REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 316, No. 3
Opinions filed in October – December 2022

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SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2022-RL-078

Rules Relating to District Courts

The court amends the attached Supreme Court Rule 104, effective the date of this order.

Dated this 16th day of November 2022.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 104

CONTINUITY OF OPERATIONS PLAN

(a) **Purpose.** This rule sets forth a district court's responsibility to develop and maintain an all-hazards continuity of operations plan.

(b) **Definitions.**

(1) **"Continuity incident"** means injury, illness, or death; damage to equipment, infrastructure, services, or property; and functional degradation to social, economic, or environmental aspects due to an environmental or a human-caused hazard.

(2) **"Continuity of operations (COOP)"** means an effort to ensure a court can continue to perform its essential functions in the event of a continuity incident.

(3) **"Hazard"** means an accident; natural disaster; space weather; domestic or foreign-sponsored terrorist attack; act of war; weapon of mass destruction; technological, chemical, biological, radiological, nuclear, or explosive event; and any other circumstance that might disrupt continuity of operations.

(c) **Requirement.** A court must develop and maintain a COOP plan for each facility where judicial branch personnel work.

(d) **Elements.** A court must address the following elements in each COOP plan.

(1) **Essential Functions.** Essential functions are critical activities that a court must continue to perform after a disruption of normal activities caused by a continuity incident. A court's essential functions directly relate to accomplishing its mission as set forth in the United States Constitution, the Kansas Constitution, a statute, a rule, or another source. The following activities are examples of essential functions: issuing a writ of habeas corpus or mandamus, holding a juvenile detention hearing, and issuing a restraining order or search warrant.

(2) **Essential Supporting Activities.** A court's essential supporting activities (ESA) support performance of essential functions but do not reach the threshold of essential functions. ESA are important facilitating activities that most courts perform; however, a court's performance of ESA alone does not directly accomplish its mission. The following activities are examples of ESA: security, human resources management, and information technology management.

(3) **Delegation of Authority Planning.** A court's delegation of authority planning provides legal authorization for an individual to act on behalf of a key official for a specified purpose and to carry out specific duties. A delegation of authority will specify a particular function that the individual is authorized to perform and include any restriction of that authority. A delegation of authority should have sufficient breadth to ensure the court can perform its essential functions. The following are examples of duties that a court might delegate: purchasing, leave authorization, and execution of contractual agreements.

(4) **Succession Planning.** A court's succession planning identifies a successor who will ensure there is no lapse in essential decision-making authority in the event an incumbent is unable or unavailable to fulfill essential duties. A court's order of succession should include accompanying authorities. An example of succession planning is replacing a member of the district court's leadership team, such as the chief judge, court administrator, chief clerk, or chief court services officer.

(5) **Alternate Facility.** An alternate facility is a location other than the primary facility that a court will use to carry out essential functions and ESA in a continuity incident. An alternate facility refers not only to a physical location but also to teleworking, telecommuting, mobile-office concepts, and other nontraditional options.

(6) **Continuity or Interoperable Communications Planning.** A court's continuity or interoperable communications planning provides the court the capability to perform essential functions and ESA in conjunction with other organizations in a continuity incident. A court might include specialized equipment or systems such as phones, radios, or mass notification systems in its continuity or interoperable communications planning.

(7) **Vital Records and Databases Management Planning.** A court's vital records and databases management planning identifies documents, references, records, information systems, data management software, and equipment needed to support essential functions and ESA during a continuity incident. A court's planning should address the availability of all forms of vital records and databases.

(8) **Human Capital Planning.** A court's human capital planning identifies the essential staff, COOP team members, and other special categories of employees who are assigned response duties during a continuity incident and COOP activation.

(9) **Test, Training, and Exercise Program.** A court's test, training, and exercise program describes measures to ensure that the court's COOP plan can support the continued execution of its essential functions throughout the duration of a continuity incident.

(10) **Devolution Planning.** A court's devolution planning describes the court's ability to transfer statutory authority and responsibility for essential functions from its primary operating staff and facilities to other court or organization employees and facilities.

(11) **Reconstitution Planning.** A court's reconstitution planning describes the process by which surviving or replacement personnel resume normal court operations from the original or replacement primary operating facility.

(12) **Pandemic Planning.** A court's planning must ensure the court can continue to perform its essential functions in the event of a pandemic.

(e) **COOP Manager.** A chief judge must appoint a judicial district COOP manager and submit that person's name to the Office of Judicial Administration (OJA) by November 1, 2021.

(1) **Responsibility.** A judicial district COOP manager will be responsible for coordinating COOP planning for each facility where court personnel work.

(2) **Training.** OJA will provide or facilitate initial and ongoing COOP training. A judicial district COOP manager must attend COOP training as directed by OJA.

(f) **Submittal; Timing.**

(1) **Initial Plan.** A court must submit all initial COOP plans to OJA no later than December 1, 2023.

(2) **Annual Update.** A court must annually review and submit updated COOP plans to OJA no later than December 1 of each year beginning in 2024.

(g) **Review and Approval.**

(1) **Initial Plan.** OJA will review initial COOP plans for required elements and completeness by February 1, 2024.

(2) **Annual Update.** OJA will review updated COOP plans annually by February 1.

(3) **Notice.** Once reviewed, OJA will provide each court a notice of approval status.

(h) **COOP Planning Resources.** COOP planning systems, templates, and other resources are available from OJA at https://www.kscourts.org.

[**History:** New rule adopted effective October 25, 2021; Am. effective November 16, 2022.]

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2022-RL-082

Rules Relating to Judicial Conduct

The court amends the attached Supreme Court Rule 601B, Kansas Code of Judicial Conduct Rules 3.10 and 3.15, effective the date of this order.

Dated this 8th day of December 2022.

FOR THE COURT

MARLA LUCKERT
Chief Justice

RULE 3.10

Practice of *Law*

A judge must not practice *law*. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a *member of the judge's family*, but the judge is prohibited from serving as the family member's lawyer in any forum. This rule does not prohibit the practice of law pursuant to, and in the context of, a judge's military service.

COMMENT

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

[2] A judge will remain subject to conflict of interest and impropriety constraints. See Rule 2.11.

[3] A judge or court staff does not violate this rule by supervising a research attorney working for the Kansas Judicial Branch under a legal intern permit or a temporary permit to practice law. See Supreme Court Rules 715 and 718.

[**History:** Am. effective March 1, 2018; Am. effective December 8, 2022.]

RULE 3.15

Reporting Requirements

(A) A judge must publicly report:

(1) compensation received for extrajudicial activities as permitted by Rule 3.12 and compensation received by the judge's spouse or *domestic partner*. Reportable compensation means income received for the personal services of the judge in an amount in excess of $500 from any single payor or in excess of $3,000 from all payors during the reporting period; income received for the personal services of the judge's spouse or *domestic partner* in an amount in excess of $3,000 from a single source during the reporting period; and income derived from business; royalties, including ownership of mineral rights; annuities; life insurance; and contract payments.

(2) fees and commissions. A judge must report each client or customer who pays fees or commissions to a business or combination of businesses from which fees or commissions the judge, the judge's spouse, or the judge's *domestic partner* received an aggregate in excess of $3,000 during the reporting period. The phrase "client or customer" relates only to businesses or a combination of businesses. The term "business" means any corporation, association, partnership, proprietorship, trust, joint venture, governmental agency unit or governmental subdivision, and every other business interest, including ownership or use of land for income. The term "combination of businesses" means any two or more businesses owned or controlled directly by the same interests. The term "other business interest" means any endeavor that produces income, including appraisals, consulting, authorships, inventing, or the sale of goods and services.

(3) ownership interests. A judge must report any corporation, partnership, proprietorship, trust, retirement plan, joint venture, and every other business interest, including land used for income, in which either the judge, the judge's spouse or *domestic partner*, dependent children, or dependent stepchildren have owned a legal or equitable interest exceeding $5,000 during the reporting period.

(4) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items, alone or in the aggregate with other items received from the same source in the same calendar year, does not exceed $200.

(5) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), unless the amount of reimbursement or waiver, alone or in the aggregate with other reimbursements or waivers received from the same source in the same calendar year, does not exceed $200. Expense reimbursement limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or *domestic partner* should be reported as a gift. Any payment in excess of such an amount is to be reported as compensation.

(6) positions. A judge must report any business, organization, including a labor organization, educational or other institution, and entity in which the judge

now holds or has held a position of officer, director, associate, partner, proprietor, trustee, guardian, custodian, or similar *fiduciary*, representative, employee, or consultant at the time of filing this report or during the reporting period.

(7) liabilities. A judge must report all of the judge's, the judge's spouse's or *domestic partner's*, dependent children's, and dependent stepchildren's liabilities to any creditor that exceeded $10,000 at any time during the reporting period except for any liability owed to a spouse, parent, brother, sister, or child; any mortgage secured by real property that is a personal residence of the judge or the judge's spouse or *domestic partner*; any loan secured by a personal motor vehicle, household furniture, or appliances that does not exceed the purchase price of the item securing the liability; any student loans or loans from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; any revolving charge account, the balance of which did not exceed $10,000 at the close of the reporting period; and political campaign funds.

(B) A judge must report annually the information listed above in (A)(1) through (7) on a form reviewed by the Commission on Judicial Conduct and approved by the Supreme Court. The judge's report for the preceding calendar year must be submitted as a public document with the Office of Judicial Administration on or before April 15 of each year.

[**History:** Am. (b) effective February 4, 2020; Am. effective December 8, 2022.]

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2022-RL-084

Rules Relating to Discipline of Attorneys

The court amends the attached Supreme Court Rule 206, effective January 1, 2023.

Dated this 21st day of December 2022.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 206

ATTORNEY REGISTRATION

(a) **Definitions.**

(1) **"Licensing period"** means the period of one year beginning July 1 and ending June 30.

(2) **"Registration fee"** means the fee established by Supreme Court order for a status listed in subsection (b)(1).

(3) **"Attorney registration portal"** means the online registration portal where an attorney must complete annual registration and update registration information.

(b) **Annual Registration.** In the year an attorney is admitted to the practice of law by the Supreme Court, the attorney must register with the Office of Judicial Administration on a form provided by the Office of Judicial Administration no later than 30 days after taking the oath of admission under Rule 726. Each year thereafter, an attorney admitted to the Kansas bar, including a justice or a judge, must register with the Office of Judicial Administration as provided in this rule.

(1) **Status.** An attorney may register as active, inactive, retired, or disabled due to mental or physical disability.

(2) **Practice of Law.** Except as otherwise provided in subsection (b)(3), Rule 1.10, Rule 116, Rule 718, and Kansas Rule of Professional Conduct 5.5, only an attorney registered as active may practice law in Kansas.

(3) **Pro Bono Exception.** An attorney registered as retired or inactive may practice law as provided in Rule 1404.

(4) **Fee.** An attorney must pay an annual registration fee, which includes the annual continuing legal education fee, in an amount established by Supreme Court order. The attorney must pay the registration fee based on the attorney's status shown in the records of the Office of Judicial Administration as of July 1. No registration fee will be charged to the following:

(A) an attorney newly admitted to the practice of law in Kansas until the first regular registration date following admission;

(B) an attorney who is on retired status or who has retired from the practice of law, has reached the age of 65 before July 1, and has requested a change to retired status; or

(C) an attorney who is on disabled status due to physical or mental disability.

(5) **Exemptions.** The following attorneys are exempt from annual rgistration:

(A) an attorney appearing pro hac vice in any action or proceeding in Kansas solely in accordance with Supreme Court Rules 1.10 or 116;

(B) an attorney who has registered as retired or as disabled due to mental or physical disability; and

(C) an attorney who has been transferred to disabled status by the Supreme Court under Rule 234

(6) **Reaffirmation of Attorney Oath Under Rule 726.** During annual registration, an attorney must reaffirm the oath under Rule 726 in the manner directed by the Supreme Court.

(c) **Notice of Annual Registration.** By June 1 of each year, the Office of Judicial Administration will send to each registered attorney a notice of annual registration. The Office of Judicial Administration may send the notice electronically.

(d) **Registration Deadline.** Annual registration, including payment of the registration fee, must be completed through the attorney registration portal by June 30 prior to the start of the next licensing period that begins July 1. Failure of an attorney to receive notice of annual registration from the Office of Judicial Administration does not excuse the attorney from the registration requirement or payment of the fee. Annual registration is not considered complete until any required payment submitted through the attorney registration portal is accepted.

(e) **Late Fee.** The Office of Judicial Administration will automatically assess a $150 late fee to any attorney who completes annual registration after June 30.

(f) **Failure to Complete Annual Registration.** An attorney required to register annually who has not completed online registration by June 30 or who fails to pay any late fee may be administratively suspended from the practice of law under the following procedure.

(1) **Notice.** The Office of Judicial Administration will send a notice to an attorney who has failed to register, pay the registration fee, or pay any late fee. The notice will state that the attorney's right to practice law is subject to being summarily suspended if the attorney does not complete registration, including payment, no later than 30 days from the date of the notice.

(2) **Administrative Suspension.** The Supreme Court will issue an order suspending from the practice of law an attorney who the Office of Judicial Administration certifies failed to complete registration, including payment, within 30 days from the date of the notice under subsection (f)(1). The Office of Judicial Administration will provide a list of suspended active attorneys to the clerk of the district court and the chief judge of each judicial district and to the clerk of the appellate courts.

(g) **Change of Status from Inactive to Active.** An attorney may apply for a change of status from inactive to active as follows.

(1) **Inactive Less than Two Years.** An attorney who is registered as inactive for less than two years may change status to active by satisfying the following requirements:

(A) submitting a request through the attorney registration portal for change of status to active;

(B) complying with any condition imposed by the Supreme Court;
(C) completing any requirement imposed by the Kansas Continuing Legal Education Board; and
(D) paying any fees imposed by the Supreme Court, plus a $50 fee for change of status.

(2) **Inactive for at Least Two but Less than Ten Years.** An attorney who has been registered as inactive for at least two years but less than ten years may change status to active by satisfying the following requirements:
(A) submitting an Application for Change of Registration Status Form to the Office of Judicial Administration; and
(B) complying with the requirements in subsection (g)(1)(B)-(D).

(3) **Inactive Ten Years or More.** An attorney who has been registered as inactive for ten years or more may change status to active by satisfying the following requirements:
(A) complying with the requirements in subsection (g)(2); and
(B) if required by the Supreme Court after it reviews the application, completing a bar review course approved by the Supreme Court.

(4) **Effective Date of Change of Status.** A change of an attorney's registered status from inactive to active is not effective until approved by the Supreme Court.
(A) A request for change of status to active effective prior to July 1 requires payment of the change of status fee under subsection (g)(1)(D) and the difference between the active fee and the inactive fee for the current licensing period. The attorney will then be responsible for paying the active fee for the next licensing period when it becomes due.
(B) A request for change of status to active effective July 1 requires payment of the change of status fee and the active fee by June 30.

(5) **Investigation.** The Supreme Court may order the disciplinary administrator to investigate the request for change of status.

(6) **Continuing Legal Education.** An attorney whose status changes to active must comply with Rule 811.

(h) **Change of Status from Retired to Active.** An attorney may apply for a change of status from retired to active by submitting an Application for Change of Registration Status Form to the Office of Judicial Administration. The Supreme Court may take the following action:
(1) order the disciplinary administrator to investigate the request for change of status;
(2) order the attorney to appear before a hearing panel of the Kansas Board for Discipline of Attorneys to consider the application; and
(3) impose appropriate conditions, costs, and registration fees before or upon granting the change of status.

(i) **Change of Status from Active to Inactive, Active to Retired, or Inactive to Retired.** An attorney who is registered as active may change status to inactive or retired. An attorney who is registered as inactive may also

change status to retired. To be eligible for retired status, an attorney must have retired from the practice of law and have reached the age of 65 as of June 30. The Office of Judicial Administration must receive a change of registration status under this subsection by June 30 to be effective for the next licensing period. An attorney may change to inactive or retired status by submitting a request through the attorney registration portal.

(j) **Reinstatement After Administrative Suspension.** An attorney who has been suspended under subsection (f)(2) or Rule 810 may seek an order of the Supreme Court to be reinstated to active or inactive status by satisfying the following requirements:
   (1) submitting an Application for Reinstatement Form to the Office of Judicial Administration;
   (2) submitting to an investigation if the Supreme Court orders the disciplinary administrator to conduct an investigation of the attorney;
   (3) paying all delinquent registration fees and a $200 reinstatement fee, unless the Supreme Court for good cause waives any portion of payment;
   (4) paying any additional amount ordered and complying with any additional condition imposed by the Supreme Court; and
   (5) completing the requirements under Rule 812.

(k) **Service Fee.** The Office of Judicial Administration will charge a $30 service fee for a check that is returned unpaid. An attorney whose check is returned unpaid must pay the service fee before a change of status can be approved, annual registration can be considered complete, or reinstatement can be granted.

(l) **Registration Card.** The Office of Judicial Administration will issue an annual registration card in a form approved by the Supreme Court to each attorney registered as active.

(m) **Disciplinary Fee Fund.** The Office of Judicial Administration will deposit the registration fees in the disciplinary fee fund. Compensation and expenses of the Office of the Disciplinary Administrator and the Kansas Board for Discipline of Attorneys will be paid from the fund. Payment from the fund will be made only on receipt of a voucher signed by a Supreme Court justice or the court's designee. Any unused balance in the fund may be applied to an appropriate use determined by the Supreme Court.

(n) **Contact or Registration Information.** An attorney must use the attorney registration portal to provide the following:
   (1) legal name;
   (2) residential address;
   (3) business address;
   (4) email address;
   (5) business telephone number;
   (6) personal telephone number; and
   (7) if applicable, liability insurer and trust account information.

(o) **Change of Contact or Registration Information.** No later than 30 days after a change occurs, an attorney must use the attorney registration portal to update any of the required information in subsection (n).

(p) **Online Registration.** Online registration is mandatory.

(q) **Confidentiality.** All files, records, proceedings, and other documents that relate to or arise out of an attorney's compliance with or failure to satisfy requirements stated in this rule are confidential and must not be disclosed except as otherwise allowed by Supreme Court rule or order or on requestof the affected attorney. The Office of Judicial Administration may disclose limited information for the furtherance of its duties. This confidentiality provision does not apply to anonymous statistical abstracts.

[**History:** New rule adopted effective January 1, 2021; Am. effective April 2, 2021; Am. effective July 1, 2022; Am. effective January 1, 2023.]

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Angelo v. State	123,237	Denied	10/28/2022	Unpublished
Armstrong v. State	123,529	Denied	10/28/2022	Unpublished
Bhaduri v. L.M.K. Construction, Inc.	123,731	Denied	12/16/2022	Unpublished
Blacklock v. State	122,738	Denied	11/23/2022	Unpublished
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Brinkley v. State	122,161	Denied	11/02/2022	Unpublished
Brown v. State	123,150	Denied	11/23/2022	Unpublished
City of Eskridge v. McGivern	124,117	Denied	10/28/2022	Unpublished
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In re Care and Treatment of Emerson	87,379	Denied	12/15/2022	Unpublished
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Overman v. State	123,527	Denied	10/28/2022	Unpublished
Partridge v. State	124,119	Denied	12/21/2022	Unpublished
Presnell v. Central Kansas Conservancy, Inc.	124,135	Denied	10/24/2022	Unpublished
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R.P. v. First Student, Inc.	124,197	Denied	10/28/2022	62 Kan. App. 2d 371
Robinson v. State	122,742	Denied	11/23/2022	Unpublished
Schremmer v. Farmers Insurance Co.	124,485	Denied	10/28/2022	Unpublished
State v. Amack	123,412	Denied	10/28/2022	Unpublished
State v. Applegate	123,693	Denied	10/28/2022	Unpublished
State v. Bagley	122,900	Denied	10/28/2022	Unpublished

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State v. Barnhart	123,413	Denied	10/28/2022	Unpublished
State v. Beddingfield	124,091	Denied	12/15/2022	Unpublished
State v. Blick	123,517	Denied	10/28/2022	Unpublished
State v. Borst	122,839	Denied	11/23/2022	Unpublished
State v. Bowen	124,068	Denied	10/28/2022	Unpublished
State v. Buchanan	123,100	Granted	11/22/2022	Unpublished
State v. Butler	123,742	Granted	11/22/2022	Unpublished
State v. Campbell	123,190	Granted	11/21/2022	Unpublished
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State v. Leija	123,079	Denied	10/28/2022	Unpublished
State v. Leija	123,080	Denied	10/28/2022	Unpublished
State v. Marks	122,291	Denied	11/23/2022	Unpublished
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State v. McIntyre	124,041	Denied	12/16/2022	Unpublished
State v. Mendoza	123,428	Denied	12/16/2022	Unpublished
State v. Mills	123,679	Denied	12/16/2022	Unpublished
State v. Nickles	123,577	Denied	11/21/2022	Unpublished
State v. Obiero	121,341	Denied	10/26/2022	Unpublished

Title	Docket Number	Disposition	Date	Reported Below
State v. Oliver	123,767	Denied	10/28/2022	Unpublished
State v. Oliver	123,768	Denied	10/28/2022	Unpublished
State v. Padilla-Loza	123,266	Denied	12/16/2022	Unpublished
State v. Parrish	123,891	Denied	12/15/2022	Unpublished
State v. Reed	123,644	Denied	10/28/2022	Unpublished
State v. Ritz	123,979			
	123,980			
	123,981	Denied	12/15/2022	Unpublished
State v. Ross	122,601	Denied	12/15/2022	Unpublished
State v. Severs	122,858	Denied	11/23/2022	Unpublished
State v. Shears	121,303	Denied	10/28/2022	Unpublished
State v. Shelden	123,407	Denied	12/16/2022	Unpublished
State v. Smith	123,611	Denied	12/16/2022	Unpublished
State v. Stine	124,568	Denied	10/28/2022	Unpublished
State v. Stubby	123,780	Denied	12/16/2022	Unpublished
State v. Taylor	124,074	Denied	10/28/2022	Unpublished
State v. Trotter	120,158	Denied	10/28/2022	Unpublished
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State v. Warden	124,667	Denied	11/22/2022	Unpublished
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Abuse of Discretion Alleged—Burden on Party Alleging Error. The party alleging an abuse of discretion bears the burden of establishing error. *State v. Richardson* ……...…… 752*

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

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

Issue Not Raised by Parties Will Not Be Considered by Appellate Courts—Exceptions. Appellate courts do not ordinarily consider an issue not raised by the parties but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court. *State v. Berkstresser* ……..……...…… 597*

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

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

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

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

Sua Sponte Consideration of Issue Not Raised by Parties—To Serve Justice or Prevent Denial of Fundamental Rights. Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court. *State v. Valdez*.....1

APPELLATE PROCEDURE:

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

Failure to Brief Issue—Issue Waived or Abandoned. When a party fails to brief an issue, that issue is deemed waived or abandoned. *State v. Berkstresser* 597*

ATTORNEY AND CLIENT:

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

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

— — Attorney charged with felony charge of breach of privacy voluntarily surrendered his license to practice law in Kansas. That charge and the disciplinary

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complaint filed as a result of that charge both were both pending upon the filing of this opinion. *In re Renkemeyer* ……..…….....74

—— The Supreme Court ordered disbarment based on Johnston's repeated violations of the Kansas Rules of Professional Conduct. Johnston failed to file a brief with the Supreme Court after filing a Notice of Exception to the hearing panel's final report. The Supreme Court held that Johnston showed a pattern of unethical conduct, including publicly making unsupported accusations again judges and other members of the bar, directly defying court orders, and misrepresenting facts to the court. The court held that disbarment was warranted. *In re Johnston* ……..…….…….. 611*

— **Discharge from Probation.** Attorney filed motion for discharge from probation, following successful five-year probation period. Supreme Court granted respondent's motion for discharge. *In re Florez* ……..……. 369

—— Attorney requests to be discharged from probation following her suspension from the practice of law for one year, which was stayed pending completion of the agreed 12-month probation plan. Noting that respondent is in compliance with all registration requirements and successfully completed the probation plan, the Supreme Court granted her motion to be discharged from probation. *In re Pingel* ……..……. 707*

— **Ninety-day Suspension**. Attorney is suspended from the practice of law for 90 days for violations of KRPCs involving diligence, communication, expediting litigation, and professional misconduct. The suspension is stayed during a three-year period of probation, beginning January 21, 2021. *In re Lowry* ……..…..…… 684*

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

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

—— Attorney stipulated to violations of KRPCs 1.3, 1.4, 8.2, and 8.3. The Supreme Court ordered Leavitt's license to practice law be suspended for one year and his suspension stayed pending successful completion of one year probation period beginning December 9, 2022. *In re Leavitt* ……..…… 698*

—— Attorney violated KRPC 1.2, 1.3, and 8.4(d) and (g) by failing to define the scope of his representation and failing to diligently give notice to

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parties of his power of attorney. The Supreme Court accepted summary submission agreement under Rule 223 and imposed a one-year suspension, though the Court stayed the suspension and placed attorney on probation for 18 months. *In re Whinery* ……...……119

—— Attorney was suspended from the practice of law for one year for violating Kansas Rules of Professional Conduct relating to conduct resulting in his conviction for three federal violations of 18 U.S.C. § 3, accessory after the fact in relation to 18 U.S.C. § 875(d). The Supreme Court ordered that Pistotnik undergo a reinstatement hearing before petition for reinstatement will be considered.
In re Pistotnik ……...……...…..…… 96

— One-year Suspension, Subject to Conditions. Attorney failed to represent his clients competently, charged his clients unreasonable fees, failed to account for how fees were generated, and engaged in dishonest communications with his clients. The Supreme Court disagreed with the hearing panel's recommended discipline and imposed a one-year suspension. The Court also ordered Borich to refund $47,000 in attorney fees to his clients and provided a stay on suspension if Borich repays the fees within 90 days of the suspension. *In re Borich* ……..……...…… 257

— **Reinstatement**. Attorney formerly subject to discipline by suspension for 6 months and later for indefinite suspension now requests to be reinstated to the practice of law. The court granted his request for reinstatement and orders Mason to serve a term of 3 years supervised probation, with conditions set out in the final hearing report. *In re Mason* …….. 552*

—— Attorney petitioned for reinstatement of his law license. The Supreme Court held that Holmes had met his burden to prove factors necessary for reinstatement, contrary to the findings of the hearing panel.
In re Holmes ……..…… 578*

CITIES AND MUNICIPALITIES:

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

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

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

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Interlocal Agreement Made by Fire District Is Enforceable—Not Void for Violating Public Policy. When an interlocal agreement governing the operation and management of a fire district is terminated by one of the parties under the terms of the agreement, and the district's assets are allocated under those terms, the fire district itself is not altered or dissolved as a legal entity. Provisions in such interlocal agreements permitting termination and asset allocation after sufficient notice are not void for violating public policy. *Delaware Township v. City of Lansing, Kansas* 86

CIVIL PROCEDURE:

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

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

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

CIVIL SERVICE:

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

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

Kansas Highway Patrol—Six Month Probationary Period Not Required if Return to Former Rank. K.A.R. 1-7-4 (2021 Supp.) does not require Kansas Highway Patrol superintendents or assistant superintendents to serve another six-

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month probationary period upon returning to their former rank in the classified service, as contemplated in K.S.A. 74-2113(a). *Bruce v. Kelly* 218

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

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

CONSTITUTIONAL LAW:

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

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

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

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

Constitutional Decisions by Appellate Courts—Constitutional Challenges Avoided if Not Necessary. Appellate courts typically avoid making unnecessary

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constitutional decisions. Thus, where there is a valid alternative ground for relief, an appellate court need not reach a constitutional challenge.
State v. Galloway 471

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

Jurisdiction of Courts over Individuals who Commit Violations of Kansas Laws. Kansas courts have jurisdiction to try, convict, and sentence individuals who commit violations of Kansas criminal laws in the state of Kansas. *State v. Verge* 554*

CRIMINAL LAW:

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

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

Constitutional Right to Speedy Trial—Right Detaches Upon Conviction. The constitutional right to a speedy trial detaches upon a conviction. *State v. Ford* 558*

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

Determination if Dismissal of Criminal Charge with Prejudice Appropriate—Appellate Review. In determining if dismissal of a criminal charge with prejudice is appropriate, appellate courts apply an abuse of discretion standard. A

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district court abuses its discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching a legal conclusion not supported by factual findings, or (3) reaching a factual finding not supported by substantial competent evidence. *State v. Mulleneaux* 75

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

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

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

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

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

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

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

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

Request for Postconviction DNA Testing of Biological Material. Under K.S.A. 2021 Supp. 21-2512(a), an inmate convicted of first-degree murder

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or rape may petition the district court for DNA testing of any biological material that: (1) relates to the investigation or prosecution that led to the conviction; (2) is in the actual or constructive possession of the State; and (3) was not previously subjected to DNA testing or can be tested with new DNA techniques that provide a reasonable likelihood of more accurate and probative results. *State v. Angelo* ……..…… 438

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

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

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

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

Review of Petition for DNA Testing by District Court—Criteria. In reviewing a petition made under K.S.A. 2021 Supp. 21-2512, the district court first determines whether the biological material sought to be tested meets

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the criteria set forth in K.S.A. 2021 Supp. 21-2512(a). If those criteria are met, the district court then considers whether testing may produce non-cumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced. If this requirement is met, the district court must order DNA testing of the biological material specified in the petition. *State v. Angelo* 438

Rule of Lenity—Application of Ambiguous Statute in Accused's Favor. The rule of lenity is a canon of statutory construction applied when a criminal statute is ambiguous to construe the uncertain language in the accused's favor. *State v. Moler* 565*

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

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

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

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

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

Sentencing Appeal—Denial of Motion Requesting Departure Sentence—Abuse of Discretion—Appellate Review. On appeal from a sentencing, this court reviews a district court judge's denial of a motion requesting a departure sentence for an abuse of discretion. A district court abuses its discretion when its decision turns on an error of law, its decision is not

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supported by substantial competent evidence, or its decision is one with which no reasonable person would agree. *State v. Galloway* …… 471

Statute Permits Claim of Self-defense Immunity if Use of Deadly Force Justified—Exception. K.S.A. 2021 Supp. 21-5231(a) permits a criminal defendant in certain cases to claim self-defense immunity from prosecution for the justified use of deadly force. This statutory immunity is confined to circumstances when the use of such force is against a person or thing reasonably believed to be an aggressor. The statute does not extend immunity for reckless acts resulting in unintended injury to innocent bystanders while the defendant engaged in self-defense with a perceived aggressor. *State v. Betts* ……..……. 191

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

EVIDENCE:

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

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

Right of Criminal Defendants to Present Relevant Evidence—Compliance with Rules of Procedure and Evidence. Criminal defendants have a right to present relevant evidence, but that right is subject to reasonable restrictions, and defendants must still comply with established rules of procedure and evidence. *State v. Frantz* ……..……..…….. 708*

INDICTMENT AND INFORMATION:

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

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JURISDICTION:

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

Citizenship of Defendant Not a Factor in Criminal Prosecution. Neither the citizenship nor the heritage of a defendant constitutes a key ingredient to a court's jurisdiction in criminal prosecutions. *State v. Verge* 554*

KANSAS OFFENDER REGISTRATION ACT:

Ambiguous Language in Statute—Rules of Statutory Construction Apply. The language in K.S.A. 2021 Supp. 22-4907(a)(12) requiring a person subject to it to register "any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment" is ambiguous, so application of traditional canons of statutory construction is necessary to discern its meaning. *State v. Moler* 565*

Driving Unregistered Vehicle One Time Insufficient to Show Violation of KORA Statute. In a criminal prosecution, proof the defendant drove an unregistered vehicle of unknown ownership only one time is insufficient to show a violation of K.S.A. 2021 Supp. 22-4907(a)(12)'s mandate to register any vehicle "owned or operated by the offender, or any vehicle the offender regularly drives." *State v.* Moler 565*

KANSAS OPEN RECORDS ACT:

Strict Liability of Act—Protection of Public from Sexual and Violent Offenders—Not Unconstitutionally Arbitrary. The strict liability character of a KORA registration violation offense bears a rational relationship to the legitimate government interest of protecting the public from sexual and other violent offenders and is thus not unconstitutionally arbitrary. *State v. Genson* 130

MOTOR VEHICLES:

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

PARENT AND CHILD:

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

Revised Kansas Code for Care of Children—Appellate Jurisdiction under Code—Limits to Appealable Orders by Statute. K.S.A. 38-2273(a)

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

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

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

REAL PROPERTY:

Rule of Law Set Out by In re Prieb Properties, LLC, Is Overruled—BOTA Is Fact-Finder in Appraising Real Property at Fair Market Value. The rule of law established by *In re Prieb Properties, LLC*, 47 Kan. App. 2d 122, 135-36, 275 P.3d 56 (2012), that holds rental rates from commercial build-to-suit leases do not reflect market conditions and may not be relied on by appraisers without adjustments is overruled. *Prieb*'s rationale invades the Board of Tax Appeals' longstanding province as the fact-finder in the statutory process for appraising real property at its fair market value. *In re Equalization Appeal of Walmart* ……..…….. 32

SEARCH AND SEIZURE:

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

Exception to Warrant Requirement of Fourth Amendment—Investigatory Detention under Terry v. Ohio—Requirements. One exception to

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

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

STATUTES:

Severance of Unconstitutional Provision by Court—Intent of Governing Body—Requirements to Sever Portion of Ordinance. Whether a court may sever an unconstitutional provision from a statute or ordinance and leave the remainder in force and effect depends on the intent of the governing body that drafted it. A court may only sever an unconstitutional portion of an ordinance if, from examination of the ordinance, the court finds that (1) the act would have been passed without the objectionable portion, and (2) the ordinance would operate effectively to carry out the intention of the governing body that passed it with such portion stricken.
City of Wichita v. Trotter 310

Statutory Construction—Ambiguous Statutory Language—Appellate Review. If a statute's language is ambiguous, the court may turn to canons of statutory construction, consult legislative history, or consider other background information to establish the statute's meaning. *State v. Moler* ... 565*

— Presumption that Legislature has No Intent to Enact Meaningless Legislation. When construing statutes, courts presume the Legislature does not intend to enact useless or meaningless legislation. *State v. Moler* ... 565*

TAXATION:

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

Determination of Fair Market Value of Property—Question of Fact. A property's fair market value determination is generally a question of fact

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with the fact-finder free to decide whether one appraisal or methodology is more credible than another. *In re Equalization Appeal of Walmart* …….. 32

TRIAL:

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

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

Confrontation Clause Guarantees Opportunity for Effective Cross-Examination—Burden on Defendant to Prove Abuse of Discretion by District Court. The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. As the party alleging error, the criminal defendant has the burden to prove the district court abused its discretion. Criminal defendants state a violation of the Confrontation Clause by showing they were prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness. *State v. Frantz* …… 708*

Confrontation Clause Guarantees Right of Cross-Examination to Criminal Defendant—Wide Latitude for Trial Judges to Impose Limits on Cross-Examination. The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right of cross-examination, but this right is not absolute, and at times it must bow to accommodate other legitimate interests in the trial process. Trial judges retain wide latitude under the Confrontation Clause to impose reasonable limits on cross-examination. *State v. Frantz* ……..……..…… 708*

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Cumulative Error Test—Whether Errors Substantially Prejudiced Defendant and Denied Defendant Fair Trial—Totality of Circumstances. The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. *State v. Brown* ……...… 154

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

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

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

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

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

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— **Determination Whether Lesser Included Offense Instruction Is Factually Appropriate**. To determine whether a lesser included offense instruction is factually appropriate, a court must consider whether there is some evidence, viewed in a light most favorable to the defendant, emanating from whatever source and proffered by whichever party, that would reasonably justify the defendant's conviction for that lesser included crime. *State v.* Berkstresser …….. 597*

— **Determination Whether Lesser Included Offense Instruction Is Factually Appropriate**. A district court commits instructional error by failing to sua sponte give a lesser included offense instruction that is both legally and factually appropriate. On appeal, to obtain reversal of a conviction based on that error, a defendant who has failed to request the instruction bears the burden to firmly convince a reviewing court the jury would have reached a different verdict had the error not occurred. *State v. Berkstresser* …….. 597*

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

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

Invited Error Doctrine's Application to Jury Instructions—Question Whether Party's Action Induced Court to Make Instructional Error. Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court. *State v. Valdez* ……. 1

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

No. 119,012

In the Matter of JEFFERY A. MASON, *Petitioner.*

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Reinstatement.*

(518 P.3d 814)

ORDER OF REINSTATEMENT

The court has twice suspended Jeffery A. Mason from the practice of law. On December 23, 2016, the court suspended Mason's license for six months followed by three years' probation. *In re Mason*, 305 Kan. 662, 673, 385 P.3d 523 (2016). On September 28, 2018, the court indefinitely suspended Mason's license. The court further ordered that Mason be subject to a reinstatement hearing before his suspension could be lifted. See *In re Mason*, 308 Kan. 1105, 427 P.3d 40 (2018); see also Supreme Court Rule 232(e) (2022 Kan. S. Ct. R. at 293) (formerly Rule 219) (procedure for reinstatement after suspension).

Now before the court is Mason's petition for reinstatement filed on October 13, 2021. Upon finding sufficient time had passed for reconsideration of the suspension, the court remanded the matter for further investigation by the Disciplinary Administrator and a reinstatement hearing. On July 27, 2022, Mason appeared before the hearing panel for a reinstatement hearing. On September 6, 2022, the court received the hearing panel's Reinstatement Final Hearing Report outlining its findings. The panel summarized its findings and recommendation to the court as follows:

"Based on the evidence presented in this case, the hearing panel concludes that [Mason] presented clear and convincing evidence to support his petition for reinstatement and the factors in Rule 232(e)(4) (2022 Kan. S. Ct. R. at 293) weigh in favor of reinstatement. The hearing panel recommends that the Supreme Court reinstate [Mason]'s license to practice law. The hearing panel further recommends that the Supreme Court place [Mason] on probation for three years, under the terms and conditions included in the revised proposed probation plan filed by the parties on July 29, 2022, adding to the plan the requirement that [Mason] sign a release allowing [his providers] to discuss the progress of [Mason]'s therapy and medical treatment with [his] probation supervisor[.]"

After careful consideration of the record, the court accepts and adopts the findings and recommendations of the hearing panel.

The court grants Mason's petition for reinstatement, orders Mason's license to practice law in Kansas reinstated, and orders him to serve a term of three years of supervised probation according to the conditions set out in the final hearing report. Mason's probation will continue until this court specifically discharges him. See Supreme Court Rule 227(g), (h) (2022 Kan. S. Ct. R. at 284) (procedure for discharge upon successful completion of probation).

The court further orders Mason to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education requirements. See Supreme Court Rule 812 (2022 Kan. S. Ct. R. at 618), as amended effective July 1, 2022 (outlining CLE requirements following reinstatement). The court directs that once OJA receives proof of Mason's completion of these conditions, it add Mason's name to the roster of attorneys actively engaged in the practice of law in Kansas.

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

Dated this 24th day of October 2022.

LUCKERT, C.J., not participating.

No. 124,493

STATE OF KANSAS, *Appellee*, v. ROBERT LEE VERGE, *Appellant*.

(518 P.3d 1240)

SYLLABUS BY THE COURT

1. JURISDICTION—*Citizenship of Defendant Not a Factor in Criminal Prosecution.* Neither the citizenship nor the heritage of a defendant constitutes a key ingredient to a court's jurisdiction in criminal prosecutions.

2. COURTS—*Jurisdiction of Courts over Individuals who Commit Violations of Kansas Laws.* Kansas courts have jurisdiction to try, convict, and sentence individuals who commit violations of Kansas criminal laws in the state of Kansas.

Appeal from Dickinson District Court; BENJAMIN J. SEXTON, judge. Opinion filed October 28, 2022. Affirmed.

Sam S. Kepfield, of Hutchinson, was on the brief for appellant.

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Robert Lee Verge asks the courts to vacate his 1998 conviction of capital murder and other charges. He asserts that Kansas state courts had no jurisdiction to try or sentence him because he was not a citizen of Kansas or the United States and was a resident of Missouri when he committed the crimes.

In 1997, Verge and another man murdered two people in Dickinson County, Kansas, and committed other crimes at the victims' residence. After a jury convicted him, the court sentenced Verge to a hard 40 life term and consecutive terms for the other crimes. The conviction was affirmed in *State v. Verge*, 272 Kan. 501, 34 P.3d 449 (2001), but this court remanded for resentencing of the non-capital crimes because the upward departures violated his rights under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *State v. Gould,* 271 Kan. 394, 23 P.3d 801 (2001).

Over the following years, Verge filed a variety of motions collaterally attacking his conviction and sentence. All these challenges were either denied or dismissed.

On April 21, 2021, Verge filed the motion in the present case, captioned a Motion to Set Aside and Correction of Illegal Sentence. He appears to allege that no Kansas district court had jurisdiction to convict or sentence him because he was a "natural living soul, Indigenous Native Moorish-American National" who resided in Missouri at the time of the murders.

Following a hearing, at which Verge repeatedly demanded that the judge prove the source of his jurisdiction over him, the court denied the motion. He took a timely appeal to this court under K.S.A. 60-2101(b) and K.S.A. 2022 Supp. 22-3601.

Verge's arguments can be difficult to follow. He apparently argues that, as a resident of Missouri at the time of the murders, he was not subject to the jurisdiction of Kansas courts. He also contends he is not a citizen of the United States; he is instead a "natural living soul, Indigenous Native Moorish-American National" and is therefore not subject to the jurisdiction of any of the states or federal government. In addition, he seems to argue he is a corporate entity in Missouri and therefore not subject to long-arm diversity jurisdiction.

The existence of in personam jurisdiction is a question of law subject to de novo review. See, e.g., *Merriman v. Crompton Corp*., 282 Kan. 433, 439, 146 P.3d 162 (2006). We conclude Verge was properly subject to the jurisdiction of the trial and sentencing court.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. Verge's birth certificate shows he was born in Jackson County, Missouri, on March 11, 1974. Any person who is born in the United States is a United States citizen, and it does not matter whether the person consented to citizenship. See 8 U.S.C. § 1401(a) (2018).

Furthermore, one does not lose one's citizenship simply by renouncing it. Americans cannot effectively renounce their citizenship by mail, through an agent, or while residing in the United States because of the provisions of section 349(a)(5) of the Immigration and Nationality Act. See 8 U.S.C. § 1481(a)(5) (2018). The Secretary of State has developed a legally enforceable set of

procedures for renouncing citizenship, including an oath of renunciation and a form. See 22 C.F.R. § 50.50 (2022). Verge is therefore a citizen of the United States.

In any event, whether Verge is a citizen of Kansas or of the United States or of some other political entity does not affect the outcome of this case. The United States Constitution states that a criminal trial is to take place in the state in which the crime was committed. U.S. Const. amend. VI. Verge committed his crime in Kansas, and Kansas courts therefore have jurisdiction to try, convict, and sentence him.

It is the duty of all residents of this country, both citizens and noncitizens of the United States, to obey the laws of both the national and state governments. See, e.g., *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 148, 21 L. Ed. 426 (1872) (Aliens domiciled in the United States "are bound to obey all the laws of the country, not immediately relating to citizenship, during their residence in it, and are equally amenable with citizens for any infraction of those laws."); *United States v. James*, 328 F.3d 953, 954 (7th Cir. 2003) ("Laws of the United States apply to all persons within its borders."); *Leonhard v. Eley*, 151 F.2d 409, 410 (10th Cir. 1945) (alien residents must comply with state and federal laws); *United States v. White*, 480 Fed. Appx. 193, 194 (4th Cir. 2012) (unpublished opinion) ("Neither the citizenship nor the heritage of a defendant constitutes a key ingredient to a . . . court's jurisdiction in criminal prosecutions . . . .")

This general principle applies to people purporting to have immunity from complying with laws because of their Moorish-American identity. See, e.g., *Caldwell v. Wood*, No. 3:07cv41, 2010 WL 5441670, at *17 (W.D.N.C. 2010) (unpublished opinion) (petitioner's allegation that membership in the Moorish-American Nation entitled him to ignore state laws was "ludicrous"); *Bond v. N.C. Dept. of Corr.*, No. 3:14-CV-379-FDW, 2014 WL 5509057, at *1 (W.D.N.C. 2014) (unpublished opinion) ("courts have repeatedly rejected arguments . . . by individuals who claim that they are not subject to the laws of the . . . individual States by virtue of their 'Moorish American' citizenship"); *Allah El v. District Attorney for Bronx County*, No. 09 CV 8746(GBD), 2009 WL 3756331, at *1 (S.D.N.Y. 2009) (unpublished opinion)

(person's "purported status as a Moorish-American citizen does not enable him to violate state . . . laws without consequence").

We agree with the conclusions of these other courts. Kansas courts had jurisdiction to try and sentence Verge. The judgment of the district court is affirmed.

State v. Ford

No. 122,764

STATE OF KANSAS, *Appellee*, v. HAROLD GLEN FORD JR., *Appellant*.

(519 P.3d 456)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Constitutional Right to Speedy Trial—Right Detaches Upon Conviction*. The constitutional right to a speedy trial detaches upon a conviction.

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed November 10, 2022. Affirmed.

Kristen B. Patty, of Wichita, argued the cause, and was on the brief for appellant.

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

The opinion of the court was delivered by

ROSEN, J.: In 1993, Harold Glen Ford Jr. pleaded guilty to first-degree murder and related charges. His convictions were vacated in 2016 because it was unclear whether he received a requested competency hearing before his guilty plea. On remand, a jury found Ford guilty of first-degree premeditated murder, aggravated robbery, and aggravated burglary. On appeal, he argues the delay between the original charges in 1992 and the trial that began in 2019 violated his constitutional right to a speedy trial. We disagree and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1992, Michael Owen was found dead in his front yard in Leawood, Kansas. An investigation led officers to Ford, and on September 21, 1992, the State charged Ford with first-degree murder, aggravated robbery, and aggravated burglary. Shortly thereafter, Ford's counsel filed a motion to determine Ford's competency, which the court granted. *State v. Ford*, 302 Kan. 455, 458, 353 P.3d 1143 (2015). A doctor determined Ford

was competent to stand trial, and the court file-stamped the completed evaluation. 302 Kan. at 458. The record did not reflect whether a competency hearing took place. 302 Kan. at 458.

On February 12, 1993, Ford pleaded guilty to felony murder, aggravated robbery, and aggravated burglary. The court sentenced him to consecutive sentences of life in prison for the felony murder, 15 years to life for the aggravated robbery, and 5 to 20 years for the aggravated burglary.

In April 2010, Ford filed a motion to correct an illegal sentence. He argued his sentence and conviction were void because the district court never held a competency hearing. At a hearing on the motion, Ford's counsel appeared, but Ford was not personally present. 302 Kan. at 459. The district court concluded there was no record of a competency hearing as required by K.S.A. 22-3302(1). However, it retrospectively concluded Ford had been competent to stand trial and denied the motion. 302 Kan. at 460-61.

This court affirmed the district court's decision that the State failed to prove Ford received a competency hearing and that a retrospective competency hearing was feasible. 302 Kan. at 470, 472-73. However, it concluded the district court's retrospective hearing had not remedied the due process error because Ford had not been present and it was unclear whether he had waived his presence. 302 Kan. at 476. It therefore remanded the case to the district court for a new hearing. It instructed the court to determine whether Ford had waived his presence and, if not, to conduct a new retrospective competency hearing or determine such a hearing was not feasible. 302 Kan. 476-77.

On remand, the district court concluded Ford had not waived his presence at the hearing on his motion. It also concluded a retrospective competency hearing was not feasible. On December 30, 2016, the district court vacated Ford's convictions and ordered the continued prosecution of the case.

On May 31, 2018, Ford filed a motion to dismiss, arguing the decades-long delay between the original charge and the impending trial violated his constitutional speedy trial right. At an evidentiary hearing on the motion, Ford focused largely on the prejudice his defense had suffered by the long delay. He presented the

testimony of private investigator Ed Brunt who, at Ford's request, had tried to locate people who had been interviewed in the original investigation. Brunt testified that some of those people had been difficult or impossible to find, that some had died, and that the memories of the interviewees to whom he spoke had faded. Ford also offered exhibits that showed some evidence had been returned, disposed of, or was missing. The court denied the motion to dismiss, concluding there had been no unjustifiable delay.

After a trial that began February 25, 2019, a jury found Ford guilty of first-degree premeditated murder, aggravated robbery, and aggravated burglary. The district court sentenced Ford to consecutive terms of life without the possibility of parole for 40 years for the murder conviction, 15 years to life for the aggravated robbery conviction, and 5 to 20 years for the aggravated burglary conviction. Ford has appealed his convictions to this court.

DISCUSSION

Ford presents only one claim. He argues his constitutional right to a speedy trial was violated by the over 26-year delay between the original charge in 1992 and the 2019 trial.

"As a matter of law, appellate courts have unlimited review when deciding if the State has violated a defendant's constitutional right to a speedy trial." *State v. Shockley*, 314 Kan. 46, 61, 494 P.3d 832 (2021).

The Sixth Amendment to the United States Constitution provides: "'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.'" *State v. Owens*, 310 Kan. 865, 869, 451 P.3d 467 (2019). Pursuant to the Fourteenth Amendment to the United States Constitution, this provision is applicable to proceedings in state courts. *Klopfer v. North Carolina*, 386 U.S. 213, 222-23, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). Unlike the Kansas statute requiring a speedy trial, the constitutional speedy trial provision does not create a strict timeframe within which the State must bring a defendant to trial. Rather, what is "speedy" is relative to each defendant and the circumstances surrounding the case against them. *Barker v. Wingo*, 407 U.S. 514, 521-22, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

To determine whether the State has violated a defendant's constitutional right to a speedy trial, courts generally consider the following nonexclusive factors outlined by the United States Supreme Court in *Barker*: (1) Length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. 407 U.S. at 530; *Owens*, 310 Kan. at 869. A court assesses the conduct of both the prosecution and the accused and considers the factors together along with "any other relevant circumstances." 310 Kan. at 869.

Our analysis begins and ends with the first factor: length of delay. Ford focuses heavily on the prejudice his defense suffered from the decades between his charge and trial. But he hinges that claim on his assertion that the speedy trial clock ran continuously from the day he was charged in 1992 until the 2019 trial. The State argues the time Ford stood convicted does not count toward a constitutional speedy trial analysis. We agree. Because Ford makes no claim that the roughly two years and nine months that accumulated outside of the time he stood convicted constituted a speedy trial violation, Ford's appeal fails.

"'The constitutional protection of a speedy trial attaches when one becomes accused and the criminal prosecution begins, usually by either an indictment, an information, or an arrest, whichever first occurs.'" *State v. Rivera*, 277 Kan. 109, 112, 83 P.3d 169 (2004) (quoting *State v. Taylor*, 3 Kan. App. 2d 316, 321, 594 P.2d 262 [1979]). A court generally counts the time between that origin point and the defendant's trial to calculate the length of delay in a constitutional speedy trial analysis.

But Ford's 1993 guilty plea and resultant conviction complicate the calculation. Supreme Court caselaw indicates this earlier conviction extinguished Ford's right to a speedy trial. In *Betterman v. Montana*, 578 U.S. 437, 441, 136 S. Ct. 1609, 194 L. Ed. 2d 723 (2016), the Supreme Court held there is no right to speedy sentencing because the speedy trial right "detaches" after conviction. The Court explained that the speedy trial right is "a measure protecting the presumptively innocent" and, consequently, "loses force upon conviction." 578 U.S. at 442. It observed the speedy trial right "[r]eflect[s] the concern that a presumptively innocent person should not languish under an unresolved charge," and thus

"guarantees 'the *accused*' 'the right to a speedy . . . *trial*.'" 578 U.S. at 443 (quoting U.S. Const. amend. VI). "At the founding," the Court explained, "'accused' described a status preceding 'convicted' . . . .[a]nd 'trial' meant a discrete episode after which a judgment (i.e., sentencing) would follow." 578 U.S. at 443.

Although *Betterman* focused solely on whether speedy trial rights exist between a conviction and sentencing, the court's rationale makes it clear that a conviction causes the speedy trial right to "detach." Other courts have relied on *Betterman* in coming to this conclusion even when the issue was not speedy sentencing. *Williams v. State*, 642 S.W.3d 896, 900 (Tex. App. 2021) (speedy trial right detached upon conviction even though defendant's guilty plea later found to be involuntary); *State v. Tatum*, No. 2019AP1016-CR, 2021 WL 246218, at *5 (Wis. Ct. App. 2021) (unpublished opinion) (speedy trial right detaches after conviction even though conviction later vacated).

The Supreme Court of Nebraska reached a similar conclusion without relying on *Betterman*. It has ruled that, "[a]bsent extraordinary circumstances, we do not consider the entire period of time beginning with the original charge or arrest in computing the length of the delay when there has been a mistrial." *State v. Short*, 310 Neb. 81, 117, 964 N.W.2d 272 (2021), *cert. denied* 142 S. Ct. 1155 (2022). The court held "[o]nly misconduct involving deliberate delay tactics designed to circumvent the right to a speedy trial" would constitute extraordinary circumstances requiring a court to count time before a new trial mandate. *Short*, 310 Neb. at 118; see also *Icgoren v. State*, 103 Md. App. 407, 423, 653 A.2d 972 (1995) (calculating length of delay from date of previous mistrial to new trial); *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978) (refusing to "lump together" periods between arrest and first trial and mistrial and second trial and instead analyzing speedy trial for each time period).

Additional reasoning supports this position. The Texas Court of Criminal Appeals opined that the argument the speedy trial clock runs even after a conviction "amounts to an assertion that [a convicted defendant] should have been prosecuted while incarcerated pursuant to a presumptively valid conviction." *Soffar v. State*, No. AP-75,363, 2009 WL 3839012, at *39 (Tex. Crim. App.

2009) (unpublished opinion). And keeping the clock running would often function to immunize people from re-prosecution after a successful appeal, thus "undermin[ing] . . . policy interests that have been preserved by the Supreme Court[]" in other contexts, including "society's interest in prosecuting persons accused of crimes, 'rather than granting them immunization because of legal error at a previous trial' and making it more probable that appellate courts will overturn convictions when necessary." 2009 WL 3839012, at *39 (quoting *United States v. Ewell*, 383 U.S. 116, 121, 86 S. Ct. 773, 15 L. Ed. 2d 627 [1966]).

Finally, we observe that considering the time that accumulated while Ford stood convicted fails to service the chief purpose of the speedy trial right. The Supreme Court has explained:

> "The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. 1, 8, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

This passage indicates that the time during which convicted defendants are readying their appeals and working towards release is not the focus of the speedy trial right. It is the time defendants labor under an "unresolved criminal charge" that is the focus of this constitutional guarantee.

For these reasons, we conclude Ford's constitutional right to a speedy trial detached upon his conviction in 1993 and remained so at least until that conviction was vacated in December 2016.

Notably, the *Betterman* Court explicitly declined to consider whether the speedy trial right "reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence," as has happened in Ford's case. *Betterman*, 578 U.S. at 441 n.2.

But we need not resolve this question today. Ford's argument relies entirely on an analysis that includes the nearly 24 years that accumulated while he stood convicted. He has made no claim that the delay that accumulated outside of those 24 years violated his

constitutional right to a speedy trial. Consequently, his appeal ends with our conclusion that his speedy trial right remained detached while he stood convicted. Ford has failed to establish a constitutional speedy trial violation.

Affirmed.

STANDRIDGE, J., not participating.

State v. Moler

No. 123,077

STATE OF KANSAS, *Appellee*, v. RICHARD I. MOLER II, *Appellant.*

(519 P.3d 794)

SYLLABUS BY THE COURT

1. STATUTES—*Statutory Construction—Ambiguous Statutory Language—Appellate Review.* If a statute's language is ambiguous, the court may turn to canons of statutory construction, consult legislative history, or consider other background information to establish the statute's meaning.

2. SAME—*Statutory Construction—Presumption That Legislature has No Intent to Enact Meaningless Legislation.* When construing statutes, courts presume the Legislature does not intend to enact useless or meaningless legislation.

3. CRIMINAL LAW—*Rule of Lenity—Application of Ambiguous Statute in Accused's Favor.* The rule of lenity is a canon of statutory construction applied when a criminal statute is ambiguous to construe the uncertain language in the accused's favor.

4. KANSAS OFFENDER REGISTRATION ACT—*Ambiguous Language in Statute—Rules of Statutory Construction Apply*. The language in K.S.A. 2021 Supp. 22-4907(a)(12) requiring a person subject to it to register "any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment" is ambiguous, so application of traditional canons of statutory construction is necessary to discern its meaning.

5. SAME—*Driving Unregistered Vehicle One Time Insufficient to Show Violation of KORA Statute.* In a criminal prosecution, proof the defendant drove an unregistered vehicle of unknown ownership only one time is insufficient to show a violation of K.S.A. 2021 Supp. 22-4907(a)(12)'s mandate to register any vehicle "owned or operated by the offender, or any vehicle the offender regularly drives."

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 30, 2021. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed November 10, 2022. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

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

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

The opinion of the court was delivered by

BILES, J.: The Kansas Offender Registration Act makes it a crime for a person subject to its provisions to fail to register "any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment." K.S.A. 2021 Supp. 22-4903(a) (criminalizing registered offender's noncompliance with Act's provisions); K.S.A. 2021 Supp. 22-4907(a)(12) (automobile registration requirement). The question here is whether that person can be convicted for not registering another person's vehicle that was driven only once. The State argues the statute covers one-time driving, but that view makes the remaining phrase "or any vehicle the offender regularly drives" pointless, which is disfavored. See *State v. Smith*, 311 Kan. 109, 114, 456 P.3d 1004 (2020) (when construing statutes, courts "presume the legislature does not intend to enact useless or meaningless legislation"). A Court of Appeals panel divided on how to interpret the statute. *State v. Moler*, No. 123,077, 2021 WL 6140376 (Kan. App. 2021) (unpublished opinion). We granted review to resolve the disagreement.

We hold the registration directive in K.S.A. 2021 Supp. 22-4907(a)(12) is ambiguous, so we resort to traditional canons of statutory construction to decide its meaning. And after doing that, it is apparent the State's "one-time driving" interpretation conflicts with the legislative history and the rule of lenity that favors the accused when a criminal statute is ambiguous. We reverse the two convictions at issue because the evidence shows the offender only drove each vehicle one time.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Richard I. Moler II with two counts of violating KORA, K.S.A. 2021 Supp. 22-4901 et seq. At trial, the evidence showed police caught him on two separate occasions driving two different unregistered vehicles.

For the first count, Valley Center police officer Erik Leiker testified he saw Moler on March 13, 2019, driving a Chevrolet pickup. The officer arrested him for driving on a suspended license. Leiker had not seen Moler in the truck before or after this incident. For the second count, Valley Center police officer Erik

Nygaard testified he saw Moler on June 22, 2019, driving a Ford Focus. The officer arrested him for driving on a suspended license. Nygaard also said he had not seen Moler driving the Focus before or after this incident.

Seth Lenker, a Sedgwick County Sheriff's deputy, testified Moler registered on March 29, 2019, and June 23, 2019, with the offender registration unit. Neither registration contained any vehicle information. He also said Moler did not register the truck or the Focus within three days of either police encounter. Similarly, Lena Castner, another registration unit employee, testified her office's sign-in sheets for March and June 2019 did not show Moler in the office except for March 29 and June 23. She also said Moler's registrations from March 29 and June 23 listed no vehicles.

Moler testified in his own defense. He admitted driving the Chevrolet truck in March and being arrested for driving with a suspended license. He said he went to the registration office twice to report this. He said he was asked if he owned a vehicle or operated one regularly, answering "no" to both. He said he was told he was "fine," signed the paperwork, paid the registration fee, and allowed to leave. He said he registered again in June after being arrested again for driving on a suspended license. As with the prior incident, he told the registration staff he did not own a vehicle or operate one regularly. He said he was told he was "good," completed the paperwork, and allowed to go.

The district court instructed the jury that to convict Moler on each count it had to find:

> "1. The defendant had been convicted of a crime which requires registration pursuant to the Kansas Offender Registration Act;
>
> 2. The defendant failed to provide all vehicle information of a vehicle operated by the offender within 3 business days;
>
> 3. [The date the act occurred;]
>
> 4. The defendant was required to register as an offender in Sedgwick County, Kansas."

The jury returned guilty verdicts on both counts. Before sentencing, Moler moved for a judgment of acquittal, arguing: (1) insufficient evidence supported the convictions; and (2) his registration obligation had expired before the violations occurred. He noted the evidence "suggests only a single use of two different

vehicles" and asserted the statute does not impose a "duty to register a vehicle that is not regularly used by the offender." He also claimed ineffective assistance of counsel because his attorney had advised him to stipulate to a registration obligation even though his had expired in 2014.

The district court denied the motion. It ruled the statutory term "operate" did not mean "regularly drive[n]" because the Legislature required registration for vehicles both "operated" and "regularly drive[n]" and listed them in the alternative. The court also rejected Moler's argument that his registration obligation had expired. It sentenced Moler to 57 months' imprisonment on the first registration conviction and to a concurrent 31-month prison term for the second. The court ordered both sentences to run "consecutive to all other cases."

Moler appealed, claiming: (1) insufficient evidence supported his convictions because KORA does not require registering a vehicle driven only one time; (2) no evidence showed he was "convicted" of a crime requiring registration because he was adjudicated as a juvenile offender; and (3) the district court erred by failing to decide whether he was obligated to register at the time of the offenses, leaving open the possibility his trial counsel was ineffective for recommending the stipulation.

A divided Court of Appeals panel affirmed. *Moler*, 2021 WL 6140376, at *11. On the registration mandate, the majority reasoned:

"K.S.A. 2018 Supp. 22-4907(a)(12) separates 'any vehicle owned or operated by the offender' and 'any vehicle the offender regularly drives' with the disjunctive 'or.' That 'or' gives the option between a vehicle owned or operated and a vehicle regularly driven, evidence that 'any vehicle the offender regularly drives' means something different than 'operate.' If 'operate' does not mean 'to drive regularly,' then it must mean something else. As discussed, caselaw on K.S.A. 2020 Supp. 8-1567(a) [Kansas' DUI statute] and the dictionary provide us an answer. Relying on the plain meaning of 'operate' in the context of using a car, 'operate' simply means 'to drive' without any requirement as to the number of times." *Moler*, 2021 WL 6140376, at *5.

Judge Thomas Malone disagreed, arguing "[t]he most reasonable interpretation" of the KORA provision at issue "is that an offender must provide information for any vehicle the offender owns or regularly drives." *Moler*, 2021 WL 6140376, at *12 (Malone,

J., concurring in part and dissenting in part). He acknowledged his view made the word "'operated' . . . redundant to the term 'owned,'" but thought there would be no reason to include the term "regularly drives" if use of a vehicle only once required registration. He pointed out either reading creates "some redundancy" but thought the majority's view caused an entire clause to have no purpose. *Moler*, 2021 WL 6140376, at *12.

Judge Malone continued by explaining the statute should be read *in pari materia* and harmonized with KORA as much as possible. He noted an offender must register lodging locations only if the offender stays seven days, so it does not make sense to require an offender to report information about a vehicle borrowed once from a friend. He also argued a one-time-use interpretation did not serve KORA's purpose of protecting the public from a likely reoffender by "associate[ing] the vehicle with an offender even though the offender may never drive it again." *Moler*, 2021 WL 6140376, at *12. Finally, he said he did not consider the statute ambiguous, but even if it is, the rule of lenity would apply to construe the registration mandate in an offender's favor. *Moler*, 2021 WL 6140376, at *12.

As to Moler's second and third arguments, the panel unanimously rejected them. It held the stipulation adequately supported Moler's convictions, and that "[a]ny error in the charging document or in the jury instructions referring to Moler's prior offense as a conviction instead of an adjudication is harmless error because such error did not affect the outcome of the case." *Moler*, 2021 WL 6140376, at *8. It also rejected the ineffective assistance of counsel claim because the State showed it likely had the evidence to prove Moler's registration obligation existed when the driving occurred. *Moler*, 2021 WL 6140376, at *11.

Moler petitioned for our court's review, contending: (1) the evidence did not establish he "owned or operated . . . or regularly drives" the vehicles he failed to register, noting the panel's statutory interpretation split; and (2) the evidence did not establish he was an "offender" required to register. He did not seek review of the panel's ineffective assistance of counsel holding, so that much is settled in the State's favor. See *State v. Neighbors*, 299 Kan.

234, 241, 328 P.3d 1081 (2014); Supreme Court Rule 8.03(i)(1) (2022 Kan. S. Ct. R. at 59).

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

STANDING

The State argued to the panel that Moler lacked standing to claim K.S.A. 2021 Supp. 22-4907(a)(12) cannot include single occasion driving because Moler did not prove he only drove each vehicle one time. The panel unanimously rejected this contention, pejoratively characterizing it as "circular and baseless." *Moler*, 2021 WL 6140376, at *3. Among its reasons, the panel noted,

> "Moler meets the basic requirements of standing—he suffered a personal and concrete injury. Moler was convicted of two crimes and sentenced to serve 57 months in prison. That is as cognizable and personal an injury as one can have." 2021 WL 6140376, at *3.

The State did not cross-petition for review of the panel's standing analysis, but since standing implicates our jurisdiction to hear this matter, we mention it briefly to dispose of it. We hold Moler has standing to challenge these convictions on sufficiency grounds based on the statutory interpretation question presented. As the panel correctly observed, "if 'operate' in K.S.A. 2018 Supp. 22-4907(a)(12) does require a vehicle to be driven more than once, the State's assertion that Moler never proved he drove the vehicles only one time each inverts the burden of proof in criminal trials." 2021 WL 6140376, at *3.

INTERPRETATION OF K.S.A. 2021 SUPP. 22-4907(a)(12)

Moving to the merits, we must decide whether sufficient evidence proves Moler "owned or operated . . . or . . . regularly dr[o]ve" the Chevrolet truck and the Ford Focus. The path to deciding this requires interpreting KORA, which presents a question of law over which we exercise unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). When interpreting statutes, a court first attempts

"'to give effect to the intent of the legislature as expressed through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to express language, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. Stated yet another way, a clear and unambiguous statute must be given effect as written. If a statute is clear and unambiguous, then there is no need to resort to statutory construction or employ any of the canons that support such construction.' [Citation omitted.]" *Betts*, 316 Kan. at 198.

So starting with the express language, KORA instructs that a "[v]iolation of the Kansas offender registration act is the failure by an offender . . . to comply with any and all provisions of such act, including any and all duties set forth in K.S.A. 22-4905 through 22-4907, and amendments thereto." K.S.A. 2021 Supp. 22-4903(a). Here, the State alleges Moler violated K.S.A. 2021 Supp. 22-4907(a)(12), which provides:

"[A] registration form shall include the following offender information:

. . . .

(12) all vehicle information, including the license plate number, registration number and any other identifier and description of *any vehicle owned or operated by the offender, or any vehicle the offender regularly drives*, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept." (Emphasis added.)

Moler does not dispute that driving a vehicle constitutes its operation and concedes the term "operated" can encompass either "regular, ongoing use" or a "one-time use" in a different context. But he claims the term's placement within KORA suggests multiple reasons to construe "operated" to mean regular, ongoing use. He argues: (1) a word is known by its associates, and the terms "owned" and "regularly drives" with which "operated" is associated, each contemplate continuing authority to drive a vehicle; (2) construing "operated" to include one-time driving renders the "regularly drives" clause superfluous; (3) requiring one-time driving registration conflicts with KORA's purpose as shown by provisions like K.S.A. 2021 Supp. 22-4907(a)(6), which requires an offender to register lodging locations where the offender stays for seven or more days, and by KORA's general purpose of protecting

the public; and (4) any lack of statutory clarity should be resolved in his favor under the rule of lenity.

The State predictably disagrees. It finds the statute clear and contends the plain meaning of "operated" requires registering even a vehicle used only once. It argues: (1) Moler's interpretation renders "operated" superfluous; (2) registration for one-time use does not make "regularly drives" meaningless because "owned" and "regularly drives" refer to present and ongoing future operation, while "operated" refers to a single use and applies to a vehicle operated in the past; and (3) while owned and regularly driven vehicles will be disclosed at an offender's quarterly registration, a vehicle operated once might not, so one-time vehicle operation triggers a "special instance of offender registration" that might help future police investigations. The State rejects Moler's claim of conflict with KORA's purpose based on the lodging provision, observing that KORA requires registration of all locations a transient offender has stayed since the last report, citing K.S.A. 2021 Supp. 22-4907(a)(6).

With these arguments in mind, we note KORA does not define "operated," so we must resort to the general principle that ordinary words are presumed to carry their ordinary, natural, common meanings. See *State v. Sandoval*, 308 Kan. 960, 963, 425 P.3d 365 (2018). And we acknowledge the word "operated" has a common meaning encompassing driving a vehicle once. See Merriam-Webster's Collegiate Dictionary 869 (11th ed. 2020) (defining the transitive verb form of "operate" to mean to "bring about, effect"; "to cause to function, work"; "to put or keep in operation"; or "to perform an operation on"). And we similarly observe there is a less natural, although viable, usage of "operation" in the context of a motor vehicle a person neither owns nor regularly drives that can include "put[ing] or keep[ing]" that vehicle "in operation" by, for example, registering and insuring a vehicle the registrant leases. See Merriam-Webster's Collegiate Dictionary 869 (11th ed. 2020) (defining "operation" to include "the quality or state of being functional or operative").

But in this context, common meaning alone does not supply enough certitude to end this inquiry given the Legislature's con-

fusing descriptor specifying that vehicles "operated" by an offender as well as those "regularly" driven both require registration. K.S.A. 2021 Supp. 22-4907(a)(12)'s sentence structure shows that "owned" and "operated" both reside within a single clause separated by the disjunctive "or." And yet another "or" separates this first "owned or operated" clause from the term "regularly drives." Such a sentence permits a meaning that triggers registration if any of these three conditions (owned, operated, or regularly driven) are satisfied. See *State v. Wiegand*, 275 Kan. 841, 845, 69 P.3d 627 (2003) ("[T]the use of the word 'or' . . . ordinarily means that conditions stand on equal footing and compliance with any condition satisfies the requirement.").

This wording leaves us with a criminal statute specifying conduct encompassed by the term "regularly drives" that is also fully incorporated by the term "operated." And either way, the search for definitive meaning leads to ignoring one or the other terms enacted by the Legislature. See *State v. Brown*, 303 Kan. 995, 1006, 368 P.3d 1101 (2016) (Courts "do not interpret statutes in isolation. Rather, we attempt to harmonize all the parts of an act to the greatest extent possible."). As Judge Malone observed, if the word "operated" means using a vehicle only once, there is no reason to mention an offender also registering a vehicle they "regularly drive[]."*Moler*, 2021 WL 6140376, at *12. After all, a regularly driven vehicle is also operated, and the statute gives no textual clue as to why having both terms serves any substantive purpose.

As written, this statutory provision frustrates the thoughtful judicial search for objective meaning as to the scope of conduct the Legislature seeks to criminalize. Courts "presume the legislature does not intend to enact useless or meaningless legislation." *Smith*, 311 Kan. at 114. And the State's interpretative effort to cast a wider net effectively neuters "regularly drives." By the same token, adopting Judge Malone's view, as he concedes, results in surplus language as well by leaving "operated" without substantive meaning.

Given the options, we conclude the better approach is to simply accept what is obvious and consider K.S.A. 2021 Supp. 22-4907(a)(12) ambiguous, which triggers the need for deeper statutory analysis. See *State v. Arnett*, 307 Kan. 648, 653, 413 P.3d

787 (2018) ("If the language of the statute is unclear or ambiguous," the court may turn "to canons of statutory construction, consult legislative history, or consider other background information to ascertain the statute's meaning."). This in turn leads us to two statutory interpretation tools that are particularly helpful here—the legislative history and the rule of lenity. See *State v. Sandberg*, 290 Kan. 980, 988, 235 P.3d 476 (2010) ("The rule of lenity is a canon of statutory construction commonly applied in the criminal law context."). Neither favors the State's one-time driving viewpoint.

Beginning with the legislative history, KORA nebulously required in 1996 that offenders register their "drivers license and vehicle information." L. 1996, ch. 224, § 5. In 2007, the Legislature changed this to include "the registration number of each license plate assigned to any motor vehicle *normally operated* by the offender." (Emphasis added.) L. 2007, ch. 183, § 5. The statute's current form took shape in 2011, when the Legislature replaced the 2007 language with a directive to provide the number "and any other identifier and description of any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept." L. 2011, ch. 95, § 7. This, of course, is the problematic language before us.

The 2011 revision accompanied broader changes proposed to bring KORA into substantial compliance with the federal Adam Walsh Act and "resolve several issues, concerns, and loopholes brought to the attention of" the Kansas Bureau of Investigation and an Offender Registration Working Group comprised of representatives from various stakeholders. These proposals were first part of 2011 House Bill 2322 and ultimately enacted in 2011 House Substitute for Senate Bill 37. See L. 2011, ch. 95, § 7. And the testimony supporting the current statutory language explained it required registration only for vehicles the offender regularly drives with no mention of one-time driving. Minutes of House Corrections and Juv. Justice Comm., March 3, 2011, Attachments 5-7 (testimony of Assistant Attorney General Kyle Smith, KBI

Special Agent in Charge David Hutchings, and KBI Public Service Administrator Nicole Dekat).

The proponents summarized K.S.A. 22-4907(a)(12)'s changes as follows:

"Amendments to K.S.A. 22-4907:

1) Require the signing of the registration form to be witnessed by the registering officer.
2) Require additional fields to be collected on the registration form such as aliases, all information regarding residences or other locations where the offender is staying, all telephone numbers, license plate number and description *of any vehicle the offender regularly drives* and locations where the vehicle is parked, any professional licenses, palm prints, and travel and immigration documents." (Emphasis added.) Minutes, House Corrections and Juv. Justice Comm., March 3, 2011, Attachment 7, pp. 7-4 to 7-5 (testimony of Nicole Dekat).

The federal Adam Walsh Act that the 2011 KORA changes were to track, states sex offenders must register "[t]he license plate number and a description of *any vehicle owned or operated by the sex offender*." (Emphasis added.) 34 U.S.C. § 20914(a)(6) (2018). But what does this mean? We are unaware of any federal caselaw applying this provision, although the United States Attorney General published national guidelines for "Sex Offender Registration and Notification." 73 Fed. Reg. 38030 (July 2, 2008); see also 34 U.S.C. § 20912(b) (2018) ("The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter."). The guidelines for 34 U.S.C. § 20914(a)(6) explain:

"Vehicle Information (§ 114(a)(6), (a)(7)): The registry must include '[t]he license plate number and a description of any vehicle owned or operated by the sex offender'. This includes, in addition to vehicles registered to the sex offender, *any vehicle that the sex offender regularly drives, either for personal use or in the course of employment.* A sex offender may not regularly use a particular vehicle or vehicles in the course of employment, but may have access to a large number of vehicles for employment purposes, such as using many vehicles from an employer's fleet in a delivery job. In a case of this type, jurisdictions are not required to obtain information concerning all such vehicles to satisfy SORNA's minimum informational requirements, but jurisdictions are free to require such information if they are so inclined." (Emphasis added.) 73 Fed. Reg. at 38057.

We conclude from this that the proponents of the 2011 changes to KORA, who represented those amendments applied to vehicles an offender who "regularly drives" a vehicle without

mentioning one-time driving, understood their proposed changes could satisfy federal law under the attorney general's published guidance as they had explained them. And the statutory language enacted notably parrots both the federal statute and the attorney general's guidance explaining what that language means, strongly suggesting the Legislature did not intend anything different.

The State never mentions this legislative history. It simply argues "a literal construction of KORA is required in order to achieve . . . its legislative purpose," citing *State v. Stoll*, 312 Kan. 726, 480 P.3d 158 (2021). But *Stoll* does not support the State. In that case, the act's literal construction "would achieve, not defeat, its legislative purpose" so there was "no need to liberally construe it" as was argued. 312 Kan. at 731. The *Stoll* court's rationale based its assessment on a particular problem in consideration of the act's purposes and did not establish a general rule demanding "literal" construction as the State contends now.

We must also consider the rule of lenity. Moler correctly asserts that when a criminal statute is ambiguous on a matter, "the rule of lenity applies to mandate that the statute be construed in favor of the accused." *State v. Terrell*, 315 Kan. 68, 73, 504 P.3d 405 (2022). This favors the more lenient construction criminalizing only an offender's failure to register a vehicle owned by the offender, or which the offender normally, habitually, or regularly operates.

Given that both the legislative history and a traditional application of the rule of lenity point in one direction, we hold K.S.A. 2021 Supp. 22-4907(a)(12)'s mandate to register any vehicle "owned or operated by the offender, or any vehicle the offender regularly drives," does not require an offender to register a vehicle of unknown ownership when the offender has driven it only one time. And this means the evidence cannot support Moler's convictions. The State points to nothing in the trial record tending to show Moler used either vehicle other than on the single occasions the testifying officers described. Also absent is any evidence showing who owned either vehicle or to whom they were registered. Any inference Moler drove either vehicle more than once would rest just on speculation.

When the evidence is viewed in the light most favorable to the State, we hold a rational fact-finder could not have found Moler "owned or operated" or "regularly drives" either vehicle under K.S.A. 2021 Supp. 22-4907(a)(12) beyond a reasonable doubt. We reverse the two convictions at issue. And given this result, we need not address his remaining issue on appeal.

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

No. 118,310

In the Matter of CURTIS N. HOLMES, *Petitioner*.

(520 P.3d 1271)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Reinstatement*.

Original proceeding in discipline. Opinion filed December 2, 2022. Reinstatement.

Julia A. Hart, Deputy Disciplinary Administrator, argued the cause.

Curtis N. Holmes, petitioner, argued the cause pro se.

PER CURIAM: In May 2018 this court imposed a one-year suspension on Curtis N. Holmes after Holmes continued to practice law despite having been suspended for failure to timely pay his annual registration fee. *In re Holmes*, 307 Kan. 871, 416 P.3d 143 (2018). In May 2019, Holmes petitioned for reinstatement. After a May 2022 hearing before a panel of the Kansas Board for Discipline of Attorneys, the panel issued a final hearing report on June 30, 2022. The hearing panel determined that petitioner had not met his burden of proving the factors in Supreme Court Rule 232(e)(4) (2022 Kan. S. Ct. R. at 295) weighed in favor of reinstatement and recommended that this court deny Holmes' petition for reinstatement.

The hearing panel made the following findings of fact, conclusions of law, and recommendations after the reinstatement hearing and arguments:

"Procedural History

"2. On September 26, 2008, the Supreme Court admitted Curtis N. Holmes (hereinafter 'the petitioner') to the practice of law in the State of Kansas, attorney registration number 23434. . . .

"3. In an original action in discipline, on May 4, 2018, the Supreme Court concluded that the petitioner violated Kansas Rules of Professional Conduct 1.4 (communication), 1.16(a)(1) (withdrawing from representation), KRPC 5.5(a) (unauthorized practice of law); 8.1 (false statement in connection with disciplinary matter), 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (misconduct prejudicial to the administration of justice), and Supreme Court Rule 218(a) (2018 Kan. S. Ct. R. at 262) (notification of

clients upon suspension). The Supreme Court suspended the petitioner's license to practice law for a period of one year and ordered that the petitioner undergo a reinstatement hearing pursuant to Supreme Court Rule 219(d) (2018 Kan. S. Ct. R. 264), now Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293).

"4. The Supreme Court based the rule violation findings and suspension on the following facts, as found by the hearing panel:

'10. Rule 208(a) requires all attorneys to register with the Clerk of the Appellate Courts and pay the annual registration fee prior to July 1 each year. The rule includes a "grace" period, providing attorneys until July 31 of each year to forward the form and pay the annual registration fee without penalty. However, "[a]ttorney registration fees received by the Clerk of the Appellate Courts after July 31 of the year in which due shall be accompanied by a $100 late payment fee." Rule 208(d).

'11. On July 29, 2015, the respondent mailed his attorney registration form and fee to the Clerk of the Appellate Courts. The Clerk did not receive the respondent's registration form and fee until after July 31, 2015. Under Rule 208(d), the respondent was required to pay a late fee of $100 because the registration form and fee were not received until after July 31, 2015. The respondent failed to provide the late fee of $100.

'12. On August 8, 2015, the respondent received a letter from the Clerk of the Appellate Courts, sent *via* certified mail, informing the respondent that his registration had not been received before August 1, 2015, and that his license to practice law would be suspended if he did not pay the late fee of $100 within 30 days. The respondent did not pay the late fee of $100 within 30 days.

'13. On October 6, 2015, the Supreme Court entered an order suspending the respondent's license to practice law for failing to pay the late fee of $100. On October 8, 2015, the Clerk sent the order of suspension to the respondent by certified mail to the respondent at the respondent's registration address. Prior to the entry of the order of suspension, the respondent was on notice that such an order would follow if the respondent did not pay the late fee.

'14. On October 13, 2015, the United States Postal Service attempted to deliver the certified mailing at 4:32 p.m., leaving a notice.

'15. On October 14, 2015, prior to 10:48 a.m., the respondent called the Clerk of the Appellate Courts and spoke with Debbie Uhl. During the conversation, the respondent stated that he had mailed the registration form and fee in plenty of time to arrive before August 3, 2015, that he had received the notice regarding the late fee, and that he did not believe that he owed the late fee, so he did not send it.

'16. At the hearing on this matter, the witnesses' testimony varied regarding what Ms. Uhl stated during the telephone conversation. Based on all the evidence presented to the hearing panel, the hearing panel concludes that Ms. Uhl informed the respondent that the Supreme Court had suspended the respondent's

license to practice law. Ms. Uhl asked the respondent if he had received the order of suspension. The respondent indicated that he had not received the order of suspension. Thus, despite the fact that the respondent had not yet signed for the certified mail, he had actual knowledge that his license was suspended on October 14, 2015.

'17. After the respondent's license to practice law was suspended, the respondent continued to practice law in multiple cases, as detailed below.

'18. G.M., E.M., and El.M. rented property from C.W. C.W. asserted that . . . G.M., E.M., and El.M. failed to timely pay their rent. As a result, C.W. filed an eviction suit against G.M., E.M., and El.M. Carol Hall represented C.W. in the eviction action. The respondent represented G.M., E.M., and El.M. in the eviction action.

'19. Additional difficulties arose between the parties, and C.W. filed a protection from stalking case against G.M., Leavenworth County District Court Case No. 2015-DM-828. G.M. then filed a protection from stalking case against C.W., Leavenworth County District Court Case No. 2015-DM-854. Robert H. Hall, Carol Hall's husband and law partner, represented C.W. in the protection from stalking cases.

'20. On October 14, 2015, the Honorable Michael D. Gibbens held a hearing in the eviction case at 1:00 p.m. While the respondent was in the courtroom shortly before 1:00 p.m., he left the courtroom and went into the hallway to look for his clients just before the case was called. G.M., E.M., and El.M. arrived and met with the respondent regarding the eviction case.

'21. The judge called the case. G.M., E.M., and El.M. did not appear. Additionally, the respondent was not in the courtroom when the judge called the case. As a result, the court entered default judgment and a writ for possession of the premises in favor of C.W. The respondent returned to the courtroom and requested that the court set aside the default judgment. The judge told the respondent that he would have to file a written motion to set aside the default judgment and writ.

'22. Even though the respondent knew prior to the time of the hearing that his license to practice law had been suspended, the respondent did not inform opposing counsel, the court, or his clients.

'23. The writ for possession of the premises was served on the respondent's clients. The writ directed the respondent's clients to vacate the premises prior to October 20, 2015, at 11:00 a.m. The order provided that the sheriff's office would remove them at that time if they had not vacated the premises.

'24. On October 15, 2015, the day after the respondent had actual knowledge of the suspension, the respondent entered his appearance on behalf of V.S., in Johnson County District Court, case number 15CV6206. The respondent sought and obtained a continuance of a hearing that was set for that day. The

respondent failed to inform the court, opposing counsel, or his client that his license to practice law had been suspended.

'25. At the time of the suspension, the respondent represented B.M., a respondent in a domestic case filed in Leavenworth County District Court, case number 2015-DM-356. Lawrence Henderson represented the opposing party. Previously, a status conference had been scheduled for October 15, 2015. The respondent and Mr. Henderson agreed to continue the status conference to October 28, 2015.

'26. On October 17, 2015, at 9:23 a.m., the respondent signed the certified mail receipt for the suspension order. According to the respondent, the respondent wrote a check in the amount of $100 payable to the Clerk of the Appellate Courts. The Clerk of the Appellate Courts did not receive a check from the respondent dated October 17, 2015.

'27. On October 17, 2015, the respondent served a motion to set aside order for immediate possession and a memorandum in support of motion to set aside order for immediate possession in the eviction action filed against G.M., E.M., and El.M. on C.W. On October 19, 2015, the respondent filed those pleadings in court. Later that same day, the respondent sought and obtained an *ex parte* temporary order setting aside the writ of immediate possession. At the time he served and filed the pleadings and sought the *ex parte* order, the respondent did not inform his clients, opposing counsel, or the court that his license had been suspended.

'28. Prior to the suspension of the respondent's license to practice . . . law, the respondent represented R.G. in a domestic case pending in Leavenworth County District Court, case number 2014-DM-904. Pamela Burton represented the opposing party in that case. On October 17, 2015, the respondent served discovery responses in R.G.'s case on Ms. Burton. The respondent filed pleadings in that case on October 19, 2015. The respondent did not inform his clients, opposing counsel, or the court that his license to practice law had been suspended.

'29. On October 19, 2015, the respondent met with G.M., E.M., El.M., and a deputy with the Leavenworth County sheriff's office about the October 20, 2015, deadline in the writ. Again, the respondent did not inform his clients that his license to practice law had been suspended.

'30. Previously, the court scheduled a hearing in the protection from stalking cases for October 19, 2015. Prior to the hearing, Mr. Hall saw the respondent at the courthouse. Later, Mr. Hall memorialized the exchange as follows:

"Carol:

["]This morning at approximately 10:45 am I went through security at the Justice Center on my way to the PFS hearing concerning the [C.W. and G.M.] PFS case. Mr. Holmes was sitting on the bench just east of the security entrance. After I passed through security I went over to Mr. Holmes to see if he was going to represent [G.M.] in the PFS case. He indicated he was going to represent her

and had told her to ask for a continuance since he was waiting for a ride from his wife, due to his car having broken down.

"He launched into speaking about the eviction case where you are representing [C.W.]. He said he had filed a motion to set aside the writ that was issued and had already spoken with Judge Gibbons [*sic*] as well as the sheriff's office. I asked him for a copy of the motion that he filed and told him that you had not received it. He said he 'sent it up' and did not have a copy. I handed him a copy of the Order For Immediate Possession that you gave me to give to him. I told him you had tried to fax it, but without success; he said you had to call first, then indicate (I think to his secretary) that you wanted to send a fax, then fax it. He acknowledged having received it by email from you.

"He suggested that the PFS cases should be continued until his client could get moved out. I told him that was a good idea and we agreed on November 16, 2015 for the new date in the PFS cases. I told him I would convey that to Judge Dawson and I did so about 15 minutes later. He indicated that his client had tried to rent another place, but had been declined because on (sic) the pending eviction case. . . . We agreed it would facilitate resolution for his client to get moved out—the sooner, the better—and that, hopefully, we could then resolve the PFS cases by agreement."

'31. When Mr. Hall appeared before Judge Dawson to seek and obtain a new hearing date in the two protection from stalking cases, Mr. Hall referenced the agreement with the respondent. The respondent, however, did not appear in court. The respondent did not inform his clients, Mr. Hall, or the court that the respondent's license had been suspended.

'32. On October 19, 2015, the court entered orders continuing the protection from stalking cases to November. In the orders, the respondent is listed as G.M.'s counsel.

'33. During the afternoon hours of October 19, 2015, Ms. Hall emailed the respondent to set a date for a hearing in the eviction action. In the email, Ms. Hall proposed several dates, including October 23, 2015. The respondent called Ms. Hall and agreed to an expedited hearing on October 23, 2015, at 11:00 a.m. The respondent did not tell Ms. Hall that his license was suspended.

'34. At the time his license was suspended to practice law, the respondent represented G.B. in an appeal from a municipal court conviction, Leavenworth County District Court case number 2015-CR-573. Previously, the court had scheduled a trial for October 20, 2015. On October 20, 2015, the respondent sought and obtained opposing counsel's consent and continued the trial to November, 2015. The respondent did not inform opposing counsel, the court, or his client that his license to practice law was suspended.

'35. On October 22, 2015, the respondent wrote a check in the amount of $100 payable to the Clerk of the Appellate Courts. The respondent delivered the check to the Clerk of the Appellate Courts.

'36. On October 22, 2015, the respondent called Ms. Hall and left a message asking Ms. Hall to call him regarding the eviction case. Ms. Hall replied to the message by email that same day asking the respondent to draft an agreement.

'37. On October 23, 2015, the Leavenworth County District Court Administrator informed Judge Michael D. Gibbens that the respondent's license to practice law was suspended. The hearing in the eviction action was scheduled to be heard in Judge Gibbens' court at 11:00 a.m. that day.

'38. Ms. Hall had several hearings before Judge Gibbens on October 23, 2015, prior to the 11:00 a.m. setting. Before the 11:00 a.m. hearing, Judge Gibbens informed Ms. Hall the respondent's license to practice law was suspended.

'39. The respondent arrived for the hearing shortly before 11:00 a.m. and entered the courtroom. The respondent approached Ms. Hall and asked her to come to speak with him in the hallway. In the hallway, the respondent told Ms. Hall that his license to practice law was suspended. The respondent told Ms. Hall that he had just learned of the suspension a day or so prior and was reluctant to leave a phone message to that effect. The respondent asked Ms. Hall to cancel the 11:00 a.m. hearing and to agree to allow his clients until the following Monday to vacate the premises. The respondent's clients were not present.

'40. Ms. Hall informed her client of the respondent's offer. Her client declined the offer. Shortly after 11:00 a.m., on October 23, 2015, Judge Gibbens entered the courtroom. The respondent was in front of the bar at counsel table when the following exchange occurred:

"JUDGE GIBBENS: Be seated. All right, Mr. Holmes, before I call this case, the Court's been advised that you were administratively suspended from the practice of law effective October the 6th.

"MR. HOLMES: Right. I became aware of that in the last few days.

"JUDGE GIBBENS: Okay. Have you been reinstated yet?

"MR. HOLMES: I've done everything I can. I've actually been advised it's been processed and it should be effective Monday.

"JUDGE GIBBENS: Okay. Well, you can't appear here today.

"MR. HOLMES: I understand. I've been advised by the Disciplinary Administrator the thing I need to do is to show up and let the Court know that, let opposing counsel know that. I would have let my client know that but I can't get a hold of them and they're not present.

"JUDGE GIBBENS: All right.

"MR. HOLMES: But I will be doing that. And I have discussed the matter with Ms. Hall.

"JUDGE GIBBENS: All right. You may withdraw then. Thank you.

"MR. HOLMES: Thank you."

'41. After the respondent left the courtroom, the court entered a default order for immediate possession and issued a writ against the respondent's clients to vacate the premises.

'42. Later that day, October 23, 2015, the respondent came to Ms. Hall's office to deliver a client file to Mr. Hall in an unrelated case. Ms. Hall came to the reception desk and took the file from the respondent. The respondent began to discuss the eviction action with Ms. Hall. Because the respondent was not licensed to practice law, Ms. Hall told the respondent that he needed to leave.

'43. On October 23, 2015, the respondent sent a letter to the disciplinary administrator, self-reporting his conduct. The respondent's letter provided:

"Please be advised that in the hopes of compliance with the rules of professional conduct, I am providing notice of a handful of matters in which I appeared in Court to represent clients which occurred apparently *after* the entry of an order regarding but *prior* to my notification of an administrative suspension.

"Pursuant to the Supreme Court Rules regarding annual registration, I mailed my Attorney Registration documents and fees on the 29th day of July, 2015. I had anticipated they would be received on or before the 31st day of July, 2015, in time to renew my registration before being deemed late. However, a few weeks later, I received a notice by certified mail that my registration renewal documents were not processed until Monday, August 3rd, 2015, and were therefore deemed late.

"I thereafter attempted to contact the registration office to object and/or to request a further explanation for the late fee. I cannot recall the precise date of the call but believe it was in late August. In any event, I had hoped to avoid having to send the late fee if I could receive a better explanation for the delay and possibly have the determination reversed. I did not receive a follow-up response from the registration office, and admittedly I waited to follow up on the issue until thirty (30) days had lapsed.

"Nevertheless, I again called and poke [sic] with the registration clerk about the same issue, I believe on October 14th, and was advised the registration office could provide me no precise explanation for the processing delay but that it was possible the registration renewal documents were either received late, or they had been received on time but were left in the lock box until they could be processed after the weekend of August 1st and 2nd, 2015. I was then informed that I would be contacted by an individual who could better explain or resolve the matter the following day; however, as of this date I have received no such contact.

"Although I was aware that it had been more than thirty (30) days since I had been notified of the late fee issue, I ultimately pr epared and mailed the late fee payment with the additional form to the registration office the same day. I had hoped that despite the delay, I might be able to avoid an administrative suspension. In over twenty (20) years of practice, I have never incurred this issue and so I was uncertain as to how the entire process worked.

"Unfortunately, I received notice of the suspension a few days later on October 17th, 2015. After reviewing the information, I immediately prepared and sent the reinstatement fee. I also sent the Continuing Legal Education reinstatement fee. I only learned after sending the reinstatement fee, that it had been received by the registration office but that they had not received the late fee I had mailed days earlier. Accordingly, I immediately wrote and delivered another

check for the late fee. Accordingly, I have undertaken all action to reinstate my license, which by this time may already be reinstated or, as I have been advised, should be reinstated imminently. However, as of the current date, I still have no knowledge as to whether the late fee sent nearly a week and a half ago was ever received, which further concerns me given the original delay in having the initial renewal fee payment processed.

"In any event, to my knowledge, there are no other impediments to my license other than the late payment fee issue, and the delay was largely occasioned as a result of the fact that I did not believe I [*sic*] payment would be received late in the first place, and my admitted stubbornness over the issue.

"I understand that an administrative suspension order was issued on October 5th or 6th, 2015; however, it was only after I received the notice of suspension that I became aware it had actually been issued. As such, after the order was issued but prior to my notice thereof I admittedly appeared in state court to represent clients on a handful of occasions. The first occasion was October 6th, 2015, in Leavenworth County, . . . The matter concerned a Motion to Determine Child Support Arrearages which I had filed some months earlier. The hearing merely consisted of notification to the Court that the parties had reached a previously negotiated agreement. The second hearing was on October 7 in two related child in need of care cases also in Leavenworth County. My client did not appear, and the matters were essentially continued until the month of November. The third matter was another child in need of care case held in Johnson County on October 8th, 2015, where I merely appeared and indicated my intention to withdraw and was excused by the Court. The fourth hearing . . . was held on October 15th and considered a temporary protection order which had been initially filed on a *Pro Se* basis . . . who asked that I appear on her behalf at the hearing. [She] had also filed a Motion to Modify Custody in a companion domestic case which she also wished me to handle but which was not scheduled at that time. The hearing was continued and the Judge expressed his intention to appoint a Guardian Ad Litem to represent the interests of the children for whom the temporary protection order had been issued. The final hearing involved the sentencing . . . on October 16th, in Olathe Municipal Court. The sentencing was based upon a plea and sentencing agreement which had been negotiated earlier.

"I would not have appeared in any of these hearings had I actually been aware of the administrative suspension, andI have not appeared in any further hearings since [having] been notified of the administrative suspension. In addition, there have been no formal disciplinary proceedings filed in the State of Kansas against me at any time and to my knowledge there are no matters pending.

"Should you have any questions regarding this matter please fee [*sic*] free to contact me."

'44. The respondent included false information in his October 23, 2015, letter to the disciplinary administrator. *See* ¶ 65.

'45. On October 26 or 27, 2015, the respondent called Mr. Henderson and asked if he would agree to continue the October 28, 2015, hearing scheduled in G.M.'s case. The respondent explained that he needed the continuance because

his daughter was getting married in Idaho on October 28, 2015. The respondent did not disclose that his license to practice law was suspended. However, Mr. Henderson had previously learned that the respondent's license was suspended. Mr. Henderson did not agree to the continuance, because he was concerned that by agreeing to the continuance he would be aiding the respondent in the unauthorized practice of law.

'46. On October 27, 2015, Kate Baird, deputy disciplinary administrator, responded to the respondent's letter self-reporting the misconduct. In the letter, Ms. Baird believing that the respondent has not practiced law after learning of the suspension order, told the respondent that she would hold the matter and asked the respondent to provide her with written notification when his license was reinstated.

'47. On October 28, 2015, [the] Supreme Court issued an order reinstating the respondent's license to practice law in Kansas.

'48. On November 6, 2015, the respondent notified the disciplinary administrator that his license had been reinstated. In that letter, the respondent disclosed additional misconduct, as follows:

"Thank you for your letter dated October 27th, 2015. Per your request, I am advising that I received the reinstatement order and was reinstated to practice on October 28th and have resumed practice.

"I should also advise in connection with my prior letter that I had also prepared and filed a few pleadings after the October 6th, 2015, period of suspension. As you may recall, I did not receive any notice thereof until late afternoon of [the] 17th of October.

"In a Johnson County divorce case No. 15-CV-6299 I entered an appearance and submitted an Answer to a Petition and a Motion to Set-Aside Temporary Orders on or about October 14th; however, this was prior to my receipt of the notice of suspension and upon my subsequent notification of the suspension, I appeared in person at a previously scheduled hearing the following week and advised the Court and counsel as well as my client of the suspension. The hearing was then continued for a few weeks.

"I also prepared and filed a Motion to Set-Aside [*sic*] a Default Judgment in a Leavenworth County wrongful detainer case No. 2015-LM-952. The Motion was also prepared and signed prior to the time I received my notice, but it was received by the Court Clerk and filed the following Monday and thereafter scheduled by the Court for an expedited hearing to take place on the 23rd of October. Nevertheless, on that date I appeared in Court just prior to the time scheduled for the hearing and notified the Court and Counsel of my administrative suspension. I had been unable to reach my clients prior to that time who, I later learned, were actually in the process of relocating from the residence which was the subject of the action and could not be reached by telephone. Nevertheless, the matter proceeded to a second default after I was excused from the Courtroom by the Court.

"In addition, I received answers from my client by e-mail to a series of discovery requests in Leavenworth Case No. 2014-DM-904. I prepared a formal

discovery response which was e-mailed to opposing counsel on October 9th. The discovery answers were later signed by me and verified by my client also prior to my receiving notice of the suspension, but they were deposited in the mail, together with several items of personal mail, the day after I had received notice. I have no excuse for having these items mailed out after I had received notice other than the fact that they had been prepared and included a couple of days earlier together with a large stack of personal mail all of which was sent out at the same time. This was an oversight on my part and was not intentional as it would have been just as easy to have waited to send the discovery answers out until the following week after I received the reinstatement.

"In a criminal case, Leavenworth County Case No. 15-CR-573, a court trial had been scheduled several weeks earlier to take place on the 21st of October. I was unable to contact the Judge to notify him of my administrative suspension; however, with the consent of opposing counsel the matter was continued prior to the day of the trial and rescheduled for [the] 17th day of December.

"I submitted no other pleadings of which I am aware, nor did I appear at any other hearings about which I have not previously advised your office. I can say, if there were any such additional matters to speak of, I can represent that none of them were conducted after my receipt of the notice of suspension.

"Should you have any questions regarding this matter, please [feel] free to contact me."

'49. The respondent's November 6, 2015, letter to the disciplinary administrator's office contained false information. *See* ¶ 66.

'50. On November 4, 2015, Ms. Hall filed a complaint with the disciplinary administrator regarding the respondent's unauthorized practice of law.

'51. On November 16, 2015, Ms. Burton filed a complaint with the disciplinary administrator regarding the respondent's unauthorized practice of law.

'52. On December 3, 2015, the respondent wrote to the disciplinary administrator's office, responding to Ms. Hall's complaint and Ms. Burton's complaint. In the respondent's correspondence to the disciplinary administrator's office, the respondent again made false statements.

'53. In the respondent's December 3, 2015, letter to the disciplinary administrator's office, the respondent admitted that he violated KRPC 3.3 (by omission), KRPC 3.4(c), and KRPC 5.5.'

"5. Prior to filing his petition for reinstatement, the petitioner paid the costs of the prior disciplinary proceeding in Kansas, as required by Rule 232.

"6. On May 7, 2019, the petitioner filed a petition for reinstatement.

"7. On June 4, 2019, the Supreme Court entered an order ruling that sufficient time has elapsed to justify reconsideration of the Supreme Court's prior order of suspension. The Supreme Court ordered the disciplinary administrator to conduct a thorough investigation of the facts alleged in the petition for reinstatement and of the petitioner's conduct since the Court's order of suspension.

The Supreme Court ordered the petitioner to appear for a hearing on the petitioner's verified petition for reinstatement; and that the matter proceed pursuant to Rule 219 (now Rule 232).

"8. On July 31, 2019, the disciplinary administrator's office received a completed reinstatement questionnaire from the petitioner.

"9. Prior to the reinstatement hearing in this matter, three other complaints alleging misconduct by the petitioner were received by the disciplinary administrator and ultimately were resolved by informal admonition on July 23, 2020, July 24, 2020, and January 8, 2021.

"10. A hearing on the petition for reinstatement was scheduled for February 14, 2022. During a prehearing conference held in this matter on February 8, 2022, the petitioner requested a ninety (90) day continuance of the reinstatement hearing. The disciplinary administrator, appearing through deputy disciplinary administrator Julia A. Hart, did not object to a continuance of the reinstatement hearing. The request to continue was granted by the hearing panel.

"11. The reinstatement hearing was rescheduled for May 16, 2022, at the Office of the Disciplinary Administrator, 701 SW Jackson St., First Floor, Topeka, Kansas 66603.

"12. During the February 8, 2022, prehearing conference, the hearing panel directed the parties to provide a copy of their proposed witness and exhibit lists, along with copies of proposed exhibits, to the other party and to the members of the hearing panel by April 11, 2022.

"13. On April 18, 2022, the hearing panel held a second prehearing conference. During the second prehearing conference the petitioner stated he attempted to email his proposed witness and exhibit lists, along with copies of proposed exhibits, to the hearing panel, Ms. Hart, and the kbda@kscourts.org filing email address using a FedEx scanning service. However, the filing was not received in its entirety from the FedEx scanning service and was not recognizable as a filing intended for this matter. The hearing panel directed the petitioner to file his witness and exhibit lists, along with copies of proposed exhibits, no later than April 21, 2022.

"14. During the second prehearing conference, the petitioner stipulated to admission of the disciplinary administrator's proposed exhibits A through L. The hearing panel admitted disciplinary administrator's exhibits A through L.

"15. On May 16, 2022, the matter was called for hearing. The hearing panel appeared. The petitioner appeared *pro se*. The disciplinary administrator's office appeared through Julia A. Hart. All appearances were in person at the Office of the Disciplinary Administrator, 701 SW Jackson St., First Floor, Topeka, Kansas 66603.

"16. During the hearing, the hearing panel admitted exhibits 1 through 4, offered by the petitioner, into evidence. The hearing panel previously admitted exhibits A through L, offered by the disciplinary administrator, into evidence during the April 18, 2022, prehearing conference.

"17. Kansas Supreme Court Rule 232 sets forth the procedure applicable to reinstatement proceedings. The hearing panel concludes that the petitioner has complied with the procedural requirements of Rule 232(b) (2022 Kan. S. Ct. R.

at 293). The hearing panel now turns its attention to the substantive considerations found at Rule 232(e)(4) (2022 Kan. S. Ct. R. at 293).

"Substantive Considerations

"18. To establish that he is eligible for reinstatement, '[t]he petitioner has the burden of proof to establish that the petitioner is fit to practice law and that the factors in subsection (e)(4) weigh in favor of reinstatement.' Rule 232(e)(3) (2022 Kan. S. Ct. R. at 293). 'Each finding of fact must be established by clear and convincing evidence.' Rule 232(f)(1)(A) (2022 Kan. S. Ct. R. at 293).

"19. The factors in Rule 232(e)(4) (2022 Kan. S. Ct. R. at 293) are:

'(A) the petitioner's current moral fitness;

'(B) the petitioner's consciousness of the wrongful nature of the petitioner's misconduct and the disrepute the misconduct brought the profession;

'(C) the seriousness of the misconduct leading to disbarment or suspension does not preclude reinstatement;

'(D) the petitioner's conduct since the Supreme Court imposed discipline;

'(E) the petitioner's present ability to practice law;

'(F) the petitioner's compliance with the Supreme Court's orders;

'(G) the petitioner has not engaged in the unauthorized practice of law;

'(H) the petitioner has received adequate treatment or rehabilitation for any substance abuse, infirmity, or problem; and

'(I) the petitioner has resolved or attempted to resolve any other initial complaint, report, or docketed complaint against the petitioner.'

The hearing panel considered the evidence presented regarding each of the factors. Where the hearing panel makes factual findings, those findings of fact are supported by clear and convincing evidence.

"20. *The Petitioner's Current Moral Fitness*. The petitioner's current moral fitness does not appear to be at issue in this reinstatement matter. The evidence showed the petitioner has a supportive family, engages with his church, and has no criminal history. There was no evidence presented that the petitioner has engaged in conduct since his suspension that would indicate he is morally unfit. The hearing panel concludes that the petitioner's moral fitness is not at issue in this case.

"21. *The Petitioner's Consciousness of the Wrongful Nature of the Petitioner's Misconduct and the Disrepute the Misconduct Brought the Profession*. The petitioner characterized the underlying misconduct that resulted in his suspension as 'mistakes of omission.' Specifically, he testified that he was angry that a late fee was assessed against him and thus neglected to pay the fee. Further, he said that he engaged in willful ignorance by waiting several days to pick up certified mail from the Supreme Court that he suspected might be notice of his administrative suspension. Finally, the petitioner testified that he was not fully forthcoming with the disciplinary administrator's office and the Supreme Court regarding his conduct during disciplinary proceedings. The petitioner's characterization of his misconduct is evidence that . . . he is not conscious of the wrongful nature of his misconduct and the disrepute his misconduct brought the profession. Instead, the petitioner showed that he does not genuinely appreciate the severity of his misconduct and the negative effect it had on the profession, his

former clients, the legal system, and the public. Further, the petitioner generally minimized his disciplinary history, including his misconduct that resulted in three separate informal admonitions since his suspension. The petitioner testified during the hearing that one of the informal admonitions he received 'was so minor and it was essentially forgotten.' The hearing panel does not agree that any of the informal admonitions were minor. The hearing panel concludes that the petitioner's evidence does not clearly and convincingly demonstrate that he appreciates the seriousness of his misconduct.

"22. *Whether the Seriousness of the Misconduct Leading to Disbarment or Suspension Does Not Preclude Reinstatement*. The petitioner's conduct that led to his suspension included failing to communicate with and properly withdraw from representation of his clients, engaging in the unauthorized practice of law, and making false statements and misrepresentations during the disciplinary process. This is serious misconduct that had a significant negative impact on his clients, the legal system, the legal profession, and the public. The hearing panel concludes that the petitioner failed to present evidence sufficient to establish that this factor weighs in favor of reinstatement.

"23. *The Petitioner's Conduct since the Supreme Court Imposed Discipline*. The petitioner has committed professional misconduct since being suspended from the practice of law. On January 8, 2021, the petitioner received an informal admonition for violations of KRPC 1.2, 1.4, and 5.5. The violation of KRPC 5.5 resulted from the petitioner's communicating with his former client through the client's spouse after his suspension.

"24. *The Petitioner's Present Ability to Practice Law*. The petitioner's ability to practice law does not appear to have been at issue in the underlying disciplinary matter. The petitioner testified that he uses similar problem-solving skills and interacts with clients in his current job as he did when he was an attorney. The petitioner has office furniture, a computer, and his law library in his home, where he said he plans to have an office if he is reinstated. The hearing panel concludes that the petitioner's present ability to practice law is not at issue in this case.

"25. *The Petitioner's Compliance with Supreme Court Orders*. In its May 4, 2018, order suspending the petitioner, the Supreme Court ordered the petitioner to comply with Supreme Court Rule 218 (2018 Kan. S. Ct. R. at 262), now Rule 231 (2022 Kan. S. Ct. R. at 292). Former rule 218(c) provided, '[i]t is the unauthorized practice of law and a violation of KRPC 5.5 for: (1) a suspended or disbarred attorney to practice law after the Supreme Court enters an order suspending or disbarring the attorney . . . .' Current Rule 231(b) provides '[i]t is the unauthorized practice of law and a violation of Kansas Rule of Professional Conduct 5.5 for an attorney to continue to practice law in Kansas after the Supreme Court issues an order suspending or disbarring the attorney.' The petitioner engaged in the unauthorized practice of law during his suspension, which means he did not comply with the Supreme Court's order or the Supreme Court's rules. In addition, in order to be reinstated the petitioner would need to meet the requirements of Supreme Court Rule 812 (2022 Kan. S. Ct. R. at 618) by completing the requisite number of continuing legal education hours to be reinstated. The petitioner testified that so far, he has completed nine continuing legal education

hours. The hearing panel concludes that the petitioner did not establish that he has complied with Supreme Court orders since the suspension of his license.

"26. *Whether the Petitioner Has Not Engaged in the Unauthorized Practice of Law*. The petitioner has engaged in the unauthorized practice of law since his suspension as evidenced by his January 8, 2021, informal admonition. The petitioner told a former client's spouse that he would represent the client once the petitioner's one-year suspension concluded and he was reinstated. The petitioner gave the client's wife 'an impression that [his] reinstatement would be forthcoming and it would be quick, and that turned out not to be the case.' Further, during the reinstatement hearing the petitioner seemed to not recognize that his conduct that resulted in the January 8, 2021, informal admonition constituted the unauthorized practice of law. *See In re Wilkinson*, 251 Kan. 546, 553, 834 P.2d 1356 (1992) ('[A] suspended or disbarred lawyer may not be present during conferences with clients, talk to clients either directly or on the telephone, sign correspondence to them, or contact them either directly or indirectly.'). In fact, the petitioner testified that he told another former client who reached out to him since his suspension about handling an adoption, 'I'll do what I can but I can't make any promises at this point.' However well-intended, the panel finds it was inappropriate for Mr. Holmes to infer that he might somehow be able to assist his former client when he had no authority to do so. The passage of time, particularly with an adoption, can be damaging to the client's case. The hearing panel concludes that the petitioner engaged in the unauthorized practice of law while his license was suspended.

"27. *Whether the Petitioner has Received Adequate Treatment or Rehabilitation for Any Substance Abuse, Infirmity, or Problem*. Treatment for substance abuse, infirmity, or other problem was not indicated as necessary in the underlying disciplinary matter. This issue was also not addressed during the reinstatement hearing. The hearing panel concludes that this factor is not at issue in this case.

"28. *Whether the Petitioner has Resolved or Attempted to Resolve any Other Initial Complaint, Report, or Docketed Complaint Against the Petitioner*. The disciplinary administrator presented evidence that the petitioner resolved complaints with the disciplinary administrator's office via three separate informal admonitions on July 23, 2020, July 24, 2020, and January 8, 2021. There was no evidence of any unresolved disciplinary complaints against the petitioner. As a result, the hearing panel concludes there is clear and convincing evidence that the petitioner has resolved all other complaints against him as required by this factor.

"Recommendation of the Parties

"29. The petitioner recommended that his petition for reinstatement be granted and that his license to practice law in Kansas be reinstated.

"30. The disciplinary administrator recommended that the petitioner's petition for reinstatement be denied and that the petitioner's license to practice law in Kansas not be reinstated.

"Recommendation of the Hearing Panel

"31. Based on the evidence presented in this case, the hearing panel concludes that the petitioner has not met his burden to prove the factors in Rule 232(e)(4) (2022 Kan. S. Ct. R. at 293) weigh in favor of reinstatement. The hearing panel recommends that the Supreme Court deny the petitioner's petition for reinstatement."

After the hearing panel issued its report, we ordered oral arguments in this matter under Rule 232(g)(4)(D) (2022 Kan. S. Ct. R. at 296).

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 Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020). We do not reweigh evidence or make credibility determinations; however, we are not bound by the Disciplinary Administrator's or the hearing panel's recommendations. *In re Kupka*, 311 Kan. 193, 204, 458 P.3d 242 (2020).

The Office of the Disciplinary Administrator asserted at oral argument that because Holmes did not file exceptions to the Reinstatement Final Hearing Report, the findings of fact and conclusions of law are deemed admitted. This would of course be true under a typical disciplinary proceeding under Supreme Court Rule 228(g)(1) (2022 Kan. S. Ct. R. at 288) (findings of fact and conclusions of law in the final hearing report will be deemed admitted if respondent fails to timely file an exception). However, Rule 232 (2022 Kan. S. Ct. R. at 293) governing reinstatement procedure does not include similar language. Rather, Rule 232(g)(4) simply provides that if the hearing panel recommends denying the petition for reinstatement, the petitioner may file exceptions. Because Rule 232 does not deem the findings of fact and conclusions of

law admitted if the petitioner does not file exceptions, we disagree with the Office of the Disciplinary Administrator that Holmes admitted to the hearing panel's findings of fact and conclusions of law by not filing exceptions.

The panel heavily relied on the facts that gave rise to the January 8, 2021, informal admonition in recommending against reinstatement. Holmes explained that his former client's wife had communicated to him that his former client was set to be released from prison in a few months, and asked if Holmes could represent him at that time. Holmes indicated to her that he believed his one-year suspension would be complete by the time his former client was expected to be released from prison, and he told her that assuming he was indeed reinstated at that time, he "would be happy to represent him and finish that case." Based solely on these facts, the panel concluded that Holmes engaged in the unauthorized practice of law in violation of KRPC 5.5 (2021 Kan. S. Ct. R. 406) when he made these communications during his suspension.

KRCP 5.5(b) (2021 Kan. S. Ct. R. 406) provides that an attorney "who is not admitted to practice in this jurisdiction shall not . . . establish an office or other systematic and continuous presence in this jurisdiction for the practice of law" or "hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."

This court "has the inherent power to define and regulate the practice of law" in Kansas. *In re Flack*, 272 Kan. 465, 473-74, 33 P.3d 1281 (2001). We have previously considered the parameters of what constitutes the "practice of law," even though "'no precise, all-encompassing definition is advisable,'" and each case "'asserting the unauthorized practice of law must be considered on its own facts on a case-by-case basis.'" *In re Miller*, 290 Kan. 1075, 1080, 238 P.3d 227 (2010). Generally speaking, the practice of law includes performing services in court, in any matter, and at any stage. But in a larger sense it includes legal advice and counsel, and the preparation of legal documents, even if those matters do not occur within a court setting. 290 Kan. at 1080 (citing *State, ex rel., v. Perkins*, 138 Kan. 899, 907, 908, 28 P.2d 765 [1934]). A suspended attorney also would be considered engaged in the practice of law if he or she conferred with clients, advised them of their

legal rights, or rendered services requiring knowledge and application of legal principles and techniques. *Miller*, 290 Kan. at 1080-81.

While a suspended attorney is permitted to work in the legal field, his or her functions must be "'limited exclusively to work of a preparatory nature under the supervision of a licensed attorney-employer and [can] not involve client contact.'" *In re Wiles*, 289 Kan. 201, 206-07, 210 P.3d 613 (2009). We have emphasized that in this context, "'[*a*]*ny contact with a client is prohibited*.'" 289 Kan. at 206-07. A non-exhaustive list of restrictions includes prohibitions on a suspended lawyer being present during client conferences, speaking with clients in person or on the phone, signing correspondence to them, or contacting them either directly or indirectly. 289 Kan. at 206-07. The purpose of this rule is to "avoid the appearance of impropriety, to avoid confusion among laypersons, or to avoid the temptation for law-trained clerks (or paralegals) to go beyond mere preparatory work." *In re Rost*, 289 Kan. 290, 309, 211 P.3d 145 (2009).

The hearing panel cites only *In re Wilkinson*, 251 Kan. 546, 834 P.2d 1356 (1992), in support of its finding that Holmes engaged in the unauthorized practice of law. In that case, Wilkinson had obtained employment as a law clerk under the authority of a licensed attorney during his indefinite suspension. The hearing panel recommended Wilkinson be disbarred after concluding that he engaged in the unauthorized practice of law by working in that capacity. We agreed that in this context, "a suspended or disbarred lawyer may not be present during conferences with clients, talk to clients either directly or on the telephone, sign correspondence to them, or contact them either directly or indirectly." 251 Kan. at 553. But we disagreed with the hearing panel's conclusion that in this context Wilkinson engaged in the unauthorized practice of law. At all times Wilkinson worked under the direction or supervision of a licensed attorney and did not act on his own; "he did not draft any of the documents, did not appear in court, and never offered advice or suggestions to" clients. 251 Kan. at 554. Furthermore, "he did not present himself as an attorney—he disclosed the fact that he was suspended from the practice of law to" clients, and the clients did not pay Wilkinson. 251 Kan. at 554. In light of

these facts, we found that the panel did not establish misconduct by clear and convincing evidence, and we dismissed the complaint against Wilkinson. 251 Kan. at 554-55, 558.

Today we hold that a suspended attorney has not engaged in the unauthorized practice of law when the attorney merely indicates future representation is possible upon reinstatement and does not otherwise engage in any counseling, advising, or rendering services requiring legal knowledge while suspended. See 251 Kan. at 554 (finding a suspended attorney was not engaged in the practice of law while working as a law clerk because "he did not draft any of the documents, did not appear in court, and never offered advice or suggestions to" clients); *State, ex rel., v. Hill*, 223 Kan. 425, 425-27, 573 P.2d 1078 (1978) (a non-lawyer who had a franchise agreement to buy and resell kits that contained forms for obtaining a divorce in Kansas, completed sample forms, and written and audio instructions was not engaged in the practice of law because he did not personally provide legal advice, never represented himself to be an attorney, and advised at least some customers that he was not an attorney).

Holmes did not apply any law to the facts of his former client's case. He did not render services requiring his professional judgment, nor did he apply any part of his legal education to the specific legal problem of his client. The client knew that Holmes was suspended and not currently licensed to practice law. In fact, the client's wife approached Holmes because the client previously had *positive* experiences with Holmes' representation. Holmes merely indicated that upon his reinstatement—which he hoped would be imminent—he would readily return to representing his former client.

Holmes did not make any promises regarding future representation nor did he induce that client to rely on him for legal services during his suspension. We are unaware of any injury that the client suffered from Holmes' statements. We decline to extend the definition of the "unauthorized practice of law" to fit Holmes' conduct relevant to the January 8, 2021, informal admonition.

The panel ultimately recommended that the court deny Holmes' petition for reinstatement because he failed to meet his burden of proving the factors in Supreme Court Rule 232(e)(4)

(2022 Kan. S. Ct. R. at 295) weighed in favor of reinstatement. Yet many of the reasons the panel provided for why it found these factors to weigh against reinstatement related to the conduct that gave rise to the January 8, 2021, informal admonition. As we have described, we find that Holmes' statements to his former client do not constitute the unauthorized practice of law in Kansas. We therefore find that, in light of the entire record, Holmes has met his burden of proving reinstatement is appropriate after our due consideration of the factors presented in Supreme Court Rule 232(e)(4).

CONCLUSION

IT IS THEREFORE ORDERED that Holmes pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education requirements. See Supreme Court Rule 812 (2022 Kan. S. Ct. R. at 618), as amended effective July 1, 2022 (outlining CLE requirements following reinstatement). Upon completion of these requirements Curtis Holmes is reinstated to the practice of law in the state of Kansas. The court directs that once OJA receives proof of Holmes' completion of these conditions, it add Holmes' name to the roster of attorneys actively engaged in the practice of law in Kansas.

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

No. 122,557

STATE OF KANSAS, *Appellee*, v. RYAN M. BERKSTRESSER, *Appellant.*

(520 P.3d 718)

SYLLABUS BY THE COURT

1. APPELLATE PROCEDURE—*Failure to Brief Issue—Issue Waived or Abandoned*. When a party fails to brief an issue, that issue is deemed waived or abandoned.

2. TRIAL—*Jury Instructions—Determination Whether Lesser Included Offense Instruction Is Factually Appropriate*. To determine whether a lesser included offense instruction is factually appropriate, a court must consider whether there is some evidence, viewed in a light most favorable to the defendant, emanating from whatever source and proffered by whichever party, that would reasonably justify the defendant's conviction for that lesser included crime.

3. SAME—*Jury Instructions—Determination Whether Lesser Included Offense Instruction Is Factually Appropriate*. A district court commits instructional error by failing to sua sponte give a lesser included offense instruction that is both legally and factually appropriate. On appeal, to obtain reversal of a conviction based on that error, a defendant who has failed to request the instruction bears the burden to firmly convince a reviewing court the jury would have reached a different verdict had the error not occurred.

4. APPEAL AND ERROR—*Issue Not Raised by Parties Will Not Be Considered by Appellate Courts—Exceptions.* Appellate courts do not ordinarily consider an issue not raised by the parties but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court.

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 23, 2021. Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed December 2, 2022. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed, and the case is remanded with directions.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

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

The opinion of the court was delivered by

BILES, J.: The State challenges a Court of Appeals decision reversing Ryan M. Berkstresser's conviction for felony fleeing or attempting to elude a police officer. The panel ordered a new trial after it held the district court erred by failing to give an unrequested jury instruction on a lesser included misdemeanor offense and that this error justified reversal. *State v. Berkstresser*, No. 122,557, 2021 WL 6068708 (Kan. App. 2021) (unpublished opinion). We reverse the panel and affirm the conviction because the panel misapplied the standard required to determine when such an instructional error necessitates reversal.

If a reviewing court determines a district court erred by failing to give an unrequested lesser included offense instruction, its next step is to consider the degree of resulting prejudice by deciding whether it is firmly convinced the jury would have reached a different verdict had this instructional error not occurred. *State v. Valdez*, 316 Kan. 1, 6, 512 P.3d 1125 (2022). But here, after the panel found error, it reversed the conviction because it held the jury "*could have* reasonably determined Berkstresser failed to yield to the officer but did not drive with a willful or wanton disregard for the safety of other persons or property as reflected in the dashcam video." (Emphasis added.) *Berkstresser*, 2021 WL 6068708, at *6. This substantively differs from deciding whether the court is firmly convinced the jury *would have reached a different verdict* on the felony charge.

We hold the panel erred by using a lower standard of doubt about the outcome to declare this unpreserved error reversible. See *State v. Carter*, 305 Kan. 139, 159, 380 P.3d 189 (2016) (clear error is in reality a heightened standard of harmlessness); Garner's Modern American Usage, p. 869 (3d ed. 2009) ("Writers often use *would* to condition statements that really ought to be straightforward."). We further hold the failure to give a lesser included offense instruction for the misdemeanor offense was not clearly erroneous because we are not firmly convinced based on the trial evidence that the jury would have reached a different verdict if such an instruction had been given, so we affirm the conviction.

That result, however, does not end the matter. We must remand this case to the district court with directions to merge

Berkstresser's two alternative convictions of felony fleeing or attempting to elude a police officer under *State v. Vargas*, 313 Kan. 866, Syl. ¶¶ 1-3, 492 P.3d 412 (2021).

FACTUAL AND PROCEDURAL BACKGROUND

Neither party disputes what happened, although they portray the facts very differently. Haysville Police Officer Randy Nowak noticed a Mitsubishi sedan following too closely to another car. His dispatch advised the Mitsubishi's license plate was assigned to a different vehicle. Nowak began a traffic stop by activating his patrol car's overhead emergency lights and siren. His car displayed Haysville Police Department decals. The driver, later identified as Berkstresser, did not stop. He increased his speed, reaching 72 miles per hour in a 50-mile-per-hour zone.

Berkstresser turned west onto a country road, reaching 65 miles per hour in an unposted area where Nowak believed the speed limit was 45. Berkstresser then went north. In doing so, he made a complete stop at a stop sign but did not properly signal the turn. He pulled into a residential driveway and drove across two front yards—near multiple parked vehicles and a bystander—before moving back onto the street without stopping or yielding. Again headed north, he swerved right across the fog line toward a ditch then left across the center line into the southbound lane before entering another driveway without signaling. He stopped and fled on foot. Officer Nowak caught up with Berkstresser, who had no valid driver's license or proof of insurance.

The State charged Berkstresser with: (1) fleeing or attempting to elude a police officer by committing five or more moving violations in violation of K.S.A. 2017 Supp. 8-1568(b)(1)(E), a severity level 9 person felony; (2) in the alternative, fleeing or attempting to elude a police officer by engaging in reckless driving in violation of K.S.A. 2017 Supp. 8-1568(b)(1)(C), a severity level 9 person felony; (3) marijuana possession in violation of K.S.A. 2017 Supp. 21-5706(b)(3), a class B nonperson misdemeanor; (4) driving with a suspended or canceled license in violation of K.S.A. 2017 Supp. 8-262(a)(1), a class B nonperson misdemeanor; and (5) no proof of insurance in violation of K.S.A. 2017 Supp. 40-3104(c), a class B misdemeanor. He pled not

guilty. Before trial, the State dismissed the marijuana possession count.

The jury returned guilty verdicts on the two alternatively charged felony counts of fleeing or attempting to elude a police officer, as well as driving with a suspended license. It acquitted him on the proof-of-insurance charge. The district court sentenced Berkstresser to 15 months' imprisonment for the reckless driving fleeing and eluding conviction but did not sentence him for the alternative conviction (five or more moving violations). The court also sentenced him to six months in jail for the suspended license. We note the panel states the district court ordered the two sentences run concurrent. *Berkstresser*, 2021 WL 6068708, at *3. But our review of the record reflects the district court ordered these sentences run consecutive.

Berkstresser appealed, raising eight trial-error claims. Of those, the panel addressed just one that it considered dispositive: Whether the district court committed clear error by not instructing the jury on the lesser included misdemeanor fleeing offense for the count alleging reckless driving. The panel held there was error requiring it to reverse the reckless driving conviction and remanded for a new trial. 2021 WL 6068708, at *6. Inexplicably, the panel did not discuss the trial-error claims associated with the jury's remaining alternative felony conviction for five or more moving violations before remanding the case for a new trial.

The State petitioned for review on the panel's reversal of the conviction. Neither party sought review for the issues left undecided, so those are not before us. See Kansas Supreme Court Rule 8.03(b)(6)(C)(ii) (2022 Kan. S. Ct. R. at 56) ("If the petitioner wishes to have the Supreme Court determine issues that were presented to the district court and the Court of Appeals but not decided by the Court of Appeals, the petitioner must also present those issues."); *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) ("Allen did not cross-petition on the panel's decision to drop her third claim, nor did she mention that claim in her response to the State's petition for review, so it is not before us.").

We granted the State's petition for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decision); K.S.A. 60-2101(b) (Supreme Court

has jurisdiction to review Court of Appeals decisions upon petition for review).

DISCUSSION

The State argues two points: (1) a misdemeanor instruction was not factually appropriate so no error occurred; and (2) even if the instruction was factually appropriate and should have been given, that omission did not prejudice Berkstresser to the degree necessary to reverse his felony conviction. As explained, we agree with the State's second argument.

Was a misdemeanor instruction factually appropriate?

A court reviews alleged instructional error in a sequential manner. See *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012) (establishing four-step progression with step 2 considering whether the instruction was legally appropriate and step 3 considering whether the instruction was factually appropriate). The State chose not to dispute that an instruction for the misdemeanor crime would have been legally appropriate, so our focus is drawn to factual appropriateness. See Kansas Supreme Court Rule 8.03(b)(6)(C)(i) (2022 Kan. S. Ct. R. at 56) ("The Supreme Court will not consider . . . issues not presented or fairly included in the petition for review."); *State v. Tracy*, 311 Kan. 605, 610, 466 P.3d 434 (2020) ("When a party fails to brief an issue, that issue is deemed waived or abandoned.").

A legally appropriate lesser included offense instruction must be given when there is some evidence, viewed in a light most favorable to the defendant, emanating from whatever source and proffered by whichever party, that would reasonably justify the defendant's conviction for that lesser included crime. K.S.A. 2021 Supp. 22-3414(3); *State v. Garcia-Garcia*, 309 Kan. 801, 820, 441 P.3d 52 (2019); *State v. Seba*, 305 Kan. 185, 204, 380 P.3d 209 (2016). The State begins by urging us to reconsider this standard's perspective.

It asserts appellate courts should instead review the evidence in a light most favorable *to the State* when the defendant did not request at trial the lesser included offense instruction in dispute.

This shift, it argues, more closely aligns with the clear error standard required by K.S.A. 2021 Supp. 22-3414(3). It contends criminal defendants "who fail to request an instruction at trial should not benefit from the 'light most favorable' standard on appeal; rather, that standard should be limited to defendants whose request for an instruction was denied by the district court." Said differently, the State believes viewing the evidence in a light most favorable to the defendant is a "benefit" even though the defendant has the burden of firmly convincing a reviewing court the trial's outcome would have been different had this instructional error not occurred.

But the State faces insurmountable barriers here because it did not ask the panel to reconsider the perspective it now finds offensive. In fact, the only caselaw the State cited to the panel as supporting authority for the standard of review was *Plummer*, which expressly held "the court should determine whether there was sufficient evidence, *viewed in the light most favorable to the defendant* or the requesting party, that would have supported the instruction." (Emphasis added.) *Plummer*, 295 Kan. at 163. So when the panel referenced the *Plummer* perspective, it was just following the authority the State provided to it. A party cannot be heard to complain when this happens. Cf. *State v. Gulley*, 315 Kan. 86, 91, 505 P.3d 354 (2022) ("'Under the invited error doctrine, a litigant may not invite error and then complain of that same error on appeal.'").

Granted, the State made vague mention of an unrequested instruction's factual appropriateness being "closely akin" to evidentiary sufficiency questions that are reviewed in a light most favorable to the State when a jury convicts on a charged crime. But this meager allusion does not fairly place the question before the panel and equates to failing to brief the issue. See *Tracy*, 311 Kan. at 610; Rule 8.03(b)(6)(C)(i). Given these failings, we decline to reconsider the applicable standard of review and will apply our existing caselaw. See *State v. Roberts*, 314 Kan. 835, 844, 503 P.3d 227 (2022) ("To be factually appropriate, there must be sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, to support the instruction.").

Moving to the merits, the State argues a misdemeanor conviction must be supported by evidence showing Berkstresser did not engage in reckless driving during the police pursuit. It reasons reckless driving is a required statutory element for the felony charge, so Berkstresser needed to demonstrate a lack of evidence on that felony element to reasonably justify giving the misdemeanor instruction. Addressing these arguments requires statutory interpretation for which we have unlimited review. *State v. Downing*, 311 Kan. 100, 103, 456 P.3d 535 (2020). We start with the statute.

K.S.A. 2021 Supp. 22-3414(3) states in part: "In cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (b) of K.S.A. 21-5109, and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime." K.S.A. 2021 Supp. 21-5109(b) covers lesser included offenses, by providing: "Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both." The relevant language here defines a "lesser included crime," as either "[a] lesser degree of the same crime" or "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 2021 Supp. 21-5109(b)(1)-(2). And as we have noted, the State concedes the misdemeanor crime instruction was legally appropriate as the panel held. See *Berkstresser*, 2021 WL 6068708, at *5.

Keeping this statutory language in mind, we look first at Berkstresser's felony charge. The district court instructed the jury on felony fleeing by committing reckless driving under K.S.A. 2017 Supp. 8-1568(b)(1)(C) by itemizing that crime's elements as follows:

"In Count 2, the defendant is charged with fleeing or attempting to elude a police officer.

"The defendant pleads not guilty.

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

"1. The defendant was driving a motor vehicle.

"2. The defendant was given a visual or audible signal by a police officer to bring the motor vehicle to a stop.

"3. The defendant intentionally failed or refused to bring the motor vehicle to a stop, or otherwise fled or attempted to elude a pursuing police vehicle.

"4. The police officer's vehicle was appropriately marked showing it to be an official police vehicle.

"5. The defendant engaged in reckless driving.

"6. This act occurred on or about the 17th day of February, 2018, in Sedgwick County, Kansas."

Note the first four elements standing alone constitute misdemeanor fleeing when the defendant is a first- or second-time offender, and the record shows no prior violation of K.S.A. 2017 Supp. 8-1568(a) for Berkstresser. But the panel did not confine itself to those four elements when considering whether evidence supported a misdemeanor conviction. It instead looked to whether some evidence showed Berkstresser "did *not* drive [recklessly]," which is the fifth element that elevates the offense to a felony when accompanied by the first four. (Emphasis added.) *Berkstresser*, 2021 WL 6068708, at *6. This means the panel extended its reasoning beyond deciding whether the evidence presented could satisfy the misdemeanor offense's statutory elements. The panel erred in its reasoning, although it still reached the correct conclusion of error as we explain.

Our caselaw applying K.S.A. 2021 Supp. 22-3414(3)'s "some evidence" standard supports a conclusion that the misdemeanor instruction was factually appropriate here because the State put on sufficient evidence for the jury to find each element of the lesser crime. See *Roberts*, 314 Kan. at 852 (holding courts' duty under K.S.A. 2021 Supp. 22-3414[3] "applies even if the evidence is weak or inconclusive"; stating, "[p]roviding lesser included offense instructions allows a jury to consider the full range of possible verdicts supported by the evidence"). After oral argument, the State filed a motion for additional briefing seeking to argue this "some evidence" standard requires more, but we deny the motion because any error in failing to give the lesser instruction—one way or the other—does not require reversal in this instance.

We hold the record contains ample support to reasonably justify a misdemeanor conviction under K.S.A. 2017 Supp. 8-1568(a)(1)-(2) and (c)(1)(A). This evidence includes: Berkstresser driving the Mitsubishi, a motor vehicle; Nowak giving a visual and audible signal to bring the Mitsubishi to a stop by activating the overhead emergency lights and siren on his patrol car; the video footage depicting Berkstresser intentionally failed

or refused to bring his car to a stop, or otherwise fled or tried to elude a pursuing police vehicle for about five minutes; and Nowak's car having regular Haysville Police Department decals.

Despite the panel's flawed reasoning, it correctly held the district court erred in failing to give a misdemeanor fleeing and eluding instruction. We consider next whether we are firmly convinced this error prejudiced the trial's outcome.

Was the failure to give a misdemeanor fleeing instruction harmless?

Because Berkstresser did not request an instruction on misdemeanor fleeing, we review any prejudice resulting from the district court's failure to give the instruction for clear error. See *State v. Owens*, 314 Kan. 210, 235, 496 P.3d 902 (2021). This means the conviction must be affirmed unless the reviewing court is firmly convinced the jury would have reached a different verdict had the instructional error not occurred. *Valdez*, 316 Kan. at 6. Berkstresser bears the burden to show this. *State v. Solis*, 305 Kan. 55, 65, 378 P.3d 532 (2016).

The panel began its prejudice analysis by correctly stating the test. *Berkstresser*, 2021 WL 6068708, at *6 ("To reverse, we must be firmly convinced the jury would have reached a different verdict had it been given the option."). But its application went askew. The panel held the district court committed clear error because "[a] jury *could have* reasonably determined Berkstresser failed to yield to the officer but did not drive with a willful or wanton disregard for the safety of other persons or property as reflected in the dashcam video." (Emphasis added.) 2021 WL 6068708, at *6. It explained its conclusion by noting: "Nowak's dashcam video showed Berkstresser pass a few vehicles throughout the pursuit, but the roads were mostly free of traffic. The vehicles Berkstresser did pass yielded to the police lights and sirens. Berkstresser used turn signals and stopped at stop signs during the chase." 2021 WL 6068708, at *6.

The panel's holding does not align with the correct test for prejudice. Having determined the district court should have instructed on the lesser included offense, the prejudice question is not whether a jury *could have* reasonably convicted a defendant

on a lesser included offense, but whether the jury *would have* reached a different verdict on the felony conviction without the instructional error. *Valdez*, 316 Kan. at 6. These two standards are not interchangeable. See *How to use "Could," "Would," and "Should,"* The Britannica Dictionary, https://www.britannica.com/dictionary/eb/qa/How-to-Use-Could-Would-and-Should#:~:text=Just%20remeber%20that%20could%20is,I%20hope%20this%20helps ("[C]ould is used to talk about something that can happen, [and] would is used to talk about something that will happen in an imagined situation."); Garner's Modern American Usage, p. 869.

Harmless error rules "'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that *have little, if any, likelihood of having changed the result of the trial*.'" *State v. Ward*, 292 Kan. 541, 560, 256 P.3d 801 (2011). And the various, context-dependent standards for prejudice our court applies represent "a 'sliding scale of probabilities,'" each of which "is formulated differently to set a higher or lower threshold or level of certainty as to whether the error affected the outcome." 292 Kan. at 563-64.

The harmless error scale is finely graduated. Errors implicating a defendant's rights under the United States Constitution, for example, must be "'harmless beyond a reasonable doubt.'" 292 Kan. at 564. This requires a court holding an error harmless to conclude there is no "'reasonable possibility'" the error contributed to the verdict. 292 Kan. at 564. On the other hand, a less stringent standard for nonconstitutional errors requires a court to find only that there is no "reasonable probability" the outcome would have been different, but for the error. 292 Kan. at 565.

Here, the clear error standard bars a conviction's reversal unless the reviewing court determines the jury "'would have reached a different verdict.'" *Valdez*, 316 Kan. at 6. Clear error is "in reality a heightened standard of harmlessness." *State v. Carter*, 305 Kan. 139, 159, 380 P.3d 189 (2016). So by failing to observe the critical distinction between what the jury "could have" done and what it "would have" done, the panel's analysis diluted the applicable test for prejudice and afforded less deference to the jury's verdict. This was error.

K.S.A. 8-1566(a) provides: "Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving." And the undisputed evidence shows multiple instances of illegal and unsafe driving on Berkstresser's part while trying to evade police. He drove well over the speed limit; failed to timely signal his turn even though he stopped at the stop sign; drove across two residential front yards near multiple parked vehicles and a bystander; failed to stop or yield when leaving the residential driveway; crossed a fog line and center line; and failed to signal when turning into a third residential property. While the panel leaned on its observation that what few moving vehicles Berkstresser passed yielded to police, the presence of other drivers on the roadway only reinforces the evidence that his conduct imperiled the safety of those individuals and their vehicles.

Given this record, we are not firmly convinced the jury would have reached a different verdict by rejecting the State's allegation that Berkstresser drove recklessly during the pursuit. We affirm his felony conviction.

Remand is required under Vargas.

One issue remains: Whether we must remand the case to the district court to address the alternative convictions because when a jury returns guilty verdicts on two alternatively charged counts, a district court must enter only one conviction. See *State v. Vargas*, 313 Kan. 866, Syl. ¶¶ 1-3, 492 P.3d 412 (2021). That was not done here.

Recently in *Vargas*, this court held "[a] district court has no authority to hold one of two convictions for alternatively charged counts in abeyance," and therefore "[w]hen a jury returns guilty verdicts on two alternatively charged counts, a district court may enter only one conviction." 313 Kan. 866, Syl. ¶¶ 1-2. Two convictions for alternatively charged counts "should merge by operation of law . . . and result in one conviction." 313 Kan. at 873.

Neither party raised the *Vargas* merger issue, but we directed them to be prepared to address it at oral argument. This court has the power to sua sponte address a new issue under certain circumstances. See Kansas Supreme Court Rule 8.03(b)(6)(C)(i) (2022

Kan. S. Ct. R. at 56) (Supreme Court will not consider issues not properly preserved below but "may address a plain error not presented"); *Valdez*, 316 Kan. 1, Syl. ¶ 5 ("Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court.").

Consistent with *Vargas*, we remand this case to the district court with directions to enter an amended journal entry reflecting Berkstresser's K.S.A. 2017 Supp. 8-1568 convictions merged, making a single conviction for fleeing or attempting to elude an officer.

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

* * *

ROSEN, J., concurring: I agree with the majority's conclusion there was no reversible instructional error, and I agree with the direction to enter an amended journal entry reflecting merged convictions. I write separately because I would not have repudiated the Court of Appeals analytical approach to assessing whether an instruction on misdemeanor fleeing and eluding was factually appropriate.

The State charged Berkstresser with felony fleeing and eluding. This crime consists of five elements, including reckless driving. K.S.A. 2017 Supp. 8-1568(b)(1)(C). The lesser included offense of misdemeanor fleeing and eluding contains identical elements except it does not require reckless driving. K.S.A. 2017 Supp. 8-1568(a). Per K.S.A. 2021 Supp. 22-3414(3), it would have been factually appropriate for the district court to instruct the jury on misdemeanor fleeing and eluding so long as there was "some evidence which would reasonably justify a conviction of [the] lesser included crime." The majority interprets this language to require the district court to instruct the jury on a lesser included crime whenever there is sufficient evidence to support the ele-

ments of the lesser included crime. I interpret this language to require the district court judge to also assess whether the evidence would "reasonably justify" a jury's rejection of the higher crime in favor of the lesser crime. In this case, that would amount to a rejection of the reckless driving element. The Court of Appeals undertook this assessment and, in my opinion, correctly concluded the evidence would reasonably justify a conviction of the lesser offense because there was plenty of evidence to suggest Berkstresser did not drive recklessly. Ultimately, however, like the majority of this court, I am not firmly convinced the jury would have reached a different verdict even if the instruction had been offered.

The majority called the panel's approach error, admonishing it for going beyond a sufficiency test to assess whether the evidence suggested the jury would have rejected the reckless driving element of the charged crime. This court explicitly set out the majority's chosen approach in *State v. Haberlein*, 296 Kan. 195, 204, 290 P.3d 640 (2012). In *Haberlein*, the defendant was charged with first-degree premeditated murder. While there was overwhelming evidence of premeditation—the only element setting premeditated murder apart from the lesser count of intentional murder—the majority held an instruction on intentional murder would have been factually appropriate because "at least in theory, the jury could have chosen to convict Haberlein of second-degree intentional murder without having its verdict subject to reversal for insufficient evidence." 296 Kan. at 204. I wrote separately, because "the test set forth in K.S.A. 22-3414(3) is not a theoretical one. Instead, it requires the trial judge, who has heard the evidence in the case, to determine whether there is 'some evidence which would *reasonably justify a conviction*.'" 296 Kan. at 214.

I have reiterated my position many times prior to and since *Haberlein*, and I maintain it today. See *State v. Williams*, 308 Kan. 1439, 1463, 430 P.3d 448 (2018); *State v. McLinn*, 307 Kan. 307, 350, 409 P.3d 1 (2018); *State v. Fisher*, 304 Kan. 242, 265, 373 P.3d 781 (2016); *State v. Qualls*, 297 Kan. 61, 73, 298 P.3d 311 (2013); *State v. Tahah*, 293 Kan. 267, 280-84, 262 P.3d 1045 (2011); *State v. Scaife*, 286 Kan. 614, 627-31, 186 P.3d 755

(2008). The factual appropriateness inquiry on jury instruction errors should not be synonymous with a theoretical sufficiency of the evidence assessment. Such a test requires a district court to instruct a jury on a lesser included offense regardless of how unbelievable it would be for a jury to reject the higher crime and convict of the lesser. This conflicts with K.S.A. 2021 Supp. 22-3414(3)'s directive to district courts to offer instructions on lesser included offenses when the evidence would "reasonably justify" a jury to convict of a lesser offense. The majority's approach also renders the factual appropriateness inquiry of our instructional error analysis a nullity in most cases. There will always be sufficient evidence to support the lesser included offense when all its elements are included within the charged offense. Otherwise, the case is subject to dismissal on a motion for acquittal. See K.S.A. 22-3419 (directing court to grant motion for acquittal at close of State's evidence when there is not sufficient evidence to support charge).

Because the majority's opinion conflicts with the directive in K.S.A. 2021 Supp. 22-3414(3) and eliminates a mandated role of the trial court judge, I concur in the judgment only on the instructional error issue.

STEGALL, J., joins the foregoing concurring opinion.

No. 124,718

In the Matter of SHAYLA C. JOHNSTON, *Respondent*.

(520 P.3d 737)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Disbarment.*

Original proceeding in discipline. Opinion filed December 2, 2022. Disbarment.

Amanda G. Voth, Deputy Disciplinary Administrator, argued the cause, and *Kathleen J. Selzler Lippert*, Deputy Disciplinary Administrator, *Deborah L. Hughes*, Deputy Disciplinary Administrator, and *Stanton A. Hazlett*, Disciplinary Administrator, were on the formal complaint for the petitioner.

Shayla C. Johnston, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent Shayla C. Johnston, an attorney admitted to the practice of law in Kansas in 2000. After a February 2021 hearing before a panel of the Kansas Board of Discipline of Attorneys, the panel issued a final hearing report on December 15, 2021.

The hearing panel determined that respondent had violated Kansas Rules of Professional Conduct (KRPC) 1.1 (2021 Kan. S. Ct. R. 321) (competence), KRPC 1.2(d) (2021 Kan. S. Ct. R. 323) (scope of representation), KRPC 1.7(a)(2) (2021 Kan. S. Ct. R. 336) (conflict of interest), KRPC 3.1 (2021 Kan. S. Ct. R. 384) (meritorious claims and contentions), KRPC 3.2 (2021 Kan. S. Ct. R. 384) (expediting litigation), KRPC 3.3(a)(1) (2021 Kan. S. Ct. R. 385) (candor to the tribunal), KRPC 3.4(c) and (f) (2021 Kan. S. Ct. R. 389) (fairness to opposing party and counsel), KRPC 3.5(d) (2021 Kan. S. Ct. R. 390) (impartiality and decorum of the tribunal), KRPC 3.6(a) (2021 Kan. S. Ct. R. 391) (trial publicity), KRPC 4.1 (2021 Kan. S. Ct. R. 397) (truthfulness in statements to others), KRPC 4.2 (2021 Kan. S. Ct. R. 398) (communication with a person represented by counsel), KRPC 4.4(a) (2021 Kan. S. Ct. R. 400) (respect for rights of third persons), KRPC 8.2(a) (2021 Kan. S. Ct. R. 425) (judicial and legal officials), and KRPC 8.4(c), (d), and (g) (2021 Kan. S. Ct. R. 427) (professional misconduct).

The panel dismissed the remaining allegations of rule violations against the respondent because the Disciplinary Administrator failed to argue them at the hearing. After the hearing and arguments, the hearing panel made the following findings of fact, conclusions of law, and recommendations:

FACTUAL AND PROCEDURAL BACKGROUND

"*Findings of Fact*

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

"Representation Involving Personal Cases

"61. In 2011, the respondent sought a divorce from her then-husband, A.G., Sedgwick County District Court case number 11DM3940. The respondent and A.G. had one minor child, K.G. In 2012, the district court awarded the respondent sole residential and legal custody of K.G. because of A.G.'s drug use, failure to participate in court proceedings, and failure to communicate with the respondent about the child.

"62. In 2013, the respondent filed a child in need of care (CINC) petition in Sedgwick County District Court, case number 13JC326, regarding her child. In that case, the respondent sought to terminate A.G.'s parental rights. A.G. opposed the termination of his parental rights.

"63. On May 14, 2014, the district court denied the respondent's petition to terminate A.G.'s parental rights finding that the respondent failed to prove by clear and convincing evidence that the child was a CINC or that A.G. was unfit and would remain so in the future. The court also stated that the respondent failed to put forth any evidence that terminating A.G.'s rights would be in the child's best interest and noted that 'asking this court to bastardize a child is troubling.'

"64. The respondent appealed the district court's decision. On May 22, 2015, in an unpublished opinion, the Court of Appeals affirmed the district court's ruling. *In the Interest of K.G.*, Appellate Court case number 112,115. The Supreme Court denied the respondent's petition for review on October 7, 2015.

"65. While the appeal was pending, A.G. sought to establish parenting time by filing a motion. Later, on August 4, 2015, the respondent and A.G., through counsel Leah Gagne, entered into an agreed parenting plan. The district court approved the parenting plan.

"66. On May 2, 2016, the respondent sent an email message to Ms. Gagne which contained a message to A.G.:

'This is your opportunity . . . to let go and move on with life, your new relationship and children. No attorney can help you if your goals are illegal and formed only to abuse me and your child.

'I fear you will end up in jail. And [K.G.] will never get to know you. If you want to talk, please let me know so I can arrange a time.

'If Leah Gagne again advises you to reject this offer, I strongly suggest you get a second legal opinion and not pay her for giving you that advice. I type this now fully knowing she will read this, that a judge will read it and likely a disciplinary administrator. If you are indeed psychologically able to make decisions for yourself, here is your chance to prove it. If you need a referral to another lawyer, please tell me and I will find someone to help you.'

"67. In that same email message and without having any evidence to support her suggestion, the respondent stated to Ms. Gagne that if A.G. was threatening her that Ms. Gagne should notify someone. The respondent told Ms. Gagne that A.G. is capable of threatening someone's life. Finally, the respondent informed Ms. Gagne that if A.G. was not threatening her, then Ms. Gagne appeared to be 'intentionally non-cooperative with [the respondent's] efforts to resolve this litigation, to pay [her] child's support and cure any indication of [A.G.]'s 'unclean hands.'

"68. Eight days later, Ms. Gagne filed a motion to withdraw as A.G.'s counsel. The court granted the motion. Thereafter, Kristina Retzlaff entered her appearance on behalf of A.G.

"69. On October 27, 2016, Ms. Retzlaff filed a motion to compel reintegration on behalf of her client. In the motion, Ms. Retzlaff alleged that A.G. completed all the specific tasks he was required to complete to begin reintegration with his child as set out in the agreed parenting plan of August 4, 2015. The court scheduled a hearing on the motion for November 14, 2016.

"70. The respondent filed an untimely response to the motion. In the response, the respondent made several allegations against the Sedgwick County bench and bar. For example, the respondent accused Sedgwick County District Court judges of engaging in an intentional pattern of discrimination against her child due to her marital status through 'collusive efforts' with members of the Sedgwick County family law bar. The respondent also alleged that the improper relationship between judges and members of the bar was designed to 'endanger, economically abuse and deprive property to children of unmarried women with the intent to create a continuous and inflated market for under-employed attorneys.' The respondent never provided any evidence to support these allegations.

"71. That same day, in a letter to the Sedgwick County District Attorney, Marc Bennett, the respondent asked for a formal inquiry into her allegations that Sedgwick County District Court judges and members of the family law bar sexually harassed her, defamed her, and threatened her with sanctions. She again asserted that there existed a pattern and practice of unlawful collusion between Sedgwick County District Court judges and the family law bar to endanger, economically abuse, and deprive property to children of unmarried women with the

intent to create a continuous and inflated market for under-employed attorneys. The Sedgwick County District Attorney did not respond to her request.

"72. On December 12, 2016, the district court held a hearing on A.G.'s motion to compel reintegration. Following the hearing, the court ordered supervised visitation for A.G. every six weeks. The court scheduled a review hearing for April 3, 2017, after three scheduled supervised visits.

"73. The first two supervised visits between A.G. and his son were held as ordered by the district court.

"74. On March 20, 2017, the respondent wrote to the Sedgwick County Counselor, Eric Yost. In the letter, the respondent alleged that the Sedgwick County District Court was operating to create perpetual income for the local bar and that the system was designed to 'interfere unjustifiably into the privacy rights of intact, single-parent families for the profit of underemployed attorneys.' The respondent included 10 items 'that could be put in place to mitigate the appearance of racketeering and corruption in County domestic cases.' The respondent never provided any evidence of racketeering or corruption in Sedgwick County.

"75. On March 22, 2017, the respondent sent an email to Ms. Retzlaff regarding the scheduled review hearing in the family law case. In the email message, the respondent stated that she was preparing a motion based on 'constitutional overage.' The respondent stated that 'the County cannot justify further interference into [her] ability to make decisions about [K.G.'s] health, education and welfare and all further actions on [the] 4th floor must be estopped.' The respondent repeated her allegations of collusion and racketeering between Sedgwick County District Court judges and the family law bar. In the email, the respondent also stated:

'. . . Most concerning is that there appears to be no way for children in this class to prevent against use of the courts for the economic gain of presumably unfit parents, including the unjust enrichment of a biological parent via murder of the child and/or custodial parent and Rule 11 violations that lead to the economic deprivation of children.'

The class of children the respondent was referring to was 'children of unremarried, divorced single mothers in Sedgwick County.'

"76. As a result of the allegations made by the respondent against the Sedgwick County bench, on March 24, 2017, the administrative judge asked the Kansas Supreme Court to assign a senior judge to the respondent's family law case. Thereafter, the Kansas Supreme Court assigned Senior Judge John Sanders to preside over the respondent's case.

"77. Unilaterally, the respondent canceled the third scheduled supervised visit between A.G. and his son. Because the respondent denied A.G. the scheduled visit, Ms. Retzlaff filed an amended motion to compel visitation.

"78. On March 31, 2017, the respondent filed a motion seeking the dismissal of the motion to compel visitation. In the motion, the respondent sought termination of A.G.'s standing as a father.

"79. At the review hearing on April 3, 2017, the court took up the two competing motions. During that hearing, the respondent further explained her position. 'So it's not a termination of parental rights. It is his termination as—with the standing of being a parent.' The respondent also argued that the district court lacked subject matter jurisdiction over the family law matter. Specifically, the respondent argued:

'MS. JOHNSTON: This is about a statute of limitations on parental standing. And if I were remarried, we wouldn't be having this conversation because I would have been able to extinguish his ability to come after me for custody. He would have had his child support obligations extinguished if I had found another man to fill the shoes of [A.G.], and this is what is the problem, that law—

'THE COURT: How on earth are you—are you going to do that?

'MS. J0HNSTON: Are you asking—

'THE COURT: How are you—by getting remarried, how are you going [*sic*] extinguish his rights as the natural father without a termination of parental rights?

'MS. JOHNSTON: Well, I agree with you, Judge, the way that it's placed in the law, it's called a termination of parental rights. What I've tried to gain some clarity on and communicate with the Court and the lawyers about and [A.G.] is that this is just his—it's not his right to see the child. That exists outside of the court. That—I can do that with him without going through court. That's not an issue.

'The issue here is whether he can continue to file motions on me over and over again, not be required to appear, and cause me extreme problems in trying to—I can't afford an attorney. I have lost my home. You know, causing me all of these issues in scheduling. Making it difficult for me to work because I'm in court every other month for three years.

'You know, this is not—this is what's going on, and if his parental right—his standing as a parent were terminated, then he would no longer have the right to gain profit through my son's intestate death, and he would not have the ability to sue for custody or to modify other orders in that regard. And that is—I'm sorry if I'm not explaining it well, Judge, but it's a statute of limitations.'

"80. In summary, the respondent argued that the statute of limitations for A.G. to become an appropriate father had passed and, as a result, his standing as a parent should be terminated, and thus, the court lacked subject matter jurisdiction. The respondent argued that she should be able to work with A.G. outside of court to establish contact between A.G. and K.G. as she saw fit. She argued that if she had remarried, her hypothetical new husband could have petitioned the court for a step-parent adoption. If her son were adopted by her hypothetical new husband, A.G. could not inherit from K.G. should K.G. die without a will. Additionally, A.G. could no longer cause the respondent to respond to motions filed by A.G. in the family law matter. But, because the respondent had not remarried

and cannot have A.G.'s rights extinguished through a step-parent adoption, she is being discriminated against as a single unmarried woman.

"81. The respondent also argued that K.G. was harmed by the district court's 'reckless' orders.

"82. During the hearing, the respondent argued that she 'complied fully with all of the court orders in multiple different forums for five or six years.' However, the respondent also admitted that she unilaterally canceled A.G.'s court-ordered supervised visit. 'So I didn't have any choice, if he's not going to communicate with me, but to cancel the visitation until we had a better agreement about whether we're going to go back to actually following the parenting plan that we agreed to or if that is now going to be abandoned like the previous one so we're going to start over.'

"83. The district court denied the respondent's motion and ordered that A.G. and his son have a visit that same day.

"84. During this same time, the respondent was representing one of her family members, C.B. The case involved disputed paternity and child support. Tragically, on May 20, 2017, C.B.'s three-year-old son, E.B., died as a result of child abuse. E.B.'s murder was not discovered for more than three months.

"85. On June 5, 2017, Ms. Retzlaff filed a motion for contempt against the respondent. In an affidavit filed with the motion, A.G. asserted that the respondent refused to comply with the district court's December 12, 2016, order allowing A.G. parenting time. The district court issued an order directing the respondent to appear and show cause why she should not be found in contempt.

"86. On June 14, 2017, the respondent filed a notice of intent to file a motion for sanctions. In the notice, the respondent asserted that A.G. and his counsel filed motions that lacked evidentiary support and were designed to 'economically coerce' the respondent into case management. The respondent also asserted that she filed a complaint alleging racketeering between Sedgwick County District Court judges, case managers, and the trustee's office. She further alleged that the judges, the case managers, and the trustee's office 'target children of un-remarried mothers to deny parental standing termination for the purpose of fraudulently generating revenue.'

"87. On June 19, 2017, the district court conducted a hearing in the respondent's family law case. The district court ordered that A.G., who lived out of state, be reintegrated with his son. The court ordered that A.G. have three unsupervised visits before the next review hearing, including a visit for July 15, 2017, from 10:00 a.m. to 8:00 p.m. At the respondent's suggestion, the court ordered the parties to exchange the child at a Wichita QuikTrip selected by the parties. The court scheduled the next review hearing for August 16, 2017. The court ordered A.G. to submit to drug testing. The court ordered Ms. Retzlaff to prepare a journal entry reflecting the court's orders. The respondent asked the court if the order was final for purposes of an appeal. The respondent did not file a notice of appeal.

"88. Ms. Retzlaff drafted an order and provided it to the respondent. The respondent disagreed about the language of the order. The parties were unable to reach an agreement regarding the contents of the order.

"89. On July 11, 2017, the respondent sent A.G. a message through 'Talking Parents,' an application designed to be used by divorced parents to communicate regarding their children. In the message, the respondent stated:

'I also hope your attorney has advised you about the costs of an appear [*sic*], the costs of defending federal actions at the same time, that you should not expect the unsupervised visitations to occur. She should have encouraged you to come to agreements with me given there is no parenting plan in place now.

'What do you want to do?'

"90. A.G. forwarded the respondent's message to his attorney. On July 12, 2017, Ms. Retzlaff sent the respondent an email message asking the respondent to confirm that the unsupervised visit scheduled for July 15, 2017, would occur as ordered.

While the respondent responded to Ms. Retzlaff's message asking questions, the respondent did not confirm that she would comply with the court-ordered unsupervised visit scheduled for July 15, 2017.

"91. On July 13, 2017, Ms. Retzlaff wrote to the respondent again. Ms. Retzlaff responded to the respondent's questions and also stated that if the respondent failed to confirm that she would make K.G. available for the visit by 4:00 p.m. that day, Ms. Retzlaff was planning to contact the district court by email. The respondent did not respond to Ms. Retzlaff's email message.

"92. That same day, A.G. sent the respondent a message through Talking Parents asking at which QuikTrip would she like to exchange K.G. for the visit. A.G. suggested that they meet at the QuikTrip located at 37th and Rock Road in Wichita. The respondent did not respond to A.G.'s message.

"93. On July 13, 2017, Ms. Retzlaff sent an email message to the district court asking the court to enter an order on the docket sheet about the scheduled visitation. Ms. Retzlaff also offered to discuss the situation by telephone. Ms. Retzlaff copied the respondent on the message. The respondent replied to the message and indicated that the situation was not an emergency warranting the court's attention. The respondent asked the court to 'not interfere further into this issue and trust that [she would] continue to make decisions in the best interest of this child.'

"94. That evening, Judge Sanders responded. He stated that he would be the arbiter of what is in the child's best interest and asked Ms. Retzlaff to draft a short order setting forth his earlier order regarding the visitation that was to occur that weekend. Judge Sanders asked Ms. Retzlaff to include a provision in the order that any violation of the order would be considered contempt.

"95. On July 14, 2017, A.G. sent the respondent a message through Talking Parents. A.G. told the respondent that he was about to fly to Kansas for the visit.

He asked her if she wanted to propose an alternative place to meet. He asked for a response.

The respondent responded, indicating that she was awaiting a recommendation on how to handle the situation, and assured A.G. that she would make K.G. available for visitation the following day.

"96. On July 14, 2017, Judge Sanders executed the draft order prepared by Ms. Retzlaff. The order stated that A.G. was to have unsupervised parenting time with K.G. on Saturday, July 15, 2017, from 10:00 a.m. to 8:00 p.m. and that the exchanges were to take place at the QuikTrip at 37th and Rock Road. The order also stated that any violation of the order would be considered contempt of court. The judge sent the parties an email message indicating that he entered an order and sent the order to them through the eflex system.

"97. Later that day, the respondent sent A.G. a message through Talking Parents. In the message, the respondent informed A.G. that she set up supervised visitation for A.G., K.G., and the respondent for the following day. She asked A.G. to let her know if he was 'up for meeting' with them tomorrow. A.G. informed the respondent that he would be at the QuikTrip at 37th and Rock Road as ordered by the court for his unsupervised visit.

"98. On July 15, 2017, the respondent sent an email message to Judge Sanders:

'I anticipated Your Honor was occupied with matters larger than this case over the last two weeks. My apologies for this late Friday email. But I cannot access the Order and do not know what the threat of contempt means. I assume I will be arrested tomorrow if I do not comply with the orders for unsupervised visitation. It appears then that I must make some written record at this juncture.

'As I have openly discussed in good faith, I have a federal petition drafted in conjunction with the racketeering cause of action. As events escalated in this case (of which Ms. Retzlaff did not disclose in her email to you), I was advised to seek immediate federal injunctive relief this week. . . . After discussions with the doctors, the supervisor at VEP and [K.G.], I arranged for a visitation tomorrow afternoon at VEP between [K.G.] and both [A.G.] and I, if [A.G.] is willing. [A.G.] was worried earlier this week that his trip would not be wasted and that visitation would occur as I finalized these details. I did not realize that I could have just emailed you to get an emergency order in place without giving [A.G.] the due process of a hearing to prevent this dilemma. Now I can only assume I will be arrested tomorrow unless I comply with the unsupervised visitation.

'Still, I do not regret that I postponed the federal injunctive relief petition so as to continue efforts to confer.

'I will have my father, [a Kansas attorney], make arrangements to get the federal relief filed in the event that I am arrested and have him email you the resulting documentation.'

"99. A.G. arrived at the designated QuikTrip at 9:00 a.m. While waiting for the respondent to bring K.G. for the unsupervised visit, A.G. sent the respondent messages through Talking Parents to notify her that he was waiting for her at

QuikTrip. A.G. waited until 10:45 a.m.; the respondent did not bring [K.G.] for the unsupervised visit.

"100. At the same time, the respondent sent A.G. a series of messages through Talking Parents asking A.G. whether he would be joining K.G. and the respondent for a supervised visit.

"101. The following day, July 16, 2021, A.G. sent the respondent a message through Talking Parents:

'Per the court order signed by the judge, I was at the QT at 37th and Rock road [*sic*] in Wichita Kansas on Saturday 7/15/2017. I arrived at 9:00 am and waited for you until 10:45 am. The judgment of the court was from 10 am to 8 pm.

'I was at the meeting place and was in communication with you. Any other communication about visitation is in direct conflict with the judges [*sic*] orders. I will follow the court order and not deviate from said orders.

'The fact that you didn't show up to the meeting place puts you in direct contempt of court. You have once again disobeyed a direct order from a judge.'

The respondent replied, noting that A.G. failed to pay child support for over a month. 'It looks like we are both in contempt of court. Quite a pair we are!'

"102. On July 18, 2017, the respondent sent A.G. a message through Talking Parents stating that absent a doctor's recommendation to the contrary, she planned to refuse all communication and visitation between A.G. and K.G.

"103. Under the previous order, A.G. was due to have another unsupervised visit with K.G. on July 29, 2017. On July 29, 2017, through his attorney, A.G. filed a notice of denied parenting time. A.G. provided an affidavit along with the notice. A.G. stated that he would not be coming to Wichita for the court-ordered parenting time because the respondent had implied that she would again deny his parenting time.

"104. On August 2, 2017, Ms. Retzlaff filed an amended motion for contempt against the respondent. In the amended motion, Ms. Retzlaff cited the respondent's failure to comply with the court order for unsupervised parenting time. Again, A.G. executed an affidavit detailing the respondent's refusal to comply with the court's order. That same day, the court issued an order, directing the respondent to appear in court on August 14, 2017, to show cause why she should not be adjudged guilty of contempt.

"105. On August 14, 2017, the respondent defended the contempt proceeding by arguing that she had 'provided plenty of notice' during the June 3, 2017, hearing that she planned to appeal the district court's order of unsupervised visitation. Although the respondent indicated that she provided notice of an appeal, she had not filed a notice of appeal. Asserting that she intended to file an appeal or that she intended to appeal a court's order is not equivalent to filing a notice of appeal as required by law. The respondent stated that she did not comply with the court's order because the doctors disagreed with the court's orders. She indicated that she would permit only supervised visitation.

"106. The respondent stated that she is the sole legal custodian and cannot be ordered by a court to disobey a doctor's recommendation for what is healthy for her child. The respondent argued that it is unconstitutional for the court to order the respondent to allow unsupervised visitation contrary to a doctor's recommendation. The respondent argued that she is the only one constitutionally allowed to make those decisions. Finally, the respondent informed the court that she has 'federal attorneys' who advised her that she cannot be held in contempt under these facts and that she needed to file for federal injunctive relief to prevent the court from interfering with her sole right to determine how to parent her child.

"107. On August 21, 2017, the respondent filed a motion for reconsideration of the motion to stay proceedings. In the motion, the respondent falsely asserted that A.G.'s legal standing as K.G.'s parent was suspended and that he presently had no standing to litigate proceedings. The respondent argued that because she was awarded sole legal custody, she was 'no longer under the jurisdiction of the State, and her decisions about K.G.'s care, custody and control were only subject to State interference by a showing of [a] compelling need.' The respondent also argued that the court had no right to compel her appearance or to question her regarding her parenting decisions.

"108. On August 31, 2017, the district court concluded that the respondent openly defied the court's orders and found the respondent in contempt. The court suspended the imposition of a sanction to allow the respondent to purge the contempt by complying with all orders of the court in good faith. The court indicated that it would review compliance at a future date before deciding if the imposition of a sentence, fine, or other penalty was necessary. Additionally, the court suspended A.G.'s visitation because A.G. tested positive for marijuana. Finally, the court scheduled a review hearing in December 2017.

"109. On September 7, 2017, the respondent sent an email message to Judge Sanders and Ms. Retzlaff. The message provided:

'No response is needed, this is my professional courtesy to you.

'Thank you for bringing clarity and some resolution to our unfortunate situation. Please understand in the coming weeks and months that I cannot control the media. My racketeering complaint made March 21, 2017 was on behalf of [E.B.], my cousin. As you know by now, [E.B.]'s remains were found this weekend. Four judges have [E.B.]'s blood on their hands in the 18th Judicial District.

'We have a public crisis.

'I will refuse to comply with your order, Judge. There will be no opportunity for two children to die in my family because of an overzealous judiciary.'

"110. On November 1, 2017, the respondent moved to Colorado.

"111. At a December 8, 2017, review hearing, the respondent informed Judge Sanders that if he imposed sanctions as a result of the contempt finding that she would file a cease and desist order with the Office of Judicial Administration (OJA) and the federal court. The respondent explained that Kansas is one of the few jurisdictions that permit cease and desist orders to be filed under

seal with OJA. She stated, '[i]t doesn't have to be filed publicly. It can be done as a request for advice on how to handle a situation. It can be done in a noninflammatory way.' When Judge Sanders asked the respondent who would rule on her cease and desist request, the respondent answered that a panel of three judges who sit on the OJA advisory board would rule on her request. Ultimately, the respondent identified the procedure as an interlocutory appeal and that she had previously requested that Judge Sanders join her in an interlocutory appeal.

"112. On December 15, 2017, the respondent drafted, but did not file, a response to A.G.'s motion to alter or amend, a motion under K.S.A. 60-260 (relief from judgment or order) based on new evidence, and a motion for sanctions. Even though it was not filed, the respondent provided a copy to Judge Sanders and Ms. Retzlaff. The respondent argued that she had new evidence that A.G. utilized the court for an interstate criminal enterprise. The respondent, however, provided no evidence to support the allegation made against A.G. In a footnote, the respondent stated that 'the issue is not ripe in this case due to [the respondent]'s refusal to allow her child to be murdered during unsupervised visitation in July 2017 . . . .'

"113. In the draft, the respondent also described A.G.'s attempts to reestablish a relationship with his son as gaslighting the respondent. 'They are acts of gaslighting, or intentional reframing of observational truth to cause disparagement of character and cast universal doubt on credibility. Gaslighting is used [by] sociopaths to secure and maintain abuses of power.' She also stated that 'should the court once again deny her equal protection of laws to extinguish parental standing, her remedy will not be to submit to high risk and unfounded orders to place [K.G.] in danger. Her remedy will be injunctive relief with the Office of Judicial Administration and in federal court pursuant to 42 USC 1983.'

"114. On December 27, 2017, the respondent filed a notice of cease and desist in the family law case. In the notice, the respondent alleged that Judge Sanders and Ms. Retzlaff engaged in 'collusion to fraudulently use court jurisdiction to incarcerate both biological parents of [K.G.]' The respondent asserted that the collusion would result in K.G. becoming a CINC, a criminal violation of K.S.A. 21-5603(a). The respondent stated that her only escape would be to get remarried and have her hypothetical new husband adopt K.G. Finally, by finding the respondent in contempt for refusing to comply with a court order, the respondent asserted that Judge Sanders participated 'in acts of intimidation designed to interfere with [the respondent]'s legal efforts to save the life of another client.' As indicated above at ¶ 84, E.B., the child of C.B., died while in the custody of his mother. The respondent further asserted Judge Sanders had used 'court resources and authority to discredit [the respondent] and frame her as a terrorist or treasonous enemy of the state.'

"115. The respondent couched her filing as a 'good-faith Constitutional challenge to the validity, scope, meaning or application of family law jurisdiction upon a sole, legal custodian with no visitation orders from grandparents nor stepparents and when the other parent is presumably unfit and a nonresident.'

"116. In the December 27, 2017, notice, the respondent sought:

a. an injunction against further litigation deriving from A.G.'s standing as a parent pending determination of procedural pathways to parental standing termination;

b. relief from all judgments arising out of her personal family law case, including the contempt judgment;

c. a prohibition against further defamatory statements by the court, Ms. Retzlaff, and A.G. that the respondent has engaged in parental alienation, has caused confusion in the proceedings, has contempt for the court, has engaged in terroristic threats, is treasonous, or has engaged in unethical or noncompliant behavior; and

d. an order directing Judge Sanders, the State of Kansas, Ms. Retzlaff, A.G., and other state entities to cease and desist further threats of incarceration, sanctions, fines, and penalties against the respondent.

"117. On December 27, 2017, A.G., through his attorney, filed a response to the respondent's notice. After receiving A.G.'s response, the respondent sent an email to Judge Sanders and Ms. Retzlaff asserting, among other things, that Judge Sanders and Ms. Retzlaff were 'acting like criminals.'

"118. On January 8, 2018, the respondent filed a complaint with the disciplinary administrator against Ms. Retzlaff. The respondent provided a copy of the complaint to Ms. Retzlaff's law partner and the Sedgwick County Sheriff. In the email message to Ms. Retzlaff's law partner and the sheriff, the respondent asserted that Ms. Retzlaff may have committed mail and wire fraud. The respondent linked a report from one of K.G.'s doctors to the email message. The disciplinary administrator did not docket the complaint against Ms. Retzlaff; rather, the disciplinary administrator dismissed the complaint for a lack of merit.

"119. On January 9, 2018, the respondent filed a complaint with the Kansas Commission on Judicial Qualifications against Judge Sanders. The complaint against Judge Sanders was dismissed because 'the complaint contained no facts establishing reasonable cause to support a finding that the judicial code had been violated.'

"120. On February 23, 2018, Judge Sanders issued a memorandum decision and order. The judge concluded that the district court had personal and subject matter jurisdiction and denied the relief sought in her December 27, 2017, notice.

"121. On May 18, 2018, the district court allowed Ms. Retzlaff to withdraw from her representation of A.G. On May 31, 2018, A.G. informed the respondent and Judge Sanders that he would be representing himself because he had no income.

"122. On February 5, 2020, the disciplinary administrator notified the respondent that disciplinary complaints had been docketed against her.

"123. Three days later, the respondent posted the following on a Facebook page associated with her firm, Excellence Legal, LLC:

'. . . When I forged into family law courts in late 2016, I immediately encountered government-sponsored human trafficking . . . anti-trust violations . . . attorney fee price inflation . . . and cartels of corrupt lawyers, public employees, privitized [*sic*] contractors and judges profiting from the enslavement of families. My market interruption was not welcome. "They" soon were threatening to incarcerate me, my ex-husband and other family members, threatening the safety of children to silence me. My cousin [E.B.] was tortured and murdered with the help of Chief Administrative Judge James Fleetwood in Sedgwick County, Kansas during the initial coercive wave.

'That didn't shut us up.

'So they physically threatened me, battered my clients and stalked my family.

. . . .

'I will continue to blow that whistle loud even if they disbar me.'

"Representation of B.J.

"124. On January 24, 2019, the respondent filed a federal civil complaint alleging a pattern of racketeering activity arising out of a civil involuntary commitment action. *B.J. v. Prairie View, Inc.*, United States District Court for the District of Kansas, case number 19CV2041. The defendants included Prairie View, Inc., a psychiatrist treating patients at Prairie View, the medical director of Prairie View, the secretary of the Kansas Department of Aging and Disability Services, and an assistant county attorney. Prairie View, Inc. is a nonprofit corporation providing mental health services in South Central Kansas.

"125. In the complaint, the respondent alleged that the defendants were a supply chain of individuals and organizations connected by a common goal to create a market for human bondage through the exploitation of the Kansas Care and Treatment of Mentally Ill Persons Act.

"126. On April 27, 2020, the federal district court dismissed the case finding the respondent's theory of the case to be implausible. The court concluded that the respondent failed to offer any evidence beyond inflammatory conclusory labels. The court concluded that the respondent's theory of an expansive scheme to involuntarily treat patients using fraudulent civil commitment proceedings, all with a common goal of collecting fees for unnecessary professional services, was not plausible or supported by facts.

"Representation of R.T.

"127. In a 2013 family law case, M.S. and R.T. divorced, Sedgwick County District Court case number 13DM4220. The respondent went to high school with both M.S. and R.T.

"128. On July 27, 2017, M.S. sent R.T. a letter asking him to provide current financial information for purposes of calculating a child support modification within 30 days.

"129. The following day, R.T. sent a text message response to M.S. and stated that he would not provide his financial information until she provided hers. M.S. sent R.T. her most recent W-2, her 2016 tax return, and several recent paystubs. Even though M.S. provided her financial information, R.T. did not provide M.S. with his financial information.

"130. R.T. asked the respondent to represent him in the family law case. On August 3, 2017, the respondent entered her limited appearance on behalf of R.T. According to the respondent's entry of appearance, her appearance was limited to '[r]epresentation and review of child support modification and parenting time adjustment in Sedgwick County Case 2013-DM-004220-DS.' (emphasis in original omitted). At the time the respondent entered her appearance, M.S. was represented by Gregory L. Bernhardt.

"131. Because R.T. did not provide the requested financial information, on August 29, 2017, Mr. Bernhardt filed a motion to compel. Mr. Bernhardt sought costs and expenses against R.T.

"132. On September 6, 2017, the respondent filed a proposed child support worksheet on behalf of R.T. The respondent calculated an interstate pay differential for her client who was residing in Colorado based on a comparison of the United States Department of Labor's statistics for average weekly wages by county. The respondent used the average weekly wage figures for the differences between Sedgwick County, Kansas, and Denver County, Colorado. However, R.T. did not reside in Denver County, Colorado; he resided in Arapahoe County, Colorado.

"133. The respondent made discovery requests to M.S. After M.S. provided the discovery, on October 30, 2017, the respondent sent an email to Mr. Bernhardt accusing M.S. of dishonest conduct regarding her wages. The respondent asserted that M.S. misrepresented her wages as full-time wages when she worked fewer than 40 hours per week. The respondent suggested that M.S. pay R.T. $12,000 plus interest for her 'unclean hands' behavior. The respondent stated that if payment was received within 30 days, the respondent would waive her attorney's fees. But, if payment was not received within 30 days, M.S. should 'expect [the respondent's attorney] fees to be requested at the hourly rate of $500 per hour, [her] customary fee for representation, in matters involving compliance and ethics issues.'

"134. Mr. Bernhardt responded that they could address her 'unfounded allegations and ludicrous demands in court.' He pointed out that R.T.'s discovery responses were due October 29, 2017, and the respondent should consider the email her golden rule notice. Mr. Bernhardt gave the respondent until November 10, 2017, to provide discovery responses.

"135. On November 5, 2017, the respondent sent Mr. Bernhardt an email stating that because M.S. was working only 28 hours a week on average, the respondent would impute income to 40 hours per week for purposes of trial. The following day, Mr. Bernhardt replied. He explained that M.S. works 30 to 35

hours per week and her employer's schedule dictates her schedule. Mr. Bernhardt pointed out that M.S.'s work schedule has remained the same as it was when she was married to R.T.

"136. In the respondent's next email to Mr. Bernhardt, the respondent threatened to void her offer to settle the case if Mr. Bernhardt further disparaged her efforts to work out the case. The respondent referred to Mr. Bernhardt's statement that her allegations were ludicrous as unprofessional behavior. Without any legal authority, the respondent asserted that Mr. Bernhardt, the trustee's office, and the court previously owed R.T. a greater duty of care to explain the issues in the case with candor because R.T. had been unrepresented.

"137. In a draft pretrial conference order, the respondent questioned whether M.S. and Mr. Bernhardt engaged in dishonest conduct because the child support paid by M.S. was based on her employment which was not full-time.

"138. The respondent failed to provide Mr. Bernhardt with the requested discovery. As a result, on December 8, 2017, Mr. Bernhardt filed a motion to compel discovery.

"139. On January 15, 2018, the respondent filed a notice of intent to request sanctions. In the notice, the respondent alleged that Mr. Bernhardt filed frivolous pleadings and engaged in other litigation abuse. On February 12, 2018, the district court heard the respondent's notice. During the hearing, the respondent referenced her allegation that Mr. Bernhardt filed frivolous pleadings and engaged in other litigation abuse by stating, 'I sincerely hope we don't have to go there' and 'I don't feel the need to professionally disparage Counsel in front of our clients.' The respondent provided no evidence that Mr. Bernhardt filed any frivolous pleadings or engaged in any other litigation abuse despite her allegations.

"140. In the notice, the respondent alleged overpayment of child support from preceding years and demanded a payment or an offset of $12,000. At the hearing, the respondent abandoned the overpayment issue and presented no credible evidence of unjust enrichment. The court concluded that there was no basis for the respondent's claim of unjust enrichment because M.S. had the same pay rate since 2012. The court stated that '[t]here was zero evidence to support unjust enrichment, concealment of income, or underemployment.'

"141. The court concluded that the respondent 'litigated the health insurance premium figure to include on the worksheet without being aware of twenty year old [*sic*] case law, or setting forth a colorable basis for not following case law, or making a legitimate argument for a change in the law.'

"142. The court noted that the respondent pursued a 'metropolitan comparison,' which was not supported by the guidelines or case law. In making the inappropriate comparison, the respondent also used the wrong county in Colorado for comparison. The court concluded that the respondent 'misrepresented her client's income to the court on September 19, 2017.' The court found that the respondent 'pursued an unclear imputed income position in a situation where there

was no demonstration of any substantial change in mother's employment, which employment predated the parties' 1997 marriage.' The respondent failed to explain or proffer 'why mother's employment of 36 hours, five days per week with the same employer for 25 years with the same pay rate since 2012 should result in anything other than her actual income being included on the child support worksheet.'

"143. The court described the respondent's approach as an 'unjustified scorched earth approach' and ordered that R.T. pay M.S.'s reasonable attorney's fees, 'primarily because of the conduct of [R.T.]'s counsel, and secondarily because [R.T.] failed to provide the requested income verification.'

"144. The court noted that in connection to her representation of R.T., the respondent might have had contact with a represented party. The court directed the respondent to self-report her conduct to the disciplinary administrator within 10 days.

"145. Following the hearing, the district court entered a memorandum order. In the order, the court struck the respondent's notice of intent to request sanctions because the respondent failed to comply with the statutory requirement to register with the Sedgwick County law library. *See* K.S.A § 20-3126.

"146. On February 14, 2018, the respondent forwarded a copy of Judge Rundle's memorandum order to the disciplinary administrator. However, in her letter to the disciplinary administrator, the respondent denied that her conduct violated the Kansas Rules of Professional Conduct. Rather, the respondent contended 'that Judge Rundle's allegations of misconduct [were] not only unfounded but [were] so clearly contrary to the record that they have the appearance of retaliatory harassment and collusion to conceal potential misconduct of a member of the domestic court bar.'

"147. In the court's February 12, 2018, memorandum order, the court directed Mr. Bernhardt to prepare all necessary journal entries and orders. Because the parties could not reach an agreement regarding the journal entry, on March 15, 2018, Mr. Bernhardt filed a motion to settle the order. The motion was set for hearing on March 26, 2018.

"148. Before the hearing on the motion to settle the order, the respondent filed a motion for a change of judge. In the motion, the respondent alleged that Judge Rundle could not afford R.T. a fair hearing of pending issues, including the settlement of the order. In the motion, the respondent reminded the court of its obligation under K.S.A. 20-311e to refrain from retaliating against the respondent for filing the motion.

"149. On March 26, 2018, the respondent filed a second notice of intent to request sanctions against Mr. Bernhardt. In the notice, the respondent asserted that Mr. Bernhardt willfully intended to injure R.T. by misrepresenting and concealing material evidence and that he intended to derive personal profit by creating an unnecessary delay. The respondent also alleged that Mr. Bernhardt failed

to disclose certain information, which would have likely decreased R.T.'s child support obligation. Even though it was a notice rather than a motion, the respondent requested relief. The respondent requested that the February 12, 2018, memorandum order be vacated, M.S.'s motions be struck, and the orders entered on July 13, 2017, be restored.

"150. The hearing on the motion to settle the journal entry was continued pending the resolution of the respondent's motion to disqualify Judge Rundle.

"151. On March 26, 2018, Judge Rundle denied the respondent's motion to change the judge.

"152. Thereafter, on March 29, 2018, the respondent filed an affidavit for a change of judge under K.S.A. 20-311d. In the affidavit, the respondent asserted that because she accused Sedgwick County judges and attorneys of racketeering and because Judge Sanders found the respondent in contempt, that Judge Rundle 'irrationally injured an innocent third party as a continued act of retaliation against [the respondent].' Additionally, the respondent alleged that Judge Rundle intended to cause her commercial and personal disparagement.

"153. The respondent also asserted that Chief Judge James Fleetwood left her a voicemail message and threatened to file an ethics complaint against the respondent for engaging in ex parte communications with a judge. In Chief Judge Fleetwood's voicemail message, he acknowledged the respondent's phone message and informed the respondent that while the judges could not have ex parte communications with one side, the respondent was welcome to file a motion and provide notice to opposing counsel. Chief Judge Fleetwood did not threaten to file a disciplinary complaint against the respondent.

"154. On April 13, 2018, Chief Judge Fleetwood denied the respondent's motion to change the judge. In the journal entry, Chief Judge Fleetwood concluded that the respondent's dissatisfaction with prior rulings did not equate to bias by Judge Rundle. Chief Judge Fleetwood also concluded that the respondent attempted to connect Judge Rundle 'to events not material, relevant or connected to Judge Rundle or the case at hand.'

"155. On April 18, 2018, the respondent filed a notice requesting that R.T.'s case be reassigned to Judge Michael Hoelscher.

"156. On May 7, 2018, the district court held a hearing on Mr. Bernhardt's motion to settle the journal entry. Judge Rundle granted the motion and approved Mr. Bernhardt's proposed order and child support worksheet and granted Mr. Bernhardt's request for attorney's fees in the amount of $4,440 against R.T.

"157. On June 8, 2018, the respondent filed a motion to alter or amend the judgment and a motion for a new trial. In the dual motion, the respondent asserted that Chief Judge Fleetwood refused to comply with the laws of the state of Kansas by denying her motion to recuse Judge Rundle and that Judge Rundle erred in awarding attorney's fees to Mr. Bernhardt without 'any factual nor legal find-

ings to support such an award.' The respondent asserted that these rulings supported her 'prior complaints of [a] RICO conspiracy between Sedgwick County judges and the attorneys who vote for them.' As factual support for her motion, the respondent identified three documents that she drafted and previously filed—a notice of cease and desist filed against Judge Rundle, Chief Judge Fleetwood, the court trustee, and Mr. Bernhardt; a motion to recuse Judge Rundle; and a motion for sanctions filed against M.S. and Mr. Bernhardt. She requested that an out-of-county judge hear her motion 'in order to preserve [R.T.]'s Constitutional procedural and substantive due process rights.'

"158. On June 27, 2018, Judge Rundle denied the respondent's motion to alter or amend the judgment and motion for a new trial without a hearing.

"159. On July 23, 2018, the respondent filed a notice of appeal. In the notice, the respondent included the following, '[i]n addition, [R.T.] advises this court of pending post judgment motions and/or Federal court petition(s) that may result in amendment of this Notice.' The respondent had not filed a federal court petition on behalf of R.T. at that time.

"160. After the respondent filed the notice of appeal, Mr. Bernhardt withdrew and Michael Whalen entered his appearance as counsel for M.S.

"161. On August 30, 2018, the respondent docketed the appeal with the Court of Appeals, case number 119,915.

"162. On September 21, 2018, Mr. Whelan filed a motion for a finding of contempt against R.T. for failing to pay the court-ordered attorney's fees of $4,440. The motion was scheduled for hearing before Judge Rundle on October 2, 2018.

"163. On September 27, 2018, the respondent sent an email message to the disciplinary investigator assigned to investigate DA13156 and DA13172. In the message, the respondent stated that on September 14, 2018, she reported to the Federal Bureau of Investigation that the disciplinary complaints were evidence of collusive criminal misconduct by Sedgwick County officials to suppress Chief Judge Fleetwood's involvement in E.B.'s murder. She also stated that there were over 20 documented acts of collusive witness intimidation in these matters. The respondent asserted that she intended to file judicial complaints against Chief Judge Fleetwood, Judge Rundle, Judge Kevin Smith, and Judge Sanders for threatening her with physical harm by her arrest and confinement in the Sedgwick County jail because the individuals accused of killing E.B. were also incarcerated in the Sedgwick County jail.

"164. On September 27, 2018, the respondent filed a judicial complaint against Judge Rundle. Even though the complaint was filed against only Judge Rundle, in the cover letter, the respondent accused Chief Judge Fleetwood, Judge Smith, Judge Sanders, and Judge Rundle of collusion to have her disbarred or physically harmed. The respondent's claim that the judges colluded to have her physically harmed was based on the premise that the judges would incarcerate

the respondent for contempt and that she would be jailed with the individuals charged in E.B.'s murder.

"165. On September 28, 2018, the respondent filed a second complaint against Judge Rundle with the Commission on Judicial Conduct. In a letter accompanying the second complaint, relying on the same assertions, the respondent alleged that Judge Rundle failed to act impartially.

"166. On November 9, 2018, the Commission on Judicial Qualifications sent the respondent two letters and notified the respondent that the complaints she filed against Judge Rundle were dismissed as they 'contained no facts establishing reasonable cause to support a finding that the judicial code had been violated.'

"167. On October 1, 2018, the respondent filed two motions in the Court of Appeals. She filed a motion for leave of court to apply for a supersedeas bond and a motion for reassignment of a district court judge to hear a motion for supersedeas bond and other post-trial matters. In the motions, she informed the court that after she filed the notice of appeal, she made criminal complaints against Judge Rundle and Chief Judge Fleetwood with the Wichita Police Department and the Federal Bureau of Investigation. The Court of Appeals denied both motions on October 4, 2018.

"168. Also, on October 1, 2018, the respondent filed two documents in the district court. She filed what purported to be a response to M.S.'s motion for contempt. However, in the response, she renewed her request that Judge Rundle be disqualified and she requested that the case be permanently assigned to a judge outside of Sedgwick County. She asserted that Mr. Whalen violated K.S.A. 20-311e by filing a motion for contempt based on R.T.'s failure to pay the attorney fee sanction. The respondent also filed a motion for sanctions against Mr. Whalen. The respondent asserted that M.S. willfully intended to injure R.T. by misrepresenting and concealing wages. The respondent also argued that M.S. engaged in unnecessary and wasteful litigation by filing a motion for contempt that was prohibited under K.S.A. 20-311e. In the motion, the respondent attempted to schedule it for hearing the next day, on October 2, 2018.

"169. In the respondent's motion, she referenced the complaints she filed against judges. However, the respondent did not provide a copy of the complaints with the motions. On October 1, 2018, Mr. Whalen requested that the respondent provide him with a copy of the referenced documents. That night, the respondent replied, informing Mr. Whalen that the complaints were sealed, that the complaints contained information pertaining to homicide investigations and CINC cases, and that she would not be appearing in Judge Rundle's courtroom.

"170. The respondent also sent an email to Judge Jeff Dewey, Judge Rundle's administrative assistant, and Mr. Whalen. In the email, the respondent asserted that Judge Rundle previously made threats against her, that Sedgwick County judges threatened to put her in jail with her cousin's murderers, that the threats to put the respondent in jail were threats of physical harm and witness

intimidation, and Judge Rundle should not be assigned any of her cases. She indicated that Judge Rundle, Chief Judge Fleetwood, and Judge Sanders were the subject of criminal complaints she filed with the Wichita Police Department and the Federal Bureau of Investigation. Finally, the respondent stated that she would not 'risk [her] safety and appear in Judge Rundle's courtroom.'

"171. The respondent did not appear at the October 2, 2018, hearing before Judge Rundle. Following the hearing, Judge Rundle issued an order. In the order, Judge Rundle noted that neither the respondent nor her client appeared for the hearing. Judge Rundle disqualified the respondent from representing R.T. in the case based on a concurrent conflict of interest, under KRPC 1.7(a)(2). Judge Rundle also concluded that '[t]he Court is simply unable to administrate a case in an orderly manner if an attorney refuses to appear.'

"172. Judge Rundle continued the case to December 11, 2018, and deferred entering an order or finding regarding the respondent's contempt of court 'through her intentional and deliberate failure to appear.'

"173. On October 3, 2018, based on Judge Rundle's October 2, 2018, order, Mr. Whalen filed a motion to disqualify the respondent from her representation of R.T. before the Court of Appeals.

"174. On October 8, 2018, the respondent filed a motion to transfer venue.

"175. On October 9, 2018, the respondent filed a response to Mr. Whalen's motion to disqualify the respondent from the representation of R.T. before the Court of Appeals. In the response, the respondent asserted that Judge Rundle, Judge Dewey, and Mr. Whalen 'were well aware that [the respondent] was in another judge's courtroom on the same floor awaiting to be notified of [Judge Dewey]'s continuance ruling pursuant to Local Rule 400, or to be called to Judge Rundle's courtroom.' In a footnote, the respondent explained that Rule 400 provides that '[a]ll requests for continuances of motions, evidentiary hearings and trials shall be heard only by the Presiding Judge, unless another judge has been assigned this duty by the Presiding Judge.' The respondent also described Mr. Whalen's motion to disqualify the respondent 'as a tool of harassment.'

"176. On October 10, 2018, Mr. Whalen filed a response to the respondent's motion to transfer venue.

"177. R.T. filed an affidavit and indicated that he wished to continue to be represented by the respondent. Because R.T. wanted the respondent to continue to represent him and because the issue of the respondent's disqualification in district court was not pending on appeal, on October 10, 2018, the Court of Appeals denied the motion to disqualify the respondent from representing R.T. in the pending appeal.

"178. On October 12, 2018, Judge Rundle denied the respondent's motion to transfer venue without a hearing under Rule 133(c) because 'oral argument on

the motion would not materially aid the court in resolving the matter.' Judge Rundle also noted that the respondent had recently refused to appear in his courtroom. He also stated that in another case, the respondent appeared by telephone without the permission of the court. At the time of the respondent's telephonic appearance, the respondent was in a Colorado courtroom. In the order, Judge Rundle restated the respondent's disqualification from further representation of R.T. in the district court case. Judge Rundle directed the clerk to refuse to file any pleadings in R.T.'s case presented by the respondent.

"179. R.T.'s appellate brief was due on October 18, 2018. The respondent failed to file a brief or request an extension of time to file a brief on behalf of R.T.

"180. On October 23, 2018, the respondent posted a comment on her firm's Facebook page which read, '[d]o you know what happens when you report Sedgwick County Judges for racketeering? Your 3 year old cousin is murdered within two months. Goodness someone needs to clean house over there.'

"181. On October 29, 2018, the respondent sent an email message to Mr. Yost in his capacity as Sedgwick County Counselor. The respondent stated that Chief Judge Fleetwood continued to engage in criminal obstruction and that he accused her of threatening him. She informed Mr. Yost that she had filed criminal complaints with the Wichita Police Department and the Federal Bureau of Investigation. The respondent also indicated that she was about to file a lawsuit in federal court against the clerk of the district court and others for 'aid[ing] and acquiesc[ing] in retaliatory obstruction.' Finally, referencing an appearance before Judge Phillip Journey scheduled for the following day, she stated:

'If I need to show up with Federal Marshalls [*sic*] please advise. Otherwise please see this email as my kind request to cease and desist efforts to put me in jail with my cousin's murderers in retaliation for complying with federal officers investigating racketeering in Sedgwick County.'

"182. Also, on October 29, 2018, the respondent sent an email message to Special Agent Jonathan Weishaar of the Health and Human Services Office of the Inspector General. In the email to the federal investigator, the respondent stated that Chief Judge Fleetwood 'left the obstruction of justice in [E.B.]'s case on my voicemail. I am not sure whether this information is helpful to you. But this threat of arrest is the fourth or fifth since it was discovered that [E.B.] died within 3 days of Fleetwood's May 16, 2017 obstruction.' Agent Weishaar took no law enforcement action as a result of the respondent's communication.

"183. On November 8, 2018, the Court of Appeals directed the respondent to file a brief on behalf of R.T. by November 28, 2018, or the appeal would be dismissed without further notice. The Court also directed that if R.T. did not wish to pursue the appeal, then the respondent should file a notice of voluntary dismissal. The respondent did not file a brief or notice.

"184. On December 7, 2018, the respondent filed suit in federal court on behalf of R.T. The respondent brought claims, including constitutional claims

and a RICO claim under 42 U.S.C. § 1983, 42 U.S.C. § 1988, and 18 U.S.C. § 1962. The respondent named the Sedgwick County board of county commissioners, Chief Judge Fleetwood, Judge Dewey, Judge Rundle, the court trustee, the district court clerk, the sheriff, and M.S. as defendants in the case. The respondent asserted that the defendants engaged in possible illegal collusion and she filed the complaint 'to remediate acts of plausible retaliatory obstruction after state appeal and contemporaneous to [the respondent]'s cooperation with federal agents investigating Sedgwick, Wyandotte and Johnson counties for racketeering in domestic and juvenile courts.' The respondent sought:

a. disqualification of Chief Judge Fleetwood, Judge Dewey, and Judge Rundle from R.T.'s case;
b. transfer of venue from Sedgwick County to Cowley County;
c. a stay of Judge Rundle's orders, including his order disqualifying the respondent;
d. an injunction preventing further filings in the child support case;
e. federal reorganization, appointment of trustee, and removal of officers in the Sedgwick County Trustee's Office;
f. R.T.'s costs and treble attorney's fees; and
g. other relief as the federal court deemed just and proper.

In her request for other relief, the respondent requested, 'prospective and/or retroactive injunctive relief . . ., declaratory relief, compensatory damages, punitive damages, pain and suffering, statutory damages (including treble damages and/or fines), reimbursement of funds paid or lost, class action certification, attorneys fees and/or costs.'

"185. On December 27, 2018, the Court of Appeals dismissed R.T.'s appeal because the respondent failed to file a brief or otherwise respond to the court's order. Thereafter, the respondent failed to take any action to revive R.T.'s appeal.

"186. On January 6, 2019, the respondent filed a notice of appeal seeking a writ of mandamus. The respondent filed the notice in Sedgwick County District Court. On February 1, 2019, Mr. Whalen sent the respondent an email that stated: '[a]nd just an FYI, there is no Notice of Appeal for a Writ of Mandamus. It is an original action filed directly in the appellate courts.'

"187. On January 9, 2019, Mr. Whalen filed a motion for attorney's fees in the Court of Appeals case. The following week, on January 15, 2019, the respondent filed a response to the motion for fees requesting that the court deny the motion. The respondent asserted that M.S. 'was well-aware of her status as a Defendant in federal diversity proceedings for Abuse of Process. Her counsel Michael Whalen received [a] Summons on December 26, 2018 [*sic*] along with the complaint and demand to cease and desist further unnecessary motion practice.'

"188. On January 17, 2019, the Court of Appeals granted Mr. Whalen's motion for attorney's fees. Under Rule 7.07(b), the court ordered R.T. to pay Mr. Whalen's fee of $960.

"189. On September 30, 2019, the federal district court issued a memorandum decision dismissing the case. The court dismissed the claims for injunctive relief because the *Younger* abstention doctrine, the *Rooker-Feldman* doctrine, and the domestic relations exception precluded the court from exercising jurisdiction over R.T.'s claim for injunctive relief. The court dismissed the claims for money damages based on the Eleventh Amendment, judicial immunity, and the failure to state plausible 42 U.S.C. § 1983 and RICO claims.

"190. Neither R.T. nor the respondent paid the $4,440 to Mr. Bernhardt. The respondent provided Mr. Whalen a check drawn on the respondent's law firm's bank account, for $960. The record is unclear whether the funds came from R.T. or the respondent.

"Representation of Z.W. and N.W.

"191. In May, 2018, Z.W. and N.W. retained the respondent to represent them in relation to the custody of A.B. and H.D. Z.W. and N.W. were the maternal grandparents of A.B. and H.D.

"192. On May 5, 2018, the respondent filed a notice of motion to intervene and cease and desist against unreasonable state intervention and administration of life-ending medical care in A.B.'s parents' family law case, Sedgwick County District Court case number 17DM2676. In the notice, the respondent asserted that A.B. was found on May 4, 2018, with life-threatening injuries, was taken to Wesley Medical Center, and was not expected to survive. Z.W. and N.W.'s daughter was arrested in relation to A.B.'s injuries.

"193. While the respondent filed a notice, she did not file a motion to intervene. And, despite the title, through the notice, the respondent requested that the grandparents be given legal custody.

"194. The portion of the document which can be described as the respondent's cease and desist command filed in the family law case to which the respondent's clients were not parties, included the following:

'FURTHERMORE, due to the mishandling of this child's known physical abuse by his mother[,] by state actors, and the well-known public acknowledgment of the State's current fatal incompetence in handling child abuse cases, PLEASE BE ADVISED THAT THE STATE OF KANSAS, DEPARTMENT OF CHILD AND FAMILY SERVICES, THE EIGHTEENTH JUDICIAL DISTRICT and/or THE WICHITA POLICE DEPARTMENT are hereby prohibited, under notice of federal cease and desist, from filing petition to seek State custody or otherwise interfere with Intervenors' efforts to secure custody of this child without proper Constitutional showing of probable cause. . . .

'As to Wesley Medical Center, PLEASE BE ADVISED of Intervenor's pending emergency actions to petition for the legal status as [A.B.'s] power of attorney to make medical decisions, with acknowledgment of notice of cease and desist against Mother and any State entity to make any DNR or end-of-life decisions for the child. Counsel for Wesley is advised to contact the undersigned attorney immediately and prior to allowing consent to administer life-ending medical actions.'

The respondent's clients, Wesley Medical Center, the Wichita Police Department, and the Kansas State Department of Children and Families (DCF) were not parties to the case.

"195. Unfortunately, on May 6, 2018, A.B. succumbed to his injuries. The Sedgwick County District Attorney's office charged A.B.'s mother and another person with child abuse and murder.

"196. The Sedgwick County District Attorney's office filed a CINC case regarding H.D., A.B.'s younger sibling, Sedgwick County District Court case number 18JC260. On May 11, 2018, the respondent sent an email requesting discovery on behalf of Z.W. and N.W. Three days later, the respondent filed a motion for expedited discovery in the CINC case on behalf of Z.W. and N.W. Through the motion, the respondent sought medical records, DCF records, law enforcement records, and other records relating to both A.B. and H.D. The district court set a hearing on the motion for May 18, 2018.

"197. On May 17, 2018, the district court exchanged email messages with the parties and with the respondent regarding a possible continuance of the hearing on the discovery motion. In response to the exchange of email messages, the respondent sent an email to the court and copied approximately 15 others on the email message. In the message, the respondent stated that by neglecting to check the box acknowledging a grandparent's request for custody, the district attorney's office engaged in conduct that 'very much looks like fraud.' The hearing on the respondent's discovery motion was not continued.

"198. On May 18, 2018, Ron Paschal from the district attorney's office replied:

'Members of this office will have no communication outside of court with Ms. Johnston. Early on Ms. Johnston sent an email telling counsel that emails should only be used for scheduling purposes and then into the late hours of the night used email to lodge false and malicious allegations of misconduct against a lawyer in the case. Ms. Johnston, you have sent other emails and voicemails of this tenor. This course of conduct is not productive and therefore we will not participate.

'Any recommendations from the District Attorney regarding custody and placement in this case will be guided by the home studies ordered by the court and conducted herein and not as a result of threats from counsel.'

"199. The district court conducted the hearing on the discovery motion on May 18, 2018. The court noted that the hearing related only to H.D. and not to A.B. The district attorney's office objected to the release of records related to A.B. The court denied the respondent's request as it related to A.B. The court granted the respondent's motion as it related to H.D.

"200. On June 13, 2018, even though Z.W. and N.W. did not have standing in the family law case involving their daughter (case number 17DM2676), and even though only a party to a case may request business records by subpoenas under K.S.A. 60-245a, the respondent issued business records subpoenas under

K.S.A. 60-245a, through the family law case to Wesley Medical Center, the Sedgwick County Forensic, DCF, and the Wichita Police Department seeking records relating to A.B.

"201. The Wichita Police Department filed an objection to the respondent's business records subpoena. DCF filed a motion to quash the respondent's business records subpoenas.

"202. Wesley Medical Center and Sedgwick County Forensic honored the respondent's subpoenas and provided A.B.'s medical records and autopsy report, respectively, to the respondent.

"203. On July 25, 2018, Mr. Paschal filed a complaint against the respondent regarding her conduct in the CINC case involving H.D., as well as the respondent's conduct in another CINC case. *See* ¶¶ 210-243 below.

"204. By August 9, 2018, the respondent provided the medical records and the autopsy report to the Wichita Eagle news outlet.

"205. The respondent notified the district attorney's office that she obtained A.B.'s medical records and autopsy report and that she provided the medical records and autopsy report to the Wichita Eagle.

"206. Marc Bennett, Sedgwick County District Attorney, responded to the respondent's email message:

. . . .

'As you are aware there are three separate legal proceedings currently pending before the 18th Judicial District Court. Two are murder cases and one is a child in need of care case. To be clear, given the pending nature of these proceedings, the state cannot condone the release of records you reference for the reasons stated in Kansas Rules of Professional Conduct 3.6(a).

'Further, parental rights are still legally intact and a jury trial has not yet been held in the criminal matters in the very jurisdiction into which you indicate you intend to release this information. I do not know the legal purpose for which you requested the subpoena or what legal purpose is to be served by the release of the information gathered as a result of said subpoena. Again, I would refer you to KRPC 3.6.'

"207. The next day, on August 10, 2018, the respondent sent an email to the district attorney's office. She stated that '[w]e need to request all of Monday's hearing be closed to the public because details material to a homicide investigation are going to be disclosed.' She also stated that there would be no reporting of the Wesley documents in her possession before Monday. However, she warned that if the district attorney's office did not close the Monday hearing, 'the State's murder case could be compromised . . . .'

"208. On September 12, 2018, the respondent filed a response to the outstanding disciplinary complaints. In response, the respondent indicated that she voluntarily and temporarily refrained from disclosing certain documents publicly. The respondent described the disciplinary complaints made against her as

'part of an enterprise of intimidation by State Actors to force [her] out of business in two states and to cover up Kansas court activities that have enabled the murder and sexual exploitation of children.' She also stated:

'Most egregious of the conspiratorial acts occurred when Sedgwick County Chief Administrative Judge James Fleetwood obstructed justice and prevented the rescue of [E.B.], my cousin, in the 72 hours before the child's murder on May 19, 2017. Judge Fleetwood intercepted my communication to the presiding family law judge at that time, . . . and prohibited emergency orders to assist law enforcement in rescuing the child.'

"209. In response to a January 16, 2019, email about scheduling a hearing in the CINC case involving H.D., the respondent sent an email message to Mr. Paschal and other counsel which read:

'I am not sure how Ron Paschal became a part of this email chain. He needs to be removed. Ron likes to file malicious and defamatory ethical complaints on me in actions with many other attorneys and then make everyone witnesses to federal investigations into his failed attempts at criminal obstruction. It is clear after my documents and statements became part of [S.B.]'s monumental sentence that I am a help, not a hindrance, to the prosecution of abuse cases. Paschal, however, has criminally suspect motivations. Let me know if I need to request a federal injunction to have him forcibly removed from this case.'

Mr. Bennett responded to the respondent's message and took:

'. . . great exception to [her] baseless and highly unprofessional allegations that Mr. Paschal has engaged in "*failed attempts at criminal obstruction*" and that he has "*criminally suspect motivations*." Personal, unfounded attacks like this against a well-respected, long standing member of the bar, diminish the profession. Frankly, these are the kind of inflammatory comments I might expect from a non-attorney, litigant.' (emphasis in original).

"Representation of K.V.

"210. K.V. and R.V. divorced. At the time of the divorce, K.V. and R.V. had one minor child, N.V. In the family law case, Sedgwick County District Court case number 14DM7672, the court awarded residential placement of N.V. to K.V. R.V. had parenting time every other weekend.

"211. In May 2018, K.V. reported to DCF that R.V. physically and sexually abused their child. While DCF and the Exploited and Missing Children's Unit (EMCU) were investigating the allegations, on June 4, 2018, K.V. filed a protection from abuse (PFA) action, Sedgwick County District Court case number 18DM3792, against R.V. In the PFA petition, K.V. made the same allegations of physical and sexual abuse by R.V.

"212. On June 4, 2018, the district court granted a temporary PFA order. The order temporarily suspended R.V.'s parenting time until further order of the court.

"213. On June 28, 2018, Judge Gregory Waller held an evidentiary hearing on the PFA matter. Trip Shawver represented K.V. and R.V. appeared pro se.

During the hearing, R.V. produced a letter from Sarah Hoss of the EMCU, dated June 27, 2018. In the letter, Ms. Hoss stated that there was insufficient evidence to support the allegations against R.V. She also stated that there were ongoing concerns that K.V. and K.V.'s mother had been coaching the child to make false allegations of abuse against R.V. Ms. Hoss recommended that the PFA case be dismissed and that the case be presented to the district attorney's office for consideration of a CINC case. Mr. Shawver asked the judge to continue the PFA hearing pending the results of the DCF investigation. Judge Waller granted Mr. Shawver's motion to continue, scheduled the PFA case for August 9, 2018, and modified the temporary order allowing R.V. to have supervised visitation pending the next hearing.

"214. On July 1, 2018, K.V. retained the respondent to represent her in the family law case, the PFA case, and the potential CINC case.

"215. That same day, K.V. and the child moved from Sedgwick County to the home of G.K. and K.K., in Butler County, Kansas. That evening, the respondent prepared a durable power of attorney purporting to provide G.K. and K.K. with legal rights regarding N.V. Neither the respondent nor K.V. sought permission or authorization from R.V. regarding the execution of a power of attorney concerning N.V.

"216. On July 2, 2018, the respondent sent an email message to Amanda Marino at the Sedgwick County District Attorney's office which provided:

'[K.V.] hired me yesterday in her custody case. She is under the impression EMCU has requested a CINC application to be presented to the DA's office with request for ex parte orders today. Are you handling this case? If not, could you advise who is? . . .

'Issuance of ex parte orders after a PFA hearing finding good cause for my client's complaints seems improbable, but I thought I would inquire just in case.'

Ms. Marino replied to the message and informed the respondent that Bradley Burge was handling the case. Ms. Marino copied Mr. Burge on the response. Mr. Burge also wrote to the respondent and indicated that he had been told another person was going to be representing K.V. As a result, Mr. Burge asked the respondent to enter her appearance so he could discuss the case with her.

"217. Meanwhile, on July 2, 2018, DCF submitted a CINC application. DCF obtained an ex parte order of protective custody granting DCF temporary custody of N.V. and authorizing law enforcement to pick up the child. The court entered the order at 10:38 a.m. that day.

"218. As provided by K.S.A. 38-2242, the ex parte order of protective custody was issued without prior notice or hearing. Also, according to K.S.A. 38-2242 and 38-2243, the protective custody order is temporary pending a hearing which must be held within 72 hours after the child is taken into custody. The district court scheduled the temporary custody hearing for July 5, 2018.

"219. During the afternoon of July 2, 2018, Mr. Burge filed the CINC petition in Sedgwick County District Court, case number 18JC337. The respondent entered her appearance at 4:25 p.m.

"220. On July 2, 2018, the respondent also entered her appearance on behalf of K.V. in the family law case and the PFA action.

"221. On July 2, 2018, the respondent sent an email message to Mr. Paschal. In the message, the respondent stated that she had been communicating with the district attorney's office to 'prevent the need for any warrant or ex parte orders' and that she was able to enter her appearance before 'any ex parte hearing.'

"222. That evening, law enforcement went to the home of G.K. and K.K. in Butler County, Kansas, to take custody of the child. No one answered the door.

"223. On July 3, 2018, Mr. Paschal responded to the respondent's email informing the respondent that an ex parte order placing the child in the temporary custody of DCF had been entered the previous day, but that law enforcement was unable to locate the child. Mr. Paschal asked the respondent to facilitate the change of temporary custody pursuant to the order. The respondent wrote to Mr. Burge and asked how the ex parte order could be vacated.

"224. Also on July 3, 2018, the respondent informed the district attorney's office and Ms. Hoss that she knew where the child was located, that the child was safe, and that the respondent would seek 'federal intervention in this case if necessary to cease police action to retrieve [N.V.] unlawfully.'

"225. On July 5, 2018, the respondent filed a motion to dismiss the CINC case and vacate the ex parte orders. In the motion, the respondent falsely asserted that on June 28, 2018, Judge Waller found allegations of abuse alleged by K.V. to be more probable than not. The respondent falsely asserted that prior to the initiation of the CINC case, N.V. was placed under the legal guardianship of others who are not subject to Sedgwick County jurisdiction. She accused the district attorney's office of 'judge shopping' for the 'purpose of unconstitutional and illegal seizure' of N.V.

"226. She also 'politely suggested' that Sedgwick County District Court judges 'cease the practice of approving ex parte orders proposed by Kansas DCF' because '[t]hey are not needed. Law enforcement can take emergency custody in under [*sic*] well-established warrantless seizure protocols, and the District Attorney may otherwise follow normal protocol to procure a warrant when time allows.'

"227. Finally, the respondent asserted that there are 'widespread allegations of ex parte order abuse in Kansas by DCF in order to "kidnap" persons considered "marketable" for state profit' and the respondent suggested that the court 'take heed and voluntarily cease the practice to prevent further escalation of the rumored racketeering.'

"228. On July 5, 2018, the district court held a temporary custody hearing. While the case was assigned to Judge Smith, Judge Greg Keith handled the hearing because Judge Smith was on vacation. At the time of the hearing, law enforcement had not located the child. The court ordered the respondent and K.V. to produce the child. The respondent argued that the court could not order her to produce the child because she did not have custody of the child.

'So, Your Honor, for—to order me to produce the child—she's not in my care. The—it—I made it known where the child was. If you all want to order them—the people who have the child right now—to come and produce her, that's fine. That's within the Court's powers and certainly within the powers of the District Attorney's Office. But to just circumvent all of that and not give notice, not respond to my inquiries and just come after me and ask me to produce the child is not—not the most efficient way of handling things, especially when I tried so—put forth so many efforts to communicate with everybody and coordinate this effort, which, for whatever reason, it didn't work.'

The respondent refused to produce the child. The court informed the respondent and K.V. that they could choose between bringing the child to the courthouse or having law enforcement or DCF pick up the child. After consultation with the respondent, K.V. refused to produce the child and stated that law enforcement or DCF would have to pick up the child.

"229. After the child was in custody, Judge Keith proposed continuing the temporary custody hearing to July 9, 2018, so that Judge Smith could hold the hearing. The respondent objected because she 'filed a motion to prevent the child from being taken into State custody.'

"230. Over the respondent's objection, the district court continued the temporary custody hearing to July 9, 2018, before Judge Smith. The court also continued the hearing on the respondent's motion to dismiss and vacate the ex parte orders.

"231. On July 6, 2018, the respondent shared a post on her firm's Facebook page, Excellence Legal, LLC, in which she stated:

'Alright Kansas . . . stay tuned for fireworks on Monday, in public hearing in the Sedgwick County courtroom of Judge Kevin Smith. This is not just a border problem. Children are being stolen by DCF from homes in places like Andover, Kansas and separated from their parents after one parent made complaints of abuse. . . . So beware! If you report the abuse of your child and DCF can't substantiate, your child may be seized from your home without notice and with no evidence of imminent danger.'

"232. On July 8, 2018, the respondent filed a supplemental motion to dismiss. In the supplemental motion, the respondent repeated her inaccurate assertion that on June 28, 2018, Judge Waller found K.V.'s allegations of abuse against R.V. to be more probable than not and that Judge Waller 'awarded restraining orders to protect' N.V. from R.V. The respondent asserted that the initiation of the CINC case to be a violation of N.V.'s 'fundamental Constitutional right to

privacy and protections against unreasonable seizure as well as [K.V.]'s fundamental right to make decisions concerning the health, safety and welfare of [N.V.] without threat of unreasonable state interference.'

"233. The respondent also argued that members of the district attorney's office and DCF caused N.V. 'unnecessary emotional distress.' In the motion, the respondent stated that K.V. intended to file a federal case seeking an injunction for the illegal seizure of N.V., for policies and customs violative of civil rights, and for 'claims of defamation, invasion of privacy, abuse of process, malicious prosecution, trespass, and nuisance.' The respondent urged that the CINC case should be dismissed because the district court lacked jurisdiction and because venue was improper in Sedgwick County.

"234. Despite her refusal to disclose the location of the child during the hearing held on July 5, 2018, in the motion, the respondent asserted 'that the undersigned was available, willing and cooperative in disclosing information about Child's location before any action was filed, but that multiple state actors just refused to discuss the matter' with the respondent.

"235. On July 8, 2018, the respondent filed a motion in limine, repeated her allegations that N.V.'s constitutional rights were violated, and argued that any evidence obtained during N.V.'s 'unlawful seizure should be excluded from this court's consideration because the benefit of deterrence of this behavior by state actors outweighs the substantial social costs.'

"236. On July 9, 2018, Judge Smith held a temporary custody hearing. During the hearing, Judge Smith asked the respondent how many CINC cases she had handled previously. The respondent reported that she had previously handled '20, 30, perhaps 40' CINC cases. However, according to the records of the Sedgwick County District Court, the respondent had been attorney of record in only *In re H.D.* and *In re N.V.* In response to disciplinary complaints, the respondent included a chart that listed her experience in family law. According to the respondent's chart, she also handled one additional CINC case in Wilson County. Notwithstanding her chart, the respondent also stated in her response to Judge Smith's disciplinary complaint that she handled cases while she was in 'law school in Shawnee County and in various counties throughout the State.' *But see* [. . .] (The respondent informed Judge Sanders in her personal family law case, 'I don't practice, . . . I have an active license, but I'm a litigation manager and I do global compliance. I mean, I don't do family law. I do chemical regulations.').

"237. The respondent also stated that the transcript of the July 9, 2018, hearing 'provides evidence of [Judge Smith]'s legal inexperience, not mine, and is frivolous.'

"238. When questioned by Judge Smith about her statement that Judge Waller found K.V.'s allegations of abuse by R.V. to be more probable than not, the respondent defended stating, 'this is how a PFA petition is maintained. If it's not dismissed, then the assumption is that the findings are going forward on a preponderance of the evidence, which is more probably true than not true.' When

Judge Smith explained to the respondent how PFA cases work, the respondent argued with the judge and then stated that they would be headed to federal court 'unless there are probable cause findings supporting the fact that this child has a need for state intervention.'

"239. At the July 9, 2018, hearing, based on the exhibits provided by the respondent, the district court found that N.V. was in immediate danger of psychological abuse by K.V. The court placed N.V. in the temporary custody of DCF. The court provided DCF the discretion to place the child with R.V. and provide K.V. with supervised visits. The court denied the respondent's motions.

"240. The court also found that because K.V. knew that the case would be presented to the district attorney's office for consideration of a CINC proceeding, by executing the power of attorney in favor of G.K. and K.K. and by moving the child out-of-county, K.V. attempted to circumvent the process and avoid the jurisdiction of the court.

"241. On July 26, 2018, Judge Smith lodged a disciplinary complaint against the respondent concerning her conduct in *In the Interest of N.V.*, Sedgwick County District Court case number 18JC337.

"242. On August 8, 2018, the respondent filed a motion to withdraw from her representation of K.V. in the CINC case.

"243. On January 18, 2020, the respondent made the following post on her law firm's Facebook account:

'If you live in Sedgwick County, vote against Judge Kevin Smith. He and Governor Laura Kelly appear to be the only two Kansans who think we need MORE non-abused kids in foster care. A great question to ask: how many 9-13 year old girls did he place in foster care during his time on the bench? This judge has virtually no legal experience, diminished social skills and unabashedly markets on behalf of private organizations that contribute fraudulently to the foster care to [*sic*] human trafficking pipeline. Remove him, Sedgwick County.'

"Representation of D.F.

"244. The respondent represented D.F., the mother, in a paternity case, *J.A. vs. D.F.*, Sedgwick County District Court case number 14DM6869, regarding the minor child, T.A. Joseph Garcia represented the father, J.A.

"245. On August 25, 2018, the district court adopted the guardian ad litem's recommendation that T.A. resume overnight visits with J.A. beginning the following day. The court ordered that T.A. be allowed to take a cell phone with her and that she be allowed to call D.F. at bedtime.

"246. While T.A. was on her visit, D.F. could not locate T.A. through the phone's global positioning system (GPS). As a result, the respondent sent an email message to Mr. Garcia, the guardian ad litem, and others, indicating that T.A.'s phone was supposed to register T.A.'s location through the phone's GPS. The respondent stated that she attempted to make 'contact with mutual friends' to avoid engaging in ex parte communications. The respondent indicated that if she

did not obtain confirmation of T.A.'s safety, the respondent would be calling law enforcement for a welfare check.

"247. The respondent sent a text message to A.A., J.A.'s wife. The respondent identified herself and stated that the GPS feature was supposed to be activated on T.A.'s phone. The respondent directed A.A. to have her husband contact D.F. or the respondent within one hour or she would be calling law enforcement for a welfare check.

"248. A.A. responded to the respondent, indicating that it was inappropriate for the respondent to contact A.A. She also indicated that they were in compliance with the court order. Finally, A.A. stated that if the respondent needed something from J.A. that the respondent should contact Mr. Garcia.

"249. On September 4, 2018, A.A. made a complaint with the disciplinary administrator regarding the respondent's contact on August 25, 2018. On October 25, 2018, the respondent communicated with the disciplinary investigator assigned to investigate A.A.'s complaint against the respondent. The respondent did not respond to the allegation made by A.A. Rather, the respondent stated:

. . . .

'[A.A.], the complainant in this matter, is a Sedgwick County employee against whom I asserted misconduct/breach of confidentiality. As a result, Judge Tyler Roush sealed the court file pertaining to this case. [A.A.] is expressly not a party to this litigation. Thus I am limited in how I can respond without Judge Roush's order and/or a protective order. . . . '

But see KRPC 1.6(b)(3). ('A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client.')

"250. In January 2019, the respondent sent an email to Mr. Garcia asserting that someone in Sedgwick County spread a rumor that D.F. had a pending legal issue in Derby, Kansas. And, as a result of the rumor, D.F. was being threatened with incarceration in Sedgwick County for six months. The respondent also stated, '[A.A.] is named as a pending defendant in a Civil RICO and 1983 action for collusion with other state actors to deprive my client of civil rights.' The respondent's statement that A.A. was named as a defendant in federal litigation was false.

"251. On September 6, 2019, the district court entered a permanent parenting plan. The parenting plan included a provision that T.A. continue in therapy with B.W.

"252. On February 10, 2020, the respondent sent an email message to B.W. In the email message, on behalf of D.F., the respondent terminated B.W.'s services. The respondent informed B.W. that she was not welcome to attend T.A.'s individualized education plan meeting, that B.W. was prohibited from speaking with anyone about T.A., and that B.W. would not be providing services to T.A. until B.W. overcame the objection that B.W. medically neglected T.A.

"253. The next day, D.F. filed a pro se motion. In the motion, D.F. stated that the respondent's email message sent on February 10, 2020, was sent without her permission and authority. D.F. also stated that the respondent's email was a misrepresentation.

"254. On May 1, 2020, the respondent filed a verified motion for amended temporary orders. In the motion, the respondent asserted that

'In September 2019, Father's Wife commenced discussions about puberty with Child and bought her training bras without prior discussion with Mother, the child's therapist nor any medical provider. At the time Child was barely 8 years old and of slight build, showing no sign, nor need for, such attention. Child had not requested information about puberty and had not asked for such a purchase to be made. . . . Father's Wife's conduct caused Child confusion, intervention by the child [*sic*] therapist and Father's Wife took no responsibility for her actions. . . . Instead, Father's Wife refused to participate in a remedy for the problem and blamed Child for being confused (aka, she called Child a liar for relaying information that Child was not mature enough to understand).'

Approximately eight months before the respondent filed the motion for amended temporary orders, the respondent knew that the allegations quoted above were untrue. In a May 15, 2020, order, the district court concluded that the respondent's inclusion of those allegations was misguided. Later, on July 2, 2020, the court sanctioned the respondent $500 for including those allegations in her motion.

"Representation of K.E.

"255. In *In re Marriage of J.C. and K.E.*, Sedgwick County case number 14DM2056, the district court entered a decree of divorce and a permanent parenting plan regarding the parties two children, G.E.C. and E.E. The parties were awarded joint legal custody. The court awarded J.C. primary residential custody and K.E. parenting time.

"256. In 2015, the district attorney's office filed CINC proceedings regarding G.E.C. and E.E. in Sedgwick County District Court cases numbered 15JC82 and 15JC83. On April 27, 2015, the district court adjudicated both children as CINC. G.E.C. and E.E. were placed in the custody of DCF.

"257. In November 2016, the parties reached an agreement on a proposed parenting plan. Under the parenting plan, J.C. received primary residential custody and K.E. received parenting time. The district court approved the plan. The court directed that the plan be filed in both the CINC cases and the family law case. The court closed the CINC cases.

"258. The parties followed the permanent parenting plan from November 2016 until December 2018. On December 9, 2018, J.C. informed K.E. verbally of her intent to move to the state of Kentucky. J.C. stated that she and her husband obtained jobs in Kentucky. K.E. verbally expressed his objection to J.C. moving the children out of state. J.C. suggested that they seek to mediate the issue, without court involvement. K.E. did not agree to mediation.

"259. On December 12, 2018, J.C. provided written statutory notice of intent to move in accordance with K.S.A. 23-3222. In the hand-written notice, J.C. gave K.E. the address where they would be living and the name of the school the children would be attending. J.C. informed K.E. that she would be starting her new job on January 7, 2019. In the notice, J.C. informed K.E. that she would continue to comply with the existing parenting plan.

"260. Under the parenting plan, the parents were to divide the winter school break. K.E. had parenting time from December 19, 2018, to December 26, 2018, and J.C. had parenting time from December 26, 2018, through January 4, 2019.

"261. J.C. informed K.E. that she intended to move the children to Kentucky after K.E.'s weekend parenting time on January 7, 2019, and that she would continue to comply with the existing parenting plan until the district court changed the plan.

"262. By December 21, 2018, K.E. retained the respondent. The respondent drafted and K.E. executed a petition for abduction prevention measures. The petition was a fillable form. In the petition, the respondent falsely stated that the children resided with K.E. and his wife from January, 2018 to the present. The form required the disclosure of all cases involving custody, allocation of decision making, or parenting time with the children. While the respondent included references to the two closed CINC cases, the respondent failed to disclose the ongoing family law case. The respondent asserted that J.C. threatened to abduct the children, that J.C. recently engaged in activities that may indicate a planned abduction by abandoning employment, terminating a lease, refusing to follow the parenting plan, and having strong ties to another state. In the petition for abduction prevention measures, the respondent sought primary residential custody for K.E. and supervised visitation for J.C.

"263. On December 26, 2018, the respondent filed the petition for abduction prevention measures, Sedgwick County District Court case number 18DM9069. Along with the petition, the respondent also filed a proposed order. A hearing on the petition was scheduled for January 7, 2019.

"264. The district court modified the order drafted by the respondent. In the order, the court made it clear that as long as J.C. was in Kansas, the existing parenting plan would remain in place.

"265. On December 26, 2018, K.E. refused to return the children to J.C. J.C. called the Wichita Police Department for assistance in gaining physical custody of her children. The officers reviewed the orders from the CINC cases as well as the order issued that same day in the abduction case. The officers concluded that they would not assist J.C. in obtaining physical custody of the children because there were conflicting orders.

"266. On December 27, 2018, J.C. retained Jennifer Wagle. That same day, Ms. Wagle sent the respondent an email message and clearly stated that J.C. would remain in Kansas until the issue of residential custody of the children was

resolved. Ms. Wagle reminded the respondent of the court orders in place regarding residential custody.

"267. On December 28, 2018, the respondent responded to Ms. Wagle's email message. In the response, the respondent indicated that she did not have a copy of the parenting plan and asked Ms. Wagle to provide her with a copy.

"268. Ms. Wagle provided the respondent with a copy of the parenting plan on January 2, 2019. In the email message transmitting the parenting plan, Ms. Wagle pointed out to the respondent that J.C. provided K.E. the required notice of her intention to relocate and that K.E. did not file an objection to the notice.

"269. Ms. Wagle informed the respondent that she would be attempting to meet with the judge about the case at 9:00 a.m. the following morning. She also informed the respondent that she would be seeking sanctions for the time Ms. Wagle spent trying to get K.E. to comply with the district court's orders.

"270. Ms. Wagle filed an answer and counter-petition to the respondent's petition for abduction prevention measures.

"271. On January 3, 2019, shortly before 9:00 a.m., the respondent sent Judge Tyler Roush an email message. In the message, the respondent asserted that:

'1. Wichita Police were requested to enforce your order last week at the planned exchange. WPD reviewed information I did not have and advised me on the phone that the risk of the out of state [*sic*] abduction was too great for them to enforce your order and they were declining to assist in a transfer of the children to [J.C.]. They advised the children should stay with my client until [the] hearing on Monday.

'2. I requested information and documentation from Ms. Wagle one week ago and received a partial response yesterday that did not cure the controversy.

'3. There are no actual orders as to any parenting time that I have thus far encountered subsequent to [the] CINC petition.

'4. Finally, [J.C.]'s vehicle was photographed attached to a Uhaul yesterday evening at her Wichita address . . . .

. . . .

'6. [J.C.] intends to abscond with the children today before Monday's hearing. . . .

The respondent's message included false statements. The police did not assist J.C. in retrieving the children because of the conflicting orders, not because the risk of abduction was too great. Additionally, the respondent's statement that there was not an existing order regarding parenting time was untrue. When the court entered a temporary order in the abduction prevention case, the court referenced the existing parenting order filed in the closed CINC cases and the family law case.

"272. Judge Roush conducted a short hearing on January 3, 2019. Ms. Wagle told the court that she was uncertain whether the CINC cases remained

pending but that J.C. believed the CINC cases to be closed. Judge Roush informed both parties that the CINC cases were closed in November 2016 and that the parenting plan was filed in both the CINC cases as well as the family law case. Ms. Wagle informed the court that J.C. would remain in Kansas until the issue was resolved and she asked the court to order K.E. to return the children to J.C. The respondent argued, based on a photograph of J.C.'s car attached to a U-Haul, that J.C. planned to leave Kansas that day. After hearing the arguments, Judge Roush repeated the ex parte order that the existing parenting plan remained in place as long as J.C. was in Kansas.

"273. After the January 3, 2019, hearing, Ms. Wagle emailed the respondent and asked when the children would be returned to J.C. The respondent did not respond. Because the respondent did not respond, Ms. Wagle sent an email to Judge Roush and the respondent. In the email message, Ms. Wagle asked Judge Roush whether he would entertain signing an order so that law enforcement could assist J.C. in obtaining physical custody of the children. Judge Roush declined to enter an additional order and warned the parties that he would be closely scrutinizing the parties' actions until the case was resolved.

"274. Ms. Wagle emailed the respondent again that afternoon. Ms. Wagle informed the respondent that J.C. went to school to pick up the children and learned that K.E. picked up the children early and exited out a different door to avoid J.C. The respondent responded to Ms. Wagle's email message, asserting that J.C. was immediately moving out-of-state and, as a result, under Judge Roush's order, K.E. is the primary residential custodian. Ms. Wagle repeated that J.C. was in Kansas and intended to remain in Kansas until the custody issue was resolved.

"275. On January 3, 2019, Ms. Wagle filed a motion for sanctions and attorney's fees in the family law case, Sedgwick County District Court case number 14DM2056. In the motion, Ms. Wagle asserted that allegations in the petition for abduction prevention measures were false and K.E., with assistance from the respondent, repeatedly refused to return the children to J.C., in violation of the court's order.

"276. On January 4, 2019, Ms. Wagle filed a motion for sanctions and attorney's fees in the abduction prevention case, Sedgwick County District Court case number 18DM9069. In the motion, Ms. Wagle made the same allegations she made in her motion for sanctions in the family law case.

"277. On January 6, 2019, a Sunday, the respondent submitted verified petitions for nonconsensual kinship adoption of J.C. and K.E.'s children. The clerk of the district court filed the petitions the following morning, January 7, 2019. The Sedgwick County District Court cases were numbered 19AD7 and 19AD8. The cases were assigned to Judge Robb Rumsey.

"278. Also on January 6, 2019, a Sunday, the respondent filed a notice of statutory stay. In the notice, the respondent instructed that because K.E. filed

termination of parental rights and adoption cases under K.S.A. 59-2136(d)(3), the abduction prevention case and the family law case must be stayed.

"279. The respondent sought to terminate J.C.'s parental rights. The respondent also sought to have A.E., K.E.'s wife, adopt the children. In the petitions, the respondent made many allegations. The respondent alleged that J.C. was presumed unfit under K.S.A. 38-2271(a)(3) because a child in J.C.'s physical custody had been adjudicated as a CINC on two or more occasions. The respondent alleged that the children resided with A.E. continuously since 2014 and the children resided with J.C. continuously since January 22, 2016.

"280. Before the scheduled January 7, 2019, hearing, the respondent emailed Judge Roush informing him that the adoption petitions temporarily divested him of jurisdiction.

"281. On January 7, 2019, Judge Roush conducted a hearing. Judge Roush ordered the abduction prevention case transferred to the family law case. Judge Roush then dismissed the abduction prevention case. Judge Roush permitted Ms. Wagle to make arguments regarding issues identified in her motions for sanctions and attorney's fees and her answer and counter-petition. Judge Roush held that the pending issues would be considered after the adoption proceedings had concluded.

"282. Judge Roush asked the respondent where the children were. She responded that the children were with K.E. because '[t]his was his regular weekend. He hasn't violated any de facto or court orders.' The judge stayed the family law proceedings until the adoption proceedings had concluded. The judge reminded the parties that the temporary order he entered following the filing of the petition for abduction prevention measures would remain in effect.

'So that means if Mom's in Kansas, she gets to have her parenting time pursuant to the old parenting plan, until Judge Rumsey issues some sort of order that supersedes my order. . . . But mine doesn't go away. It doesn't just vanish because you filed a petition in a different court.'

"283. Ms. Wagle requested that the court issue a written order that J.C. could use to enforce the parenting time. Judge Roush declined to enter an additional order but reiterated that the previous order remained in place. The judge also warned the parties that there would be consequences for failing to comply with court orders.

"284. After the hearing, Ms. Wagle attempted to talk with the respondent about the children returning to their mother's home. The respondent refused to return the children to J.C. but indicated that J.C. could have four hours of supervised visitation.

"285. Later that evening, Ms. Wagle sent an email message to the respondent and Judge Rumsey's assistant requesting an emergency hearing in the termination and adoption cases. The respondent responded by stating:

'. . . Ms. Wagle has requested emergency orders three times since last Thursday and has been denied on each occasion. Wichita Police Department has advised Ms. Wagle's client there is no emergency and they will not assist. I object to further emergency hearings between these parties.'

The respondent's response was misleading. Ms. Wagle replied in an email sent that same day to the respondent, Judge Rumsey, and his assistant correcting the respondent's email and attaching copies of Judge Roush's docket sheets and communications.

"286. On January 9, 2019, Ms. Wagle filed an answer and counterclaim in the adoption cases. In that filing, Ms. Wagle asserted that various claims in the petitions were false or were misrepresentations by the omission of material facts. Ms. Wagle moved to dismiss the adoption petitions because the petitions were not supported by facts or law and were filed for improper purposes.

"287. On January 10, 2019, Ms. Wagle filed a petition for sanctions and attorney's fees and requested an order for the return of the children in the termination and adoption cases. The motion was set for hearing on January 17, 2019.

"288. On January 10, 2019, Ms. Wagle replied to the respondent's January 7, 2019, email in which the respondent refused to return the children to J.C. In the message, Ms. Wagle reiterated that J.C. intended to remain in Kansas until the issue of residential custody was settled and that because J.C. remained in Kansas, she was entitled to have residential custody.

"289. The respondent's reply to Ms. Wagle included a statement that the respondent intended to request sanctions against Ms. Wagle if J.C. continued further malicious prosecution of K.E.

"290. On January 16, 2019, in the family law case, Ms. Wagle filed a proposed parenting plan and a motion to enforce custody and parenting time.

"291. Through email to the respondent, Ms. Wagle continued to request the children be returned to the residential custody of J.C. The respondent continued to refuse to do so.

"292. On January 16, 2019, the respondent filed a notice in the family law case, objecting to J.C.'s intended move to Kentucky. In the document, the respondent asserted that K.E. timely objected to J.C.'s intended move to Kentucky through communications between J.C., the respondent, and the Wichita Police Department and the filing of a petition for abduction prevention measures. The respondent also asserted that the orders issued in the abduction prevention measures case were orders that effectuated K.E.'s objection.

"293. On January 17, 2019, Judge Rumsey entertained Ms. Wagle's emergency motion. Despite Judge Roush's clear statements to the contrary, the respondent argued that the CINC cases remained open and that Judge Roush refused to order K.E. to return the children to J.C.

"294. Following the hearing, Judge Rumsey ordered the immediate return of the children to J.C. and an immediate suspension of K.E.'s parenting time. The judge also set a review hearing to ensure that K.E. complied with the court's order. The judge granted J.C. indigency status and appointed Ms. Wagle as counsel for J.C. The judge ordered K.E. and A.E. to pay $2,500 into Ms. Wagle's trust account to be used toward attorney's fees in the adoption proceeding. The judge held Ms. Wagle's motion for fees and sanctions in abeyance. The judge indicated that he would consider the motion for fees and sanctions if it was established at an evidentiary hearing that the adoption petitions were filed to circumvent another court's order or were filed in bad faith. The judge set the matter for trial on February 14, 2019.

"295. K.E. also fathered a child (B.S.) with another woman, A.S. The respondent represented K.E. regarding issues relating to B.S. On January 10, 2019, the respondent filed a verified petition for kinship adoption without relinquishment regarding B.S., Sedgwick County District Court case number 19AD11. The adoption trial regarding B.S. was consolidated with the adoption trial regarding G.E.C. and E.E., scheduled for February 14, 2019.

"296. On February 13, 2019, the day before the trial in the adoption cases, the respondent filed a motion to continue the adoption trials. She also sent an email message to Judge Rumsey's office asking for 'additional security measures' for her clients and witnesses based on allegations that J.C. was engaged in stalking behavior and witness intimidation.

"297. At the outset of the hearing on February 14, 2019, Judge Rumsey summarily denied the respondent's motion to continue the termination and adoption hearing without argument.

"298. As a preliminary matter, the respondent moved to dismiss the adoption petition she filed regarding B.S. The respondent explained that she filed the adoption case because the mother, A.S., failed to file a paternity case and because A.S. would not comply with her requests to resolve outstanding issues.

"299. Judge Rumsey explained to the respondent that paternity actions are filed to establish parentage. A.S. did not need to file a case to establish her parentage, as the mother's parentage is established at birth. A paternity action is filed to determine the parentage of the father. A.S. was not obligated to file a paternity action to establish K.E.'s legal rights as a parent of B.S.

"300. Chan Townsley, counsel for A.S., agreed to the dismissal, requested attorney's fees, and asked whether the court would order the return of the child to A.S. The court accepted the parties' stipulation to the dismissal, took the issue of fees under advisement, and denied A.S.'s request for the return of the child because the court had no authority to enter orders once the case was dismissed.

"301. During the hearing on the termination and adoption petitions regarding G.E.C. and E.E., the respondent asserted that J.C. was presumed unfit under K.S.A. 38-2271 because children in her custody had been adjudged CINCs on

two occasions. The respondent argued that because of the presumption, J.C. had the burden to prove by clear and convincing evidence that she was fit.

"302. Judge Rumsey explained that there was no evidence that a child in J.C.'s custody had been adjudicated as a CINC on two occasions—only that two children in J.C.'s care had been adjudicated as CINCs. As a result, the judge concluded that the presumption of unfitness did not apply and the respondent had the burden to prove, by clear and convincing evidence, that J.C. was unfit as a mother.

"303. After questioning two witnesses, the respondent moved to dismiss the pending adoption cases. The respondent asserted that her clients, K.E. and A.E., feared retribution from J.C. and her husband should A.E. adopt the children. Ms. Wagle agreed to the dismissal and requested that her motion for sanctions and attorney's fees be granted. She indicated that she would provide the respondent and the court with a statement of her fees. The court accepted the stipulated dismissal and took the motion for sanctions and attorney's fees under advisement.

"304. In February 2019, shortly before the hearing on the adoption petitions, J.C. re-established therapy for G.E.C. and E.E. with a therapist who saw the children beginning in 2016. During a therapy session with G.E.C., he reported significant fear that if he leaves his home, K.E. will take him and he will never see J.C. again. G.E.C. became emotional when talking about how much he missed his step-father, J.E. He became emotionally dysregulated and was taken to a crisis center.

"305. After K.E. and the respondent learned of the incident, on March 8, 2019, the respondent wrote to the therapist. The respondent informed the therapist that K.E. objected to G.E.C. receiving treatment without K.E. present. The respondent also stated that J.C. 'currently is subject to anti-abduction orders and in the last few months has only permitted [K.E.] to see his children when the children are forcibly removed from her physical custody.' *But see* [. . .] (The district court dismissed the abduction prevent case two months earlier). The respondent also asserted that G.E.C. is:

'an alleged victim of abuse and neglect and is at risk of abduction and harm by J.C. J.C.'s current lethality assessment, given her long-term violent history and current multi-level life risk-stressors, is pronounced and indicative of a person capable of homicide when control cannot be achieved. '

On March 11, 2019, based on the respondent's March 8, 2019, correspondence, the therapist discontinued treatment with G.E.C. and E.E.

"306. On February 23, 2019, Ms. Wagle filed a disciplinary complaint against the respondent. On April 22, 2019, the disciplinary administrator received the respondent's written response, dated April 5, 2019. The respondent asserted that Ms. Wagle's complaint was made in bad faith and requested that the complaint be dismissed. The respondent did not, however, address the misconduct alleged in Ms. Wagle's complaint.

"307. On March 28, 2019, the district court granted Ms. Wagle's motion for sanctions and attorney's fees. The court found that J.C. complied with the process to seek to move the children out-of-state, K.E. violated the parenting plan by refusing to return the children on December 26, 2018, the adoption petitions were filed solely to cause a delay in the family law proceedings because adoption proceedings take precedence over family law cases, the adoption petitions effectively nullified the family law court orders of custody and parenting time, the claims in the adoption petitions were not warranted by existing law, the respondent's arguments were frivolous, and while the facts put forth would potentially have some merit in a family 'move away' case, they lacked merit in an adoption case. The court assessed fees against the respondent and her co-counsel in the amount of $11,690. Because K.E. had already paid $2,500 to Ms. Wagle, the balance owing by the respondent and her co-counsel totaled $9,190. Evidence was not presented to establish that either the respondent or her co-counsel paid the $9,190 award of attorney's fees.

"308. On April 22, 2019, the respondent filed a motion to vacate, clarify or amend and to stay enforcement of the order of attorney's fees from March 28, 2019. Initially, the respondent argued that the court lacked subject matter jurisdiction to enter the order because the adoption cases had been dismissed.

"309. Alternatively, the respondent falsely asserted that Ms. Wagle caused the delay by stating that the children remained subject to the CINC proceedings and that '[a]s of January 7, 2019, at 10:00 AM, the parties agreed that the children were still subject to CINC jurisdiction.' Ms. Wagle did not cause delay and the parties did not agree that CINC cases remained open. On January 3, 2019, Judge Roush made it clear that the CINC cases were closed.

"310. The respondent also argued that based on Ms. Wagle's comments, K.E. understood that the CINC cases remained pending. And because the CINC cases remained pending, K.E., through the respondent, filed the adoption petitions to prevent the issuance of 'ex parte orders and served as express evidence that he had taken every legal measure to ensure the safety and stability of his children against [J.C.]'s increasingly hostile and erratic behavior.' (emphasis omitted). Again, on January 3, 2019, Judge Roush made it clear to all parties that the CINC cases were closed. Thus, it is not reasonable that K.E. relied on statements to the contrary. The respondent and K.E. knew that the CINC cases were closed at the time the respondent filed the termination and adoption cases.

"311. In addition to arguing that the children remained the subject of CINC cases, the respondent made additional arguments. The respondent argued that the district court's order for attorney's fees is 'evidence of continuing, pervasive violations of [the respondent]'s First Amendment Right to Petition.' She also argued that the order for attorney's fees 'was in furtherance of an enterprise by Sedgwick County partners to provide monetary reward to attorneys who initiate bad faith and harassing litigation and ethical complaints against [the respondent], [the respondent's] clients and associated counsel for the purpose of preventing her interstate business and whistleblowing cooperation with federal Health and Human

Services Agency investigation.' Finally, the respondent repeated her allegations of racketeering.

"312 That same day, on April 22, 2019, the respondent filed a motion to change judge and a motion to transfer venue in the adoption cases. In the motion to transfer venue, the respondent argued that the March 28, 2019, order for attorney's fees was vague and incomplete. She also argued that the order was issued after her allegations for racketeering which she asserted was a causal factor in the obstruction of law enforcement officers' efforts to save the life of her cousin, E.B.

"313. On May 30, 2019, Judge Rumsey clarified that the judgment against the respondent and her firm was ordered under K.S.A. 60-211(b). The court denied the respondent's motions for change of judge and change of venue.

"314. After the adoption cases were dismissed, the family law case, Sedgwick County District Court case number 14DM2056, resumed before Judge Roush. On June 7, 2019, Judge Roush conducted an evidentiary hearing. Ruling from the bench, the court overruled K.E.'s objection to J.C.'s move to Kentucky and imposed sanctions against the respondent and K.E.

"315. On June 10, 2019, Judge Roush entered an order memorializing his June 7, 2019, rulings. In the written order, the judge noted that K.E. made unfounded allegations against J.C., K.E. pulled the children out of school and changed their school 'before the ink was barely dry on the Abduction Order,' and '[e]vidence of abduction was woefully unsubstantiated.' The court found that the respondent's pleadings were presented for an improper purpose and that some of the factual contentions had no evidentiary support. The court found that 'captioning the custody and move-away issues . . . as an attempted abduction was an improper purpose.'

'The evidence was that [J.C.] notified [K.E.] of her intent to move to Kentucky, with a certified letter that listed her home address, employment information, and proposed school for the children to attend, along with a declared intent to follow the parties' current out-of-town parenting plan which was already in place. In short, calling this letter an abduction attempt would mean that every certified letter that attempted to comply with K.S.A. 23-3222 notice would also be an abduction attempt. Such a reading has no merit.'

The court sanctioned the respondent by entering a judgment of $5,000 in favor of J.C. under K.S.A. 60-211.

"316. Judge Roush also awarded J.C. $5,000 in attorney's fees against K.E. 'Justice and equity require an award of attorney's fees against [K.E.] in favor of [J.C.] in the sum of $5,000. This is due to the repeated denial of parenting time . . . . This is entirely independent of any sanctions entered by Probate Court as a result of those proceedings.'

"317. On August 16, 2019, the respondent filed a motion for a new trial or to alter or amend. In the motion, the respondent asserted that the court permitted Ms. Wagle to 'blatantly misrepresent law and facts' and 'rewarded the behavior

with sanctions.' The respondent stated that the court's mistake was understandable 'given the gravity of the mobster-like conduct of both [J.C. and Ms. Wagle] during [the] pendency of proceedings.' The respondent demanded that the court fix the mistake or own the mistake.

"318. On August 26, 2019, the court conducted a hearing on the respondent's motion for a new trial and other pending matters. The court denied the respondent's motion and denied the respondent's request to stay enforcement finding the respondent's allegations to be unfounded.

"319. No evidence was presented to establish that the $5,000 sanction imposed against the respondent was paid.

"*Conclusions of Law*

"320. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence), KRPC 1.2(d) (scope of representation), KRPC 1.7(a)(2) (conflict of interest), KRPC 3.1 (meritorious claims and contentions), KRPC 3.2 (expediting litigation), KRPC 3.3(a)(1) (candor to the tribunal), KRPC 3.4(c) (fairness to opposing party and counsel), KRPC 3.4(f) (fairness to opposing party and counsel), KRPC 3.5(d) (impartiality and decorum of the tribunal), KRPC 3.6(a) (trial publicity), KRPC 4.1 (truthfulness in statements to others), KRPC 4.2 (communication with a person represented by counsel), KRPC 4.4(a) (respect for rights of third persons), KRPC 8.2(a) (judicial and legal officials), KRPC 8.4(c) (professional misconduct involving dishonesty), KRPC 8.4(d) (professional misconduct that is prejudicial to the administration of justice), and KRPC 8.4(g) (professional misconduct that adversely reflects on fitness to practice), as detailed below.

"321. In addition to alleging that the respondent violated the rules detailed in ¶ 320, above, in the amended formal complaint, the disciplinary administrator also alleged that the respondent violated KRPC 1.3 (diligence), KRPC 1.4 (communication), KRPC 1.5 (fees), KRPC 1.6 (confidentiality), KRPC 1.8 (conflict of interest), KRPC 1.9 (conflict of interest), KRPC 1.16 (declining or terminating representation), KRPC 3.7 (lawyer as a witness), KRPC 4.3 (unrepresented persons), KRPC 5.7 (responsibilities regarding law-related services), KRPC 6.4 (law reform activities affecting client interests), KRPC 7.1 (communications concerning a lawyer's services), KRPC 7.2 (advertising), KRPC 8.1 (cooperation), KRPC 8.5 (jurisdiction), and former Rule 207 (cooperation). At the hearing, the disciplinary administrator did not argue that the respondent violated these rules. Because the disciplinary administrator did not argue that the respondent violated those rules, the hearing panel dismisses the allegations that the respondent violated KRPC 1.3 (diligence), KRPC 1.4 (communication), KRPC 1.5 (fees), KRPC 1.6 (confidentiality), KRPC 1.8 (conflict of interest), KRPC 1.9 (conflict of interest), KRPC 1.16 (declining or terminating representation), KRPC 3.7 (lawyer as a witness), KRPC 4.3 (unrepresented persons), KRPC 5.7 (responsibilities regarding law-related services), KRPC 6.4 (law reform activities

affecting client interests), KRPC 7.1 (communications concerning a lawyer's services), KRPC 7.2 (advertising), KRPC 8.1 (cooperation), KRPC 8.5 (jurisdiction), and former Rule 207 (cooperation).

"KRPC 1.1

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

"323. The respondent failed to provide her clients competent representation in many ways. Please note that while some of the instances included below might not rise to the level of a violation of KRPC 1.1 independently, taken as a whole, it is clear that the respondent failed to provide competent representation to her clients.

"324. In representing her clients, the respondent regularly filed notices and in the notices the respondent requested relief. A motion is a request for relief. A notice is a warning of something. The respondent's failure to file motions to seek relief on behalf of clients amounted to incompetent representation, in violation of KRPC 1.1.

"325. In her representation of R.T., the respondent attempted to litigate how to calculate and credit the health insurance premium. The respondent was unaware of the settled law on this point. The respondent did not make a legitimate argument for not following the law or making a change in the law. The respondent provided R.T. with incompetent representation, in violation of KRPC 1.1.

"326. In her representation of R.T., the respondent pursued a metropolitan comparison for adjusting income for child support calculation purposes. The district court concluded that a metropolitan comparison was not supported by the Kansas child support guidelines nor was it supported by Kansas case law. Further, the respondent failed to use the adjustment from the out-of-state county where R.T. resided. The respondent failed to provide R.T. with competent representation in adjusting his income for child support calculation purposes, in violation of KRPC 1.1.

"327. The respondent filed a motion to alter or amend the judgment and for a new trial in representing R.T. The respondent asserted that prior documents the respondent drafted and filed were factual support for the motion. The respondent's reliance on documents that she drafted and filed as factual support for a motion is another example of the respondent's incompetent representation of R.T., in violation of KRPC 1.1.

"328. The Court of Appeals dismissed R.T.'s appeal because the respondent failed to file a brief on his behalf. The respondent failed to apply the requisite thoroughness and preparation in representing R.T. before the Court of Appeals, in violation of KRPC 1.1.

"329. The respondent filed a second notice of appeal on behalf of R.T. Despite its title, the document purported to be a writ of mandamus to the Supreme Court. The document that the respondent filed was ineffective as a notice of appeal because the respondent failed to docket the appeal with the appellate court. The document that the respondent filed was also ineffective as initiating a mandamus action. To initiate a mandamus action, the respondent would have had to file a petition with the Supreme Court in a separate action. This is another example of the respondent's incompetent representation of R.T., in violation of KRPC 1.1.

"330. The respondent also failed to provide competent representation to K.V. In that case, the respondent drafted a power of attorney which was executed in favor of G.K. and K.K. in an attempt to avoid the jurisdiction of the Sedgwick County District Court in an impending CINC action. The respondent attempted to have an ex parte order of temporary custody set aside before the child was taken into temporary custody. The respondent's representation of K.V. complicated K.V.'s position and ultimately, contributed to K.V.'s loss of custody of her child. The respondent suggested to the court that it cease the practice of approving ex parte orders proposed by DCF because the ex parte orders are not necessary. The respondent exhibited a lack of a basic understanding of the laws applicable in CINC and PFA cases, in violation of KRPC 1.1.

"331. The respondent filed a petition for abduction prevention measures on behalf of K.E. In the petition, the respondent was required to disclose all cases involving custody, allocation of decision-making, or parenting time. The respondent disclosed the closed CINC cases but failed to disclose an ongoing family law case that had jurisdiction over the children. The respondent provided K.E. with incompetent representation, in violation of KRPC 1.1, by failing to identify the one relevant case.

"332. On behalf of K.E., the respondent filed a petition for the termination of parental rights and step-parent adoption regarding B.S. The respondent filed the case because B.S.'s mother would not file a paternity case and would not communicate with K.E. about issues relating to the child. A.S. was not responsible for filing suit to establish K.E.'s legal rights. The respondent provided K.E. with incompetent representation by filing the termination and adoption case, in violation of KRPC 1.1.

"333. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.1 in her representation of R.T., K.V., and K.E.

"KRPC 1.2(d)

"334. KRPC 1.2(d) provides that, '[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.' According to KRPC 1.0(e), '"[f]raud" or "[f]raudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.' In this jurisdiction, a fraudulent act is 'an-

ything calculated to deceive, including all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another.' *Umbehr v. Board of County Commissioners of Wabaunsee County*, 252 Kan. 30, 37, 843 P.2d 176 (1992).

"335. The respondent violated KRPC 1.2(d) in her representation of K.V. By counseling her client to move N.V. out-of-county in a failed attempt to circumvent the jurisdiction of the Sedgwick County District Court, the respondent counseled her client to engage in fraud. The respondent also drafted a power of attorney in favor of G.K. and K.K. By drafting and by having G.K. and K.K. execute the power of attorney, the respondent, again, attempted to circumvent the jurisdiction of the Sedgwick County District Court. By counseling her client and by taking actions designed to circumvent the jurisdiction of the district court, the respondent counseled and assisted her client in fraudulent conduct, in violation of KRPC 1.2(d).

"336. The hearing panel concludes that the respondent violated KRPC 1.2(d).

"KRPC 1.7(a)(2)

"337. The personal interests of an attorney may create a conflict of interest for current clients. KRPC 1.7 provides:

'(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

. . . .

'(2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

'(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

'(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

'(2) the representation is not prohibited by law;

'(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

'(4) each affected client gives informed consent, confirmed in writing.'

"338. In her representation of R.T., the respondent did not appear at a hearing scheduled before Judge Rundle. The respondent asserted that she did not feel personally safe in appearing for the hearing and, as a result, she intentionally declined to attend the hearing. The respondent's safety concerns were related to fears of being held in contempt of court for violating court orders and facing possible incarceration. The respondent's refusal to appear on behalf of her client at a scheduled hearing materially limited her representation of R.T.

"339. Because the respondent's representation of R.T. was materially limited by the respondent's personal interest, the hearing panel must examine the applicability of KRPC 1.7(b).

"340. After the respondent refused to appear on behalf of her client at a scheduled court hearing, it was not reasonable to conclude that the respondent would be able to provide diligent and competent representation to R.T. Also, there was no evidence that R.T. gave the respondent informed consent nor that such informed consent was confirmed in writing. The hearing panel concludes that KRPC 1.7(b) does not ameliorate the respondent's violation of KRPC 1.7(a)(2).

"341. The hearing panel concludes that the respondent violated KRPC 1.7(a)(2).

"KRPC 3.1

"342. Attorneys are prohibited from bringing or defending a proceeding unless there is a basis for doing so that is not frivolous. KRPC 3.1.

"343. In this case, the respondent made frivolous claims in her personal family law matter and her representation of B.J., R.T., Z.W. and N.W., K.V., D.F., and K.E. While the following list is extensive, it reflects only examples of the respondent's violations of KRPC 3.1. Providing a complete recitation of the respondent's violations of KRPC 3.1 is not necessary to paint a clear picture of the extent to which the respondent violated this rule.

"344. In her personal family law case, the respondent repeatedly falsely accused the Sedgwick County bench, bar, and other officials of engaging in collusion and racketeering. The respondent included her allegations of collusion and racketeering in letters to county officials as well as in notices and motions filed in her personal family law case and in notices and motions she filed on behalf of clients. The respondent never provided any evidence to support these allegations. Her claims were unfounded and frivolous, in violation of KRPC 3.1.

"345. In the respondent's family law case, the respondent asserted that the statute of limitations had passed for A.G. to become a responsible parent and that the district court should terminate A.G.'s standing as a parent. The respondent provided no legal authority for her claim. The respondent's argument was frivolous, in violation of KRPC 3.1.

"346. The respondent also argued that as a single, un-remarried woman, she was being discriminated against. She claimed that had she remarried, her new husband could adopt K.G., and A.G.'s parental rights would be terminated. The respondent's argument was frivolous, in violation of KRPC 3.1.

"347. The respondent claimed that because she was the sole legal custodian of her child, she could not be ordered by a court to disobey a doctor's recommendation regarding her child. The respondent was obligated to comply with the court's orders. The respondent's claim lacked merit and was frivolous, in violation of KRPC 3.1.

"348. The respondent asserted that she and the district court could jointly file a cease and desist request with OJA seeking advice on how to handle a situation. The respondent claimed that the issue did not have to be filed publicly and that a panel of three judges who sat on the OJA advisory board would hear the case. OJA does not have an advisory board to hear cease and desist requests. The respondent's claim was frivolous, in violation of KRPC 3.1.

"349. The respondent claimed that the district court fraudulently used court jurisdiction to threaten to incarcerate the respondent and A.G. to cause K.G. to become a CINC, in violation of K.S.A. 21-5603 (contributing to a child's misconduct or deprivation). The respondent never provided any evidence that the court fraudulently used its jurisdiction to attempt to incarcerate the respondent. The respondent violated court orders and the court found her in contempt for violating court orders. The respondent's claim was frivolous, in violation of KRPC 3.1.

"350. In the federal suit filed on behalf of B.J., the respondent claimed that the defendants were a supply chain of individuals and organizations connected by a common goal to create a market for human bondage through the exploitation of the Kansas Care and Treatment of Mentally Ill Persons Act. The respondent put forth no evidence to support her claims. The federal court concluded that the respondent's claims were merely inflammatory conclusory labels not supported by any evidence. The respondent's claims in the federal action filed on behalf of B.J. were frivolous, in violation of KRPC 3.1.

"351. In her representation of R.T., the respondent claimed that M.S. misrepresented her wages as full-time when she worked less than full-time and, as a result, was unjustly enriched. The respondent sought $12,000 on behalf of R.T. for M.S.'s unclean hands. The district court found that M.S.'s employment remained the same for the preceding 15 years and she had the same pay rate since 2012. The court found no evidence to support the respondent's claim of unjust enrichment, concealment of income, or underemployment. The respondent's claim was frivolous, in violation of KRPC 3.1.

"352. The respondent asserted that opposing counsel and the court owed R.T. a greater duty of care to explain the issues with candor during the time that he was a pro se litigant. The respondent provided no legal authority to support her position. Pro se litigants are entitled to no greater safeguards. *See People v. Romero*, 694 P.2d 1256 (Colo. 1985). The respondent's claim is without merit and is frivolous, in violation of KRPC 3.1.

"353. In that same case, the respondent alleged that Judge Rundle intentionally misrepresented the law to justify a fraudulent award of attorney's fees to

opposing counsel. The respondent alleged that Judge Rundle irrationally injured an innocent third party in retaliation and in an attempt to discourage the respondent's continued representation of clients in family court. Again, the respondent provided no evidence to support her claims of wrongdoing. The respondent's claims were frivolous and libelous, in violation of KRPC 3.1.

"354. In K.E.'s case, the respondent asserted that Mr. Whalen violated K.S.A. 20-311e by filing a motion for contempt based on the respondent's failure to pay the court-ordered sanction. Then, the respondent filed a motion for sanctions against Mr. Whalen. The respondent's claim that Mr. Whalen violated K.S.A. 20-311e by filing a motion for contempt and the respondent's motion against Mr. Whalen for sanctions were frivolous claims, in violation of KRPC 3.1.

"355. On behalf of R.T., the respondent brought suit against members of the Sedgwick County bench, other county officials, and M.S. asserting constitutional claims and a RICO claim under 42 U.S.C. § 1983, 42 U.S.C. § 1988, and 18 U.S.C. § 1962 for collusion and retaliation. The federal court dismissed the respondent's cause of action based on immunity and because the respondent failed to state plausible claims. The respondent's claims were frivolous, in violation of KRPC 3.1.

"356. In the motion to dismiss the CINC case the respondent filed on behalf of K.V., the respondent claimed that the district attorney's office engaged in judge shopping to aid in the unconstitutional and illegal seizure of N.V. She also claimed that the court lacked subject matter jurisdiction and the institution of the CINC case violated K.V.'s constitutional rights. The respondent's claims were not supported by evidence, were frivolous, and violated KRPC 3.1.

"357. The respondent filed a petition for abduction prevention measures on behalf of K.E. and asserted that J.C. intended to abduct G.E.C. and E.E. The petition, however, was frivolous. J.C. provided K.E. the notice required by statute when a parent intends to move out of state. The district court concluded that the respondent's claim that J.C. intended to abduct the children had no merit. The court pointed out that if J.C.'s letter, provided under K.S.A. 23-3222 evidenced intended abduction, then every time a parent complied with the statute, there would be evidence of an intent to abduct. The respondent's claim that J.C. intended to abduct the children based on the statutory notice was frivolous, in violation of KRPC 3.1.

"358. In the abduction prevention case, Ms. Wagle repeatedly assured the respondent that J.C. would remain in Kansas until the district court ruled on the custody case, and the respondent repeatedly claimed that J.C. intended to abduct G.E.C. and E.E. by taking them to Kentucky. The respondent's repeated claims that J.C. intended to abduct the children lacked merit and were frivolous, in violation of KRPC 3.1.

"359. In K.E.'s case, the district court ordered that the existing parenting plan remain in effect, provided J.C. stayed in Kansas. When Ms. Wagle attempted to

work with the respondent in transferring the children to J.C.'s care, the respondent claimed that Ms. Wagle was maliciously prosecuting K.E. The respondent's claim of malicious prosecution was frivolous, in violation of KRPC 3.1.

"360. The respondent filed termination of parental rights and adoption cases regarding G.E.C. and E.E. In the petitions, the respondent asserted that because J.C. had two children in her physical custody adjudicated as CINCs, J.C. was presumed unfit. The respondent's claim lacked merit. For the statutory presumption to apply, a child in J.C.'s custody had to have been adjudicated a CINC on two or more prior occasions. The respondent's claim in the termination and adoption petitions lacked merit and was frivolous, in violation of KRPC 3.1.

"361. The respondent filed a third termination of parental rights and adoption case on behalf of K.E. The case concerned B.S. The respondent filed the petition because A.S. would not file a paternity case and otherwise settle pending issues. The respondent's purpose in filing the petition for termination and adoption was not legitimate. Thus, the third petition for termination of parental rights and adoption was frivolous, in violation of KRPC 3.1.

"362. The respondent asserted that J.C. refused to follow the existing parenting plan. The respondent's claim was false, lacked merit, and was frivolous, in violation of KRPC 3.1.

"363. In her representation of K.E., the district court ordered the respondent and her co-counsel to pay $9,190 in attorney's fees. Thereafter, the respondent filed a motion to vacate. In the motion, the respondent argued that the award of attorney's fees was evidence of the district court's violation of her First Amendment Right to Petition. She argued that the order furthered an enterprise by Sedgwick County to provide a monetary reward to attorneys who initiate bad faith and harassing litigation and ethical complaints against the respondent. The respondent's claim was frivolous, in violation of KRPC 3.1.

"364. After the district court ordered the respondent to pay sanctions in the cases involving K.E. and in response to an attempt to collect the judgments, the respondent asserted that Ms. Wagle and J.C. had a history of fraud. The respondent's claim that Ms. Wagle and J.C. had a history of fraud was not supported by any evidence, lacked merit, was libelous, and was frivolous, in violation of KRPC 3.1.

"365. The hearing panel concludes that the respondent repeatedly violated KRPC 3.1 in her personal family law case and in her representation of R.T., B.J., K.V., and K.E.

KRPC 3.2

"366. An attorney violates KRPC 3.2 if she fails to make reasonable efforts to expedite litigation consistent with the interests of her client. *Id.* Comment one to KRPC 3.2 provides:

'Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or

repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.'

"367. In the respondent's representation of R.T., after docketing an appeal with the Court of Appeals, the respondent failed to file a brief or voluntary dismissal. The respondent failed to expedite the litigation consistent with R.T.'s interests, in violation of KRPC 3.2.

"368. The hearing panel concludes that the respondent violated KRPC 3.2 in representing R.T. before the Court of Appeals.

"KRPC 3.3(a)(1)

"369. The foundation of the practice of law is truth. Attorneys must be honest in all they do, particularly in appearances before courts. 'A lawyer shall not knowingly 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.' KRPC 3.3(a)(1). The respondent violated KRPC 3.3(a)(1) in many ways, including the following.

"370. In a motion for reconsideration, the respondent falsely informed the court that A.G.'s legal standing as a parent had been suspended and that he no longer had the standing to litigate matters relating to K.G. The respondent also argued that because she was awarded sole legal custody, she was no longer under the jurisdiction of the state. The respondent's statements in the motion were false, in violation of KRPC 3.3(a)(1).

"371. In representing K.V., the respondent falsely asserted in a motion to dismiss and in a supplemental motion that the judge who heard the PFA petition found K.V.'s allegations of abuse more likely true than not. However, the court had not made any findings regarding the PFA petition. The court had simply continued the hearing on the PFA petition until after DCF investigated claims of emotional abuse by K.V. The respondent violated KRPC 3.3(a)(1) in making the false statement of fact.

"372. In that same motion, the respondent falsely asserted that N.V. was the subject of a guardianship when the respondent knew that was false. The respondent drafted a power of attorney in favor of G.K. and K.K. and the respondent knew that a power of attorney did not create a guardianship. In this regard, the respondent violated KRPC 3.3(a)(1).

"373. While representing K.V. at a temporary custody hearing and in response to a question by the district court, the respondent falsely informed the court that she had handled between 20 and 40 CINC cases during her legal career. According to other information provided by the respondent, the respondent pre-

viously handled three CINC cases. Also, the respondent previously informed another judge that she was not a family law attorney, rather she was experienced in chemical regulation. The respondent's statement to the court regarding her experience in handling CINC cases was false, in violation of KRPC 3.3(a)(1).

"374. In the respondent's supplemental motion to dismiss filed on behalf of K.V., the respondent asserted that she was ready, willing, and able to provide information about N.V.'s location before the CINC action was filed and that multiple state actors refused to discuss the case with her. The respondent's statement is untrue. The district attorney's office promptly replied to the respondent's communications before and after the CINC action was filed. The respondent did not disclose that she knew the location of the child until after an ex parte order had been issued. The respondent provided false information to the court in her supplemental motion to dismiss the CINC action, in violation of KRPC 3.3(a)(1).

"375. The respondent filed a motion for amended temporary orders on behalf of D.F. In the motion, the respondent falsely asserted that A.A. purchased training bras for T.A. and had discussions with T.A. regarding puberty without D.F.'s prior knowledge or approval. The respondent knew that those allegations were untrue well in advance of filing the motion. The district court sanctioned the respondent for including false allegations in the motion. The respondent's statement in the motion was false, in violation of KRPC 3.3(a)(1).

"376. The respondent made false statements to the district court in the abduction prevention petition and the termination and adoption petitions filed on behalf of K.E. In the abduction prevention petitions, the respondent falsely asserted that the children had resided with K.E. and A.E. since January 2018, and that J.C. planned to abduct the children. In the termination and adoption petitions, the respondent falsely alleged that the children had resided with A.E. continuously since 2014 and that J.C. was presumed unfit under the statute. The respondent's statements in the petitions were false, in violation of KRPC 3.3(a)(1).

"377. In her representative capacity for K.E., the respondent sent the district court an email message regarding the physical custody of G.E.C. and E.E. The respondent falsely stated that the law enforcement officers concluded that the risk of out-of-state abduction was too great and the law enforcement officers declined to enforce the court's order. The law enforcement officers did not conclude that the risk of abduction was too great; rather, the officers declined to assist in transferring the children because they concluded that two court orders conflicted. The respondent's statement in the email message to the court was false, in violation of KRPC 3.3(a)(1).

"378. The respondent argued at the hearing on Ms. Wagle's emergency order that Judge Roush refused to order K.E. to return the children to J.C. That was false. Judge Roush repeatedly informed the parties that the existing parenting plan remained in place and, as long as J.C. stayed in Kansas, she was entitled to her parenting time. At that same hearing, the respondent also argued that a second CINC case remained pending. As of January 3, 2019, the respondent knew

that the children were not the subject of CINC proceedings. The respondent's statements to the district court were false and in violation of KRPC 3.3(a)(1).

"379. In a motion to vacate the respondent filed on behalf of K.E., the respondent falsely asserted that Ms. Wagle caused the delay by asserting that the children remained subject to CINC jurisdiction and by falsely asserting that the parties agreed that the children remained subject to CINC jurisdiction. The respondent also falsely asserted that she filed the termination and adoption petitions in reliance on Ms. Wagle's statement that the children remained subject to CINC jurisdiction. The respondent knew, months before, that the CINC cases were closed years before. The respondent violated KRPC 3.3(a)(1) by making false statements to the court.

"380. The hearing panel concludes that the respondent repeatedly violated KRPC 3.3(a)(1) by providing false information to the court on multiple occasions.

"KRPC 3.4(c)

"381. Clearly, lawyers must comply with court orders. KRPC 3.4(c) provides the requirement in that regard: '[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.'

"382. In March 2019 and July 2019, the respondent repeatedly canceled scheduled visits between A.G. and K.G. in violation of court orders. The respondent's refusal to comply with court-ordered parenting time for A.G. violated KRPC 3.4(c).

"383. In addition, in July 2017, the respondent informed her ex-husband that absent a doctor's recommendation, she planned to refuse all communication and visitations between A.G. and K.G. The respondent violated KRPC 3.4(c) by refusing to comply with court orders.

"384. In September 2017, in her personal family law case, the respondent informed both the court and Ms. Retzlaff that she would continue to refuse to comply with the court's orders. Again, the respondent violated KRPC 3.4(c) by refusing to comply with court orders.

"385. In her representation of R.T., the respondent refused to appear in Judge Rundle's courtroom for a scheduled hearing. As a result, the hearing could not proceed. When the respondent refused to appear in court on behalf of R.T., the respondent violated KRPC 3.4(c).

"386. During her representation of K.V., after the CINC case had been filed and an ex parte order for temporary custody had been issued, the respondent informed the district attorney's office that she knew where the child was located, that the child was safe, and that the respondent would seek a federal injunction if necessary to prevent law enforcement from retrieving N.V. unlawfully. During a temporary custody hearing held before N.V. had been taken into custody, the

district court ordered the respondent and her client to produce the child. The respondent refused to produce the child, arguing that the court could not order her to produce the child because she did not have custody of the child. The respondent, however, knew where the child could be found and refused to assist in transferring the physical custody of the child. When the respondent refused to comply with the court order, the respondent violated KRPC 3.4(c).

"387. The respondent also violated the district court orders in her representation of K.E., in violation of KRPC 3.4(c). In that case, after her client's parenting time ended, the respondent refused to honor an existing court order by assisting Ms. Wagle with the transfer of the children to J.C.

"388. The district court ordered the respondent to pay attorney's fees and sanctions in three cases. First, the district court ordered the respondent to pay Mr. Garcia $500 for attorney's fees for violating K.S.A. 60-211(b)(3). The district court also ordered the respondent to pay two sanctions in connection with her representation of K.E. The court ordered the respondent and her co-counsel to pay $9,190 in attorney's fees to J.C. in the termination and adoption petition cases. Later, in a separate case involving the same parties, the court ordered the respondent to pay a $5,000 sanction to J.C. for violating K.S.A. 60-211. The respondent did not pay the court-ordered attorney's fees and sanctions. By failing to pay the court-ordered fees and sanctions, the respondent, again, violated KRPC 3.4(c).

"389. The hearing panel concludes that the respondent repeatedly violated court orders in representing herself in her personal family law case as well as in representing R.T., K.V., and K.E. Accordingly, the hearing panel concludes that the respondent repeatedly violated KRPC 3.4(c).

"KRPC 3.4(f)

"390. KRPC 3.4(f) provides that '[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party' except in a limited circumstance. The limited exception requires that the person be a 'relative or an employee or other agent of a client' and that the lawyer 'reasonably believe[] that the person's interests will not be adversely affected by refraining from giving such information.' KRPC 3.4(f).

"391. In representing D.F., the respondent directed another person, B.W., to refrain from speaking with anyone about the child. The limited exception to KRPC 3.4(f) does not apply in this case. B.W. was not a relative, an employee, or an agent of D.F. The respondent could not reasonably believe that B.W.'s interests would not be adversely affected by refraining from speaking with J.A. regarding his child's treatment. The respondent's misconduct in this regard is further aggravated by her lack of authority from her client to make the demand.

"392. The hearing panel concludes that the respondent violated KRPC 3.4(f) by directing B.W. to refrain from speaking with anyone regarding T.A.'s treatment.

"KRPC 3.5(d)

"393. Lawyers are required to be respectful to the court. Specifically, KRPC 3.5(d) provides that '[a] lawyer shall not . . . engage in undignified or discourteous conduct degrading to a tribunal.'

"394. The respondent engaged in disrespectful, undignified, and discourteous conduct to the Sedgwick County bench on many occasions in the representation of herself and her clients. Some examples of the respondent's violations of KRPC 3.5(d) include the following.

"395. The respondent repeatedly falsely accused the Sedgwick County bench, bar, and other officials of engaging in collusion and racketeering. The respondent included her allegations of collusion and racketeering in letters to county officials as well as in notices and motions filed in her personal family law case. The respondent never provided any evidence to support these allegations. The respondent's false accusations were undignified, discourteous, and degrading to the court, in violation of KRPC 3.5(d).

"396. Judge Rundle was concerned that the respondent had communicated with a represented party while she was representing R.T. As a result, Judge Rundle directed the respondent to self-report the circumstances to the disciplinary administrator. Rather than explain the circumstances which gave rise to Judge Rundle's direction to self-report her conduct, the respondent asserted that Judge Rundle's allegations were so clearly contrary to the record that the allegations had the appearance of retaliatory harassment and collusion to conceal potential misconduct by opposing counsel. The respondent's comments were undignified, discourteous, and degrading to the tribunal, in violation of KRPC 3.5(d).

"397. In her motion to alter or amend the judgment and for a new trial filed on behalf of R.T., the respondent asserted that the district court's denial of her motion supported her allegations of a RICO conspiracy between the judges and the attorneys who vote for the judges. The respondent's allegations were undignified, discourteous, and degrading to the court, in violation of KRPC 3.5(d).

"398. At a temporary custody hearing regarding N.V., the district court attempted to explain to the respondent how PFA cases proceed. The respondent argued with the court, talked over the court, and then stated that she would file suit in federal court unless probable cause findings supported the CINC case. Arguing with the court, talking over the court, and threatening federal litigation were undignified, discourteous, and degrading to the court, in violation of KRPC 3.5(d).

"399. The respondent's statements and actions described above were undignified, discourteous, and degrading to the court. The hearing panel concludes that the respondent violated KRPC 3.5(d).

"KRPC 3.6(a) and KRPC 8.4(a)

"400. To prevent prejudice to an ongoing adjudicative proceeding, a lawyer's speech may be limited.

'A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.'

KRPC 3.6(a). Comment 3 to KRPC 3.6(a) limits the applicability of this rule; 'the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.'

"401. Also, '[i]t is professional misconduct for a lawyer to [v]iolate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.' KRPC 8.4(a)

"402. On behalf of her clients, Z.W. and N.W., the respondent improperly obtained medical records and the autopsy report regarding A.B. After receiving the records, the respondent improperly disseminated the records to a reporter with the Wichita Eagle. The medical reports and autopsy report had a substantial likelihood of materially prejudicing the criminal case against those suspected in A.B.'s death and the CINC action brought to protect H.D., A.B.'s sibling.

"403. The hearing panel concludes that the respondent attempted to violate KRPC 3.6(a) through the acts of another; by providing the medical reports and autopsy report to the reporter with the Wichita Eagle.

"KRPC 4.1

"404. Attorneys are required to be honest in dealings with third persons. 'In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.' KRPC 4.1(a).

"405. In the course of representing Z.W. and N.W. in a CINC action regarding H.D. and after A.B.'s death, the respondent sought A.B. and H.D.'s medical records. In H.D.'s CINC case, the district court granted the respondent's request to obtain H.D.'s medical records but denied the respondent's request to obtain A.B.'s medical records. Even though Z.W. and N.W. were neither parties nor interested parties to a family law case involving A.B.'s parents, the respondent caused subpoenas to be issued and obtained medical records and the autopsy report regarding A.B., under K.S.A. 60-245a. K.S.A. 60-245a only authorizes subpoenas from parties. In the certificate of service, the respondent indicated that her clients were not parties to the action. Nonetheless, the respondent's filing was misleading. The respondent made a false statement of material fact, in violation of KRPC 4.1, when she caused subpoenas to be issued under K.S.A. 60-245a.

"406. In the respondent's representation of K.E. and after the hearing on the adoption petitions, the respondent wrote to G.E.C. and E.E.'s therapist. In the letter, the respondent falsely asserted that J.C. was subject to anti-abduction orders, violated the existing parenting plan regarding K.E.'s parenting time, and allowed K.E. to see the children only when they were forcibly removed from her

physical custody. Shortly after the respondent's communication, the therapist discontinued treatment with G.E.C. and E.E. The hearing panel concludes that the respondent made false statements of material fact to a third person, in violation of KRPC 4.1.

"407. The hearing panel concludes that the respondent twice violated KRPC 4.1.

"KRPC 4.2 and KRPC 8.4(a)

"408. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented in the matter without authorization.

"409. Also, '[i]t is professional misconduct for a lawyer to [v]iolate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.' KRPC 8.4(a)

"410. The respondent represented D.F. in a family law matter. Mr. Garcia represented J.A. in the same action. While the parties' child was on a visit with J.A., the respondent contacted A.A., J.A.'s spouse, and told her to have J.A. call the respondent or D.F. or the respondent would contact law enforcement and request a welfare check on T.A. Because J.A. was represented by counsel, it was improper for the respondent to attempt to contact J.A. through another, in violation of KRPC 4.2 and KRPC 8.4(a).

"411. The hearing panel concludes that the respondent violated KRPC 4.2 and KRPC 8.4(a).

"KRPC 4.4(a)

"412. When a lawyer takes action on behalf of a client, the lawyer's action must have a legitimate purpose. 'In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person.' KRPC 4.4(a).

"413. The respondent repeatedly engaged in conduct that had no substantial purpose other than to embarrass, delay, or burden a third person. The respondent also engaged in conduct that violated the rights of a third person. Some examples of the respondent's violations of KRPC 4.4(a) include the following.

"414. The respondent repeatedly falsely accused the Sedgwick County bench, bar, and other officials of engaging in collusion and racketeering. The respondent included her allegations of collusion and racketeering in letters to county officials, notices and motions filed in her personal family law case, and notices and motions filed on behalf of clients. The respondent never provided any evidence to support these allegations. The respondent's accusations against the bench, bar, and other officials had no purpose other than to embarrass and burden those third parties, in violation of KRPC 4.4(a).

"415. During a December 2017, hearing in her personal family law case, the respondent stated on the record that she would be filing a cease and desist order with OJA and a suit in federal court against the court, counsel, and A.G. The respondent's threat of action had no substantial purpose other than to embarrass or burden A.G., his attorney, and the judge, in violation of KRPC 4.4(a).

"416. The respondent filed an attorney disciplinary complaint against Ms. Retzlaff. She sent a copy of the attorney disciplinary complaint to Ms. Retzlaff's law partner and the Sedgwick County sheriff. In the cover letters that accompanied the complaint against Ms. Retzlaff, the respondent falsely accused Ms. Retzlaff of fraud. The respondent's communications served no legitimate purpose and were designed to embarrass and burden Ms. Retzlaff, in violation of KRPC 4.4(a).

"417. In representing Z.W. and N.W., the respondent sent an email message to the district court and approximately 15 others and suggested that the Sedgwick County District Attorney's office engaged in conduct that looked like fraud. The respondent's statement served no purpose other than to embarrass and burden the district attorney's office, in violation of KRPC 4.4(a).

"418. When the respondent improperly obtained copies of A.B.'s medical records and autopsy report, the respondent used a method of obtaining evidence that violated the legal rights of Wesley Medical Center and the Sedgwick County Forensics, in violation of KRPC 4.4(a).

"419. In her representation of Z.W. and N.W., the respondent stated in an email message sent to several attorneys that Mr. Paschal filed malicious and defamatory ethics complaints against her, made failed attempts at criminal obstruction, and had criminally suspect motivations. The respondent's statements served no purpose other than to embarrass and burden Mr. Paschal, in violation of KRPC 4.4(a).

"420. In the respondent's motion to dismiss the CINC proceeding pending regarding N.V., the respondent reminded the district court that no one was immune from damages for fraud. The respondent stated that she intended to file a federal case seeking an injunction for the illegal seizure of N.V. as well as for common law torts. The respondent's statements served no other purpose than to embarrass and burden the court and opposing counsel, in violation of KRPC 4.4(a).

"421. At a temporary custody hearing regarding N.V., the respondent argued with the judge and talked over the judge. The respondent then threatened that she would file an action in federal court unless there were probable cause findings supporting the court's decision. The respondent's behavior in court and threat to sue served no purpose other than to embarrass and burden the court, in violation of KRPC 4.4(a).

"422. After K.E. retained the respondent to represent him, the respondent filed a petition for abduction prevention measures. On the eve of the evidentiary

hearing in the abduction prevention case, the respondent filed petitions for the termination of J.C.'s parental rights and the adoption of the children by A.E., K.E.'s spouse. The respondent filed the abduction prevention petition and the termination and adoption petitions solely to cause a delay in the family law proceedings. The respondent had no basis for filing the cases other than to embarrass and burden J.C. and to delay the family law case, in violation of KRPC 4.4(a).

"423. The respondent also filed a termination and adoption petition regarding B.S. The respondent filed the petition because A.S. would not communicate and resolve outstanding issues. Thus, the respondent had no substantial purpose other than to embarrass and burden A.S., in violation of KRPC 4.4(a).

"424. After the hearing on the adoption petitions, the respondent wrote to G.E.C. and E.E.'s therapist. In the letter, the respondent falsely asserted that J.C. was subject to anti-abduction orders, violated the existing parenting plan regarding K.E.'s parenting time, and allowed K.E. to see the children only when the children were forcibly removed from J.C.'s physical custody. Shortly after the respondent's communication, the therapist discontinued treatment with G.E.C. and E.E. The respondent had no substantial purpose for sending the communication other than to embarrass and burden J.C. and the therapist, in violation of KRPC 4.4(a).

"425. The respondent filed a motion to transfer venue on behalf of K.E. In the motion, the respondent asserted that the district court entered an award of attorney's fees against her in retaliation following her allegations in federal court that the Sedgwick County bench and bar engaged in racketeering. The respondent had no substantial purpose for repeating her racketeering claims other than to embarrass and burden the court, in violation of KRPC 4.4(a).

"426. In the respondent's motion for a new trial filed on behalf of K.E., the respondent accused Ms. Wagle of blatantly misrepresenting the law and facts. The respondent asserted that J.C. and Ms. Wagle engaged in mobster-like conduct. Finally, the respondent argued that the court must either fix the mistake or own the mistake, referencing the respondent's pending federal court action accusing members of the local bench of racketeering. The respondent's statements served no purpose other than to embarrass and burden Ms. Wagle, J.C., and the court and to delay the imposition of the sanctions, in violation of KRPC 4.4(a).

"427. The hearing panel concludes that in each of these examples, the respondent's statements served no purpose other than to embarrass the court, counsel, and the opposing party, to burden the court, counsel, and opposing party, or to cause a delay in the cases, or to violate the legal rights of another. The hearing panel concludes that the respondent repeatedly violated KRPC 4.4(a).

"KRPC 8.2(a)

"428. KRPC 8.2(a) provides:

'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications

or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.'

KRPC 8.2(a). The respondent made false statements regarding judges on many occasions in the representation of herself and her clients. Some examples of the respondent's violations of KRPC 8.2(a) include the following.

"429. The respondent repeatedly falsely accused the Sedgwick County bench and bar and other officials of engaging in collusion and racketeering. The respondent included her allegations of collusion and racketeering in letters to county officials, notices and motions filed in her personal family law case, and notices and motions filed on behalf of her clients. The respondent's allegations were false and defamatory and in violation of KRPC 8.2(a).

"430. Similarly, in an email message to Judge Sanders and Ms. Retzlaff, the respondent falsely asserted that four district court judges had the blood of E.B. on their hands. The respondent's allegations were false statements about the integrity of the judges, in violation of KRPC 8.2(a).

"431. After a disciplinary complaint was filed against the respondent, the respondent, using her firm's Facebook page, cryptically asserted that the district court was guilty of government-sponsored human trafficking. The respondent also asserted that the court profited from the enslavement of families and threatened to incarcerate the respondent, A.G., and other family members. Finally, the respondent falsely asserted that E.B. was tortured and murdered with the help of Chief Judge Fleetwood. The respondent's false statements regarding the integrity of the Sedgwick County bench, generally, and Chief Judge Fleetwood, specifically, seriously undermined and violated KRPC 8.2(a).

"432. The respondent filed a motion requesting that Judge Rundle recuse himself from R.T.'s case. Judge Rundle denied the motion. In the respondent's affidavit to support the motion, the respondent falsely asserted that because she previously accused Sedgwick County judges and attorneys of racketeering and because a different judge found the respondent in contempt, Judge Rundle retaliated against the respondent. The respondent asserted that R.T. was victimized by the judge's misconduct. She falsely asserted that Judge Rundle intended to cause her commercial and personal disparagement. The respondent had no evidence to support her allegations and thus, knew that the allegations she made about Judge Rundle's integrity were false, in violation of KRPC 8.2(a).

"433. After the respondent contacted a judge ex parte, Chief Judge Fleetwood called the respondent and left a voicemail message. In the message, Chief Judge Fleetwood explained that she needed to file a motion and provide notice to the opposing side to have her request considered. Based on that contact, the respondent falsely asserted that Chief Judge Fleetwood threatened to file an ethics complaint against the respondent, Chief Judge Fleetwood engaged in obstruction, and Chief Judge Fleetwood prohibited emergency orders designed to assist law enforcement in rescuing E.B. The respondent's false statements impugned Chief Judge Fleetwood's integrity, in violation of KRPC 8.2(a).

"434. The respondent sent an email message to Judge Dewey, Judge Rundle's administrative assistant, and Mr. Whalen. In the email message, the respondent falsely accused Judge Rundle of making threats against the respondent. The respondent also falsely asserted that members of the Sedgwick County bench threatened to put the respondent in jail with her cousin's murderers. The respondent's statements were false statements concerning the integrity of judges, in violation of KRPC 8.2(a).

"435. The respondent sent Mr. Yost a letter in his capacity as Sedgwick County Counselor. In the letter, the respondent falsely stated that Chief Judge Fleetwood continued to engage in criminal obstruction. The respondent's false statement regarding Chief Judge Fleetwood's integrity is a violation of KRPC 8.2(a).

"436. In representing Z.W. and N.W., the respondent repeated the false accusations that Chief Judge Fleetwood obstructed justice and prohibited the issuance of emergency orders to assist law enforcement in rescuing E.B. The respondent's false statements regarding Chief Judge Fleetwood's integrity is yet another violation of KRPC 8.2(a).

"437. The respondent made many false statements regarding the Sedgwick County bench. The hearing panel concludes that the respondent repeatedly violated KRPC 8.2(a).

"KRPC 8.4(c)

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

"439. The respondent engaged in conduct that involved dishonesty in the following circumstances.

"440. In a letter to Mr. Yost, the respondent asserted the Sedgwick County bench was attempting to jail the respondent in retaliation for complying with a federal racketeering investigation. While the respondent made a report to federal authorities that she believed that the Sedgwick County bench and bar were conspiring in violation of the federal racketeering laws, there is no evidence that the respondent complied with a federal racketeering investigation, that a federal law enforcement agency conducted an investigation based on the respondent's communication, or that members of the Sedgwick County bench retaliated against the respondent. The respondent's statement to Mr. Yost was dishonest, in violation of KRPC 8.4(c).

"441. While the CINC case regarding N.V. was pending, the respondent posted false information on her firm's Facebook page. The respondent falsely asserted that children were being stolen by DCF from homes in places like Andover. She falsely stated that children may be seized from their homes without any warning. The respondent's false statements on her Facebook page violate KRPC 8.4(c).

"442. After the respondent withdrew from her representation of K.V., the respondent made a second false post on her firm's Facebook page, alluding to N.V.'s CINC case. The respondent urged Sedgwick County voters to vote against Judge Smith because he and the governor appeared to be the only two people in Kansas who thought that more non-abused children should be placed in foster care. The respondent also stated that the judge had virtually no legal experience, diminished social skills, and unabashedly marketed on behalf of private organizations that fraudulently contributed to the foster care human trafficking pipeline. The respondent violated KRPC 8.4(c) by posting false information on her Facebook page.

"443. While representing D.F., the respondent engaged in dishonest conduct when she falsely stated to Mr. Garcia that A.A. was a named defendant in a civil RICO and § 1983 action. The respondent also engaged in dishonest conduct when she purported to act with the permission of D.F. when the respondent attempted to terminate B.W.'s treatment of T.A. The respondent violated KRPC 8.4(c) when she made false statements during her representation of D.F.

"444. In her representation of K.E., the respondent asserted in an email message to Judge Rumsey's assistant and Ms. Wagle that Ms. Wagle had requested emergency orders three times in the previous week and the court denied her request each time. The respondent's assertion was misleading. Ms. Wagle simply asked the court to issue an order clarifying the existing order. Ms. Wagle did not seek a new, different, or emergency order. The respondent violated KRPC 8.4(c) when she made a misleading statement to Judge Rumsey's assistant and Ms. Wagle.

"445. After the hearing on the adoption petitions, the respondent wrote to G.E.C. and E.E.'s therapist. In the letter, the respondent falsely asserted that J.C. was subject to anti-abduction orders, violated the existing parenting plan regarding K.E.'s parenting time, and allowed K.E. to see the children only when the children were forcibly removed from J.C.'s physical custody. Shortly after the respondent's communication, the therapist discontinued treatment with G.E.C. and E.E. The respondent violated KRPC 8.4(c) when she made false statements to the therapist.

"446. Finally, during the hearing on Ms. Wagle's emergency motion, the respondent falsely stated to the court that Judge Roush had refused to order K.E. to return the children to J.C. Judge Roush ordered the respondent and her client to return the children to J.C., provided that J.C. remain in Kansas. The respondent violated KRPC 8.4(c) through her false statements to the court.

"447. The hearing panel concludes that the respondent repeatedly violated KRPC 8.4(c).

KRPC 8.4(d)

"448. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d).

"449. The respondent repeatedly engaged in conduct that was prejudicial to the administration of justice in her personal family law case as well as in cases where she represented R.T., Z.W. and N.W., K.V., and K.E. The following are representative examples of the respondent's misconduct in this regard.

"450. The respondent engaged in conduct prejudicial to the administration of justice when she repeatedly unilaterally canceled court-ordered visits between K.G. and A.G. and when she informed Judge Sanders that she would not comply with his orders. The respondent violated KRPC 8.4(d) in this regard.

"451. In communications with A.G. and his attorney, the respondent instructed A.G. on what his attorney should have advised him to do. Attempting to insert herself between her ex-husband and his attorney and provide advice about what A.G.'s attorney should have advised him to do was prejudicial to the administration of justice, in violation of KRPC 8.4(d).

"452. The respondent engaged in conduct prejudicial to the administration of justice, in violation of KRPC 8.4(d), when she repeatedly falsely accused the Sedgwick County family court bench and bar and other officials of engaging in collusion and racketeering. The respondent included her allegations of collusion and racketeering in letters to county officials, notices and motions filed in her personal family law case, and notices and motions filed on behalf of her clients. The respondent never provided any evidence to support these allegations.

"453. The respondent engaged in conduct prejudicial to the administration of justice in her representation of R.T. The respondent took what should have been a simple straight-forward motion to modify child support based on a change in income and, with a scorched earth approach, turned it into vitriolic litigation. M.S.'s income had remained stable since 2012. She had the same employment since before the parties were married. Despite that, the respondent made allegations of unjust enrichment without evidence. She accused counsel of fraud and she accused the court of misconduct. The respondent engaged in professional misconduct prejudicial to the administration of justice, in violation of KRPC 8.4(d).

"454. The respondent engaged in conduct prejudicial to the administration of justice when she obtained A.B.'s medical records and autopsy report through the family law case when her clients were not parties to the case and after the district court denied the respondent's request for the same records in H.D.'s pending CINC case. The respondent violated KRPC 8.4(d).

"455. The respondent engaged in conduct prejudicial to the administration of justice and violated KRPC 8.4(d) when she refused to inform the court of the location of N.V. and when she refused to produce N.V. The respondent engaged in conduct prejudicial to the administration of justice when she drafted and assisted K.V. in executing the power of attorney, referred to the power of attorney as a guardianship case, assisted her client in moving N.V. out-of-county, and

attempted to circumvent the process and avoid the jurisdiction of the court, in violation of KRPC 1.1.

"456. The respondent engaged in conduct prejudicial to the administration of justice when she filed the petitions for abduction prevention measures in a 'move-away' case. The respondent engaged in conduct prejudicial to the administration of justice when she counseled her client to refuse to return G.E.C. and E.E. to J.C.'s physical custody. The respondent engaged in conduct prejudicial to the administration of justice when she filed the petitions for termination and adoption on the eve of the hearing on the petition for abduction prevention measures. The respondent engaged in conduct prejudicial to the administration of justice when she filed the termination and adoption petition regarding B.S. to compel A.S.'s cooperation. Finally, the respondent engaged in conduct prejudicial to the administration of justice when she failed to pay the sanctions ordered by the court. The respondent violated KRPC 8.4(d) in multiple ways in her representation of K.E.

"457. The hearing panel concludes that the respondent repeatedly engaged in conduct prejudicial to the administration of justice, in violation of KRPC 8.4(d).

"KRPC 8.4(g)

"458. 'It is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4(g).

"459. The respondent engaged in conduct that adversely reflects on her fitness to practice law when she made repeated allegations that the Sedgwick County bench and bar engaged in collusion and racketeering. The respondent's conduct adversely reflects on her fitness to practice, in violation of KRPC 8.4(g).

"460. When the respondent inappropriately obtained A.B.'s medical records and autopsy report and provided the records and report to the Wichita Eagle newspaper, she engaged in conduct that adversely reflects on her fitness to practice law, in violation of KRPC 8.4(g).

"461. The respondent engaged in conduct that adversely reflects on her fitness to practice law when, in response to a disciplinary complaint, the respondent falsely stated that a review of the transcript of the proceedings would establish the judge's legal inexperience, not her legal inexperience. A review of the transcript establishes that the respondent did not understand the procedures related to CINC and PFA cases. The respondent's comments in her response to the disciplinary complaint adversely reflect on her fitness to practice law, in violation of KRPC 8.4(g).

"462. After the respondent withdrew from her representation of K.V., the respondent made a post on her firm's Facebook page, alluding to N.V.'s CINC case. The respondent urged Sedgwick County voters to vote against Judge Smith

because he and the governor appeared to be the only two people in Kansas who thought that more non-abused children should be placed in foster care. The respondent also stated that the judge had virtually no legal experience, diminished social skills, and unabashedly marketed on behalf of private organizations that fraudulently contributed to the foster care human trafficking pipeline. The respondent engaged in conduct that adversely reflects on her fitness to practice law by posting the statements on her firm's Facebook page, in violation of KRPC 8.4(g).

"463. The respondent engaged in conduct that adversely reflects on her fitness to practice law, in violation of KRPC 8.4(g) when she wrote to B.W., ordered B.W. not speak to anyone regarding her treatment of T.A., and discontinued B.W.'s services without the permission of her client.

"464. Despite Ms. Wagle's repeated assurances that J.C. would remain in Kansas until the court ruled on custody, the respondent continuously argued that J.C. was immediately moving from Kansas and, as a result, K.E. was entitled to physical custody of the children. The respondent's repeated refusal to honor the district court's order that the children return to J.C.'s physical custody adversely reflects on the respondent's fitness to practice law, in violation of KRPC 8.4(g).

"465. K.E. refused to return the children to J.C. at the end of his parenting time. At a hearing held 10 days after the children should have returned to their mother's physical custody but had not been returned, the respondent argued that K.E. was not in violation of the existing parenting plan because it had been his weekend to have parenting time. The respondent's misplaced argument that K.E. did not violate the existing parenting agreement adversely reflects on the respondent's fitness to practice law, in violation of KRPC 8.4(g).

"466. During the time that K.E. improperly refused to return the children to J.C., the respondent agreed to permit J.C. to have four hours of supervised visitation. The respondent's conclusion that she had the authority to establish supervised visitation when the existing parenting plan required the children to be with J.C., reflects adversely on the respondent's fitness to practice law, in violation of KRPC 8.4(g).

"467. The respondent wrote to G.E.C. and E.E.'s therapist. Without any evidence to support the allegation, the respondent falsely asserted that G.E.C. was at risk of harm by J.C. and that J.C.'s lethality assessment was pronounced and indicative of a person capable of homicide. Shortly after the therapist received the respondent's communication, the therapist discontinued treatment with the children. The respondent's intentional interference with the patient/therapist relationship adversely reflects on the respondent's fitness to practice law, in violation of KRPC 8.4(g).

"468. The hearing panel concludes that the respondent repeatedly engaged in conduct that adversely reflects on her fitness to practice law, in violation of KRPC 8.4(g).

"Allegations that the Respondent Violated the Rules of Professional Conduct

During the Disciplinary Proceedings

"469. The disciplinary administrator requested that the hearing panel find violations of the Kansas Rules of Professional Conduct based on email messages sent by the respondent shortly before the disciplinary hearing. While Exhibits 307 through 309 are relevant for purposes of factors in aggravation, the exhibits may not form the basis of a rule violation because allegations regarding this conduct were not (and, given the timing, could not have been) included in the amended formal complaint. As such, the hearing panel considered the information contained in Exhibits 307 through 309 only as it related to factors in aggravation. *See State v. Turner,* 217 Kan. 574, 538 P.2d 966 (1975) (The disciplinary administrator must clearly set out the facts in the complaint so that the respondent receives proper notice of the basic factual situation out of which the charges might result.)

"*American Bar Association Standards for Imposing Lawyer Sanctions*

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

"471. *Duty Violated*. The respondent violated duties owed to her clients to provide competent representation and to avoid conflicts of interest. The respondent violated her duty owed to the public to maintain her personal integrity. The respondent violated duties owed to the legal system to refrain from engaging in dishonest conduct, to refrain from abusing the legal process, and to refrain from engaging in improper communications with individuals in the legal system. Finally, the respondent violated duties to the legal profession to refrain from engaging in conduct that is dishonest, is prejudicial to the administration of justice, and adversely reflects on her fitness as an attorney.

"472. *Mental State*. The respondent knowingly and intentionally violated her duties.

"473. *Injury*. As a result of the respondent's extensive misconduct, the respondent caused actual serious injury to her clients, the public, the legal system and the legal profession. The respondent's misconduct also led to the unnecessary expenditure of court resources, unnecessary attorney's fees, and significant delay in many proceedings. The respondent's misconduct led to the dissemination of private medical records and an autopsy report to a local newspaper. The respond-

ent's misconduct led to the imposition of sanctions against the respondent's clients, her co-counsel, and herself. Most significantly, the respondent's misconduct resulted in G.E.C. and E.E. being separated from their mother, J.C., for 23 days.

"Aggravating and Mitigating Factors

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

"475. *Dishonest or Selfish Motive*. Much of the respondent's misconduct in this case involved dishonest conduct. Clearly, the respondent's misconduct was motivated by dishonesty. Accordingly, the hearing panel concludes that the respondent's dishonest motive aggravates the misconduct in this case.

"476. *A Pattern of Misconduct*. The respondent engaged in patterns of misconduct. The respondent repeatedly denied her ex-husband visitation with their child. She repeatedly falsely asserted that the Sedgwick County bench and bar engaged in collusion and racketeering. The respondent repeatedly improperly caused the delay. The respondent repeatedly refused to assist in transferring the physical custody of children in violation of court orders. The respondent engaged in patterns of personal attacks on opposing parties, opposing counsel, and courts throughout the underlying litigation as well as during the disciplinary investigation and prosecution. The respondent's patterns of misconduct significantly aggravate the serious misconduct in this case.

"477. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.1 (competence), KRPC 1.2(d) (scope of representation), KRPC 1.7(a)(2) (conflict of interest), KRPC 3.1 (meritorious claims and contentions), KRPC 3.2 (expediting litigation), KRPC 3.3(a)(1) (candor to the tribunal), KRPC 3.4(c) (fairness to opposing party and counsel), KRPC 3.4(f) (fairness to opposing party and counsel), KRPC 3.5(d) (impartiality and decorum of the tribunal), KRPC 3.6(a) (trial publicity), KRPC 4.1 (truthfulness in statements to others), KRPC 4.2 (communication with a person represented by counsel), KRPC 4.4(a) (respect for rights of third persons), KRPC 8.2(a) (judicial and legal officials), KRPC 8.4(c) (professional misconduct involving dishonesty), KRPC 8.4(d) (professional misconduct that is prejudicial to the administration of justice), and KRPC 8.4(g) (professional misconduct that adversely reflects on fitness to practice). The respondent violated many of the rules numerous times. The number of offenses committed by the respondent significantly aggravates the respondent's misconduct.

"478. *Refusal to Acknowledge Wrongful Nature of Conduct*. The respondent refused to acknowledge that she engaged in any misconduct or violated any of the Kansas Rules of Professional Conduct. The respondent's refusal to acknowledge the wrongful nature of her conduct is an aggravating factor.

"479. *Vulnerability of Victim*. The respondent's clients and the opposing parties were vulnerable to the respondent's misconduct.

a. For issues related directly to the respondent's misconduct, two courts ordered R.T. to pay sanctions. First, the district court ordered R.T. to pay $4,440 to M.S. for costs and attorney's fees. It is unclear whether R.T. paid the $4,440 sanction. Second, the Court of Appeals ordered R.T. to pay Mr. Whalen's attorney's fees in the amount of $960. The respondent provided Mr. Whalen a $960 check.

b. It appears to the hearing panel that the respondent's misconduct exacerbated K.V.'s situation. K.V. was vulnerable to the respondent's misconduct in that regard.

c. J.C., G.E.C., and E.E. were vulnerable to the respondent's misconduct.

d. Based on the obstructionist approach the respondent took in representing K.E. (refusing to assist Ms. Wagle in having the children returned to J.C.), the district court ordered K.E. to pay $5,000 in attorney's fees to J.C., for denying J.C. parenting time. Thus, K.E. was also vulnerable to the respondent's misconduct.

"480. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas on April 28, 2000. At the time of the misconduct, the respondent had been practicing law for more than 15 years.

"481. *Indifference to Making Restitution*. The Sedgwick County District Court sanctioned the respondent personally on three occasions. Neither party presented any evidence that the respondent paid the awards of attorney's fees and sanctions.

a. The district court ordered the respondent to pay Mr. Garcia $500 for attorney's fees for violating K.S.A. 60-211(b)(3).

b. The district court ordered the respondent to pay two sanctions in connection with her representation of K.E. First, on March 28, 2019, the court ordered the respondent and her co-counsel to pay $9,190 in attorney's fees to J.C.

c. On June 10, 2019, the court ordered the respondent to pay J.C. $5,000 for violating K.S.A. 60-211(b). The sanction was not based on attorney's fees. The court granted J.C. a judgment against the respondent.

"482. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Because the respondent did not testify nor did she call any witnesses on her behalf, evidence of mitigation was limited. However, in reaching its recommendation for discipline, the hearing panel, in this case, notes the following:

"483. *Absence of a Prior Disciplinary Record*. The record is void of evidence that the respondent has previously been disciplined.

"484. *Imposition of Other Penalties or Sanctions*. While other penalties (attorney's fees and sanctions) were imposed against the respondent personally as described in ¶ 481 above, the respondent has not paid those sanctions. As a result, the imposition of the other penalties will become a mitigating factor only if the respondent pays the attorney's fees and sanctions. It is important to note

that the respondent provided Mr. Whalen a $960 check from her law firm for the payment of one sanction ordered against R.T. However, there was no evidence establishing the source of the funds.

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

'4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.'

'4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.'

'5.11 Disbarment is generally appropriate when . . . (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.'

'6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.'

'6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.'

"*Discussion*

"486. When the respondent became an attorney, she took an oath. The oath required the respondent to promise not to 'delay nor deny the rights of any person through malice, for lucre, or from any unworthy desire.' She also promised not to foster or promote any 'fraudulent, groundless or unjust suit.' Finally, the respondent promised that she would 'neither do, nor consent to the doing of any falsehood in court.' The respondent failed in each regard to uphold her oath. The respondent denied the rights of A.G., R.V., and J.C. She promoted numerous fraudulent, groundless, and unjust claims and suits. The respondent provided false information to courts on many occasions.

"487. The respondent's misconduct caused actual serious harm in each case. Most significantly, the respondent prevented a mother from seeing her children for at least 23 days. The effects of the respondent's misconduct are long-lasting.

"488. The respondent's false allegations of collusion, racketeering, and general misconduct against the Sedgwick County bench, bar, and other officials as well as her allegations of misconduct by the disciplinary administrator as evidenced by Exhibits 307 through 309, harmed the legal profession in unmeasurable ways.

"489. It appears to the hearing panel that instead of assisting her clients in achieving outcomes that met their needs and, as described by Judge Rundle, the respondent

took a scorched earth approach to the practice of law. The respondent's approach did not serve her clients or the justice system well.

"490. The respondent's conduct during the disciplinary proceedings, as evidenced by Exhibits 307-309, establishes that she has continued her abusive litigation practices.

"491 . For the respondent's egregious and pervasive misconduct and her refusal to acknowledge the wrongful nature of her conduct, the hearing panel concludes that the respondent should no longer enjoy the privilege of a license to practice law.

"492. The hearing panel concludes that the respondent poses a substantial threat of harm to clients and the administration of justice and recommends that the disciplinary administrator file a motion for temporary suspension under Rule 213 (2021 Kan. Sup. Ct. R. 262).

"*Recommendation of the Disciplinary Administrator*

"493. The disciplinary administrator recommended that the respondent be disbarred.

"*Recommendation of the Respondent*

"494. The respondent recommended that the allegations of misconduct pending against her be dismissed.

"*Recommendation of the Hearing Panel*

"495. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be disbarred.

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

DISCUSSION

I. *The panel's findings of fact and conclusions of law in the final hearing report are supported by clear and convincing evidence.*

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 Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). Clear and convincing evidence is evidence that causes the fact-finder to believe

that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so this 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). However, Supreme Court Rule 228(h)(2)(E) (2022 Kan. S. Ct. R. at 289) provides that after exceptions are filed, "[i]f either party fails to file a brief, that party will be deemed to have admitted the findings of fact and conclusions of law in the final hearing report."

Respondent was given adequate notice of the formal complaint and of the amended complaint, to which she filed an answer. On February 3, 2022, respondent filed a timely Notice of Exception to all findings of fact and conclusions of law in the final hearing panel report. However, respondent failed to subsequently file any supporting briefs. Rule 228(h)(2)(A) provides that the party who files an exception must file an opening brief not later than 30 days after the court clerk provides the transcript to the respondent. The Clerk of the Appellate Courts mailed Johnston a copy of the transcript on April 15, 2022, along with a notice that her brief would be due on May 18, 2022. Johnston failed to file a brief by that deadline. We then issued a May 31 order that required Johnston to either file a motion for extension of the May 18 deadline, or file a motion to file a brief instanter by June 14, 2022. Johnston did neither.

Instead, on June 14, respondent filed a motion to modify the court's May 31 order, claiming authority under Supreme Court Rule 7.06 (2022 Kan. S. Ct. R. at 51) (motion for rehearing or modification in a case decided by the Supreme Court). Along with respondent's motion to modify, she requested a stay of all deadlines.

This court issued an order on June 29, 2022, denying respondent's motion under Rule 7.06. Because respondent failed to brief, failed to extend her briefing deadline, and subsequently failed in an attempt to stay all deadlines, Rule 228(h)(2)(E) controls. Under that rule, as we stated in our order on June 29, we "deem[] Respondent to have admitted the findings of fact and conclusions of law in the final hearing report because she failed to timely file a brief."

The evidence before the panel clearly and convincingly established that the charged misconduct violated KRPC 1.1 (competence), KRPC 1.2(d) (scope of representation), KRPC 1.7(a)(2) (conflict of interest), KRPC 3.1 (meritorious claims and contentions), KRPC 3.2 (expediting litigation), KRPC 3.3(a)(1) (candor to the tribunal), KRPC 3.4(c) (fairness to opposing party and counsel), KRPC 3.4(f) (fairness to opposing party and counsel), KRPC 3.5(d) (impartiality and decorum of the tribunal), KRPC 3.6(a) (trial publicity), KRPC 4.1 (truthfulness in statements to others), KRPC 4.2 (communication with a person represented by counsel), KRPC 4.4(a) (respect for rights of third persons), KRPC 8.2(a) (judicial and legal officials), KRPC 8.4(c) (professional misconduct involving dishonesty), KRPC 8.4(d) (professional misconduct that is prejudicial to the administration of justice), and KRPC 8.4(g) (professional misconduct that adversely reflects on fitness to practice law).

II. *Respondent's pattern of serious misconduct and dishonesty warrants disbarment.*

The final issue before us is determining the appropriate discipline to impose based on respondent's misconduct. The Disciplinary Administrator and the hearing panel recommended that we disbar respondent from the practice of law. Respondent recommends that the allegations of misconduct be dismissed and that she should receive no discipline.

"We base our disciplinary decision on the facts and circumstances of the violations and the aggravating and mitigating circumstances present. *In re Johanning*, 292 Kan. 477, 490, 254 P.3d 545 (2011). And although not mandated by our rules, this court and disciplinary panels '[h]istorically' turn to the American Bar Association Standards for Imposing Lawyer Sanctions to guide the discipline discussion. . . .

"Under that framework, we consider four factors in assessing punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the misconduct; and (4) the existence of aggravating and mitigating circumstances. ABA Standard 3.0. [Citations omitted.]" *In re Kline*, 298 Kan. 96, 213, 311 P.3d 321 (2013).

ABA Standards for Imposing Lawyer Sanctions sections 9.22 and 9.32 list aggravating and mitigating factors to be considered. Of these, the panel found that the following aggravating factors existed: (1) dishonesty or selfish motive; (2) pattern of misconduct; (3) multiple offenses; (4) refusal to acknowledge wrongful nature of conduct; (5) especially vulnerable victim; (6) substantial experience in the practice of

law; and (7) indifference in making restitution. The panel also identified the following mitigating factors: (1) absence of a prior disciplinary record; and (2) imposition of other penalties or sanctions.

After carefully considering the findings, conclusions, recommendations, and the ABA Standards for Imposing Lawyer Sanctions, we find respondent's misconduct warrants the severe sanction of disbarment.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Shayla C. Johnston is disbarred from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(1) (2022 Kan. S. Ct. R.at 281) for violating KRPC 1.1, 1.2(d), 1.7(a)(2), 3.1, 3.2, 3.3(a)(1), 3.4(c) and (f), 3.5(d), 3.6(a), 4.1, 4.2, 4.4(a), 8.2(a), and 8.4(c), (d), and (g).

IT IS FURTHER ORDERED that the Office of Judicial Administration strike the name of Shayla C. Johnston from the roll of attorneys licensed to practice law in Kansas.

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292) (notice to clients, opposing counsel, and courts following suspension or disbarment).

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

No. 125,160

In the Matter of FORREST A. LOWRY, *Respondent*.

(520 P.3d 727)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Ninety-day Suspension.* Original proceeding in discipline. Opinion filed December 2, 2022. Ninety-day suspension, stayed pending successful completion of the agreed three-year probation plan.

W. Thomas Stratton Jr., of Disciplinary Administrator's office, argued the cause, and *Stanton A. Hazlett*, former Disciplinary Administrator, and *Gayle Larkin,* Disciplinary Administrator, were with him on the formal complaints for the petitioner.

John J. Ambrosio, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, argued the cause for respondent, and *Forrest A. Lowry*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Forrest A. Lowry, of Ottawa, an attorney admitted to the practice of law in Kansas in 1988.

The following summarizes the history of this case before the court:

The Office of the Disciplinary Administrator filed a formal complaint in disciplinary case number DA13,344 against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer to the complaint.

The hearing panel then conducted a hearing on the formal complaint by Zoom, where the respondent appeared along with counsel. Following the hearing, the hearing panel issued an order stating that the panel would keep the record open, and if the respondent timely filed and implemented a plan of probation, the hearing panel would schedule a second hearing to receive evidence on the probation plan and its implementation. Respondent did file and implement such plan, and further hearing on the formal complaint was scheduled.

Before the hearing could take place, respondent self-reported an ineffective assistance of counsel determination to the Office of the Disciplinary Administrator. The self-report was docketed and investigated by the Disciplinary Administrator as disciplinary case number DA13,693. The formal hearing in DA13,344 was continued until a probable cause determination could be made in DA13,693.

Months later, the Office of the Disciplinary Administrator filed a formal complaint in DA13,693. The respondent filed an answer to this new complaint. That same day, the respondent filed a proposed plan of probation in DA13,693, which in material part, was identical to the amended probation plan filed in DA13,344. Both cases were scheduled for combined disposition. A formal hearing, during which respondent appeared in person and by counsel, was held by Zoom on all remaining matters in both cases.

The hearing panel determined the respondent violated KRPC 1.3 (2022 Kan. S. Ct. R. at 331) (diligence); KRPC 1.4 (2022 Kan. S. Ct. R. at 332) (communication); KRPC 3.2 (2022 Kan. S. Ct. R. at 390) (expediting litigation); and KRPC 8.4 (2022 Kan. S. Ct. R. at 434) (professional misconduct).

Upon conclusion of the hearing, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"*Findings of Fact*

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

"34. The respondent is engaged in the private practice of law as a solo practitioner. His practice consists of criminal defense in state and federal courts. He has served as panel counsel for the Board of Indigents' Defense Services, which provides indigent felony defense services in Kansas state courts.

"DA13,344

"*Representation of R.F.*

"35. In May 2008, R.F. was convicted of first-degree murder, rape, aggravated kidnapping, aggravated arson, aggravated criminal sodomy, aggravated battery, and criminal threat. The court sentenced R.F. to 81 years in prison, including a hard 50 sentence for the murder conviction.

"36. R.F. took a direct appeal from his convictions to the Kansas Supreme Court. The Supreme Court affirmed the convictions in 2010.

"37. On November 3, 2010, R.F. sought relief pursuant to K.S.A. 60-1507 in Allen County District Court case number 2010-CV-90.

"38. The court considered and denied R.F.'s K.S.A. 60-1507 motion on March 22, 2013. Thereafter there was a delay during which notice of appeal was filed, the Appellate Defender's Office was allowed to withdraw, and the appeal was withdrawn. Then, the court appointed other counsel to perfect the appeal.

"39. Other counsel failed to timely perfect the appeal. On May 16, 2018, other counsel filed a notice of appeal and a motion to withdraw from the representation. The court granted other counsel's motion to withdraw.

"40. On June 13, 2018, Dina L. Morrison, chief clerk of the Allen County District Court, called the respondent and informed him that he had been selected to be appointed to represent R.F. in the appeal from the denial of the K.S.A. 60-1507 motion.

"41. The respondent accepted the appointment to represent R.F.

"42. On June 13, 2018, Ms. Morrison sent the respondent an email that stated:

'I have submitted the Order Appointing to Judge Rogers and it should be done later today and you will have access to the case. I added you as a conflict attorney in the underlying criminal case since you aren't officially appointed on it. I hope that allows you access in Eflex. The case number is 2006CR110.

'Judge Rogers asked me to thank you for taking the case.'

"43. That same day, the Allen County District Court entered an order appointing the respondent as attorney of record in 2010-CV-90.

"44. The respondent took no immediate steps to timely perfect R.F.'s appeal.

"45. On February 26, 2019, R.F. wrote to the respondent asking him for a status update. The respondent did not respond to R.F.'s letter.

"46. On May 24, 2019, R.F. again wrote to the respondent asking him for a status update. The respondent did not respond to R.F.'s letter.

"47. On July 17, 2019, R.F. sent a letter of complaint to the disciplinary administrator's office about the respondent.

"48. After receiving a copy of R.F.'s complaint, the respondent sent a response to the disciplinary administrator's office on September 16, 2019. In his response, the respondent stated that he would perfect the appeal that same day or the following day.

"49. The respondent stated in his response to R.F.'s complaint and testified during the formal hearing that he confused R.F. with another client of the respondent's with a similar name and located at the same prison.

"50. The respondent attempted to docket the appeal on September 18, 2019, and again on October 3, 2019, but both attempts were rejected by the court because the filings did not include required certified copies of documents. The respondent finally perfected the appeal on October 15, 2019.

"51. The respondent testified that during this time a firm he was part of for 22 years disbanded and he had recently begun practicing on his own with no support staff except for help with billing. The respondent has dealt with sleep apnea, depression, and occupational paralysis for years, which he testified impacted his ability to complete work on clients' cases.

"52. The respondent stipulated that his conduct in representing R.F. in this case violated KRPC 1.3 (diligence), 1.4 (communication), and 3.2 (expediting litigation).

"DA13,693

"*Representation of A.W.*

"53. A.W. was charged with two counts of rape in Douglas County District Court case number 2017-CR-1012. The respondent represented A.W. in 2017-CR-1012, including a four-day jury trial that began on January 7, 2019. At the end of trial, the jury hung on the first count and convicted A.W. of the second count of rape.

"54. After appeal, a Van Cleave hearing was held in A.W.'s case on November 2 and 3, 2020. Douglas County District Court Judge Sally D. Pokorny found that the respondent provided ineffective assistance of counsel to A.W.

"55. On March 16, 2021, Judge Pokorny ruled, in material part, as follows:

'The discovery produced by the State included approximately 2000 pages of text messages and hundreds of photographs that were collected from [the alleged victim's] phone, and this discovery was in Mr. Lowry's possession. However, Mr. Lowry testified he did not review the evidence.'

'The failure of Mr. Lowry to review the text messages denied him the ability to strongly attack the credibility of [the State's expert] Dr. Spiridigliozzi and the validity of his report.'

'I also find it was ineffective assistance of counsel for Mr. Lowry to fail to request the unredacted report from Dr. Spiridigliozzi. Mr. Lowry received a redacted report of the doctor's report. He never requested an unredacted report. He admits he was entitled to the full report and has no explanation for why he did not ask for an unredacted report.'

'. . . According to the report written by Dr. Spiridigliozzi, he knew the victim had received treatment for mental health issues before she met the defendant. He knew she had previously been prescribed Xanax and Zoloft and he received a

report from the victim's mother that the victim was previously prescribed Prozac. But when he testified at the jury trial, he failed to let the jury know that, and Lowry, not having the text messages or Dr. Spiridigliozzi's full report, was unable to cross-examine him about this issue.'

'Dr. Spiridigliozzi was operating as the State's hired lie detector and he implied the victim was credible because he had confirmed everything she told him was accurate. At a pretrial hearing, the parameters of Dr. Spiridigliozzi went far beyond those parameters and no objection was made. Mr. Lowry was ineffective for failing to object.'

'However, the Court's confidence in the jury's verdict is undermined by Mr. Lowry's failure to review text messages, as those messages went directly to the credibility of the victim's self-reports to Dr. Spiridigliozzi, upon which his diagnosis was based, and went directly to the credibility of Dr. Spiridigliozzi's testimony to the jury that he had confirmed everything the victim reported to him as being accurate.'

'In my 43 years of experience as a lawyer and a Judge trying and presiding over criminal cases, it is my firm belief that if the jury knew of the information contained in the 2000 text messages taken from the victim's phone, there is a substantial likelihood the outcome of this case would have been different. I find Mr. Lowry was ineffective in not reviewing the discovery in his possession and in not demanding a copy of the unredacted report from [the State's expert]. I am ordering a new trial in this case. I will prepare an order to transport the defendant back to Douglas County for a bond hearing and will also have, at the same time, a case management hearing and a setting for a new trial.'

"56. The respondent testified that he agreed with Judge Pokorny's decision that he provided ineffective assistance. The respondent said that at the time of A.W.'s trial, he had well over 100 case files, represented clients in high level felony matters in 10 counties and three or four federal courts, and was preparing for a murder trial in Coffey County and another rape trial just two weeks later. He acknowledged that he had taken on too much work during that time.

"57. The respondent stipulated that he violated KRPC 1.3 (diligence) by failing to review the text messages of the alleged victim that he had received in discovery, which would have allowed the respondent to cross examine the State's expert regarding the alleged victim's credibility more effectively. The respondent also stipulated that he violated KRPC 1.3 by failing to object to the State's expert testimony implying that the alleged victim's statements to the expert were credible because the expert confirmed the statements were accurate. Further, the respondent stipulated that he violated KRPC 1.3 by failing to request an unredacted report of the State's expert, to which he was entitled, and which would have enabled him to more effectively cross examine the State's expert at trial. Finally, the respondent stipulated that he violated KRPC 1.3 by failing to bring to the jury's attention certain Facebook pictures that portrayed the alleged victim in a less sympathetic way than she had portrayed herself to the State's expert witness.

"58. The respondent further stipulated that the above conduct also violated KRPC 8.4(d) (misconduct prejudicial to the administration of justice).

"59. The respondent further stipulated that the above conduct also violated KRPC 8.4(g) (misconduct that adversely reflects on the lawyer's fitness to practice law).

"*Conclusions of Law*

"60. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.3 (diligence), KRPC 1.4 (communication), KRPC 3.2 (expediting litigation), and KRPC 8.4(d) and (g) (professional misconduct), as detailed below.

"KRPC 1.3

"61. Attorneys must act with reasonable diligence and promptness in representing their clients. See KRPC 1.3. The respondent failed to diligently and promptly represent R.F. and A.W.

"62. In R.F.'s case, the respondent failed to timely file and perfect R.F.'s appeal of the denial of his K.S.A. 60-1507 motion. The respondent accepted appointment to represent R.F. on June 13, 2018, and was appointed that same day. However, the respondent did not attempt to docket R.F.'s appeal until September 18, 2019. The respondent's first two attempts to docket the appeal were rejected for failure to include required certified copies of court documents. The respondent finally perfected the appeal on October 15, 2019. This resulted in a delay of over 16 months for R.F.'s appeal to be perfected.

"63. In A.W.'s case, the respondent: (1) failed to request an unredacted copy of the State's expert's report, to which the respondent was entitled, and would have enabled him to more effectively cross examine the State's expert; (2) failed to review the alleged victim's text messages that the respondent had received in discovery, which, had he reviewed them, would have enabled him to cross examine the State's expert during trial about the messages, potentially undermining the credibility of the alleged victim; (3) failed to object to the State's expert's testimony implying that the alleged victim's statements to the expert were credible because the expert confirmed the statements were accurate; and (4) failing to bring to the jury's attention certain Facebook pictures that portrayed the alleged victim in a less sympathetic way than she had portrayed herself to the State's expert.

"64. The respondent's lack of diligence caused significant delay in R.F.'s appeal and resulted in an ineffective assistance of counsel determination and finding of substantial likelihood that the jury's ruling would have been different but for the respondent's ineffective assistance in A.W.'s case.

"65. The respondent stipulated that he violated KRPC 1.3 in R.F. and A.W.'s cases.

"66. Because the respondent failed to act with reasonable diligence and promptness in representing his clients, R.F. and A.W., the hearing panel concludes that there is clear and convincing evidence the respondent violated KRPC 1.3.

"KRPC 1.4

"67. 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.'

"68. The respondent violated KRPC 1.4(a) when he failed to respond to R.F.'s February 26, 2019, and May 24, 2019, letters requesting information about the status of his appeal.

"69. The respondent stipulated that he violated KRPC 1.4 in R.F.'s case.

"70. Accordingly, the hearing panel concludes that there is clear and convincing evidence the respondent violated KRPC 1.4(a).

"KRPC 3.2

"71. 'A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client.' KRPC 3.2.

"72. The respondent caused unnecessary delay in R.F.'s case by failing to perfect the appeal of the denial of R.F.'s K.S.A. 60-1507 motion for more than 16 months.

"73. The respondent stipulated that he violated KRPC 3.2 in R.F.'s case.

"74. Accordingly, the hearing panel concludes that there is clear and convincing evidence the respondent violated KRPC 3.2.

"KRPC 8.4(d)

"75. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d).

"76. The respondent engaged in conduct that was prejudicial to the administration of justice when he failed to comply with the order appointing him to represent R.F., which he agreed to do, and subsequently failed to perfect R.F.'s appeal for over 16 months.

"77. The respondent engaged in conduct that was prejudicial to the administration of justice when he failed to provide effective assistance of counsel to A.W. as determined by Judge Pokorny on March 16, 2021.

"78. The respondent stipulated that he violated KRPC 8.4(d) in A.W.'s case.

"79. The hearing panel concludes that there is clear and convincing evidence the respondent violated KRPC 8.4(d) in his representation of both R.F. and A.W.

"KRPC 8.4(g)

"80. 'It is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4(g).

"81. The respondent engaged in conduct that adversely reflects on his fitness to practice law when he provided ineffective assistance of counsel to A.W. as determined by Judge Pokorny on March 16, 2021. The ineffective assistance finding was based on multiple errors by the respondent of a magnitude great enough that Judge Pokorny found that there was a 'substantial likelihood the outcome of this case would have been different' but for the respondent's ineffective assistance.

"82. The respondent stipulated that he violated KRPC 8.4(g) in A.W.'s case.

"83. As such, the hearing panel concludes that there is clear and convincing evidence the respondent violated KRPC 8.4(g).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"84. 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.

"85. *Duty Violated*. The respondent violated his duty to his clients and his duty to the legal system.

"86. *Mental State*. The respondent negligently violated his duty. The respondent's lack of diligence in R.F.'s and A.W.'s cases exhibit a pattern of neglect.

"87. *Injury*. As a result of the respondent's misconduct, the respondent caused potential significant injury to R.F. While R.F.'s appeal of the denial of his K.S.A. 60-1507 motion was ultimately heard by the Court and denied, the potential injury of a 16-month delay to perfect the appeal of an incarcerated client is great. Further, as a result of the respondent's misconduct, the respondent caused actual injury to A.W., who was convicted of one count of rape without effective assistance of counsel.

"Aggravating and Mitigating Factors

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

"89. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on two occasions. On March 16, 2010, the respondent entered into a diversion agreement wherein he admitted that he violated KRPC 1.3 (diligence) and 1.4 (communication). On July 19, 2018, the respondent received an informal admonition for violations of KRPC 1.3 (diligence) and 1.4 (communication).

"90. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct in R.F.'s and A.W.'s cases. Particularly, the respondent's lack of diligence and prejudice to the administration of justice are a common theme in both cases.

"91. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.3 (diligence), KRPC 1.4 (communication), KRPC 3.2 (expediting litigation), and KRPC 8.4(d) and (g) (professional misconduct). Further, the respondent committed misconduct in his representation of more than one client. Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"92. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1988. At the time of the misconduct, the respondent had been practicing law for more than 30 years.

"93. 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:

"94. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness.

"95. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions*. The respondent fully cooperated with the disciplinary process including cooperating with investigators and ultimately entering into stipulations as to facts and rules violations in both DA13,344 and DA13,693. Further, the testimony of James Campbell showed that over the past year the respondent has actively complied with his proposed probation plan and Mr. Campbell's directions.

"96. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar of Franklin County, Kansas, and accepts court appointed

criminal defense cases in other surrounding counties. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by several letters received by the hearing panel and by the testimony of district court judge Amy Harth and attorney James Campbell.

"97. *Physical Disability*. The respondent testified that he has been diagnosed with and suffers from sleep apnea, which causes insomnia, for many years. The respondent has worked with his physician to resolve the sleep apnea issue but testified that he has had little success in addressing it via the use of a CPAP machine. However, the respondent testified that he has experienced good results from taking other steps as suggested by his physician. Under the respondent's proposed probation plan, the respondent is required to follow the advice of his physician for treatment of all medical reasons for his insomnia. Under the probation plan, the respondent is also required to continue to work with KALAP and follow KALAP's advice to address his sleep problems.

"98. *Mental Disability or Chemical Dependency Including Alcoholism or Drug Abuse*. The respondent testified that he battles depression, which the respondent testified may be exacerbated by exhaustion caused by sleep apnea. The respondent also testified that he suffers from occupational paralysis, which he described as a 'mental paralysis where I look at it and say I don't think I can do one more thing today . . . I have to put this off until the morning.' The respondent testified that he has been working regularly with KALAP, which he states has been 'a lot of help.' Under the respondent's proposed probation plan, the respondent is required to continue to work with KALAP and follow KALAP's advice to address any mental health issues.

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

"100. In addition to the above-cited factors, 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) 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.'

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

"6.23 'Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.'

"*Discussion*

"101. In reaching its recommendation of discipline, the hearing panel considered the fact that the conduct at issue in DA13,693 occurred in 2019, around the same time as the conduct at issue in DA13,344, even though the DA13,693 case was docketed after formal hearing in DA13,344 commenced.

"102. The hearing panel also notes that the misconduct alleged in DA13,344 and DA13,693 is similar in nature, and appears to have stemmed from the same underlying circumstances in the respondent's health, unsustainable caseload, and practice management.

"103. When a respondent requests probation, the hearing panel is required to consider Rule 227 (2022 Kan. S. Ct. R. at 283), which provides:

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

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

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

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

"104. The respondent developed a workable, substantial, and detailed plan of probation. The plan provides that the respondent shall not violate the plan or the KRPC. The respondent provided a copy of the proposed plan of probation to the disciplinary administrator and each member of the hearing panel at least 14 days prior to the continued hearing on the formal complaint in DA13,344 and the hearing in DA13,693. The respondent put the proposed plan of probation into effect prior to the hearing by complying with each of the terms and conditions of the probation plan for over one year.

"105. Further, the respondent's chosen probation supervisor, James Campbell, testified at length during the hearing about the measures put in place for the respondent's probation and the respondent's compliance with those measures over the past year. The hearing panel concludes that the probation plan contains adequate safeguards to address the respondent's misconduct, protect the public, and ensure the respondent's compliance with the KRPC, the Rules Relating to Discipline of Attorneys, and the respondent's oath of office.

"106. The hearing panel concludes that the respondent has complied with Rule 227(a) and (c) and that the respondent's probation plan satisfies the requirements in Rule 227(b). The hearing panel further concludes that the respondent's misconduct can be corrected by probation.

"107. Placing the respondent on probation is in the best interests of the legal profession and the citizens of the State of Kansas.

"108. Of note, the respondent's far reduced case load appears to have allowed him to better represent his clients and avoid the issues that led to his misconduct in these two

matters. The hearing panel recommends that a reduced caseload remain part of the respondent's practice as recommended by Mr. Campbell.

"109. The hearing panel thanks Mr. Campbell for his service to the bar by serving as probation supervisor for the respondent and for helping the respondent implement practices that appear to have benefitted the respondent, his clients, and the legal system.

"*Recommendation of the Parties*

"110. The disciplinary administrator recommended that the respondent's license to practice law be suspended for a period of six months. The disciplinary administrator also recommended that the respondent be required to undergo a reinstatement hearing. The disciplinary administrator does not oppose staying this period of suspension while the respondent is on probation for three years according to the terms of the probation plan filed by the respondent.

"111. The respondent recommended an unspecified underlying period of suspension to be stayed while the respondent is on probation for three years according to the terms of the probation plan filed by the respondent.

"*Recommendation of the Hearing Panel*

"112. Based upon the stipulations, the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of 90 days. The hearing panel further recommends that prior to reinstatement, the respondent be required to undergo a hearing pursuant to Rule 232 (2022 Kan. S. Ct. R. at 293.) The hearing panel further recommends that the imposition of the 90-day suspension be stayed while the respondent is on probation for three years according to the terms of the probation plan filed by the respondent in DA13,344 on January 15, 2021, and as Respondent's Exhibit 693-E in DA13,693.

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

DISCUSSION

In a disciplinary proceeding, our standard of review is well-established.

"[T]he 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 Hodge*, 307 Kan. 170, 209, 407 P.3d 613 (2017); Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218,

473 P.3d 886 (2020)." *In re Huffman*, 315 Kan. 641, 674, 509 P.3d 1253 (2022).

The respondent was given adequate notice of each formal complaint to which he filed an answer. The respondent was also given adequate notice of the hearings before the panel and the hearing before this court. The respondent developed a detailed probation plan that was provided to the Disciplinary Administrator and each member of the hearing panel prior to the hearing on the formal complaints. Respondent also had the opportunity to take exception to the panel's findings of fact and conclusions of law.

The respondent chose to take no exceptions, and so the panel's findings of fact and conclusions of law are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2022 Kan. S. Ct. R. at 287). These admitted facts establish by clear and convincing evidence the charged misconduct in violation of KRPC 1.3 (2022 Kan. S. Ct. R. at 331) (diligence), KRPC 1.4 (2022 Kan. S. Ct. R. at 332) (communication), KRPC 3.2 (2022 Kan. S. Ct. R. at 390) (expediting litigation), and KRPC 8.4 (2022 Kan. S. Ct. R. at 434) (professional misconduct) and support the panel's conclusions of law. We thus adopt both the panel's findings of fact and conclusions of law.

The only remaining issue is to decide the appropriate discipline for these violations. During oral arguments, the Disciplinary Administrator's office (ODA) proposed following the panel's recommendation of a 90-day suspension stayed during three years of probation according to the respondent's Amended Proposed Probation Plan, pursuant to which the respondent has been operating voluntarily. According to regular reports from respondent's plan supervisor, the respondent has been fully compliant with this plan, which has included following all suggestions made to respondent by the supervisor. The ODA further indicated it would not oppose starting the probation period on January 15, 2021—the date respondent began following the plan voluntarily. Finally, the ODA recommended following the remainder of the panel's recommendations for discipline, including a hearing under Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293) before his license would be reinstated. Respondent echoed the ODA's recommendations, also requesting that the three-year probation period begin January 15, 2021, rather than the date we issue an opinion in this matter.

This court is not bound by the recommendations made by the Disciplinary Administrator or the hearing panel. *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, the recommendations of the hearing panel, and the recommendations of the parties, we conclude appropriate discipline is as follows:

The respondent is suspended from the practice of law for 90 days. However, that suspension is stayed for a period of three years, during which the Respondent is placed on probation under the terms and conditions of his Amended Proposed Probation Plan and the additional condition that respondent's practice be limited to the number of cases advised by his probation supervisor. Respondent's period of probation shall begin on January 15, 2021, which is the date he began voluntarily complying with his proposed plan.

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 Forrest A. Lowry is suspended for 90 days from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) for violations of KRPC 1.3, 1.4, 3.2, 8.4(d), and 8.4(g). However, respondent's suspension is stayed during a three-year period of probation, beginning January 21, 2021. Respondent's probation shall have the terms and conditions set forth above, which are incorporated by reference.

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

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

ROSEN and BILES, JJ., not participating.

In re Leavitt

No. 125,417

In the Matter of TROY J. LEAVITT, *Respondent*.

(520 P.3d 1287)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—One-year Suspension*. Original proceeding in discipline. Opinion filed December 9, 2022. One-year suspension, stayed pending successful participation and completion of probation period of one year.

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

Peggy A. Wilson, of Morrow Willnauer Church, LLC, of Kansas City, Missouri, argued the cause, and *Troy J. Leavitt*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Troy J. Leavitt, of Blue Springs, Missouri. Leavitt was admitted to practice law in Kansas on April 25, 1997. Leavitt also is a licensed attorney in Missouri, admitted in 1996.

On February 23, 2022, the Disciplinary Administrator's office filed a formal complaint against Leavitt alleging violations of the Kansas Rules of Professional Conduct (KRPC). This complaint stemmed from discipline imposed on him from Missouri for the representation of a client in a paternity matter involving custody and child support. The Missouri Supreme Court's decision stemmed from the Missouri disciplinary hearing panel's finding that Leavitt violated Missouri Rules of Professional Conduct 4-1.3 (diligence), 4-1.4 (communication), 4-8.2 (judicial and legal officials), and 4-8.4(d) (misconduct prejudicial to the administration of justice).

On March 9, 2021, the Missouri Supreme Court suspended Leavitt's license to practice law for one year. The court stayed the suspension and placed Leavitt on probation. After Leavitt was placed on probation, the Missouri disciplinary counsel reported to the Office of the Disciplinary Administrator that Leavitt had been informally admonished in 2017 by the Missouri disciplinary counsel for violating Missouri Rules of Professional Conduct 4-1.15

(safekeeping property) and 4-1.16 (terminating representation). The respondent failed to report this prior informal admonishment to the Disciplinary Administrator's office as required by Rule 207 (2017 Kan. S. Ct. R. 246).

On July 11, 2022, the parties entered into a summary submission agreement under Supreme Court Rule 223 (2022 Kan. S. Ct. R. at 278) (summary submission is "[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken").

In the summary submission agreement, the Disciplinary Administrator and Leavitt stipulate and agree that Leavitt violated the following Kansas Rules of Professional Conduct and Supreme Court Rules:

- KRPC 1.3 (2022 Kan. S. Ct. R. at 331) (diligence);
- KRPC 1.4 (2022 Kan. S. Ct. R. at 332) (communication);
- KRPC 8.2 (2022 Kan. S. Ct. R. at 432) (judicial and legal officials); and
- KRPC 8.3 (2022 Kan. S. Ct. R. at 433) (reporting professional misconduct).

Before us, the parties jointly recommend Leavitt's license to practice law be suspended for one year, with the suspension stayed pending successful participation and completion of a one year probation period, and which would begin upon the filing date of this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

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

"*Findings of Fact*: Petitioner and the respondent stipulate and agree that the respondent engaged in the following misconduct as follows:

. . . .

"5. In November 2020, the respondent and the Missouri disciplinary counsel filed a joint stipulation of facts, conclusions of law, and recommendation for discipline. The respondent stipulated to the following facts:

'8. In or about January 2018, [client/father] hired respondent to file a proceeding to modify a paternity judgment involving custody and child support.

'9. In February 2018, respondent filed a Motion to Modify on [client/father]'s behalf in the Circuit Court of Jackson County, Missouri, and it was captioned as [Father, Petitioner v. Mother, respondent], the Honorable S. Margene Burnett presiding.

'10. On November 13, 2018, [mother] through her counsel, filed a Motion to Dismiss the modification proceeding, essentially requesting dismissal as a sanction for procedural issues involving an uncorrected discrepancy between the amended pleadings and the content of the proposed parenting plan. In addition to seeking a dismissal [mother] sought to recover her attorney fees from [client/father].

'11. A proposed Judgment accompanied the Motion to Dismiss. . . .

'12. Upon receipt of the Motion to Dismiss respondent contacted [client/father] and set up an appointment for Saturday, November 17, 2018. [Client/father] cancelled the appointment due to work constraints, so they met on November 20, 2018. [R]espondent advised [client/father] of the Motion to Dismiss and that he believed the Court dismissing the action with prejudice and awarding attorneys' fees for not filling [*sic*] an amended parenting plan when the matter was three months out from trial was highly unlikely.

'13. Also, at the November 20, 2018, meeting, respondent advised [client/father] of the attorneys' fees, but not the exact amount, only that opposing counsel's fees were significantly higher than those being charged respondent.

'14. Additionally, at the November 20, 2018 meeting, respondent referenced that the motion contained [client/father]'s failure to appear for case management, not filing a parenting plan, and not attending co-parenting classes.

'15. On behalf of [client/father], respondent did not want to admit to the Court that [client/father] failed to attend co-parenting classes required by the Court and Counsel believed filing a parenting plan and not answering the motion would be the best way to proceed with the least amount of damage to [client/father]'s case.

'16. A response to the motion to dismiss on behalf of [client/father] was due on Friday, November 23, 2018 (the day after the Thanksgiving holiday). [R]espondent did file a Parenting Plan signed by [client/father] on November 21, 2018, but did not file a specific Memorandum in Opposition to the Motion to Dismiss or seek additional time for a response. [R]espondent claims he thought the Motion to Dismiss would be moot based on the filing of the Amended Parenting Plan. Further, respondent also thought that by filing the parenting plan three months prior to trial, there would be no prejudice to the opposing party and that dismissal with prejudice and attorney's fees would be far to [*sic*] harsh of a remedy for the Court to consider.

'17. Because respondent believed the Motion to Dismiss was moot after the Parenting Plan was filed, Respondent and opposing counsel were in the process of setting up depositions when the case was dismissed.

'18. On November 29, 2018, Judge Burnett entered a Judgment dismissing the modification proceeding. . . . Significantly, the entire motion to modify proceeding brought by [client/father] was dismissed with prejudice.

'19. On November 30, 2018, [mother], through her counsel, filed an application with the court seeking $4,386.50 in attorney fees to be assessed against [client/father] pursuant to R.S.Mo. § 452.355(1).

'20. Respondent did not file any specific opposition to the application for attorney fees, but he did file a motion to reconsider the merits of the dismissal.

'21. A subsequent amendment to the Judgment awarded $4,891.93 in attorney fees against [client/father].

'22. [R]espondent claims to have been "personally outraged" by the Judgment.

'23. [R]espondent did not promptly advise [client/father] of the Judgment nor of the attorney fee application.

'24. Without advising the client of the adverse result, respondent filed a motion for reconsideration on November 30, 2018. [Mother], through her counsel, filed an opposition to the motion for reconsideration on December 4, 2018.

'25. On Saturday, December 8, 2018, respondent realized he did not advise [client/father] of the Court's ruling and called [client/father]. Respondent received a call back from [client/father]'s girlfriend. Respondent then sent a text to [client/father] that said "Emergency text me immediately."

'26. [Client/father] was not aware that the case had been dismissed with prejudice at the time of the "emergency."

'27. The Respondent and [client/father] exchanged a few more texts on Saturday, December 8, 2018. None of the text messages mention a dismissal or judgment or attorney fees.

'28. In between text messages on that Saturday, respondent and [client/father] had a series of phone calls during which respondent lost his temper and made profane and disrespectful statements directed towards [client/father], such as "When I tell you to fucking jump, you better fucking jump."

'29. Another text from respondent to [client/father] indicated that 99% of the blame was on [client/father] for failing to appear for the case management conference or attend counseling, without discussing respondent's lack of response to the motion or that respondent had "mistakenly failed to file" an Amended Parenting Plan. Respondent's communications on that day not only attempted to shift the blame away from himself, but also suggested that [client/fa-

ther] did not care about his children and also unfairly suggested that [client/father] was acting like he was too important to be bothered with the situation while working from out-of-town. Another text message from respondent to [client/father] on December 8, 2018, stated: "I will fire you."

'30. One text from respondent on December 8, 2018, said: "Well we have a rogue judge and an attorney filing motions." Respondent's text was misleading because it omitted the fact that there was actually a Judgment in place rather than just a motion.'

"6. In addition, the respondent stipulated in the Missouri joint stipulation that he violated MRPC 4-1.3 (diligence), MRPC 4-1.4 (communication), MRPC 4-8.2 (judicial and legal officials), and MPRC 8.4(d) (misconduct prejudicial to the administration of justice). The respondent stipulated to the following violations:

'31. As to Count I, respondent violated Missouri Supreme Court Rule 4-1.3 by failing to exercise the required level of diligence in that he failed to promptly respond to the motion to dismiss and the application for attorney fees and instead filed a parenting plan.

'32. As to Count II, respondent violated Missouri Supreme Court Rule 4-1.4 by failing to adequately and promptly communicate the status of the case and the judge's adverse ruling during the critical period of November 21, 2018 to December 10, 2018.

'33. As to Count III, by his profane, unprofessional and disrespectful communications with the client on December 8, 2018, respondent violated Missouri Supreme Court Rule 4-8.4(d).

'34. As to Count IV, by his comments to his client stating that Judge Burnett was a "rogue judge" based on ordering the case dismissed when he believed the motion was moot, and, respondent violated Missouri Supreme Court Rule 4-8.4(d) and Rule 4-8.2.'

"7. On January 12, 2021, the Missouri hearing panel issued its decision, accepting the parties' stipulation and joint recommendation for discipline. The Missouri hearing panel acknowledged the respondent took full responsibility for his actions.

"8. On March 9, 2021, the Missouri Supreme Court suspended the respondent's license to practice law for one year for violating Missouri Rules of Professional Conduct Rule 4-1.3 (diligence), Rule 4-1.4 (communication), Rule 4-8.2 (judicial and legal officials), and Rule 4-8.4(d) (misconduct prejudicial to the administration of justice). The Court stayed the suspension and placed the respondent on probation.

"9. Previously, in 2017, the Missouri disciplinary counsel informally admonished the respondent for violations of Missouri Rules 4-1.15 (safekeeping property) and 4-1.16 (terminating representation). The respondent, however, failed to report the informal admonishment to the disciplinary administrator's office as required by former Rule 207 (2017 Kan. Sup. Ct. R. 246).

"10. After the Missouri Supreme Court placed the respondent on probation, on March 9, 2021, the Missouri disciplinary counsel reported the respondent's 2021 misconduct to the disciplinary administrator's office.

"11. On April 8, 2021, the respondent provided a written response to the disciplinary administrator's office.

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

"12. KRPC 1.3 (diligence): The respondent failed to exercise the required level of diligence in that he failed to promptly respond to the motion to dismiss, the motion for attorney fees, and only filed an amended parenting plan, believing that filing the amended parenting plan, would render the Motion to Dismiss moot. Additionally, there was actual injury to his client when the client's action was dismissed due to the respondent's lack of diligence.

"13. KRPC 1.4 (communication): The respondent failed to adequately and promptly communicate the status of the case and the judge's adverse ruling during the critical period of November 21, 2018 to December 10, 2018.

"14. KRPC 8.2 (judicial and legal officials): The respondent's statements to his client describing the judge as 'rogue' were false or made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.

"15. KRPC 8.3 (reporting professional misconduct) and Rule 207 (2017 Kan. Sup. Ct. R. 246): The respondent failed to report that he had engaged in conduct that constituted misconduct when he did not report his 2017 informal admonition in Missouri.

"Applicable Aggravating and Mitigating Circumstances:

"16. Aggravating circumstances include:

a. Multiple offenses: The respondent's conduct violated multiple professional rules of conduct; Rule 1.6 (diligence), Rule 1.4 (communication), Rule 8.2 (judicial and legal officials), and Rule 8.3 (reporting).

b. Substantial experience in the practice of law: The respondent has been licensed to practice law in Missouri since 1996 and in Kansas since 1997.

"17. Mitigating circumstances include:

a. Absence of a dishonest or selfish motive: There was no intent for the respondent to obtain a significant benefit to himself.

b. Personal or emotional problems if such misfortunes have contributed to violation: The respondent suffered from anger issues as demonstrated with his client communication in this case, but he continues to seek treatment for it . . . .

c. Timely good faith effort to make restitution or to rectify consequences of misconduct: The respondent has made full and timely restitution. The respondent sent letters of apology to the judge, the Honorable S. Marlene Burnett, and to his client. The respondent reimbursed his client attorneys' fees paid in the amount of $2,850. The respondent paid opposing counsel's attorney's fees that the respondent was assessed by the court in the amount of $4,891.83.

d. The present and past attitude of the attorney as shown by their cooperation during the proceeding and his full and free acknowledgment of the transgressions:

e. Previous good character and reputation in the community: The respondent submits admissible evidence of good character and reputation . . . .

f. Imposition of other penalties or sanctions: The respondent's Missouri license was suspended for twelve months but the suspension was stayed pending successful participation and completion of a probation plan for twenty-four months beginning with the Order of Discipline entered by the Missouri Supreme Court on March 8, 2021 [*sic*].

g. Remorse: The respondent expressed deep remorse that he is deeply troubled by his own conduct. The respondent desires to improve his practice and professionalism in the future by:

i. The respondent is currently seeking counseling for anger management issues.

ii. The respondent refunded $2,850 for attorneys' fees paid by his client with a letter of apology concerning his conduct.

iii. The respondent paid the opposing counsel's attorney's fees assessed his client in the amount of $4,891.83.

iv. The respondent sent a letter of apology to the judge concerning his conduct and misjudgment.

"Recommendations for Discipline:

"18. Petitioner and the respondent jointly recommend the respondent's license be suspended for twelve months with the suspension stayed pending successful participation and completion of probation. Probation shall be for twelve months with the terms set forth in the proposed plan of probation . . . . The probation period shall begin to run upon the entry of an Order of Discipline entered by the Kansas Supreme Court.

. . . .

"Additional Stipulations by the Parties:

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

"24. The parties agree that no exceptions to the findings of fact and conclusions of law will be taken.

"25. The complainant in this matter is the Missouri Deputy Chief Disciplinary Counsel for the Missouri Office of Disciplinary Counsel. Notice of the Summary Submission will be provided to the complainant and given 21 days to provide the disciplinary administrator with their position regarding the agreement as provided in Supreme Court Rule 223(d).

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

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

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

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

DISCUSSION

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

The Disciplinary Administrator provided Leavitt with adequate notice of the formal complaint. The Disciplinary Administrator also provided adequate notice of the hearing before the panel. The hearing on the formal complaint was cancelled after the parties agreed to enter into the Summary Submission Agreement. Under Rule 223(b), a summary submission agreement

> "must be in writing and contain the following:
> "(1) an admission that the respondent engaged in the misconduct;
> "(2) a stipulation as to the following:
> (A) the contents of the record;
> (B) findings of fact;
> (C) and 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) (2022 Kan. S. Ct. R. at 278).

The chair of the Kansas Board for Discipline of Attorneys ultimately approved the summary submission. Thus, the factual findings in the summary submission are deemed admitted. See Supreme Court Rule 228(g)(1) (2022 Kan. S. Ct. R. at 288) ("If the respondent files a statement . . . that the respondent will not file an exception . . . , the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.").

The summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 1.3, 1.4, 8.2, and 8.3. We adopt the findings and conclusions set forth by the parties in the summary submission.

The remaining issue is deciding the appropriate discipline. The parties jointly recommend Leavitt's license to practice law be suspended for one year and the suspension be stayed pending successful participation and completion of a probation period of one year. An agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Rule 223(f). After full consideration, however, we adopt the joint recommendation.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Troy J. Leavitt is disciplined by a one-year suspension in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) and that his suspension is stayed pending successful participation and completion of a probation period of one year, which will begin upon the filing date of this opinion. Probation will be subject to the terms set out in the plan of probation referenced in the parties' Summary Submission Agreement.

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

No. 123,994

In the Matter of MANDEE ROWAN PINGEL, *Respondent.*

(521 P.3d 412)

ORDER OF DISCHARGE FROM PROBATION

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

On November 19, 2021, the court ordered Mandee Rowan Pingel suspended from the practice of law in the state of Kansas, in accordance with Supreme Court Rule 225(a)(3) (2021 Kan. S. Ct. R. at 275), for a one-year period. The court then stayed the suspension pending Pingel's successful completion of the agreed 12-month probation plan. *In re Pingel*, 314 Kan. 347, 498 P.3d 744 (2021).

On November 22, 2022, Pingel filed a motion to be discharged from probation along with a supporting affidavit in compliance with Supreme Court Rule 227(g)(1) (2022 Kan. S. Ct. R. at 284). The Office of the Disciplinary Administrator responded that Pingel has fully complied with the conditions of the agreed probation plan, confirmed Pingel's eligibility for discharge from probation, and voiced no objection to such discharge.

The court, having reviewed the motion, the supporting affidavit, and the response grants Pingel's motion for discharge from probation.

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

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

Dated this 21st day of December 2022.

State v. Frantz

No. 123,096

STATE OF KANSAS, *Appellee*, v. BARBARA MARIE FRANTZ, *Appellant.*

(521 P.3d 1113)

SYLLABUS BY THE COURT

1. TRIAL—*Confrontation Clause Guarantees Right of Cross-Examination to Criminal Defendant—Wide Latitude for Trial Judges to Impose Limits on Cross-Examination.* The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right of cross-examination, but this right is not absolute, and at times it must bow to accommodate other legitimate interests in the trial process. Trial judges retain wide latitude under the Confrontation Clause to impose reasonable limits on cross-examination.

2. EVIDENCE—*Right of Criminal Defendants to Present Relevant Evidence— Compliance with Rules of Procedure and Evidence.* Criminal defendants have a right to present relevant evidence, but that right is subject to reasonable restrictions, and defendants must still comply with established rules of procedure and evidence.

3. TRIAL—*Confrontation Clause Guarantees Opportunity for Effective Cross-Examination—Burden on Defendant to Prove Abuse of Discretion by District Court.* The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. As the party alleging error, the criminal defendant has the burden to prove the district court abused its discretion. Criminal defendants state a violation of the Confrontation Clause by showing they were prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.

Appeal from Leavenworth District Court; MICHAEL D. GIBBENS, judge. Opinion filed December 30, 2022. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, argued the cause and was on the brief for appellant, and *Barbara Frantz*, appellant pro se, was on the supplemental brief.

Kristafer Ailslieger, deputy solicitor general, argued the cause, and *Shawn M. Boyd*, deputy county attorney, *Todd Thompson*, county attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Barbara Marie Frantz appeals her conviction for the first-degree premeditated murder of her estranged husband, Gary. Frantz asks this court to reverse her conviction, arguing: (1) the district court violated her Sixth Amendment rights when it imposed limits on her cross-examination of a State's witness; (2) the district court erred in denying her motion for judgment of acquittal at the close of the State's evidence; and (3) there was insufficient evidence to support her conviction. Acting pro se, Frantz also filed a second brief raising several other claims of error.

For the reasons discussed more fully in this opinion, we first conclude the district court's limits on cross-examination were reasonable and did not constitute an abuse of discretion or otherwise deprive Frantz of her confrontation rights under the Sixth Amendment. Second, the State presented evidence during its case sufficient to establish a prima facie case of first-degree, premeditated murder against Frantz. Third, our review of
the record confirms the evidence at trial was sufficient to support the jury's verdict. Finally, we hold the issues Frantz raised in her pro se brief fail to demonstrate error. Thus, we affirm her conviction.

FACTS AND PROCEDURAL BACKGROUND

At around 8:30 p.m. on January 27, 2017, Officer Ezekiel Stevenson of the Leavenworth Police Department was dispatched to the Stove Loft Apartments in response to reports that shots had been fired. He found Gary Frantz lying in a parking lot across the street from the apartment complex. Gary had suffered six gunshot wounds, including a sucking chest wound, and he was having difficulty breathing. Gary was surrounded by several fellow Stove Loft tenants when Officer Stevenson arrived at the scene.

Officer Stevenson began administering first aid and questioning Gary about the shooting. Body camera footage recorded the following exchange between Officer Stevenson and Gary:

"Officer Stevenson: Do you know who shot ya, Gary?
"Gary: My [inaudible].
"Officer Stevenson: Hunh?
"Gary: My wife.
"Officer Stevenson: You're wife? What's your wife's name?
"Gary: Barbara.
"Officer Stevenson: Barbara what?

"Gary: Frantz.
"Officer Stevenson: Barbara what?
"Gary: Frantz!
"Officer Stevenson: Frantz? Okay. What did she shoot you for?
"Gary: I don't know.
"Officer Stevenson: 'Kay. Were you guys having an argument?
"Gary: No."

About a minute later, Stevenson again asked, "Why did your wife shoot you?" and Gary said, "I don't know." After several minutes, Gary was no longer speaking. He eventually succumbed to his injuries.

Around midnight, law enforcement went to the apartment of Frantz' and Gary's son, Patrick Frantz. They informed Patrick that Gary had died two hours earlier, and they believed Frantz had shot him. While police were at his apartment, Patrick called his maternal grandmother, Rosella Reece, to tell her what had happened. Neither Patrick nor Reece knew Frantz' whereabouts.

After the shooting, law enforcement was on the lookout for Frantz' silver two-door Hyundai Genesis. In the early morning hours of January 28, 2017, they found Frantz' car parked in the driveway of Reece's home in Burlingame. Frantz was still in the car, and law enforcement took her into custody.

Law enforcement recovered eight shell casings from the crime scene. The shell casings were the same type of ammunition that law enforcement found during a search of Frantz' apartment. During that search, law enforcement also found a box for a 9-millimeter handgun with a spent casing inside. A firearm tool mark examiner later determined the eight shell casings from the crime scene and the spent casing found in Frantz' apartment had all been fired from the same gun. But the gun was never located.

The State charged Frantz with the first-degree premeditated murder of Gary. Before trial, Frantz filed a motion to present evidence of an alternative perpetrator. In the motion, she noted some Stove Loft tenants originally described the shooter as a white man, so Frantz wished to present evidence that Patrick was the shooter. After an evidentiary hearing, the district court granted Frantz' motion.

State's Case in Chief

Testimony of Fellow Apartment Tenants

At Frantz' trial, at least a half dozen tenants of the Stove Loft Apartments testified to witnessing events related to the shooting. Those tenants said they heard several gunshots, a pause, and then several more gunshots. Several tenants said they looked out their window and saw a larger man being chased by a smaller person who was shooting at him. Witnesses generally described the shooter as white and slim, with short hair and wearing a cap. Because the shooter had short hair, one witness originally believed the shooter was a man, but she was "not going to bet [her] life on that." Another witness said the shooter appeared to be a young adult or woman. Several witnesses also testified to seeing the shooter get into a silver or light-colored two-door car before driving off. And one of those witnesses was also able to identify the make of the car as a Hyundai.

After the shooting, several tenants went outside to help Gary. Three tenants testified that before police arrived, they asked Gary who had shot him, and Gary said his wife shot him. And four tenants testified that Gary gave the same response when police later asked him the same question.

At trial, only one tenant, Debra Raynal, identified Frantz and placed her at the crime scene. Raynal testified she went to her window after hearing gunshots on the night of the shooting. She saw someone walking toward a light-colored two-door car. The person got in the car and drove north. Raynal assumed the person was a young man because of the person's clothing and short hair. When police arrived on the scene, Raynal went outside and told them she had seen a young, white man in his 20's.

Despite the initial description she had given to police, Raynal later identified Frantz as the person she saw fleeing the crime scene after the shooting. Raynal testified she first recognized Frantz in the courtroom during a prior motions hearing. Raynal explained she was able to identify Frantz at that time because she could see Frantz' build and view Frantz' face in profile. According to Raynal, this was important because on the night of the shooting, she had observed only the

profile of the perpetrator's face. Before that motions hearing, Raynal had seen Frantz' picture in the newspaper but had not recognized Frantz as the shooter because the photographs showed only a frontal view of Frantz' face.

Patrick's Direct Examination

The State also called Patrick as a witness. Patrick testified he had moved into an apartment in the Legends area of Kansas City, Kansas, with his parents in May 2014. In early 2016, Gary and Frantz separated, and Frantz moved into another apartment near the Legends. Later that year, Gary and Patrick moved into separate apartments in Leavenworth. By early 2017, Patrick did not have much of a relationship with either of his parents and had little to no contact with them in the weeks before the shooting.

According to Patrick, Frantz "had a few delusional ideas." She believed Gary was trying to poison her. She also believed Patrick and Gary were trying to collect a settlement from KU behind her back. Patrick said he had no knowledge of Gary trying to poison Frantz.

Patrick said he went with Frantz to buy a 9-millimeter handgun in October 2016. He also took her to a shooting range the same day to show her how to load and safely handle the gun. He and his mother went shooting one other time before Thanksgiving 2016. The only other time Patrick handled the gun was when he cleaned it at his mother's apartment.

Patrick testified he worked at the front desk of a hotel near the Legends, and on the night of the shooting, he had worked from 3 p.m. to 11 p.m. A timecard showed Patrick had clocked into work that day at 2:59 p.m. and clocked out at 11:09 p.m. Patrick testified it took him about 20 to 25 minutes to drive home from work, so he would have arrived at his home in Leavenworth around 11:30 p.m. on the night of the shooting.

When law enforcement notified him of Gary's death later that night, Patrick said he was distressed that his father had been murdered. He said he knew his mother was responsible, even before the officers told him she was a suspect, because she is the only one who would want to harm Gary.

Patrick's Cross-examination

Frantz fully explored several theories of impeachment during Patrick's cross-examination. Though he told police he had not been in contact with Gary for months, Patrick admitted he sent angry text messages to Gary about a week before the shooting. Gary had a set of Patrick's keys, and Patrick wanted Gary to return the keys in person. Instead, Gary left the keys under a statue outside Patrick's apartment. This angered Patrick because someone could have stolen the keys, and he expressed that anger in a couple of text messages. Patrick explained he had forgotten about those messages until prosecutors showed them to him.

Similarly, Patrick said he had not been in contact with Frantz since Thanksgiving 2016. And he told police he cut off contact with Frantz because she had attacked him. But on cross-examination, Patrick admitted Frantz called the police that Thanksgiving because he would not leave her apartment. Patrick also admitted that Gary had called 911 to complain about Patrick on another occasion. The nature of Gary's complaint was not disclosed at trial.

Defense counsel also questioned Patrick about discrepancies between his account of the phone call with Reece on the night of the shooting and Reece's account. According to Patrick's written statement to police, Reece told him she thought Frantz was going to commit suicide because Frantz left her therapy animal and some belongings at Reece's house a couple days before the shooting and, as she left, Frantz told Reece she would "see [Reece] in heaven."

But Reece said she told Patrick that Frantz had said, "[S]ee you later," after dropping some items off at Reece's house. And Reece did not remember telling Patrick she was concerned Frantz might harm herself. When asked about these discrepancies on cross-examination, Patrick said he was the one who had inferred Frantz might hurt herself, not Reece. He also said he could not remember whether Reece told him Frantz had said "see you in heaven" or "see you later."

Reece also testified that, during the call, Patrick said the shooting happened at 8 p.m. When defense counsel asked Patrick why he said Gary was shot at 8 p.m., Patrick said the police told

him Gary was shot at that time. But law enforcement's conversation with Patrick on the night of the shooting was captured on an officer's body camera. And in the video footage, police informed Patrick that Gary passed away two hours earlier. Because the police were talking to Patrick around midnight, that would suggest Gary died around 10 p.m., not 8 p.m.

Frantz also elicited testimony from Patrick suggesting he had a financial interest in Gary's assets and the outcome of the trial. Patrick admitted he had taken action to prevent Frantz from receiving Gary's pension after the murder, and he had been fighting with Frantz' family over Gary's Jeep. Patrick also testified Frantz was the only beneficiary under Gary's life insurance policy, and the outcome of the criminal proceedings could affect how much of Gary's estate Patrick would receive.

Testimony of the Forensic Pathologist

Dr. Michael Handler, a forensic pathologist who subspecialized in forensic neuropathology, performed Gary's autopsy. He testified Gary's cause of death was multiple gunshot wounds, including a wound that perforated Gary's right lung. Dr. Handler explained the injury to Gary's lung would have made it much more difficult for Gary to breathe and would have affected his thought processes. But Dr. Handler added that Gary's injuries would not have rendered him incoherent or delusional. Dr. Handler also did not observe any injuries to Gary's brain or any other brain disease that would have altered Gary's cognition. Thus, Dr. Handler opined there was "no reason to believe that [Gary's] brain is incapable of saying what he wants to say until the moment he dies."

State's Exhibits

As part of its case in chief, the State played the video of Gary's dying declarations made to Officer Stevenson and the video of law enforcement's conversation with Patrick on the night of the shooting. In the latter video, Patrick told police he had not talked to Gary in a while and wanted nothing to do with Gary because of the way Gary had handled Frantz' medical problems. Patrick also said he had always disliked Gary and hated him for his mistreatment of Frantz, but Patrick did not condone what Frantz had done.

The video of Patrick's conversation with police also shows that Patrick had a goatee at the time. But Raynal and another Stove Loft tenant had testified the shooter had no facial hair.

The State also presented several posts from Frantz' Facebook page. In a lengthy message posted on the day of the shooting, Frantz wrote, "To my Mom I thank you for my life. I love you with all my heart. I will see you again someday." Later in the post, Frantz wrote,

> "My ex-husband that I have been there so much for Stood Beside you took care of you loved honored respected. I have been raped by you I've had [*sic*] been cheated on by you and you helped end my life. Only to have you destroy me I hope you rot in hell if not I hope you rot in prison."

In several other posts, Frantz accused Gary of abusing her and cheating on her. She also called him "pathetic," "cowardly," "a liar," and "a piece of shit."

Defense Evidence

Frantz called several witnesses in her defense. Frantz' ex-sister-in-law, Della Beauclair, testified she was at Reece's house the day after the shooting when Patrick came over. She described Patrick's demeanor as "odd" and "emotionless." According to Beauclair, Patrick said he did not care if Gary was dead or alive, and he was more worried about Reece than he was about what had happened to Gary. Beauclair also testified that Patrick said he left work early the day of the shooting because he was sick, and he had asked someone to cover for him. Patrick also said he thought it was odd there was not much blood at the crime scene. Beauclair asked if Patrick had been to the crime scene, and Patrick said he had not but police said there was not much blood at the scene.

Frantz also called Jennifer Johnson, a registered nurse with a doctorate in nursing practice. Johnson had watched the video from Officer Stevenson's body camera, which showed Gary having difficulty breathing and speaking. She opined Gary had been suffering from hypoxia, a condition in which the brain or other organs are not receiving enough oxygen. She explained that when the brain is not receiving enough oxygen, an individual can experience memory and word loss, and otherwise have difficulty communicating. According to Johnson, there was "really no way to

know whether or not [Gary] understood or could effectively articulate what he was trying or meaning to say."

Frantz also presented a short clip of the video from Officer Stevenson's body camera. The video had been slowed down to highlight Gary's first answer when Stevenson asked who shot him. Frantz argued the clip showed Gary had originally said, "My boy."

Conviction, Sentence, and Appeal

The jury convicted Frantz of first-degree premeditated murder. The district court sentenced her to life imprisonment without the possibility of parole for 25 years. Because the district court imposed a life sentence, Frantz appealed directly to our court. Jurisdiction is proper. See K.S.A. 2021 Supp. 22-3601(b)(3).

Additional facts will be provided in the analysis as needed to resolve the issues raised by the parties.

ANALYSIS

Frantz contends her conviction should be reversed because: (1) the district court limited the scope of Patrick's cross-examination; (2) the district court erred in denying Frantz' motion for judgment of acquittal at the close of the State's evidence; and (3) the evidence was insufficient to support the jury's verdict. In her pro se briefing, Frantz raises several other claims of error. We address each of these challenges in turn.

I. *The District Court Did Not Abuse Its Discretion or Violate Frantz' Sixth Amendment Confrontation Clause Rights by Limiting Her Cross-examination of Patrick*

For her first issue on appeal, Frantz argues the district court erred by limiting her cross-examination of Patrick. To fully resolve the issue and the parties' competing arguments, we first identify several additional facts relevant to Frantz' Sixth Amendment challenge. Second, we identify the applicable legal framework and controlling standard of our review. Third, we discuss how certain preservation questions complicate our substantive review and explain how we resolve those issues in this case. Finally,

we analyze the merits of Frantz' challenge and ultimately affirm the district court's rulings.

A. *Additional Relevant Facts*

At trial, the district court excluded two lines of inquiry during the defense's cross-examination of Patrick—questions about Patrick's hospitalization for depression and questions about an alleged prior threat Patrick made to his girlfriend.

As to Patrick's hospitalization for depression, the subject was first addressed during the evidentiary hearing on Frantz' motion to present evidence of an alternate perpetrator. At that hearing, Patrick's partner, Kelly Neumann, testified she began dating Patrick several months after Gary's death. Neumann said she had Patrick hospitalized three times in 2017 "[f]or depression; for suicidal tendencies; for, you know, erratic behavior; for just sadness." According to statements Patrick had made to her, Neumann understood Patrick to be depressed because he was very close to his mother and she was in custody. Neumann added that Patrick had also lost his dad and "he was not emotionally prepared to handle his own life."

As to the prior threats Patrick purportedly made to his girlfriend, the subject was also addressed at the hearing on Frantz' motion to present evidence of an alternate perpetrator. At that hearing, Neumann testified that in December 2017, 11 months after the killing, Patrick was heavily medicated and became aggressive with her. Neumann said Patrick "may have" said he could kill her at the time, but she could not remember. Later, the following colloquy took place:

"Q: Okay. Has he ever told you that he could kill you and get away with it?

"A: No. I don't—no.

"Q: Okay. Would you ever tell anybody that he said that?

"A: No.

"Q: Okay. So you never said, Patrick told me he could kill me and get away with it?

"A: I don't believe so, no.

"Q: Okay. Well, you don't believe so or no?

"A: I don't—I mean—it was a—when he was medicated [for depression], he would mumble and say a lot of things. He would also cry at the drop of a hat. So, you know, things like that."

At trial, defense counsel attempted to cross-examine Patrick on both subjects—his hospitalization for depression and the alleged prior threat. First, defense counsel inquired about Patrick's hospitalization, asking him, "In fact, you were—after [Gary's murder] occurred, you actually went to the hospital; correct?" The State asked to approach, telling the court "I believe that the defense attorney is trying to get into Patrick being hospitalized regarding some depression." The State objected to this line of inquiry, arguing Patrick's hospitalization for depression would be improper impeachment because it involved a specific instance of conduct and was also irrelevant.

Defense counsel argued they were not asking the question to adduce character evidence, but to impeach Patrick's direct testimony. Defense counsel explained Neumann had previously testified at a motion hearing that Patrick said he was depressed because he was close to his mother and she was in custody. Defense counsel claimed that Patrick's statement was inconsistent with his testimony on direct examination that he thought his mom killed Gary and she was the only one who could have done it. Defense counsel also claimed Patrick was hospitalized because he was suicidal, which showed consciousness of guilt. According to the defense, excluding evidence related to Patrick's hospitalization would violate Frantz' Sixth Amendment right to present a defense.

The district court sustained the State's objection. It ruled that if the evidence of Patrick's depression and hospitalization was being offered as character evidence affecting his credibility, it was inadmissible under K.S.A. 60-422(c). The court stated the evidence was also likely inadmissible under K.S.A. 60-446 because Patrick's character was not in issue.

Later during Patrick's cross-examination, the defense also inquired about Patrick's alleged prior threat to his girlfriend:

"Q: . . . Had you ever made threats to your father?
"A: No.
"Q: Have you—had you ever made threats to anyone?
"A: No.
"Q: Never told your girlfriend you could kill her and get away with it."

The State objected to defense counsel's question about Patrick's purported threat to his girlfriend, arguing it was improper

character evidence founded on a specific instance of conduct. The State also argued the alleged threat was not relevant to the identity of Gary's killer. Defense counsel responded: "I asked if he ever threatened to kill his father. . . . He said no. So I asked, have you ever threatened to kill anyone, and he said no. But he has said he can kill and get away with it." Beyond impeachment, defense counsel argued the alleged threat was also relevant because it was an admission by Patrick that he had killed before.

The district court found the alleged threat did not constitute an admission that Patrick had previously killed someone. The court also ruled that defense counsel could not impeach Patrick by asking him about the alleged threat against Neumann because that threat was not otherwise relevant. However, the court clarified that the defense could impeach Patrick's statement (that he had never threatened anyone) by calling a witness who would testify to having been threatened by Patrick. The defense called no such witness at trial.

Frantz renewed her objections to these two rulings in her motion for new trial. Frantz again claimed those limitations violated her Sixth Amendment right to present a defense. In its order denying Frantz' motion, the district court ruled that the evidence regarding Patrick's mental health and hospitalization was inadmissible under K.S.A. 60-422(d), reasoning:

> "The defense effort to cross examine Patrick Frantz about his mental health and hospitalization following the murder of his father was relevant as tending to prove a trait of his character. The trait the defense was trying to prove could be inferred to be honesty or veracity. The trait could not be proven by acts of specific conduct such as his mental health but by opinion testimony only."

The district court also upheld its ruling to limit Frantz' inquiry into the alleged threat Patrick made against Neumann. The court found there was insufficient evidence the alleged threat was ever made and defense counsel's question would have been prejudicial, even if Patrick had denied making the threat.

On appeal, Frantz argues the evidence regarding Patrick's hospitalization for depression and the alleged threat were important to her defense. She argues the jury would have had more information about Patrick's personality and possible motive to kill

Gary if she had been allowed to pursue these lines of questioning. She claims the district court's limitations on her cross-examination of Patrick served no legitimate purpose and thus violated her Sixth Amendment right to cross-examine witnesses against her.

B. *Relevant Legal Framework and Standard of Review*

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Implicit in this right of confrontation is a criminal defendant's right of cross-examination. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Thomas*, 307 Kan. 733, 738, 415 P.3d 430 (2018). But this right is not absolute, and at times it must "'bow to accommodate other legitimate interests in the criminal trial process.'" *Thomas*, 307 Kan. at 738.

As the United States Supreme Court has explained, the Sixth Amendment guarantees an *opportunity* for cross-examination to establish a witness' bias, not unlimited cross-examination for any purpose:

> """The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination*.'" Of particular relevance here, '[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). [Citations omitted.]" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Likewise, criminal defendants have a right to present relevant evidence, but that right is subject to reasonable restrictions. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from

criminal trials." 523 U.S. at 308. And "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302; see *State v. Stano*, 284 Kan. 126, 131, 159 P.3d 931 (2007). For these reasons, reviewing courts have traditionally been reluctant to impose constitutional constraints on ordinary evidentiary rulings made by trial courts. See *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *United States v. Austin*, 933 F.2d 833, 842 (10th Cir. 1991).

"Because a district court may exercise reasonable control over the scope of cross-examination, appellate courts review the court's decision to limit cross-examination for an abuse of discretion." *Thomas*, 307 Kan. at 739. And to the extent this issue also involves the district court's decision to limit cross-examination based on evidentiary rulings, those rulings are also reviewed for an abuse of discretion. *State v. Atkinson*, 276 Kan. 920, 925, 80 P.3d 1143 (2003). "A district court abuses its discretion when (1) no reasonable person would have taken the view adopted by the district court; (2) the judicial action is based on an error of law; or (3) the judicial action is based on an error of fact." *Thomas*, 307 Kan. at 739.

As the party alleging error, Frantz has the burden to prove the district court abused its discretion. 307 Kan. at 739. "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' *Davis v. Alaska*, [415 U.S.] at 318." *Van Arsdall*, 475 U.S. at 680.

C. *Preservation Questions*

Before addressing the merits of this issue, we pause to address potential preservation issues. Kansas law generally requires the proponent of excluded evidence to proffer sufficient evidence to the trial court to preserve the issue for appellate review. K.S.A. 60-405. And the failure to make an adequate proffer precludes review because

the appellate court has no basis to consider whether the trial court abused its discretion. *State v. Evans*, 275 Kan. 95, 100, 62 P.3d 220 (2003).

At trial, Frantz did not make a proffer to establish how Patrick would have answered the challenged questions or testified in response to the excluded lines of questioning. Frantz proffered only some of the substance of Neumann's testimony from the motion hearing. But the district court judge who heard the testimony at that motion hearing did not preside over the trial. Thus, the trial court judge may not have been aware of the entire substance of Neumann's testimony at the time of his rulings. Furthermore, Frantz' arguments on appeal address only the limitations on Patrick's cross-examination. We question whether Frantz' partial proffer of Neumann's testimony was adequate for purposes of reviewing the issue on appeal.

Nevertheless, neither party has briefed whether Frantz provided an adequate proffer. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (an issue not briefed is deemed waived or abandoned). And, more importantly, the State does not object. Thus, we will reach the merits of Frantz' argument. And for that purpose, we assume Patrick would have testified consistently with Neumann's testimony at the motion hearing.

D. *The District Court's Limits on Patrick's Cross-examination Did Not Violate Frantz' Right to Confrontation.*

The district court made two evidentiary rulings that had the effect of limiting the scope of Frantz' cross-examination of Patrick. To thoroughly evaluate Frantz' claim that these rulings violated her Sixth Amendment right to confrontation, we first analyze each of the evidentiary rulings for potential error under Kansas' rules of evidence. Then, we explore whether the limitations were reasonable, considering the scope of Frantz' cross-examination of Patrick in its entirety.

1. *The District Court Did Not Err by Excluding Evidence of Patrick's Hospitalization for Depression*

As previously noted, Frantz did not make a proffer of the excluded testimony. But for purposes of our analysis, we assume for the sake of argument Patrick would have testified he was hospitalized for depression, suicidal tendencies, and erratic behavior,

and his depression was caused by Frantz' incarceration and Gary's death.

In its evidentiary ruling, the district court found Frantz' question about Patrick's hospitalization for depression was calculated to elicit character evidence affecting Patrick's credibility. And on appeal, Frantz does not directly challenge the district court's characterization of the excluded testimony as character evidence. Nonetheless, the record indicates Frantz may have offered additional grounds for admitting Patrick's testimony, including that such testimony could have been used to impeach Patrick with a prior inconsistent statement or to show Patrick's consciousness of guilt. Thus, we first review the district court's ruling under the evidentiary rules governing the admission of character evidence. Then, we address whether the evidence was otherwise admissible as impeachment evidence or to establish Patrick's consciousness of guilt.

First, when viewing the excluded testimony as potential character evidence, several statutes govern our analysis of the district court's ruling. K.S.A. 60-420 generally allows any party to admit evidence relevant to the credibility of a witness:

"Subject to K.S.A. 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence concerning any conduct by him or her and any other matter relevant upon the issues of credibility."

But this general rule is subject to several limitations. Relevant here, K.S.A. 60-422 excludes evidence of any character trait other than honesty or veracity, and it prevents a party from establishing a witness' character traits through specific instances of conduct:

"As affecting the credibility of a witness . . . (c) evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible."

Even so, evidence of specific instances of a witness' conduct can be admissible when character is in issue at trial. K.S.A. 60-446 ("When a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct."); see also *State v. Price*, 275 Kan. 78, 91, 61 P.3d

676 (2003) (K.S.A. 60-446 "'deals with the rather rare situations where character is an ultimate issue [i.e., a fact necessary to liability, defense or damages] as contrasted with the use of character merely as circumstantial evidence of another fact.'").

If, as Frantz argues on appeal, testimony regarding Patrick's hospitalization for depression would show his violent character, then such evidence was offered to establish a character trait other than honesty or veracity. K.S.A. 60-422(c) makes clear that evidence establishing any character trait other than honesty or veracity, or their opposites, shall be inadmissible. Thus, to the extent Frantz intended to offer Patrick's testimony to establish his propensity toward violence, the district court properly excluded such evidence under K.S.A. 60-422(c).

If, as Frantz seemed to argue to the district court, this testimony was offered to prove Patrick's dishonesty or lack of veracity, that testimony would relate to a specific instance of conduct (his hospitalization) and would be inadmissible under K.S.A. 60-422(d). Further, the district court also found evidence regarding Patrick's hospitalization for depression, a specific instance of conduct, would not be admissible under K.S.A. 60-446 because Patrick's character was not an ultimate issue at trial. On appeal, Frantz does not challenge the district court's ruling under K.S.A. 60-446. For these reasons, we conclude the district court did not err in excluding Patrick's testimony as improper character evidence.

Second, the record also suggests Frantz wanted to question Patrick about his depression and hospitalization to impeach him with a prior inconsistent statement. Frantz believed Patrick's statements to Neumann—that he was depressed because his mother was in custody—would impeach Patrick's testimony on direct examination that he believed Frantz had killed Gary. But a witness' prior statement is only proper impeachment material if it contradicts or is inconsistent with what the witness has said on the stand. *State v. Worth*, 217 Kan. 393, 396, 537 P.2d 191 (1975). We see no incongruity between Patrick's prior statement that he was depressed because his mother was in custody for killing his father and Patrick's testimony that he believed his mother committed the crime. Because Patrick's prior statement to Neumann was not appropriate impeachment evidence, the district court did not err by

excluding it. See *Worth*, 217 Kan. at 395-96 (district court did not err in striking witness' prior testimony offered for impeachment purposes when that testimony was not inconsistent with witness' direct testimony).

Finally, Frantz argued Patrick's hospitalization for suicidal tendencies showed a guilty conscience, and thus would constitute circumstantial evidence that Patrick killed Gary. Evidence of a defendant's conduct following the commission of an alleged crime may be circumstantially relevant and thus admissible to establish the defendant's consciousness of guilt. *State v. Webber*, 260 Kan. 263, 274, 918 P.2d 609 (1996); *State v. Cathey*, 241 Kan. 715, 730, 741 P.2d 738 (1987), *disapproved of on other grounds by State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006). And "'[c]ircumstantial evidence that would be admissible and support a conviction if introduced by the State cannot be excluded by a court when offered by the defendant to prove his or her defense that another killed the victim.'" *State v. Burnett*, 300 Kan. 419, 433, 329 P.3d 1169 (2014).

While Kansas courts have not broached the issue, other jurisdictions have held that suicide attempts, as well as suicidal ideations, may be admissible to establish a person's consciousness of guilt. See, e.g., *Commonwealth v. Sanchez*, 416 Pa. Super. 160, 175-76, 610 A.2d 1020 (1992) (listing decisions from other jurisdictions finding suicide attempts evidence of consciousness of guilt and finding evidence of suicidal thoughts admissible for same purpose); see also 73 A.L.R.5th 615 (discussing admissibility of evidence relating to accused's suicide attempt). But these courts have generally found such evidence admissible only when there is a sufficient nexus between the crime and the suicide attempt to support an inference the defendant was attempting to evade prosecution by committing suicide. See *Mathis v. State*, 287 So. 3d 1268, 1270 (Fla. Dist. Ct. App. 2019) ("Courts have recognized suicide attempts to be 'indicative of a desire to avoid prosecution and [a] circumstance from which guilt may be inferred.'"); *Lamerand v. State*, 540 S.W.3d 252, 261 (Tex. App. 2018) ("Keith attempted suicide shortly after learning that he had been accused

of sexually assaulting Kathryn and that the police were investigating him. Given the timing, a jury could have reasonably inferred that Keith's suicide attempt evidenced a consciousness of guilt.").

Assuming, without deciding, that evidence of suicidal ideations can be probative of a witness' state of mind and may tend to establish a guilty conscience in certain circumstances, Frantz has not proffered a sufficient nexus between Patrick's suicidal thoughts and Gary's murder to support that inference. And based on the record before us, no such nexus exists. Patrick never faced prosecution for Gary's murder. And Patrick was hospitalized for depression months after Gary's death. See *Meggison v. State*, 540 So. 2d 258, 259 (Fla. Dist. Ct. App. 1989) (finding defendant's suicide attempt after pleading guilty not probative of flight from pending prosecution); *People v. Foster*, 56 Ill. App. 3d 22, 32, 371 N.E.2d 961 (1977) (finding defendant's suicide attempt not probative of consciousness of guilt because not made in close temporal proximity to murder), *rev'd on other grounds by* 76 Ill. 2d 365, 392 N.E.2d 6 (1979).

Moreover, on appeal, Frantz does not mention Patrick's suicidal ideations. Frantz argues only that she should have been allowed to question Patrick about his hospitalization for depression. But any potential nexus between Patrick's general depression and his alleged guilt would be even more tenuous than the nexus between his suicidal ideations and his alleged guilt. We conclude the district court did not err in excluding this evidence.

2. *The District Court Did Not Err by Limiting Frantz' Ability to Elicit Testimony During Patrick's Cross-examination of an Alleged Threat He Made Against His Girlfriend*

Frantz also argues the district court should have admitted Patrick's testimony in response to her question whether he had previously told Neumann he could kill her and get away with it. Again, Frantz did not make a proffer to establish how Patrick would have answered any questions about the alleged threat, so we will assume for the sake of argument that Patrick would have testified consistently with Neumann's testimony at the motion hearing.

Frantz claims the alleged threat was a statement against interest suggesting Patrick had previously killed someone. And she asserts Patrick's admission that he had killed before would be relevant to whether he killed Gary. Alternatively, Frantz argues the testimony was admissible to establish Patrick's propensity toward violence and to impeach his prior testimony that he had never threatened anyone. We address each of these arguments in turn.

First, Frantz contends the excluded testimony was an admission against Patrick's interests and was relevant to the identity of the shooter. If Patrick had admitted to killing someone before, that admission might have been relevant because it could have some tendency to prove the identity of Gary's killer. See *State v. Page*, 303 Kan. 548, 550, 363 P.3d 391 (2015) (quoting K.S.A. 60-401[b]) ("Relevant evidence is evidence that has '"any tendency in reason to prove any material fact."'"). And "[g]enerally, all relevant evidence is admissible. K.S.A. 60-407(f)." *State v. Miller*, 308 Kan. 1119, 1167, 427 P.3d 907 (2018). But the district court did not limit cross-examination because Patrick's admission or statement against interest was not relevant. Instead, the district court found Patrick's alleged threat was not an admission or statement against interest in the first place. We agree.

The phrase "I could kill you and get away with it" expresses a mere possibility or hypothetical—it is not confirmation of past conduct. See The American Heritage Dictionary of the English Language 416 (5th ed. 2011) ("[C]ould" is "[u]sed with hypothetical or conditional force: If we could help, we would."). While someone might be confident in their ability to get away with murder because they had done so previously, the purported threat attributed to Patrick does not support that connotation.

Second, Frantz argues she should have been allowed to question Patrick about the alleged threat to establish Patrick's character trait of being prone to violence. But as the State argues, if Frantz wished to question Patrick about the threat to establish his propensity for violence and suggest Patrick killed Gary, any testimony it could elicit would be inadmissible under K.S.A. 60-447. That statute provides that "when a trait of a person's character is relevant as tending to prove conduct on a specified occasion . . . evidence of specific instances of conduct other than evidence of conviction

of a crime which tends to prove the trait to be bad shall be inadmissible." K.S.A. 60-447(a). Because the alleged threat would have been a specific instance of conduct (other than a conviction) offered to prove Patrick's violent character, its admission was prohibited by K.S.A. 60-447(a).

And if Frantz wished to question Patrick about the alleged threat to establish Patrick's character trait of being prone to violence, any testimony the question could elicit would also be inadmissible under K.S.A. 60-422 for two reasons. First, the alleged threat would have established a character trait other than dishonesty or lack of veracity and thus been inadmissible under K.S.A. 60-422(c) (evidence of witness' character traits unrelated to honesty or veracity inadmissible). Second, the alleged threat would have been a specific instance of Patrick's conduct offered to prove a trait of his character and would be inadmissible under K.S.A. 60-422(d) (evidence of specific instances of conduct relevant to prove witness' character trait inadmissible).

Finally, Frantz contends she should have been allowed to question Patrick about the alleged threat against his girlfriend to impeach his earlier testimony on cross-examination. As previously noted, Frantz first asked if Patrick had ever threatened Gary, which Patrick denied. Next, Frantz asked if Patrick had ever threatened anyone, which Patrick also denied. Frantz then asked if he had ever told his girlfriend that he could kill her and get away with it. Only this third question drew an objection from the State, which the district court sustained.

Frantz argues she should have been allowed to question Patrick about the alleged threat to impeach his testimony that he had never threatened anyone. But based on the record before us, Frantz has failed to establish any error on this basis. Again, we assume Patrick would have testified consistently with Neumann's testimony at the motion hearing. But Neumann's testimony regarding the alleged threat was, at best, ambiguous. She initially denied that Patrick had told her he could kill her and get away with it. When pressed further, she responded by saying Patrick would say things under his breath. But she never specifically testified Patrick made the alleged threat. In short, the record before us fails to establish Patrick ever threatened Neumann. And we cannot conclude the

district court abused its discretion by preventing Frantz from questioning Patrick about an alleged threat that was never substantiated. See *State v. Vonachen*, 312 Kan. 451, 460, 476 P.3d 774 (2020) (appellant has burden to provide record sufficient to establish claimed error).

Furthermore, the district court did not preclude Frantz from impeaching Patrick's testimony that he had never threatened anyone. We note Frantz' second question—whether Patrick had threatened anyone—elicited testimony regarding a specific instance of Patrick's conduct. And that testimony may have been inadmissible under K.S.A. 60-447, K.S.A. 60-422(d), or both. We need not decide that question today because the State did not object to that inquiry. But the district court also recognized the State's failure to object to Frantz' inquiry opened the door for her to impeach Patrick's testimony that he had never threatened anyone in the past. Thus, the district court ruled that Frantz could impeach that testimony by calling a rebuttal witness or witnesses to testify to prior threats Patrick had directed toward them. Frantz did not accept this invitation, however.

The district court's ruling complies with K.S.A. 60-420, which permits parties to impair or support a witness' credibility through cross-examination, through the introduction of extrinsic evidence, or both. See also *State v. Beans*, 247 Kan. 343, 346, 800 P.2d 145 (1990) (holding defendant need not first cross-examine witness before presenting extrinsic evidence impeaching witness' direct testimony). The district court's ruling is also consistent with our caselaw holding defendants should be allowed to present rebuttal evidence when necessary to impeach purportedly false testimony from a key witness for the State. See, e.g., *State v. Macomber*, 241 Kan. 154, 159, 734 P.2d 1148 (1987) (district court committed reversible error when it excluded evidence of a key witness' drug use when that evidence was offered to show the witness had testified falsely about her drug use). Frantz fails to explain how limiting the method of impeachment (through rebuttal witness rather than cross-examination), as opposed to preventing her from impeaching Patrick at all, constitutes an abuse of discretion. Instead, Frantz' opportunity to call a rebuttal witness to impeach Patrick's testimony further illustrates the reasonableness of the district

court's limitation on cross-examination. See *Van Arsdall*, 475 U.S. at 679; *Thomas*, 307 Kan. at 741.

Based on the foregoing analysis, we conclude the district court's evidentiary rulings impacting the scope of Patrick's cross-examination were either legally and factually sound or otherwise correct under Kansas' rules of evidence. See *State v. Robinson*, 293 Kan. 1002, 1027, 270 P.3d 1183 (2012) (upholding district court's evidentiary ruling as right for the wrong reason).

3. *The Limits on Cross-examination Did Not Violate the Sixth Amendment*

Even though the district court's limitations on her cross-examination complied with applicable statutes, Frantz nevertheless contends the limits on cross-examination violated the Sixth Amendment because they served no legitimate purpose and impaired her ability to confront a key witness for the State. We disagree with both contentions.

First, we reject Frantz' assertion that the limits on Patrick's cross-examination served no legitimate purpose. The challenged limitations were the byproduct of the district court's reasonable interpretation and application of the Kansas rules of evidence. Our established rules of evidence exist to ensure the fairness, reliability, and efficiency of trials. See *Chambers*, 410 U.S. at 302; *State v. Humphrey*, 217 Kan. 352, 364, 537 P.3d 155 (1975). Thus, the exclusion of inadmissible evidence concerning Patrick's personal health history and the alleged prior threat to Neumann served legitimate interests in the trial process. See *Van Arsdall*, 475 U.S. at 679 (trial judges have wide latitude to impose reasonable limits on cross-examination based on concerns about harassment and questioning that is only marginally relevant).

Second, Frantz was given a constitutionally sufficient opportunity to cross-examine Patrick. In deciding whether the district court's limits on cross-examination impaired Frantz' Sixth Amendment rights, we must consider whether Frantz was still able to "'engag[e] in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could

appropriately draw inferences relating to the reliability of the witness.'"' *Atkinson*, 276 Kan. at 929 (quoting *Van Arsdall*, 475 U.S. at 680). In other words, we must determine "whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *United States v. Garcia*, 13 F.3d 1464, 1469 (11th Cir. 1994) (citing *Van Arsdall*, 475 U.S. at 680).

The record shows that even with the district court's limits, Frantz extensively cross-examined Patrick. Frantz' cross-examination of Patrick takes up 141 pages of the trial transcript, compared to only 34 pages of his direct examination. During Patrick's cross-examination, Frantz elicited testimony directly supporting her theory of defense that Patrick was the shooter and disclosing Patrick's potential motives and biases. For example, Frantz elicited testimony that (1) Patrick had sent angry text messages to Gary six days before the shooting but told police he had not had contact with Gary for weeks; (2) Patrick told a detective that he thought Frantz had bought a gun from Cabela's when he in fact knew she did because he went with her; (3) Gary had called 911 on Patrick before; (4) Frantz had called the police on Patrick before; (5) Patrick had access to Frantz' apartment; (6) the outcome of the trial could affect how much of Gary's property Patrick would inherit; (7) Patrick told Neumann that he hated Gary; and (8) Patrick testified police had told him Gary was shot at 8 p.m. even though bodycam video showed police had indicated only that Gary had died from a gunshot wound around 10 p.m.

Frantz asserts the jury would have had even more information about Patrick if she had been allowed to pursue the excluded lines of questioning. But the touchstone for whether the Confrontation Clause has been satisfied is not whether the defendant was able to engage in "'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Van Arsdall*, 475 U.S. at 679. Instead, the proper inquiry is whether the defendant was able to present sufficient information for the jury to make a discriminating appraisal of the witness' motives and bias. *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010); see also *Van Arsdall*, 475 U.S. at 680 (limits on cross-examination violate Confron-

tation Clause where they prevent defendant from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness). Here, the district court's limitations did not prevent Frantz from providing the jury with sufficient information to make a discriminating appraisal of Patrick's credibility. Through cross-examination, Frantz was able to put before the jury facts showing Patrick had motive and opportunity to murder Gary as well as a potential bias to frame Frantz—either because he did it, because he wanted to receive the entirety of Gary's estate, or both. The limitations the district court placed on Patrick's cross-examination only prevented Frantz from adducing evidence that was inadmissible and would not have given the jury a significantly different impression of Patrick's credibility.

We conclude the district court did not abuse its discretion by limiting Frantz' cross-examination of Patrick. The challenged limitations served legitimate interests in the trial process by excluding testimony that was inadmissible under our rules of evidence. And those limits did not prevent Frantz from engaging in the otherwise appropriate cross-examination of Patrick. Because the district court's limitations fell within the wide latitude afforded to courts to impose reasonable limitations on cross-examination, we hold Frantz' Confrontation Clause rights were not violated.

II. *The District Court Did Not Err by Denying Frantz' Motion for Judgment of Acquittal at the Close of the State's Evidence*

Next, Frantz argues the district court erred by denying her motion for judgment of acquittal after the close of the State's evidence. Frantz contends she was entitled to a judgment of acquittal because of the lack of direct evidence identifying her as the person who shot Gary. Before reaching the merits of this challenge, we first discuss a potential waiver issue under our established precedent.

A. *Waiver Rule Adopted by this Court*

In *State v. Blue*, 225 Kan. 576, 578, 592 P.2d 897 (1979), we held that when a defendant unsuccessfully moves for judgment of acquittal at the close of the State's evidence and then proceeds to present evidence, the defendant waives any error in denial of the motion. We later modified this rule to provide that a defendant

does not waive error if he or she presents only rebuttal evidence confined to the substance and credibility of the witnesses for the State or a codefendant and does not try to refute any elements of proof adduced in the State's case. *State v. Copes*, 244 Kan. 604, 610-11, 772 P.2d 742 (1989); see also *State v. Murdock*, 286 Kan. 661, 670-71, 187 P.3d 1267 (2008) (recognizing *Copes* modified waiver rule). "If the motion for acquittal is renewed after the close of all of the evidence, the trial court should consider *all* of the evidence in ruling upon that motion." *Copes*, 244 Kan. at 607.

This rule has been adopted by the federal appellate circuits and appears to have been adopted by many, if not most, states. See, e.g., *United States v. Foster*, 783 F.2d 1082, 1085 & n.1 (D.C. Cir. 1986) (stating "[a]ll eleven numbered circuits and the District of Columbia Court of Appeals are now on record . . . as adhering to the waiver rule" and listing cases in footnote); *Thomas v. State*, 330 Ark. 442, 446, 954 S.W.2d 255 (1997) ("A defendant who goes forward with the production of additional evidence after a directed-verdict motion is overruled waives any further reliance upon the former motion."); *State v. Seeley*, 326 Conn. 65, 71, 161 A.3d 1278 (2017) ("The so-called waiver rule provides that, when a motion for [a judgment of] acquittal at the close of the state's case is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf."); *Cox v. State*, 19 N.E.3d 287, 290 (Ind. Ct. App. 2014) ("[O]ne who elects to present evidence after a denial of [her] motion for directed verdict made at the end of the State's case waives appellate review of the denial of that motion."); *State v. Tscheu*, 758 N.W.2d 849, 857 n.7 (Minn. 2008) ("[W]e have held that where a defendant chooses to introduce evidence after his motion for judgment of acquittal has been denied, we consider the 'whole record' and not just the evidence produced by the State."); *Woods v. State*, 242 So. 3d 47, 54 (Miss. 2018) ("When the defendant proceeds with his case after the state rests and the court overrules the defendant's motion for a directed verdict, the defendant has waived the appeal of that directed verdict."); *State v. Smith*, 944 S.W.2d 901, 916 (Mo. 1997) (by presenting evidence in his own defense after State rested, defendant waived challenge to sufficiency of evidence raised in motion for

judgment of acquittal at close of State's evidence); *State v. Combs*, 297 Neb. 422, 430, 900 N.W.2d 473 (2017) (if court denies defendant's motion to dismiss or for directed verdict at end of State's case, and defendant proceeds to present evidence, defendant waives appellate review of denial of motion); *State v. Hill*, 163 N.H. 394, 395-96, 42 A.3d 842 (2012) (when court denies challenge to sufficiency of evidence after close of State's case, and defendant proceeds to present evidence, court reviews entire trial record); *State v. Kinsella*, 796 N.W.2d 678, 682 (N.D. 2011) ("[O]ur adherence to the waiver rule is consistent with the position taken by the federal circuit courts of appeals and the majority of state courts."); *State v. Phillips*, 416 S.C. 184, 191 n.7, 785 S.E.2d 448 (2016) ("Under the waiver rule, a defendant who presents evidence in his own defense waives the right to have the court review the denial of directed verdict based solely on the evidence presented in the State's case-in-chief."); *State v. Gilley*, 297 S.W.3d 739, 763 (Tenn. Crim. App. 2008) (defendant waived right to appeal denial of motion for judgment of acquittal at close of State's case because he presented evidence); *State v. Griffith*, 129 Wash. App. 482, 489, 120 P.3d 610 (2005) ("When a defendant presents a defense case in chief, he waives his right to appeal the denial of his motion to dismiss made at the end of the State's case in chief."); *McEuen v. State*, 388 P.3d 779, 782 (Wyo. 2017) ("We have previously held that a defendant's introduction of evidence following denial of a judgment of acquittal is a waiver of the appeal of that motion."). But see *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1200-01 (9th Cir. 2000) (failure to renew motion for judgment of acquittal at end of trial, after motion has been made at end of the government's case, does not mean that it has been waived, but only that higher standard of review is to be imposed); 2A Wright & Miller, Fed. Prac. & Proc. Crim. § 463 (4th ed.) (discussing federal circuits in which status of waiver rule is uncertain).

But some courts and jurists have criticized this waiver rule because it "seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense." *Cephus v. United States*, 324 F.2d 893, 896 (D.C. Cir. 1963), *abrogated by Foster*, 783 F.2d 1082; see also *State v. Per-*

kins, 271 Conn. 218, 272, 856 A.2d 917 (2004) (Katz, J., dissenting) (waiver rule cuts against well-established principle that "'[a] criminal defendant has the right to put the state to its burden and need not defend until and unless the state has presented a prima facie case'"). This critique has persuaded some states to reject the waiver rule altogether. See *In re Anthony J.*, 117 Cal. App. 4th 718, 732, 11 Cal. Rptr. 3d 865 (2004) (declining to adopt federal waiver rule because "[s]uch a rule offends the most basic premises of our criminal justice system, the presumption of innocence and the duty of the prosecution to prove guilt beyond a reasonable doubt"); *Kontos v. State*, 363 So. 2d 1025, 1034 (Ala. Crim. App. 1978) (a timely motion to exclude at the close of State's case entitles defendant to be discharged at that point, and allowing defendant to cure error in court's improper denial of the motion "would lead to the demise of the motion to exclude as a procedural corollary to the defendant's presumption of innocence and the State's burden of proof").

Here, the waiver rule adopted by our court in *Blue* would seemingly apply. After the district court denied Frantz' motion, Frantz presented evidence in her defense, and some of that evidence refuted the State's proof that Frantz was the shooter. Beauclair's testimony suggested that Patrick left work early on the day of the shooting and that he had unique knowledge of the crime scene. Frantz also presented an enhanced version of Officer Stevenson's bodycam video to support her argument that Gary had identified "my boy" as the shooter.

Even so, we need not decide the continuing validity of this waiver rule or its application here because the State failed to preserve the issue for appeal. By failing to raise or brief the waiver issue, the State has abandoned any argument related to the rule adopted in *Blue*. See *State v. Boysaw*, 309 Kan. 526, 542-43, 439 P.3d 909 (2019) (argument deemed waived, abandoned for failure to brief issue).

B. *The District Court Properly Denied Frantz' Motion*

Turning to the merits, Frantz was charged with the first-degree premeditated murder of Gary. To secure a conviction, the State needed to prove beyond a reasonable doubt that Frantz intentionally killed Gary and the killing was done with premeditation. See K.S.A. 2016 Supp. 21-5402. The district court did not err in denying Frantz' motion for judgment of acquittal because the State presented sufficient evidence in its case-in-chief to support a prima facie case of first-degree premeditated murder.

1. *Standard of Review and Legal Framework*

"A challenge to a denial of a motion for acquittal is, at the core, a challenge to the sufficiency of the evidence." *State v. Cottrell*, 310 Kan. 150, 163, 445 P.3d 1132 (2019). "'When examining the sufficiency of the evidence in a criminal case, the standard of review is whether, after reviewing all the evidence in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. The appellate court does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence.'" *State v. Raskie*, 293 Kan. 906, 919-20, 269 P.3d 1268 (2012).

Moreover, appellate courts do not differentiate between circumstantial and direct evidence in terms of probative value. "'A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom. If an inference is a reasonable one, the jury has the right to make the inference.'" *State v. King*, 308 Kan. 16, 28, 417 P.3d 1073 (2018).

2. *The State Presented Sufficient Evidence During Its Case-in-Chief to Prove Frantz Was the Shooter*

The main issue at Frantz' trial was the identity of Gary's killer, and Frantz argues the State presented insufficient evidence during its case to prove beyond a reasonable doubt that she was the one who shot and killed Gary. Frantz claims the only evidence directly

placing her at the scene of the shooting was Raynal's identification testimony at trial and Gary's dying declaration. Frantz essentially argues Raynal's identification is so incredible that this court should disregard it in assessing the sufficiency of the evidence. Frantz also asserts Gary's dying declaration, on its own, cannot support her conviction because it is open to interpretation.

As to the eyewitness identification evidence, Raynal was the only Stove Loft tenant who testified to seeing Frantz in the parking lot on the night of the shooting. But Raynal had originally told police she had seen a young man (not a middle-aged woman) leaving the scene. And Raynal could not identify Frantz until she saw Frantz in court at a pretrial hearing when Frantz was wearing handcuffs and a jail jumpsuit.

Given the circumstances surrounding the identification, Frantz moved to suppress Raynal's identification before trial, but the district court denied that motion. See *State v. Corbett*, 281 Kan. 294, 304-05, 130 P.3d 1179 (2006) (courts may exclude eyewitness identification if impermissibly suggestive procedure led to substantial likelihood of misidentification). On appeal, Frantz does not challenge the district court's denial of her motion or otherwise argue the district court should have excluded Raynal's testimony.

Raynal's identification certainly had its shortcomings, but this is not one of those rare cases where a witness' testimony is so incredible no reasonable fact-finder could have relied on it in reaching a guilty verdict. See *State v. Milo*, 315 Kan. 434, 450, 510 P.3d 1 (2022). Raynal explained that at the time of the shooting, she observed only the profile of the perpetrator. And she was able to identify Frantz at the hearing because that was the first time since the shooting that she saw Frantz' profile and build. And Raynal testified the perpetrator's short hair initially led her to believe the shooter was male, and it had not occurred to her that a woman would commit such a crime. Raynal was also subjected to vigorous cross-examination, and the district court instructed the jury on factors to consider when weighing the reliability of eyewitness identification testimony. Under these circumstances, we trust juries to determine the credibility and weight of witness testimony, and we will not revisit those determinations on appeal. See *State*

v. Lopez, 299 Kan. 324, 329-30, 323 P.3d 1260 (2014); *Corbett*, 281 Kan. at 306.

As to Gary's dying declaration, Frantz argues Gary's statement is open to interpretation because his first answer to Officer Stevenson's question, "Do you know who shot ya, Gary?" is unintelligible on the body camera footage. But our review of the evidence confirms a rational fact-finder could have found that Gary reliably identified Frantz as his killer in response to questioning by law enforcement. Gary's first response to Officer Stevenson's question regarding the identity of his killer is difficult to understand on video, but multiple witnesses testified to hearing Gary say his wife was the shooter when Officer Stevenson repeated his question. In the video admitted by the State, Gary also corrects other people when they misstate Frantz' name, but Gary never corrects Officer Stevenson when he asks Gary why "your wife" or "she" shot him. Several witnesses also testified to hearing Gary identify his wife as the shooter before Officer Stevenson arrived on the scene. And no witness ever testified to hearing Gary identify "my boy" or Patrick as the killer.

Moreover, while Raynal's identification and Gary's dying declaration may have been the only evidence *directly* placing Frantz at the scene of the crime, the State presented other circumstantial evidence that Frantz was the shooter. During the State's case, witnesses testified they saw a silver or light-colored two-door Hyundai leaving the scene of the shooting, and Frantz drove a silver two-door Hyundai. Police arrested Frantz in this very vehicle hours after the shooting. Gary was shot with a 9-millimeter gun, and Frantz had purchased a 9-millimeter handgun a few months before the shooting. Markings on the shell casings found at the crime scene matched markings on a shell casing found in Frantz' apartment, indicating they had all been fired from the same gun. And Frantz had made several vitriolic Facebook posts about Gary, including one on the day of the shooting in which she said of Gary, "I hope you rot in hell if not I hope you rot in prison."

Frantz argues that absent Gary's dying declaration, this circumstantial evidence is insufficient to support her conviction, and thus the question before us is whether the dying declaration on its own was sufficient to support her conviction. But we need not

consider the merits of this claim because parties cannot pick and choose which facts and evidence appellate courts consider when reviewing for sufficiency. Instead, appellate courts must consider *all* the evidence presented (in this instance, by the State in its case-in-chief) and construe that evidence in a light most favorable to the State. *State v. Darrow*, 304 Kan. 710, 716, 374 P.3d 673 (2016). Frantz' argument simply invites us to reweigh the evidence, which is not the proper function of a reviewing court. Viewing the evidence in a light most favorable to the State, we hold a reasonable jury could have found beyond reasonable doubt from the evidence presented during the State's case that Frantz was Gary's killer.

III. *The State Presented Sufficient Evidence to Support Frantz' Conviction for First-degree Premeditated Murder*

In her sufficiency challenge, Frantz contends the State's evidence identifying her as the shooter was further undercut by expert opinion testimony presented during the defense's case. She also contends the evidence was insufficient to prove beyond reasonable doubt that Frantz killed Gary intentionally and with premeditation. We disagree with both contentions.

A. *Standard of Review and Relevant Legal Framework*

We review Frantz' issue under the same sufficiency of the evidence standard identified in the previous issue. The only difference is that we now consider all the evidence presented at trial—rather than limiting our inquiry to the evidence the State presented during its case-in-chief.

B. *The Evidence Was Sufficient to Prove Frantz Was the Shooter*

As noted in the previous issue, the State presented sufficient evidence during its case to prove beyond reasonable doubt that Frantz shot and killed Gary. This evidence included Raynal's in-court identification of Frantz, Gary's dying declaration, and other circumstantial evidence suggesting Frantz was the shooter.

In the previous issue, we reviewed only the sufficiency of the evidence the State presented during its case. But in assessing the

sufficiency of the evidence supporting the jury's verdict, we consider all the trial evidence. Capitalizing on this expanded evidentiary review, Frantz argues the expert opinion testimony she elicited from Johnson during the defense's case substantially undercut the reliability of Gary's dying declaration.

Johnson opined Gary was suffering from hypoxia when he made the declaration that Frantz shot him and thus there was no way to be sure he was effectively communicating at the time. Frantz argues this evidence could support an inference that Gary identified "my boy"—that is, Patrick—as the killer and Gary was merely calling out for Frantz in his dying moments.

But when reviewing for sufficiency of the evidence, appellate courts do not consider whether the evidence may be susceptible to more than one inference, or even which inference is most compelling. Instead, appellate courts must view the evidence in the light most favorable to the State to determine if a jury could have reasonably drawn conclusions or inferences supporting the defendant's guilt. See *State v. Scaife*, 286 Kan. 614, 618, 186 P.3d 755 (2008). And as noted in the previous issue, our review of the State's evidence confirms a rational fact-finder could have found that Gary reliably identified Frantz as his killer.

Also, Johnson did not definitively say Gary did not know what he was saying or that he could not understand what was being said to him. And her opinion was refuted by the State's expert, Dr. Handler. He testified the lack of oxygen to Gary's brain would not have rendered him incoherent or unable to speak. Dr. Handler also stated there was no reason to believe Gary was incapable of saying what he wanted to say before his death. Resolving the conflict between Johnson's and Dr. Handler's expert opinion testimony in the State's favor, as we must, the evidence supports a finding that Gary understood what he was saying when he made his dying declaration.

Viewing all the evidence presented at trial in a light most favorable to the State, we hold a reasonable jury could have found beyond reasonable doubt that Frantz was Gary's killer.

C. *The State Presented Sufficient Evidence to Prove Beyond Reasonable Doubt that Frantz Killed Gary Intentionally and with Premeditation*

While the main issue at trial was the identity of Gary's killer, Frantz also argues the evidence was insufficient to support a finding that Frantz killed Gary intentionally and with premeditation. "A person acts 'intentionally,' or 'with intent,' with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result." K.S.A. 2021 Supp. 21-5202(h). And "[p]remeditation means to have thought the matter over beforehand." *State v. Kettler*, 299 Kan. 448, 466, 325 P.3d 1075 (2014).

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. Roberts*, 314 Kan. 835, 850, 503 P.3d 227 (2022); *Kettler*, 299 Kan at 466-67. And we have identified several factors relevant to determining whether circumstantial evidence gives rise to an inference of premeditation, including: "'(1) the nature of the weapon used; (2) 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.' [Citation omitted.]" 299 Kan. at 467.

Gary was shot six times with a gun. See *State v. Salary*, 301 Kan. 586, 601, 343 P.3d 1165 (2015) (finding defendant's use of a handgun to shoot victim multiple times supported inference of premeditation). Witnesses heard several shots, a pause, and then more shots. See *State v. Cosby*, 293 Kan. 121, 134, 262 P.3d 285 (2011) (finding evidence supporting premeditation included the defendant firing multiple shots with a pause between the first and second shot). Witnesses testified the shooter was chasing Gary while firing. See *State v. Clemons*, 273 Kan. 328, 335, 45 P.3d 384 (2002) (finding evidence sufficient to support premeditation where two witnesses testified to seeing defendant chase victim across street). Witnesses also testified the shooter immediately left the scene. See *State v. Alvidrez*, 271 Kan. 143, 149, 20 P.3d 1264

(2001) (fleeing scene of shooting without calling for or rendering aid could support inference of premeditation). When Officer Stevenson asked Gary why his wife had shot him, Gary said he did not know and they had not been fighting, suggesting a lack of provocation. See *Kettler*, 299 Kan. at 468 (while first-degree murder victim had previously robbed co-defendant, no evidence showed victim did anything on day of his murder to entice co-defendants to confront him). Frantz had posted several angry messages directed at Gary on social media. And on the day of the shooting, she posted that she hoped Gary would "rot in hell" or "rot in prison." See 299 Kan. at 468 (defendant's threatening statements before shooting supported inference of premeditation). This evidence is sufficient to support the jury's finding that Frantz acted intentionally and with premeditation.

IV. *Frantz' Pro Se Claims*

In her supplemental pro se brief, Frantz raises numerous other points of error, including violations of her due process rights, insufficiency of the evidence, prosecutorial error, and a challenge to the validity of her arrest warrant.

A. *Frantz Has Failed to Establish Any Violation of Her Due Process Rights*

Frantz argues she was denied due process of law because (1) the State concealed exculpatory evidence; (2) her conviction was secured through perjured testimony; (3) her trial transcripts are inaccurate or incomplete; and (4) the district court erroneously denied her motion for judgment of acquittal. We will address these arguments in turn.

First, Frantz claims the State concealed exculpatory evidence because it did not inform the jury that Officer Stevenson misunderstood Gary's dying declaration or that Gary may have been responding to bystanders rather than Officer Stevenson's questions. Prosecutors have an affirmative duty to disclose evidence favorable to the accused, and failure to do so violates the defendant's due process rights. *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021). But prosecutors do not have a duty to draw inferences

from the evidence in favor of the defense and argue those inferences to the jury. Here, the State disclosed Officer Stevenson's bodycam footage to the defense, and that footage was played for the jury. Frantz was free to argue at trial that Officer Stevenson misheard Gary or that Gary was responding to other bystanders in the video.

Frantz also claims a law enforcement officer lied to conceal body camera footage of a conversation with Patrick's neighbor. See *Breitenbach*, 313 Kan. at 97 (for purposes of determining whether prosecutor withheld exculpatory evidence, law enforcement's knowledge of evidence imputed to prosecutor). But nothing in the record shows that footage of the conversation exists or that law enforcement lied to conceal its existence. In fact, the record shows Frantz knew of the conversation and its substance.

Second, Frantz asserts the State secured her conviction through perjured testimony. She claims the State manipulated one of the Stove Loft tenants into testifying that Gary identified his wife as the shooter both before and after Officer Stevenson arrived on the scene. She also alleges Raynal was manipulated into identifying Frantz as the shooter at trial.

"'A conviction obtained by the introduction of perjured testimony violates a defendant's due process rights if (1) the prosecution *knowingly* solicited the perjured testimony, or (2) the prosecution failed to correct testimony it *knew* was perjured.'" *Haddock v. State*, 282 Kan. 475, 508, 146 P.3d 187 (2006).

Frantz raised a similar claim in her motion for new trial, and the district court found Frantz had failed to establish that any witness had committed perjury. See K.S.A. 2021 Supp. 21-5903(a)(1) (defining perjury as "intentionally and falsely . . . testifying . . . to any material fact upon any oath or affirmation legally administered in any cause, matter or proceeding before any court"). Our review of the record has uncovered nothing to suggest any witness intentionally and falsely testified at Frantz' trial; thus, we affirm the district court's finding.

Third, Frantz alleges court reporters altered the trial transcripts included in the record on appeal. Criminal defendants have a due process right to reasonably accurate trial transcripts, and a defendant may be entitled to a new trial if manifestly incomplete

or inaccurate transcripts preclude meaningful appellate review. *State v. Holt*, 298 Kan. 531, 537, 314 P.3d 870 (2013). But when an appellant claims the denial of due process based on inaccurate or incomplete transcripts, the appellant "must make the best feasible showing possible that a complete and accurate transcript might have changed the outcome of the appeal." 298 Kan. at 538. Here, nothing in the record supports Frantz' claim that unidentified portions of the transcript have been altered or omitted. Moreover, Frantz fails to show that an accurate or complete transcript might have changed the outcome of her appeal.

Fourth, Frantz argues the district court violated her due process rights by denying her motion for judgment of acquittal at the close of the State's case because there was insufficient evidence to support her conviction for first-degree murder. As previously noted, Frantz waived any claim of error regarding the district court's denial of her motion for judgment of acquittal. See *Copes*, 244 Kan. at 610-11. Furthermore, our review of the record confirms the State presented sufficient evidence in its case in chief to support Frantz' conviction. Indeed, all the evidence discussed in our sufficiency of the evidence analysis in Issue III (other than Johnson's expert opinion testimony) was presented before the close of the State's evidence. Thus, we hold Frantz has failed to establish a violation of her due process rights.

B. *The State Presented Sufficient Evidence to Support Frantz' Conviction*

Next, Frantz argues the State failed to prove beyond a reasonable doubt that her actions were the proximate cause of Gary's death. See *State v. Wilson*, 308 Kan. 516, 522, 421 P.3d 742 (2018) ("'[U]nlawful conduct which is broken by an independent intervening cause cannot be the proximate cause of the death of another for the purpose of a conviction for homicide.'"). But Dr. Handler testified Gary died from his gunshot wounds. Dr. Handler also testified Gary had some broken ribs due to receiving CPR. He explained such injuries were common in people who had received CPR and did not contribute to Gary's death. Thus, there is no evidence to suggest an intervening event severed the causal connection between Frantz shooting Gary and Gary dying.

Frantz also argues the State presented insufficient evidence to prove she acted with the mens rea, or culpable mental state, for first-degree premeditated murder. As discussed in Issue III, we hold the State fulfilled its burden to prove this element beyond a reasonable doubt.

C. *The State Did Not Commit Reversible Prosecutorial Error*

Frantz argues the prosecutor committed prosecutorial error by stating facts not in evidence during closing argument. The prosecutor stated once during closing that Frantz "waited in [Gary's] parking lot." Frantz asserts there is no evidence to show she waited in the parking lot.

When reviewing claims of prosecutorial error, we use a two-step process. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). First, we must determine if error occurred—whether the acts complained of fall outside the wide latitude afforded to 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. 305 Kan. at 109. If we find error has occurred, we must then determine whether the error prejudiced the defendant's due process rights to a fair trial. In conducting that analysis, we determine whether the State can demonstrate there is no reasonable possibility that the error contributed to the verdict. 305 Kan. at 109.

We find the prosecutor's comment falls within the wide latitude afforded prosecutors in arguing their case. While no evidence directly shines light on when Frantz arrived at Gary's apartment, it was reasonable to argue from the evidence that she waited for him in the parking lot. Frantz apparently had to drive at least 20 minutes to arrive at Gary's apartment in Leavenworth, and she and Gary were not on good terms, so it seems reasonable to infer from this evidence Frantz was unlikely to have known his whereabouts. See *State v. Longoria*, 301 Kan. 489, 524, 343 P.3d 1128 (2015) (prosecutor has wide latitude in crafting arguments and drawing reasonable inferences from evidence). The challenged statement falls within the wide latitude afforded to prosecutors in arguing the case.

D. *Frantz Did Not Preserve Her Challenge to Her Arrest Warrant for Review*

Frantz claims her arrest warrant is "illegal" because the supporting affidavit omitted information. The affidavit states, "Barbara has told her son, Patrick Frantz, she wanted Gary, 'to get what he deserves.'" And Patrick told law enforcement that Frantz had texted him saying Gary "was gonna get what's coming to him through her turning in his phone." Frantz now claims the affidavit omitted that she believed Gary had child pornography on his phone, and she wanted to turn in his phone so he would go to prison for possessing child pornography.

If law enforcement deliberately omitted information from the affidavit supporting Frantz' arrest warrant, that omission may violate Frantz' Fourth Amendment rights if the missing information would have negated a probable cause finding. See *United States v. Banks*, 884 F.3d 998, 1009 (10th Cir. 2018). But parties generally may not raise constitutional claims for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). Frantz does not cite to any point in the record where she raised this issue before the district court. See Kansas Supreme Court Rule 6.02(a)(5) (2020 Kan. S. Ct. R. 34) (requiring appellant to include a pinpoint reference to the location in record where issue was raised and ruled on). Nor has she briefed why we should consider her claim despite her failure to raise it below. See *Daniel*, 307 Kan. at 430 (although there are exceptions to general rule that constitutional issue cannot be raised for first time on appeal, litigant must assert the exceptions); Supreme Court Rule 6.02(a)(5).

Even so, Frantz' challenge to the affidavit fails under the record before us. Even assuming the omission of the information was deliberate, Frantz would only be entitled to relief if she can show the inclusion of the omitted information negated probable cause. *State v. Breazeale*, 238 Kan. 714, 725, 714 P.2d 1356 (1986). But our review of the affidavit shows that even with the addition of the omitted information, the affidavit still establishes probable cause to arrest Frantz for first-degree premeditated murder. The affidavit states: (1) Frantz and Gary were having marital problems; (2) Frantz believed Gary was poisoning her and she expressed a desire to get revenge by getting him sent to prison; (3)

Frantz had recently purchased a handgun; (4) Frantz was acting strangely shortly before the shooting; (5) Gary was shot multiple times with a handgun; and (6) Gary said Frantz shot him. The totality of this information, as well as reasonable inferences drawn from this information, would support a reasonable belief that Frantz committed the first-degree premeditated murder of Gary. See *Rosendahl v. Kansas Dept. of Revenue*, 310 Kan. 474, 481, 447 P.3d 347 (2019) (defining probable cause as "'the reasonable belief, drawn from the totality of information and reasonable inferences available to the arresting officer, that the defendant has committed or is committing a specific crime'").

E. *We Decline Frantz' Request to Take Judicial Notice of Certain Documents and Information and Her Request to Add an Exhibit to the Record*

Frantz asks this court to take judicial notice of several documents and pieces of information, including two witness statements given to police on the night of the shooting; a complaint she filed with the State Board of Examiners of Court Reporters alleging court reporters had altered transcripts; and several other allegations of professional misconduct. But none of these items are subject to judicial notice under K.S.A. 60-409.

Frantz also asks this court to independently request a copy of Officer Stevenson's body camera footage to determine if the State has altered the video provided on appeal. But Frantz has the burden to designate a record sufficient to establish error on appeal (including her claim that the State has altered evidence), and she has not done so. *Vonachen*, 312 Kan. at 460.

CONCLUSION

In sum, we hold the district court did not abuse its discretion or violate Frantz' Confrontation Clause rights by limiting her cross-examination of Patrick. The district court imposed those limits to prevent Frantz from adducing evidence which was inadmissible under established evidentiary rules. And the district court's limitations did not prevent Frantz from otherwise effectively cross-examining Patrick. We also hold that Frantz waived

any challenge to the district court's denial of her motion for judgment of acquittal at the close of the State's evidence. And the State presented sufficient evidence to support Frantz' conviction for first-degree premeditated murder. Finally, we hold Frantz' supplemental briefing failed to establish any other error requiring reversal.

Affirmed.

* * *

STEGALL, J., concurring: I concur in the result, but I do so only after considering and rejecting the waiver rule from *State v. Blue*, 225 Kan. 576, 578, 592 P.2d 897 (1979). The majority recognizes that this rule precludes appellate review of a trial court decision to deny a motion for acquittal at the close of the State's case-in-chief if the defendant proceeds to put on evidence in his or her own defense. Often referred to as a "waiver," the rule is premised on the idea that on a subsequent motion for acquittal—or on appellate review—all the evidence against the defendant ought to be considered. See, e.g., *State v. Copes*, 244 Kan. 604, 607, 772 P.2d 742 (1989) ("If the motion for acquittal is renewed after the close of all of the evidence, the trial court should consider *all* of the evidence in ruling upon that motion."). The majority provides a helpful string cite to numerous other jurisdictions that have adopted the same rule. *State v. Frantz*, 316 Kan. 708, 733-34; see, e.g., *State v. Seeley*, 326 Conn. 65, 71, 161 A.3d 1278 (2017) ("'The so-called waiver rule provides that, when a motion for [a judgment of] acquittal at the close of the state's case is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf.'").

The majority concedes the *Blue* waiver rule would typically apply here to preclude appellate review of the district court's decision to deny Frantz' motion for acquittal at the conclusion of the State's evidence. But due to a lack of briefing by the State, the majority reaches the merits on the issue anyway. *Frantz*, 316 Kan. at 735.

More often than not, when an issue is not properly preserved for appellate review, we will not decide it. This is often true even

when the parties don't specifically raise the issue of preservation. See *State v. Parry*, 305 Kan. 1189, 1192, 390 P.3d 879 (2017) (an appellate court has discretion to sua sponte reach a preservation issue not raised by either party). I would prefer to stick with our general practice and consider preservation issues even when not argued by the parties. If an issue is not properly preserved, it is not properly before us absent a preservation exception. And mutual agreement of the parties to present an unpreserved issue to this court is not—in itself—a recognized exception to our preservation requirements. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (Exceptions to our general bar against unpreserved claims are: "'(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason.'").

Given this, I will consider the application of the *Blue* waiver rule in this case. And it isn't difficult to conclude the rule ought to be discarded. As the majority recites, there are simple fairness problems with the rule. *Frantz*, 316 Kan. at 734-35. For example, some courts have found the rule "presents a defendant whose motion to dismiss has been erroneously denied with a Hobson's choice: resting and sacrificing the right to present a defense out of fear that his or her testimony may cure defects in the prosecution's case, or putting on such evidence and thereby possibly assisting the prosecution in proving its case." *In re Anthony J.*, 117 Cal. App. 4th 718, 732, 11 Cal. Rptr. 3d 865 (2004).

But even more basic, the rule violates one of the most sacrosanct principles of American criminal law—the prohibition against being put in jeopardy twice for the same accusation. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 796, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) ("Like the right to trial by jury, [the prohibition on double jeopardy] is clearly 'fundamental to the American scheme of justice.'"); *Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense,

thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) ("[A]lthough the Court of Appeals may correctly have believed 'that the acquittal was based upon an egregiously erroneous foundation, . . . [n]evertheless, "[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the defendants] twice in jeopardy, and thereby violating the Constitution."'"); *Green*, 355 U.S. at 200 (Frankfurter, J., dissenting) (describing the prohibition of double jeopardy as an "indispensable requirement of a civilized criminal procedure"); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168, 21 L. Ed. 872 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.").

Simply put, the government doesn't get two bites at the conviction apple. But this is exactly what the *Blue* rule allows. To make the point clear, consider what happens when a trial court does grant a motion to acquit following the State's evidence.

"A judgment of acquittal . . . terminates the prosecution; and the double jeopardy clause of the fifth amendment bars further proceedings against the defendant for the same offense. If the trial court grants a motion for acquittal . . . the order is final and not appealable by the state. Appellate review of the decision after acquittal would constitute double jeopardy. [Citations omitted.]" *State v. Gustin*, 212 Kan. 475, 479-80, 510 P.2d 1290 (1973).

"[A]n acquittal through a directed verdict is immediate, is accorded finality, and renders the question of guilt no longer at issue. The defendant then stands acquitted of the offense to which the motion is directed and the grant has the same force and effect as the return of a verdict of not guilty by the trier of fact, whether it is the court or a jury." 75A Am. Jur. 2d Trial § 851.

This is as it must be because the "'constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal.'" *United States v. DiFrancesco*, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); see also K.S.A. 2021 Supp. 21-5110(a)(1) (additional prosecution "is barred" following "a determination that the evidence was insufficient to warrant a conviction").

So, in a hypothetical case in which the State fails to present sufficient evidence for a conviction, and the trial court correctly grants a motion for judgment of acquittal at the close of the State's evidence,

the defendant may no longer be prosecuted for that alleged offense. But—according to the *Blue* waiver rule—if the trial court commits legal error and denies the same motion, the State is free to get its second bite during the defendant's presentation of evidence and the defendant is prevented from seeking appellate review of the error. In my view, the application of this rule turns a blind judicial eye to potential double jeopardy violations of both the United States and Kansas Constitutions.

A defendant who was legally entitled to an acquittal—even if he or she did not obtain that acquittal at the time it was asked for through the legal error of a judge—must have the same double jeopardy protections afforded an identical defendant who in fact did obtain a legally correct judgment of acquittal. To vindicate this double jeopardy right, an appellate court has an obligation to consider whether the motion for acquittal at the close of the State's case was denied in error. If it was, then everything that happened afterward—even if sufficient evidence was later presented—must nonetheless be disregarded as a violation of double jeopardy principles.

Given this, I would use today's opportunity to abrogate the *Blue* waiver rule and reach the merits of the properly preserved question presented by Frantz—did the district court err when it denied Frantz' motion for acquittal after the State's case-in-chief? Because I agree with the way the majority opinion analyzes this question, I concur in the judgment.

LUCKERT, C.J., and ROSEN, J., join the foregoing concurring opinion.

No. 124,737

STATE OF KANSAS, *Appellee,* v. MEKA RICHARDSON, *Appellant.*

(521 P.3d 1111)

SYLLABUS BY THE COURT

APPEAL AND ERROR—*Abuse of Discretion Alleged—Burden on Party Alleging Error*. The party alleging an abuse of discretion bears the burden of establishing error.

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed December 30, 2022. Affirmed.

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

Francis X. Altomare, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 1992, a jury convicted Meka Richardson of first-degree murder and aggravated robbery in the shooting death of Brenda Wassink. The jury rendered a belt-and-suspenders conviction, finding Richardson guilty of the first-degree murder on both theories presented by the State—first, premeditation; and second, felony murder committed during an aggravated robbery. During the sentencing phase, the jury unanimously found specific aggravating factors not outweighed by specific mitigating factors. The district court sentenced Richardson to life in prison without the possibility of parole for 40 years.

In December 2021, Richardson filed a one-page letter with the Wyandotte County District Court requesting postconviction discovery of the ballistics report from her case. Richardson had filed a similar request for the ballistics report in 2020, which the district court denied. In denying the 2020 letter request, the district court applied the postconviction discovery test articulated by a panel of the Court of Appeals in *State v. Mundo-Parra*, 58 Kan. App. 2d 17, 24, 462 P.3d 1211 (2020). The district court again summarily denied Richardson's 2021 postconviction discovery request because she "still failed to state good cause and state[d] no statutory authority," though the district court also cited no specific standard.

Richardson appeals the district court's denial of her most recent request directly to our court. Jurisdiction is proper under K.S.A. 2021 Supp. 22-3601(b)(3) (appeal must be taken directly to Supreme Court when the maximum sentence of life imprisonment has been imposed).

Richardson alleges the district court erred by not granting her motion for postconviction discovery under the *Mundo-Parra* framework. But we decline to take up that issue in this case. Just as we said in *State v. Butler*, 315 Kan. 18, 20, 503 P.3d 239 (2022), "[w]e begin by stating what this opinion does not do. It does not endorse the rule established in *Mundo-Parra*, as [appellant] requests on appeal. Nor does it abrogate that holding." This is because here, even if there is a postconviction discovery right as set forth in *Mundo-Parra*, Richardson has not established that the district court abused its discretion by denying her motion. We therefore affirm the district court's order.

This court reviews lower court rulings on postconviction discovery for abuse of discretion. A district court abuses its discretion if no reasonable person could agree with its decision or if its exercise of discretion is founded on a legal or factual error. 315 Kan. at 21. The party alleging an abuse of discretion bears the burden of establishing error. 315 Kan. at 21.

This court has not articulated a definitive test for when and if postconviction discovery is appropriate. We have recognized, however, that postconviction discovery may be appropriate in certain limited circumstances. Fifty years ago, in *State v. Nirschl*, 208 Kan. 111, 116, 490 P.2d 917 (1971), we said it was "arguable . . . that disclosure and post trial discovery may be necessary on certain occasions to insure due process." The Court of Appeals has cited *Nirschl* and ordered postconviction discovery—an in-chamber review of the defendant's case to see whether anything related to one of the investigating officers seemed improper. *State v. Riis*, 39 Kan. App. 2d 273, 276-78, 178 P.3d 684 (2008).

More recently, the *Mundo-Parra* panel of the Court of Appeals held that in order to get discovery, a defendant must (1) make a good-cause showing by identifying the specific subject matter for discovery, and (2) then explain why discovery of those matters is necessary to protect substantial rights. 58 Kan. App. 2d

at 24. The panel provided more context to this broad test by stating that a proper request should be targeted, as opposed to a "fishing expedition." 58 Kan. App. 2d at 25. Additionally, the defendant must indicate how the information would have changed the result of trial or called into question the conviction in more than a mere speculative way. 58 Kan. App. 2d at 24-25.

In February of 2022, we considered whether postconviction discovery would be appropriate in *Butler*. 315 Kan. at 20-21. We held Butler was not entitled to postconviction discovery, and we expressly declined to endorse or discredit the *Mundo-Parra* test relied on by the Court of Appeals. We noted that even if *Mundo-Parra* was the correct standard, the district court did not abuse its discretion by denying Butler's motion. 315 Kan. at 21-24.

Just as in *Butler*, resolving Richardson's claim does not require us to either adopt or reject the *Mundo-Parra* test. Richardson's brief both fails to argue good cause for her request and fails to identify how the district court abused its discretion. Richardson does not claim any specific legal or factual error and does not allege that no reasonable judge would have denied her request. Richardson seems aware of this flaw, and asks us to deviate from *Butler*, though without arguing why *Butler* was wrongly decided or is distinguishable from her case.

Furthermore, Richardson does not allege that any information contained in the ballistics report would be exculpatory and she fails to identify any other reason the ballistics report may be relevant to a challenge to her conviction. Thus, even under our broad language in *Nirschl*, Richardson has failed to articulate how postconviction discovery might be necessary to insure her due process rights. 208 Kan. at 116.

Alternatively, Richardson argues that the right to "pursue a challenge to her conviction" should be considered a habeas corpus challenge. And because the writ of habeas corpus is a fundamental right, she should be afforded postconviction discovery so long as that discovery pertains to that action. Richardson's habeas corpus argument is unpreserved as it is raised for the first time on appeal. We decline to utilize a prudential exception to our preservation requirements in order to consider her claim. See *State v. Gutierrez-Fuentes*, 315 Kan. 341, 347, 508 P.3d 378 (2022)

("[B]efore invoking one of the limited exceptions, an appellate court must also determine whether the unpreserved issue is amenable to resolution on appeal. Even then, the decision to review an unpreserved claim under an exception is a prudential one; the court necessarily exercises discretion. Despite an exception supporting review of a new claim, an appellate court has no obligation to do so. [Citations omitted.]"); *State v. Parry*, 305 Kan. 1189, 1192, 390 P.3d 879 (2017) ("[J]ust because an exception may permit review of an unpreserved issue, this alone does not obligate an appellate court to exercise its discretion and review the issue.").

Finding no error, the district court is affirmed.