

18-8138  
No. \_\_\_\_\_

Supreme Court, U.S.

FILED

FEB 19 2019

OFFICE OF THE CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

Joseph Hughes — PETITIONER  
(Your Name)

vs.

Dan Schnurr — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the State of Kansas

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Hughes #114259

(Your Name)

Hutchinson Correctional Facility, P.O. Box 1568

(Address)

Hutchinson, KS 67504

(City, State, Zip Code)

none

(Phone Number)

ORIGINAL

**QUESTION(S) PRESENTED**

How can the State of Kansas manage me as a sexual offender when I was found acquitted of rape by a jury? Furthermore, the State of Kansas wasn't able to find evidence of a sexually motivated crime, therefore under what legal authority does Kansas have to impose management as a sex offender? How is this not a second prosecution and second punishment for the same offense, amounting to double jeopardy?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the State of Kansas Court of Appeals court appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was November 21, 2018. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### K.S.A. 21-5110

Effect of former prosecution. (a) A prosecution is barred if the defendant was formerly prosecuted for the same crime, based upon the same facts, if such former prosecution:

- (1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction;
- (2) was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or
- (3) was terminated without the consent of the defendant after the defendant had been placed in jeopardy, except where such termination shall have occurred by reason of:
  - (A) The illness or death of an indispensable party;
  - (B) the inability of the jury to agree; or
  - (C) the impossibility of the jury arriving at a verdict.

A conviction of an included crime is an acquittal of the offense charged.

- (b) A prosecution is barred if the defendant was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution:
  - (1) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime or crimes of which evidence has been admitted in the former prosecution and which might have been included as other counts in the complaint, indictment or information filed in such former prosecution or upon which the state then might have elected to rely; or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the crime was not consummated when the former trial began;
  - (2) was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or
  - (3) was terminated without the consent of the defendant after the defendant had been placed in jeopardy, except where such termination shall have occurred by reason of:
    - (A) The illness or death of an indispensable party;
    - (B) the inability of the jury to agree; or
    - (C) the impossibility of the jury arriving at a verdict, and the subsequent prosecution is for an offense of which the defendant could have been convicted if the former prosecution had not been terminated improperly.

(c) A prosecution is barred if the defendant was formerly prosecuted in a district court of the United States or in a state court of general jurisdiction of another state or in the municipal court of any city of this state for a crime which is within the concurrent jurisdiction of this state, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began; or

(2) was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the prosecution in this state.

(d) A prosecution is not barred under this section:

(1) By a former prosecution before a court which lacked jurisdiction over the defendant or the offense;

(2) by a former prosecution procured by the defendant without the knowledge of a prosecuting officer authorized to commence a prosecution for the maximum offense which might have been charged on the facts known to the defendant, and with the purpose of avoiding the sentence which otherwise might be imposed; or

(3) if subsequent proceedings resulted in the invalidation, setting aside, reversal or vacating of the conviction, unless the defendant was adjudged not guilty.

(e) In no case where a conviction for a lesser included crime has been invalidated, set aside, reversed or vacated shall the defendant be subsequently prosecuted for a higher degree of the crime for which such defendant was originally convicted.

(f) A defendant is in jeopardy when such defendant is put on trial in a court of competent jurisdiction upon an indictment, information or complaint sufficient in form and substance to sustain a conviction, and in the case of trial by jury, when the jury has been impaneled and sworn, or where the case is tried to the court without a jury, when the court has begun to hear evidence.

History: L. 2010, ch. 136, § 10; July 1, 2011.

**K.S.A. 60-1501, K.S.A. 60-1501(a), K.S.A. 60-1501(b), K.S.A. 60-1501(c)**

**Jurisdiction and right to writ; time limitations.** (a) Subject to the provisions of K.S.A. 60-1507, and amendments thereto, any person in this state who is detained, confined or restrained of liberty on any pretense whatsoever, and any parent, guardian, or next friend for the protection of infants or allegedly incapacitated or incompetent persons, physically present in this state may prosecute a writ of habeas corpus in the supreme court, court of appeals or the district court of the county in which such restraint is taking place. No docket fee shall be required, as long as the petitioner complies with the provisions of subsection (b) of K.S.A. 60-2001, and amendments thereto.

(b) Except as provided in K.S.A. 60-1507, and amendments thereto, an inmate in the custody of the secretary of corrections shall file a petition for writ pursuant to subsection (a) within 30 days from the date the action was final, but such time is extended during the pendency of the inmate's timely attempts to exhaust such inmate's administrative remedies.

(c) Except as provided in K.S.A. 60-1507, and amendments thereto, a patient in the custody of the secretary for aging and disability services pursuant to K.S.A. 59-29a01 et seq., and amendments thereto, shall file a petition for writ pursuant to subsection (a) within 30 days from the date the action was final, but such time is extended during the pendency of the patient's timely attempts to exhaust such patient's administrative remedies.

History: L. 1963, ch. 303, 60-1501; L. 1976, ch. 251, § 23; L. 1994, ch. 227, § 3; L. 1996, ch. 148, § 3; L. 2012, ch. 90, § 2; L. 2014, ch. 115, § 231; July 1.

#### K.A.R. 44-12-1001

Violation of statutes, other regulations, or orders. (a) Unless otherwise designated in this rule book, violation of state or federal statutes shall be a class I offense if the statute is a felony crime. A violation shall be a class II offense if the statute designates a misdemeanor criminal offense.

(b) Unless otherwise designated in this rule book, violation of any civil penalty statute or any regulation shall be a class III offense. (Authorized by and implementing K.S.A. 1990 Supp. 75-5210; effective May 1, 1981; amended April 20, 1992.)

#### Bill of Rights, Section 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### United States Constitution, 1<sup>st</sup> Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### United States Constitution, 5<sup>th</sup> Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### United States Constitution, 14<sup>th</sup> Amendment

1. 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On August 3, 2017, Petitioner Joseph Hughes filed a K.S.A. 60-1501 Petition and Memorandum in Support. In the petition, Mr. Hughes challenged his management by Kansas Department of Corrections (KDOC) as a sex offender, pursuant to Internal Management Policy and Procedure (IMPP) 11-115A, and further challenged ongoing conditions thereof, which was imposed as a result of a criminal complaint filed in Shawnee County, Kansas District Court, in Case No. 15-CR-96, alleging rape, in violation of K.S.A. 21-5503(1)(A). Mr. Hughes was charged in the same complaint with attempted first degree murder, in violation of K.S.A. 21-5402 and K.S.A. 21-5301, three counts of robbery, in violation of K.S.A. 21-5420(a), two counts of aggravated burglary, in violation of K.S.A. 21-5807(b), two counts of criminal damage to property, in violation of K.S.A. 21-5813(a)(1)(B)(2), one count of criminal damage to property, in violation of K.S.A. 21-5813(a)(1)(B)(3), and domestic battery, in violation of K.S.A. 21-5414(a)(1)(B)(2). Case No. 15-CR-96 was consolidated for trial with Case No. 15-CR-1836, in Shawnee County, Kansas, wherein Mr. Hughes was charged with three counts of conspiracy to obstruct, in violation of K.S.A. 21-5913(a)(1), and three counts of perjury, in violation of K.S.A. 21-5903(a)(1)(B)(2).

At the conclusion of the jury trial, on March 30, 2016, Mr. Hughes was acquitted of rape, one count of robbery, one count of aggravated burglary. He was convicted of attempted second degree murder, two counts of robbery, one count of aggravated burglary, three counts of criminal damage to property,

domestic battery, and aggravated battery. Mr. Hughes was convicted on all counts in Case No. 15-CR-1836. Mr. Hughes was sentenced on June 21, 2016, to a term of imprisonment and remanded to custody.

While in custody at Hutchinson Correctional Facility (HCF), Mr. Hughes was served with a “Due Process Hearing Notice,” on September 28, 2016, at 12:35PM, which provided that KDOC proposed to manage him as a sex offender per IMPP 11-115A, for the reason, “based on the attached prosecutor’s affidavit which indicates your actions were sexually motivated, where you were charged with the sex crime indicated below, even though you were not convicted of this crime. The Hearing notice further provided:

“You will have the opportunity to tell us any mitigating circumstances we should consider, with supporting evidence, before making a final decision. You will not be permitted to tell us these convictions did not occur or that they were in and of themselves invalid. You will find an Offender Request for Witness form attached. You must complete and return this form within 24 hours of receiving this notice, so we receive it 48 hours before the scheduled hearing. You will receive a response about your request for witnesses within 24 hours after we receive it, so you have it 24 hours before the scheduled hearing. It is your responsibility to have your witnesses present, in person, by phone, or through written statement, if approved. The KDOC will not subpoena witnesses, or be responsible for witnesses being present.”

IMPP 11-115(A) defines a sex offender as follows:

“An offender who will be managed by the KDOC as a sex offender and be bound by rules related to sex offenders, unless an override removes any or all of those conditions, and who shall be identified as any offender who: Has a current conviction for which s/he is incarcerated that is a sex offense; Has a past conviction for a sex crime, felony or misdemeanor, as an adult; Has a current or past journal entry that is marked with the Sexually Motivated Indicator (SMI); Has a past adjudication for a sex crime as a juvenile; Has one or more past municipal ordinance violations that are sex crimes, and which, after a due process hearing under this policy, is/are determined to be sexually motivated; Has a charge for a

sex crime, currently or in the past, and for which charge the prosecutor's affidavit is available; and who, after a due process hearing under this policy, is determined should be managed as a sex offender because the charged behavior was sexually motivated; or whose sexual behavior during incarceration or while in the community following incarceration has been documented by a disciplinary conviction or revocation of post-incarceration supervision, and which then leads to the offender receiving an override to be managed as a sex offender."

The hearing notice was signed on September 19, 2016, by Kimberley Coffin, KDOC Sex Offender Specialist, but not served upon Mr. Hughes until September 28, 2016 at 12:35PM. The notice further provided the due process hearing was set for September 30, 2016, at 10:00AM. It is the policy of KDOC, the alleged offender is not entitled to representation of counsel at the due process hearing, but may consult with counsel, prior thereto.

It's important to note that Hughes received insufficient notice of the due process hearing - less than 48 hours prior to the hearing, wherein he had to request witnesses and put on a case with less than 48 hours' notice, which did not comport with due process as the form itself states:

"the hearing should be set 72 hours after this notice is served."

Mr. Hughes proceeded with the telephone hearing on September 30, 2016. Mr. Hughes requested his trial attorney as a witness, which was denied, without any reason provided. At the time of Mr. Hughes' "Due Process Hearing," transcription of trial had not yet occurred. Without access to his trial transcript, for the criminal case, which was needed to challenge the charged offense in the criminal complaint was allegedly sexually motivated, Mr. Hughes proffered during the telephone hearing, evidence at trial revealed no

DNA evidence to support a violation of K.S.A. 21-5503(1)(A), and witnesses' testimony at trial was inconsistent with or contrary to their testimony at a preliminary hearing. Mr. Hughes advised at the hearing he was acquitted of rape.

After the "Due Process Hearing," Mr. Hughes received a letter decision from Ms. Coffin, dated September 30, 2016, reciting the affidavit in support of the complaint, providing:

"Sexual motivation was found in case 15-CR-96, originally charged with Rape, per the affidavit: On January 18, 2015, when Mr. Hughes returned to the alleged victim's home, the alleged victim recalls lying in her hallway with Mr. Hughes on top of her. She stated he pulled down her pants and vaginally raped her. The alleged victim recalls Mr. Hughes ejaculating on her face, telling her he wanted to get off one last time before he killed her." The letter further provided: "in accordance with IMPP 11-115A, you will now be managed as a sex offender by the KDOC. This shall be the final decision and no appeal shall be allowed. Clinical Associates has been notified and you will be evaluated to determine if sex offender treatment is needed. You have the same option as any other offender managed as a sex offender and seek modification of some or all of the decision through the override process."

Mr. Hughes sought an override of the September 30, 2016 decision, which was denied on February 9, 2017, without any written findings.

After filing his K.S.A. 60-1501 petition, on August 11, 2017, counsel for KDOC filed a motion to dismiss, alleging Mr. Hughes' K.S.A. 60-1501 petition was untimely filed, as he did not file his petition until August 3, 2017, more than 175 days after the February 9, 2017 Order, denying Mr. Hughes' override request, which was beyond the 30 days permitted under K.S.A. 60-1501.

Mr. Hughes filed a response, indicating the conditions of his management were ongoing and the 30 day time limit should not apply.

Alternatively, Hughes argued the failure to consider the petition would result in manifest injustice, as the time limit to file a K.S.A. 60-1501 petition may be extended by a showing of manifest injustice, which has been interpreted to mean obviously unfair or shocking to the conscience.

At a hearing held on the motion to dismiss, counsel for KDOC argued Hughes' petition was required to be filed within 30 days of a final action pursuant to K.S.A. 60-1501(b), and the override denial was on February 9, 2017, and the petition was filed 175 days later, and the Court did not have jurisdiction to hear the case. Counsel for KDOC argued *Litzinger v. Bruce*, 41 Kan.App.2d 9, 201 P.3d 707 (2008) and *Corter v. Cline*, 42 Kan. App. 2d 721, 217 P.3d 991 (2009) made clear the 30 day time frame should apply, and the consequences of the status as a sex offender was not continuing in nature so as to avoid the 30 day appeal time. Counsel for Hughes argued the petitioner was challenging not only his management as a sex offender, but the ongoing resulting conditions of the management. Counsel indicated one significant condition was the inability to have contact with his children, or any other person under 18 years of age - no visits, no phone calls, no letters, no e-mails, no photographs, no contact with them whatsoever, and argued parents have a liberty interest under the First and Fourteenth Amendment of the Constitution to establish relations with their children and such condition by itself is an ongoing condition which is unconstitutional. Additional ongoing conditions were advanced, including, as part of the management, special seating during visits, limitations in work opportunities which may be pursued,

and inability to transfer to a minimum security facility to complete or participate in a work release program. Counsel further indicated if Hughes violated the condition he cannot have contact with his children - he is subject to lose good time credits. Other conditions proffered were treatment requirements and the requirement of treatment upon release, as well as additional travel restrictions which will be imposed that are not ordinarily imposed on those who are not managed as sex offenders. Counsel for Hughes asserted as stated in his petition, these conditions along with those referred to in his petition are ongoing, and this civil regulation is more akin to punishment than it is remedial, especially where Mr. Hughes was not convicted of a sex offense, there was no minor victim involved in the allegations, and he was acquitted of rape, and the management and resulting conditions of management, as applied to Mr. Hughes results in a double jeopardy violation. Counsel indicated the reason given to manage Hughes as a sex offender was the complaint alleging rape, and a complaint is not evidence, and Hughes had asserted a due process issue in his petition regarding the findings being insufficient to manage him as a sex offender.

Alternatively, Counsel for Hughes, argued if the Court did not find the ongoing conditions (which Hughes contends result in a double jeopardy violation as well as a First Amendment issue with regard to no contact with his children) allowed consideration of Mr. Hughes' petition outside of the 30-day time limit for filing, it should be considered whether the failure to consider the petition would result in manifest injustice, and in doing so, requested the

Court look at the totality of the circumstances, persuasive reasons which prevented Mr. Hughes from filing his petition. Counsel proffered after Mr. Hughes requested an override, he received a one page letter saying his request was denied, which he had submitted through his unit team leader at KDOC, per the process implemented by KDOC. When Hughes received the decision, he went back to his unit team leader who told him he was done, and counsel indicated this fact was important in considering whether there was a reason that prevented him from timely filing a 1501 petition. Counsel argued the unit team response was equivalent to when a person relied on the erroneous advice of their attorney, constituting excusable neglect. In addition, at the time the notice of hearing was given to Hughes, he did not have access to trial transcripts, and producing evidence to dispute the offense was sexually motivated was difficult, along with KDOC policy that a person is not allowed to have an attorney, although they can consult with one.

Second, counsel argued substantial issues of law and fact support finding failure to consider the petition would result in manifest injustice. Such issues included the management as applied to Mr. Hughes results in a double jeopardy violation as well as written findings were not made, or were insufficient in the initial order determining they were going to manage Hughes as a sex offender based on the complaint, as well as Hughes received insufficient notice of the due process hearing - less than 48 hours prior to the hearing, wherein he had to request witnesses and put on a case with less than

48 hours notice did not comport with due process. Further, Hughes requested a witness be present - his trial attorney - which request was denied.

Finally, counsel for Hughes indicated the court should consider whether failure to consider the petition would result in manifest injustice where Mr. Hughes sets forth a colorable claim of actual innocence. Counsel indicated as Hughes generally proffered at the due process hearing, DNA evidence was lacking in the criminal trial to support the rape charge, as well as witness testimony at trial was contrary to or inconsistent with previous statements or preliminary hearing testimony.

Further, counsel indicated Mr. Hughes was acquitted of rape, and an acquittal is a resolution of the facts, and Hughes had made a colorable claim of innocence. Counsel indicated the Court, under the manifest injustice exception could find it should consider the petition. Counsel proffered another reason for part of the delay - approximately 20 days, occurred after Mr. Hughes had signed and verified the K.S.A. 60-1501 petition, on July 5, 2017, and on the same date, counsel forwarded releases for Mr. Hughes' signature in order to obtain records from KDOC to support exhaustion of administrative remedies, and for medical records regarding the decision for management. Mr. Hughes signed the releases on July 5, 2017, which were then forwarded by this counsel to the records department at KDOC, but no records were received in return, and eventually counsel made the decision to file the petition without the requested records, with the limited records possessed, which counsel believed may be enough to show exhaustion of administrative remedies. Counsel

requested the Court consider the 20 day delay which resulted when records were requested, but were never forwarded to Hughes or his counsel, (even with follow up inquiries by counsel) as another reason contributing to the delay in filing the K.S.A. 60-1501 petition. Counsel for KDOC argued the Court normally is not invited to consider the management of day-to-day operations in the prison. Counsel for KDOC indicated the basis for the decision to manage Mr. Hughes as a sex offender was it was decided it was a sexually motivated offense, whether he was convicted or not. Counsel for KDOC argued work release opportunities, minimum security status, possible consequences of violating the rules are speculative - none of it happened - and may never happen and cannot be used as an excuse for jurisdictional failing. The District Court indicated the matter would be taken under advisement. Counsel for Hughes indicated the conditions complained of were within the policy attached to the petition and many of those conditions were already in place, and some were certain to occur, according to the policy. Counsel indicated there are conditions that apply to Mr. Hughes that are ongoing, such as the inability to have contact with his children.

Mr. Hughes testified at the hearing about the ongoing conditions regarding his children and work release. Mr. Hughes indicated since he was a level three, he had no disciplinary action, at 10 or 11 months, he was eligible for minimum security which would then make him eligible for work release. Hughes' management as a sex offender prevented him from participating in work release. With regard to his children, Mr. Hughes indicated weekly

attempts made by his children, or attempts by others in his family to contact him were rejected. Mr. Hughes indicated he is not allowed to have material, photographs, or letters from nieces or nephews, as his mail is censored, even though he had never been convicted of a sex crime. Mr. Hughes further indicated evidence alleged at trial regarding the charged offense for which he was required to be managed as a sex offender, proved to be false - for example, he was allegedly at a residence for two and a half hours, and the State's own witnesses placed him at the residence for only three and a half minutes.

The Court then decided to take the matter under advisement and continued the matter to another date.

The District Court issued an Opinion and Order, on October 6, 2017, dismissing Mr. Hughes' petition for failure to show the Court had jurisdiction. The Court ruled:

"This Court found in the case of Jeffrey Litzinger v. Bruce, which was affirmed in 41 Kan.App.2d 9, 201 P.3d 707 (2008), the statute requiring the Petition to be filed within 30 days of final action applied to Litzinger. Litzinger was appealing the decision to manage him as sex offender, exactly the situation Hughes complains of. This Court notes that in the Court of Appeals opinion at page 12, the Court addresses the contention that the "...condition of treatment is ongoing." This Court is satisfied the same rationale should be applied in this case. The decision was final on 9 February 2017. Appeal needed to be filed within 30 days."

Mr. Hughes filed a timely notice of appeal on October 20, 2017. On August 3, 2018, the Court of Appeals issued an unpublished Memorandum Opinion affirming the district court's summary dismissal of his K.S.A. 60-1501 petition.

## REASONS FOR GRANTING THE PETITION

Review is sought because the Kansas Court of Appeals erred in affirming the summary dismissal of Hughes' K.S.A. 60-1501 petition for lack of jurisdiction where ongoing conditions of Hughes' management as a sex offender violate the U.S. Constitution. The Kansas Court of Appeals found the facts in Hughes' case strongly similar to those in Litzinger v. Bruce, 41 Kan. App. 2d 9 Syl. 5, 201 P.3d 707 (2008), where the Court rejected the argument ongoing conditions of confinement while classified as a sex offender rendered the 30-day time limitation for filing a K.S.A. 60-1501 petition inapplicable. Like Hughes, Litzinger was charged with rape, but not convicted, and KDOC classified Litzinger for management as a sex offender. Litzinger sought an override, which was denied, and filed a grievance 18 months later, contesting his sex offender classification. In less than a month, the grievance was denied by KDOC. Then over two months after the end of the grievance process, Litzinger filed a K.S.A. 60-1501 petition with the district court. At the time, Litzinger was required to request the warden's review once an override request had been decided in order to proceed with any further appeal, which did not occur. Litzinger failed to file a grievance within 15 days of the date of denial of his override request. Here, pursuant to IMPP 11-115A Section VII Notification to Offenders to be Managed as Sex Offenders and Due Process Hearing Subsection(B)(6) Hughes sought a full override which was denied. Currently IMPP 11-115A does not provide for any further appeal as the policy and procedure did in Litzinger.

Litzinger challenged his initial classification as a sex offender, not the resulting conditions of his confinement, whereas here, Hughes challenges both. Review is sought because the Court of Appeals did not consider one of the ongoing conditions of management deprives him from any form of contact with persons under 18, including his children, contrary to the Supreme Court's holding that parents have a liberty interest, protected by the Constitution under the First and Fourteenth Amendment, in having a reasonable opportunity to develop close relations with their children. See Wirsching v. Colorado, 360 F.3d 1191, 1198 (10th Cir. 2004). The Courts failed to consider the condition that any violation of possessing restricted items such as photos or letters from those under 18 results in a class 1 violation, and loss of good time credit. These conditions are ongoing.

Management and ongoing conditions thereof violate the double jeopardy guarantee, as applied to Hughes, under the Fifth Amendment of the U.S. Constitution, Section 10 of the Kansas Constitution Bill of Rights, and K.S.A. 21-5110, which prohibit a second prosecution for offense after acquittal, a second prosecution for the same offense, and multiple punishments for the same offense. Litzinger did not allege any ongoing condition of management violates the U.S. Constitution. Litzinger referenced possible constitutional claims including double jeopardy, denial of equal protection of the law, reckless disregard for some unspecified federal civil rights, and cruel and unusual punishment, all of which appeared to relate to the initial decision to classify him.

As applied to Hughes, management under IMPP 11-115A violates double jeopardy principles because management as a sex offender after acquittal of rape in his criminal case amounts to both a second prosecution and a second punishment for the same offense. Review is sought because the Court of Appeals found Hughes may have better specific punitive conditions than Litzinger, but the conditions flow from the decision to classify him as a sex offender. In Tonge, v. Simmons, 27 Kan. App. 2d 1048, 11 P.3d 77, rev. denied 270 Kan. 904 (2000), petitioners challenged not their guilt in violating K.A.R. 44-12-1001, or the imposition of penalties associated, but challenged only the resulting conditions of their confinement caused by the unreasonable execution of the penalty depriving them of the capacity to maintain personal hygiene.

The resulting conditions challenged there also flowed from the administrative decision finding a violation and imposition of penalties. The management and resulting ongoing conditions are unreasonably executed here because they include but are not limited to no contact with his children and violate double jeopardy principles. Analysis pursuant to the factors in Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed. 2d 450 (1997) is necessary to determine whether punishment is civil or criminal. The management is retributive because it affixes culpability for prior charged criminal conduct based on an affidavit attached to a criminal complaint, which is not evidence. Hughes was acquitted of the offense conduct, which is a resolution of the some or all of the factual elements of the offense charged. A finding of scienter - that the charged conduct was sexually motivated is

required in order to impose management under IMPP 11-115A, and sexually motivated behavior is defined as behavior undertaken or committed for the express purpose of sexual gratification of the offender. A complaint - a mere allegation- is insufficient to support the same.

Management under IMPP 11-115A functions as a deterrent based on conditions imposed as a result of management, all of which suggest a punitive purpose - to be singled out to sit in special seating during all visitations; participation in sex offender treatment, which continues upon release and is mandatory; no visits with anyone under age 18 are allowed, including Hughes' children, and even though none of the charged conduct involved minors, Hughes is unable to possess any pictures of a minor, and violation thereof results in loss of good time credit. Additional travel limitations are imposed after release and limited work opportunities exist while confined. No person below the age of 18 shall be permitted contact by any form, except through an override process, which was requested and denied. Hughes is subject to review on an ongoing and periodic basis to ensure job assignments, housing and program placements are not contributing to any sexual victimization and/or abusiveness. Residence planning is required under 11-115A, and offenders shall be supervised during post-release supervision in accordance with IMPP 14-124A. Offenders managed as sex offenders are assessed by the treatment provider at admission to determine the level of treatment needed. Hughes requires treatment according to his provider, and if he refuses the same, good time credit is withheld. These conditions are not imposed on

prisoners who are not classified as sex offenders. Management and conditions thereof is an affirmative restraint, as Hughes is subject to additional searches and seizures, forced to sit at a specially designated area during visitations, and is unable to engage in employment opportunities and visitation privileges other prisoners have, and unable to have contact with his children in any form and will continue to be managed as a sex offender upon release.

The management and conditions thereof promote the traditional aims of punishment - retribution and deterrence, even though the measure has been described as simply an administrative measure designed to enhance security of the facility and the rehabilitation of sex offenders. Hughes was acquitted of rape, necessarily entailing a resolution of facts so rehabilitation and enhanced security is unnecessary. The behavior to which the management applies is already a crime for which Hughes was acquitted, and necessarily involved a factual resolution. There was no finding by the trial court of sexual motivation as to offense conduct for which Hughes was convicted. Hughes has not engaged in any such conduct while incarcerated.

There is no alternative purpose to which sex offender management may rationally be connected assignable for it as applied to Hughes, as he was acquitted of the alleged offense conduct, as charged in the criminal complaint, which is not evidence. The basis of Hughes' management and the conditions imposed - the threat of the loss of good time credit for any violation of possessing aforementioned prohibited items, or for refusing treatment, and limited work opportunities, registration and treatment requirements upon

release, and the duration of the management, is excessive in relation to the alternative purpose assigned, to enhance security of the facility and rehabilitate Hughes.

The Court of Appeals did not decide Hughes' due process claims. Inmates retain certain constitutionally protected liberty interests whose deprivation implicates the right to due process, and Hughes' management under 11-115A here, where he was acquitted of rape, implicates such rights. See Daniels v. Colo. Dept. Of Corrections, 2009 WL 3246198 (D. Colo. 2009), unpublished order. If an inmate has not been convicted of a sex offense, the KDOC must afford Hughes a hearing, so he may contest the sexual basis of a conviction. Daniels, at \*8, citing Gwinn v. Amwiller, 354 F.3d 1211, 1218 (10th Cir. 2004) (An inmate who has not previously been convicted of a sex offense may be classified as a sex offender for purposes of a prison treatment program only if the prison affords him the procedural protections to which prisoners facing disciplinary sanctions involving liberty interests are generally entitled. Gwinn, at 1218.) Those protections are set forth in Wolff v. McDonnell, 418 U.S. 539, 555-56, 94 S.Ct. 2963, 41 L.Ed. 2d 935 (1974), and include, notice of the charges, an opportunity to present witnesses and evidence in defense of those charges, and a written statement by the factfinder of the evidence relied on and reasons for the disciplinary action. Gwinn, at 1219.

A protected liberty interest may arise when prison authorities impose on a prisoner's already quite-limited freedom and the restraint is atypical and a significant hardship on the inmate in relation to the ordinary incidents of

prison life. Jamerson v. Heimgartner, 304 Kan. 678, 681, 372 P.3d 1236 (2016). Kansas courts have indicated the duration of segregation or other loss of privileges is a factor that must be considered in determining whether there is an atypical and significant hardship sufficient to implicate due process. See Jamerson, *supra*. The restraint is atypical, and a significant hardship, because Hughes is required to sit in special seating during visits; is deprived from visits or contact by any means, with persons under 18, including his children, even though he has a liberty interest, protected by the Constitution under the First and Fourteenth Amendment, in having a reasonable opportunity to develop close relations with their children. See Wirsching v. Colorado, 360 F.3d 1191, 1198 (10th Cir. 2004). Hughes is deprived of possessing photos or letters to and from those under 18. Any violation of possessing restricted items results in a class 1 violation, and loss of good time credit. Treatment requirements continue upon release. The duration of conditions is ongoing. Housing and job placement is restricted under the regulation. Inmates have a protected property interest in their money. Restrictions on employment opportunities are imposed when managed under 11-115A. Refusal of treatment results in loss of good time credit. Inmates have a protected liberty interest in good time credits already earned. See Dunlap v. Heimgartner, 376 P.3d 93, 2016 WL 2775579 (Kan. 2016)(unpublished opinion).

Hughes was not afforded adequate notice to present evidence. Hughes was denied a witness request, without reason. “An inmate’s due process rights are violated where there is nothing in the record to show why the prison

officials would not allow the inmate to call requested witnesses.” Johnson v. Roberts, 2016 WL 2810212 (Kan.App. 2016) (unpublished opinion).

The decision to manage Hughes was based on an affidavit in support of a criminal complaint alleging an offense for which Hughes was acquitted - necessarily resulting in a resolution of the facts. There was insufficient evidence to find the alleged offense was sexually motivated. See May v. Cline, 304 Kan. 671, 372 P.3d 1242 (2016). The decision denying an override was conclusory and did not contain any findings.

The Court of Appeals did not consider whether conditions of management under IMPP 11-115A impinges on Hughes’ constitutional rights. The management is invalid, as it does not reasonably relate to legitimate penological interests as applied to Hughes. In assessing the contact with minors prohibition here, the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed. 2d 64 (1987) should be applied as follows: “A prison regulation impinging on inmates’ constitutional rights... is valid if it is reasonably related to legitimate penological interests.” The Court must “balance the guarantees of the Constitution with legitimate concerns of prison administrators,” *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002), asking (1) whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification; (2) whether alternative means of exercising the right are available notwithstanding the policy or regulation; (3) what effect accommodating the exercise of the right would have on guards, other prisoners, and prison sources

generally; and (4) whether ready, easy-to implement alternatives exist that would accommodate the prisoner's rights. See Turner, at 98-91. Hughes has no convictions for a sex offense, and none of his convictions were found to be sexually motivated by the trial court. Hughes was acquitted of rape based on lack of DNA evidence and witness testimony. IMPP 11- 115A has been described by the Kansas Appellate Courts as ... simply an administrative measure designed to enhance security of the facility and the rehabilitation of sex offenders." As applied here, there is no rational connection between the prison regulation and any legitimate governmental interest advanced for its justification, as Hughes is not a convicted sex offender in need of rehabilitation so management as a sex offender does not enhance security of the facility.

Whether alternative means of exercising the right are available notwithstanding the policy - Hughes is not allowed any form of contact with his children. Alternative means of exercising the right would permit some contact.

Considering the effect within the prison of accommodating the asserted right and availability of alternatives that would accommodate the prisoner, one less restrictive alternative would be to monitor visits, or allow no contact visits, which would have a minimal institutional effect, given visits of all inmates are already monitored to a degree.

In determining whether management under IMPP 11-115A violates Hughes' due process rights, the rational connection that exists between the prison policy regulation and a legitimate governmental interest advanced as

its justification is as described above.

Considering alternative means of exercising the right are available notwithstanding the policy or regulation - Hughes could be accorded sufficient notice of the hearing to allow him to produce the evidence to show no offense conduct was sexually motivated or evidence to support the same was insufficient. Sufficient time to procure this evidence could be provided. KDOC could have allowed for the requested witnesses for the hearing. There was no reason provided for denial of the override request. There was insufficient evidence to support the imposition of the management. Fact finding could be provided by KDOC. Accommodating Hughes' due process rights would have little to no effect on guards, no effect on other prisoners and no additional effect on prison sources generally, as sufficient time may be permitted to allow Hughes to produce evidence. Requiring written reasons from management would not have any effect on prison sources generally.

Ready, easy-to-implement alternatives exist that would accommodate Hughes' rights by simply requiring written findings to support management, and providing sufficient time to procure evidence, and allow for witnesses - easy to implement alternatives to accommodate Hughes' due process rights.

Review is sought because the Court of Appeals erred when it found K.S.A. 60- 1507(f)(2) analysis is inapplicable to Hughes' petition. The Court of Appeals found Hughes' reliance on *Griffin v. Bruffett*, 53 Kan. App. 2d 589, 389 P.3d 992 (2017) does not support application of manifest injustice subsection in K.S.A. 60-1507 because he does not share Griffin's status as an

involuntarily confined sexually violent predator and is not subject to the provision for that class of petitioners in K.S.A. 60-1501(c).

K.S.A. 60-1501 Jurisdiction and right to writ, time limitations, subsection (a) provides:

“Subject to the provisions of K.S.A. 60-1507, and amendments thereto, any person in this state who is detained, confined or restrained of liberty...may prosecute a writ of habeas corpus...”

Subsection K.S.A. 60-1501(b) and (c) are identical except (b) applies to an inmate in the custody of the secretary of corrections, and (c) applies to a patient in the custody of the secretary for aging and disability. In Griffin, the Court applied the factors in Vontress v. State, 299 Kan. 607, 614, 325 P.3d 1114 (2014) to determine whether manifest injustice would result from failure to consider his petition filed outside of 30 days. Balancing those factors, the Court found two of the three factors weighed against finding manifest injustice. The Court of Appeals erred in declining to apply the test in K.S.A. 60-1507(f)(2) to determine whether manifest injustice would result for failure to consider Hughes' petition. Review is requested because the Court of Appeals erred when it did not remand this case for consideration of Hughes' reasons for delay.

Upon receipt of the decision denying an override, Hughes consulted with his Unit Team Manager, who indicated in explicit terms nothing further could be done as opposed to advising him to consult with counsel. At the time, Hughes had no access to trial transcripts for evidentiary purposes to challenge a finding of sexual motivation. The district court indicated at the hearing on

the motion to dismiss he was going to take the case under advisement and would try and address whether there was manifest injustice, and whether the unit team leader may have misled the petitioner. In the district court's order, the Court did not make any findings as to manifest injustice, or factors supporting the same. As to Hughes' claim of actual innocence, Hughes asserted evidence at trial did not establish the alleged offense for which KDOC relies as the basis for management as a sex offender, and there is insufficient evidence to support the alleged conduct was sexually motivated. Evidence at trial showed DNA evidence was negative, and witnesses' testimony at trial did not support the offense. Hughes was found not guilty of rape - the basis for management, and an acquittal is a resolution of the facts, in his favor. This factor weighs in Hughes' favor in finding manifest injustice, but the district court did not address this factor in the order of dismissal.

The Court of Appeals erred in affirming the district court's summary dismissal of Hughes' K.S.A. 60-1501 petition for lack of jurisdiction. An evidentiary hearing was required as unconstitutional ongoing conditions permit consideration of Hughes' petition out of time, and a hearing was required to present factors supporting consideration of Hughes' petition to prevent manifest injustice.

Mr. Hughes is being unlawfully restrained of liberty due to the Kansas Department of Corrections management of him as a sex offender, even though Mr. Hughes was acquitted of rape by a jury. The KDOC acknowledges in their "Due Process Hearing Notice" that Mr. Hughes was "not convicted of this

crime", yet they proceeded with classifying and managing him as a sex offender. The restraint is wrongful as management in accord with IMPP 11-115A violates the double jeopardy guarantee, which prohibits a second prosecution for offense after acquittal, a prosecution for the same offense, and multiple punishments for the same offense. Management under IMPP 11-115A violates double jeopardy principles because his confinement or restraint imposed after a conviction amounts to both a second prosecution and a second punishment for the same offense.

Mr. Hughes was acquitted of the offense conduct, which was a resolution of the some or all of the factual elements of the offense charged. The complaint is insufficient to support a finding that the charged conduct was sexually motivated or that Mr. Hughes' behavior was undertaken for the express purpose of sexual gratification. A complaint is not evidence.

Should this management be allowed to continue, the Courts are implying that a jury is incapable of making the correct decision to acquit individuals of charges. Essentially lessening the power the jury has been given to render a verdict. Furthermore, should this management continue, the Courts are allowing Correctional Facilities to impose restrictions on individuals who have been absolved, cleared and exonerated by a jury – who have heard all of the evidence and testimony and still found the individual not guilty of the offense. This begs the question, why give an individual the choice of having a jury trial if the outcome isn't going to be upheld appropriately.

## **CONCLUSION**

**WHEREFORE**, Petitioner respectfully requests this Honorable Court grant his **PETITION FOR A WRIT OF CERTIORARI**, and reverse the Kansas Supreme Courts decision and all such other relief this Court deems necessary to effectuate justice.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Doe", is written over a solid horizontal line.

Date: February 18, 2019