ct. R. at 278) for violations of KRPC 1.1, 1.3, 1.4, and 8.4(c). After 90 days, the suspension is stayed conditioned upon Solorio's successful participation and completion of a 9-month probation period. Probation will be subject to the terms set out in the amended probation plan. No reinstatement hearing is required upon successful completion of probation.

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

No. 128,210

In the Matter of LAINE CHARLES RUNDUS, *Respondent.*

(561 P.3d 515)

ORIGINAL PROCEEDING IN DISCIPLINE

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

Original proceeding in discipline. Oral argument held December 11, 2024. Opinion filed December 27, 2024. One-year suspension.

Gayle Larkin, Disciplinary Administrator, argued the cause, and was on the formal complaint for the petitioner.

Laine C. Rundus, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against respondent Laine C. Rundus, of Belleville, who was admitted to practice law in Kansas in September 2007.

On August 23, 2024, the Disciplinary Administrator's office filed a formal complaint against Rundus alleging violations of the Kansas Rules of Professional Conduct. This followed an order of the Kansas Supreme Court entered on April 3, 2024, that had temporarily suspended Rundus' license to practice law under Rule 213 (2024 Kan. S. Ct. R. at 264) following his felony conviction for driving under the influence. Rundus' license to practice law remains suspended.

After the formal complaint was filed, the parties entered into a summary submission agreement and later an amended summary submission agreement under Supreme Court Rule 223 (2024 Kan. S. Ct. R. at 275). In both, Rundus admitted that he violated the Kansas Rules of Professional Conduct (KRPC)—specifically KRPC 8.4(b) (2024 Kan. S. Ct. R. at 430) (misconduct: commit criminal act) and Rule 219 (2024 Kan. S. Ct. R. at 270) (reporting criminal charges or conviction within 14 days). 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 they jointly recommended a sanction. See Rule 223(b).

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). The summary submission agreement and an amended summary submission agreement were filed with this court.

Before us, the parties recommend a finding of misconduct and a sanction of a one-year suspension from the practice of law. They also recommend that Rundus be required to undergo a reinstatement hearing prior to his return to the practice of law as contemplated by Kansas Supreme Court Rule 232(e) (2024 Kan. S. Ct. R. at 291). At the reinstatement hearing, the parties recommend that Rundus be required to establish that he received adequate treatment for depression and that he has been released from criminal probation.

The court accepts those recommendations, including the Disciplinary Administrator's additional recommendation that the one-year period of suspension be made retroactive to April 3, 2024, the date Rundus' license was temporarily suspended. Rundus must seek a reinstatement hearing and provide evidence of his treatment for depression and his release from criminal probation at his reinstatement hearing, The court also orders that Rundus must show that he has contacted and worked with the Kansas Lawyers Assistance Program and that he is following any recommendations made by that program.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant portions of the amended summary submission agreement follow.

"*Findings of Fact*

"5. Under Rule 223(b)(2)(B) (2024 Kan. S. Ct. R. at 275), the parties stipulate to the following findings of fact:

"6. The respondent, Laine C. Rundus, is an attorney at law, Kansas Attorney Registration No. 23348. The Supreme Court admitted the respondent to the practice of law on September 28, 2007. The respondent's most recent registration address with the Office of Judicial Administration is 1971 U.S. Highway 81, Belleville, Kansas 66935.

"7. On April 3, 2024, the Kansas Supreme Court entered an order temporarily suspending the respondent's license to practice law under Rule 213 (2024 Kan. S. Ct. R. at 264). The respondent's license remains suspended.

"*Republic County, Kansas, Case Number 2023TR00131*

"8. On March 3, 2023, at approximately 1:17 a.m., Deputy Shawn Sprayberry with the Republic County Sheriff's office observed a vehicle parked in a parking lot at an unusual time. The deputy approached the vehicle and observed the respondent sitting in the driver's seat, slumped toward the passenger's seat. The respondent appeared to be unconscious. The deputy was eventually able to wake the respondent. The respondent's keys were in the ignition and the ignition was in the 'on' position.

"9. When the respondent stepped from the vehicle, he was unsteady on his feet. The deputy administered field sobriety tests. After the respondent failed the field sobriety tests, the deputy arrested the respondent for driving under the influence of alcohol ('DUI').

"10. The respondent submitted to a blood test for alcohol concentration. The test showed that the respondent's alcohol concentration was .21.

"11. The respondent did not timely report the charge to the disciplinary administrator's office.

"12. On March 27, 2023, the respondent called the disciplinary administrator's office to report the March 3, 2023, charge. Kathleen Selzler Lippert directed the respondent to provide the information in writing. The respondent did not provide a written report until August 2023.

"13. On June 5, 2023, the respondent entered a plea of guilty to the charge. The respondent did not timely report the conviction to the disciplinary administrator's office.

"14. The court sentenced the respondent to six months in jail but placed the respondent on probation after the respondent served 48 hours. On July 14, 2023, the respondent paid the fines and costs in 2023TR00131.

"15. On August 15, 2023, the respondent sent an email message to the disciplinary administrator's office, reporting the conviction (the respondent's email message referenced an incorrect date for the conviction).

"*Saunders County, Nebraska, Case Number CR-23-190*

"16. On April 8, 2023, shortly after midnight, Nebraska Highway Patrol Officer Chase Landry observed a vehicle speeding. Trooper Landry initiated a traffic stop. The respondent was the driver of the vehicle. The trooper approached the respondent's vehicle on the passenger's side and detected a distinct odor of an alcoholic beverage emitting from the vehicle. The trooper informed the respondent of the reason for the stop and asked for proof of registration and insurance. The respondent was unable to provide the trooper with the requested documentation. Additionally, the respondent did not have his driver's license with him.

"17. The trooper asked the respondent if he had consumed any alcoholic beverages. The respondent denied consuming any alcoholic beverages. The trooper asked the respondent to perform field sobriety tests; the respondent failed the field sobriety tests.

The trooper transported the respondent to the Saunders County Corrections Office. There, the respondent submitted to a breath alcohol concentration test. According to the test, the respondent's breath alcohol concentration was .169.

"18. The trooper arrested the respondent for DUI and other traffic charges. The respondent did not timely report the charge to the disciplinary administrator's office.

"19. On June 15, 2023, the respondent entered a plea of no contest to the charge. The Saunders County, Nebraska, court imposed a 30 day jail sentence.

"20. In the respondent's August 15, 2023, email message referenced above, the respondent also disclosed the Saunders County, Nebraska, conviction (again, the respondent referenced an incorrect date as the date of conviction).

"*Republic County, Kansas, Case Number 2023TR00474*

"21. On June 30, 2023, Deputy Sprayberry observed a vehicle fail to maintain a single lane of traffic while traveling north on U.S. Highway 81. The deputy initiated a traffic stop and discovered that the respondent was driving the vehicle. The [deputy] asked the respondent to provide proof of registration and insurance. The respondent was unable to do so.

"22. The [deputy] noticed the odor of alcohol coming from the vehicle. When questioned, the respondent denied consuming any alcohol. The deputy administered field sobriety tests; the respondent failed the tests.

"23. The [deputy] transported the respondent to the sheriff's office and . . . administered a breath alcohol concentration test. The respondent's breath alcohol concentration was .124.

"24. The [deputy] arrested the respondent for DUI and other traffic violations.

"25. On July 14, 2023, the Republic County Attorney charged the respondent with DUI, a level 6, nonperson felony. The respondent failed to timely report the charge.

"26. In the respondent's August 15, 2023, email message referenced above, the respondent also disclosed the third arrest for DUI (the respondent indicated that he was charged on July 3, 2023, however, he was arrested on June 30, 2023, and formally charged on July 14, 2024).

"27. On January 8, 2024, the respondent entered a plea of guilty to felony DUI. The respondent did not notify the disciplinary administrator's office of the conviction as required.

"28. On February 6, 2024, the district court sentenced the respondent to serve 30 days in jail for the third conviction for DUI. The district court ordered the respondent to serve 48 hours in jail and then placed the respondent on house arrest for an additional 30 days. The court ordered that the respondent be subject to post-release supervision (probation) for 24 months.

"29. Among other things, the respondent's probation plan required him to 1) complete alcohol treatment, 2) pay fines and costs in the total amount of $2,596.50, and 3) complete 50 hours of community service work.

"30. The respondent completed two of the three items by completing the alcohol treatment and paying the fine. The respondent continues to complete the community service work, but has not yet completed all the hours required by his probation plan.

"31. Provided the respondent completes the remaining hours of community service work prior to February 6, 2025, the respondent and his probation officer expect that he will be discharged from probation one year early.

"32. The respondent is in compliance with all other terms of probation.

"*Conclusions of Law*

"33. Under Rule 223(b)(1) (2024 Kan. S. Ct. R. at 275), the respondent admits that he engaged in misconduct. Under Rule 223(b)(2)(C) (2024 Kan. S. Ct. R. at 275), the parties stipulate that the findings of fact stated above constitute clear and convincing evidence of violations of KRPC 8.4(b) (misconduct: commit criminal act) and Rule 219 (reporting criminal charges or conviction within 14 days).

"34. 'It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.' KRPC 8.4(b). In this case, the respondent drove while under the influence of alcohol on three occasions. The crimes which the respondent was convicted of adversely reflect on his fitness as a lawyer in other respects. Accordingly, the respondent violated KRPC 8.4(b).

"35. Rule 219(c) (2024 Kan. S. Ct. R. at 270) requires an attorney to notify the disciplinary administrator's office within 14 days when the attorney has been *charged* with a reportable offense. Additionally, Rule 219(d) requires an attorney to notify the disciplinary administrator's office within 14 days when an attorney has been *convicted* of a reportable offense. The respondent failed to timely notify the disciplinary administrator's office of the charges and convictions, as required by Rule 219(c) and (d) and as detailed above.

"*ABA Standards for Imposing Lawyer Sanctions*

"36. In making the joint recommendation for discipline, the disciplinary administrator and the respondent 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.

"37. *Duty Violated*. The respondent violated his duty to the public and his duty to the profession.

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

"39. *Injury*. As a result of the respondent's misconduct, the respondent caused potential harm to the public and the legal profession.

"*Aggravating and Mitigating Factors*

"40. *Aggravating Circumstances*. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Under Rule 223(b)(2)(D) (2024 Kan. S. Ct. R. at 275), the parties stipulate that the following aggravating factors are applicable in this case:

"41. *A Pattern of Misconduct*. The respondent engaged in a pattern of misconduct. Within this disciplinary case, the respondent was charged with and convicted of DUI.

"42. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 2007. At the time of the misconduct, the respondent has been practicing law for more than 15 years.

"43. *Illegal Conduct, Including that Involving the Use of Controlled Substances.* The misconduct in this case involved the commission of illegal conduct on three separate occasions.

"44. *Mitigating Circumstances.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Under Rule 223(b)(2)(D) (2024 Kan. S. Ct. R. at 275), the parties stipulate that the following mitigating factors are applicable in this case:

"45. *Absence of a Prior Disciplinary Record*. The respondent has not previously been disciplined.

"46. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness.

"47. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. The respondent suffers from depression. It is clear that the respondent's depression contributed to his misconduct.

"48. *Imposition of Other Penalties or Sanctions*. The respondent has experienced other sanctions for his conduct. As a result of the three convictions, the respondent spent time in jail, on house arrest, and paid fines and costs. In addition, the respondent remains on probation.

"*Applicable ABA Standards*

"49. The parties agree that ABA Standards for Imposing Lawyer Sanctions 5.12 and 7.2 are the standards applicable in this case.

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

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

"*Recommendation for Discipline*

"50. Based on the findings of fact, the conclusions of law, the aggravating factors, the mitigating factors, and ABA Standards 5.12 and 7.2 and under Rule 223(b)(3) (2024 Kan. S. Ct. R. at 275), the parties jointly recommend that the Supreme Court suspend the respondent's license for one year. The parties further recommend that prior to reinstatement, the respondent be required to undergo a reinstatement hearing as contemplated by Rule 232(e). At the reinstatement hearing, the parties recommend that the respondent be required to establish that he has received adequate treatment for depression and that he has been released from probation.

"*Additional Stipulations and Procedures*

"51. *Waiver of Hearing.* Under Rule 223(b)(4) (2024 Kan. S. Ct. R. at 275), the respondent waives the hearing on the formal complaint as provided by Rule 222(c) (2024 Kan. S. Ct. R. at 274).

"52. *No Exceptions.* Under Rule 223(b)(5) (2024 Kan. S. Ct. R. at 275), the parties agree no exceptions will be taken.

"53. *Notice to Complainants.* The respondent self-reported the criminal cases. As a result, there are no complainants to notify of the summary submission agreement.

"54. *Board Chair*. The parties acknowledge that after the Summary Submission Agreement is signed, the disciplinary administrator will provide a copy of the agreement to the chair of the Kansas Board for Discipline of Attorneys. If the chair approves the agreement, the scheduled hearing on the formal complaint will be cancelled and the case will proceed according to Rule 228 (2024 Kan. S. Ct. R. at 284). If the chair rejects the agreement, the case will proceed to hearing as scheduled according to Rule 222 (2024 Kan. S. Ct. R. at 274).

"55. *Oral Argument.* The respondent also understands and agrees that after entering into this Summary Submission Agreement he will be required to appear before the Supreme Court for oral argument under Rule 228(i) (2024 Kan. S. Ct. R. at 284).

"56. *Effect of Agreement.* The respondent understands and agrees that pursuant to Rule 223(f) (2024 Kan. S. Ct. R. at 275), the Summary Submission Agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

"57. *Electronic Delivery and Signatures.* The parties agree that the Summary Submission Agreement may be exchanged and executed by electronic transmission and that electronic signatures will be deemed to be original signatures."

DISCUSSION

In a disciplinary proceeding, 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) (2024 Kan. S. Ct. R. at 279). We have defined clear and convincing evidence as "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 Rundus 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 and the amended summary submission agreement, the parties stated that they would not take exceptions to the findings of facts and conclusions of law in those documents. Under the terms of Supreme Court Rule 228(g)(1) (2024 Kan. S. Ct. R. at 285), Rundus has thus admitted the factual findings and conclusions of law in the summary submission and the amended summary submission agreements.

Based on Rundus' admissions and the record that supports those admissions, we adopt the findings of fact in the amended summary submission agreement. These findings of facts provide clear and convincing evidence that support the conclusions of law set out in the agreement. These findings and conclusions establish that Rundus' conduct violated KRPC 8.4(b) and Rule 219. More specifically, the admissions establish that Rundus drove a motor vehicle while under the influence of alcohol on three occasions

and was convicted for those incidents with the third offense resulting in a felony conviction. These crimes adversely reflect on his fitness as a lawyer. KRPC 8.4(b). Rundus also admits that he failed to notify the Disciplinary Administrator's office within 14 days after he was charged with and convicted of each of the DUI offenses.

Having found these violations of our rules of professional conduct, we turn to considering the appropriate discipline. The parties' agreements about the appropriate level of discipline are advisory only and do not prevent us from imposing a greater or lesser discipline. Kansas Supreme Court Rule 223(f) (2024 Kan. S. Ct. R. at 276). Here, after full consideration of the findings of facts and conclusions of law, we adopt the joint recommendation of a one-year suspension from the practice of law.

The Disciplinary Administrator also recommended that we make the one-year suspension retroactive, so it would effectively begin on April 3, 2024, when Rundus' license to practice law was temporarily suspended. In considering this recommendation, we have weighed the mitigating factors stated in the amended summary submission agreement, as supported by the parties' joint exhibits. These reflect that Rundus has no prior history of misconduct and suffers from depression that contributed to his misconduct. Rundus has also experienced other sanctions for his misconduct through the criminal justice system: He has paid fines and fees and has completed jail time and time on house arrest. He has also followed the terms of his criminal probation. As required under his probation terms, he has completed an outpatient alcohol treatment program and has maintained sobriety. In addition, he has fulfilled a portion of his community service work requirement, although he must complete more hours before being discharged from criminal probation. While doing these things, Rundus has been suspended from the practice of law and he will remain suspended until he can show he qualifies for reinstatement. Given those factors and the burden he faces to gain reinstatement, we accept the Disciplinary Administrator's recommendation and order that the one-year suspension will be retroactive on April 3, 2024.

As we have suggested, we also adopt the parties' joint recommendation that Rundus must petition for reinstatement and undergo a reinstatement hearing under Kansas Supreme Court Rule 232(b) and (e). At the reinstatement hearing, Rundus must satisfy his burden to show that the factors in Rule 232(e)(4) weigh in favor of reinstatement and show he has met the specific conditions recommended in the amended summary submission—that is, that he has received adequate treatment for depression and that he has been released from criminal probation. We impose yet another requirement: Rundus must establish at the hearing that he has contacted and worked with the Kansas Lawyers Assistance Program and that he is following any recommendations made by that program.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that respondent Laine C. Rundus' license to practice law in Kansas is suspended for one year; the period of suspension will be retroactive, beginning on April 3, 2024. Supreme Court Rule 225(a)(3) (2024 Kan. S. Ct. R. at 278). Respondent must undergo a reinstatement hearing under Kansas Supreme Court Rule 232(e) prior to his reinstatement to the practice of law. At the reinstatement hearing, the respondent must establish:

- He has received adequate treatment for depression;
- He has been released from criminal probation;
- He has contacted and worked with the Kansas Lawyers Assistance Program and is following any recommendations made by that program; and
- The factors in Rule 232(e)(4) weigh in favor of 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.