No. 21-

IN THE

Supreme Court of the United States

BENJAMIN A. APPLEBY,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

JONATHAN LAURANS, ESQ.
Counsel of Record
1609 West 92nd Street
Kansas City, Missouri 64114
(816) 421-5200
jlaurans@msn.com

Counsel for Petitioner

307805

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's guarantee of procedural due process is violated when a State supreme court refuses to enforce its legislature's directive that all prisoners subjected to the State's unconstitutional judicially-decided enhanced-punishment scheme must be resentenced, thereby depriving those aggrieved of a valuable, statutorily-vested liberty interest.

2. Whether the Sixth Amendment's guarantee of a trial by jury requires a remand for a full resentencing trial after an Alleyne violation is recognized.

PARTIES TO PROCEEDING AND DIRECTLY RELATED CASES

The parties to this proceeding appear on the cover. Supreme Court Rule 14.1(b)(i). There are no corporate entities involved. Supreme Court Rule 14.1(b)(ii) and 29.6.

Pursuant to Supreme Court Rule 14.1(b)(iii), below is a list of all proceedings in other courts that are directly related to this case:

- State v. Appleby, No. 04CR02934, Johnson County, Kansas District Court (jury trial and sentencing). Judgment entered Dec. 29, 2006.

- State v. Appleby, No. 98017, Kansas Supreme Court (direct appeal of conviction and sentence). Judgment affirmed Nov. 20, 2009.

- Appleby v. State, No. 10CV08873, Johnson County, Kansas District Court (state post-conviction). Judgment entered Aug. 2, 2012.

- Appleby v. State, No. 108777, Kansas Court of Appeals (state post-conviction). Judgment affirmed Feb. 28, 2014.

- Appleby v. Cline, No. 15-3038-JTM, United States District Court for the District of Kansas (federal habeas). Judgment entered Dec. 27, 2016.

- Appleby v. Cline, No. 17-3002, United States Court of Appeals for the Tenth Circuit (federal habeas). Judgment affirmed Sept. 28, 2017.

- State v. Appleby, No. 04CR02934, Johnson County, Kansas District Court (motion to correct illegal sentence). Judgment entered Oct. 24, 2019.

- State v. Appleby, No. 122281, Kansas Supreme Court (motion to correct illegal sentence). Judgment affirmed Apr. 30, 2021; reconsideration denied, June 8, 2021.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Table of Appendices

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Page

Page

Page

Page

Page

Statutes

Cited Authorities

Page

PETITION FOR WRIT OF CERTIORARI

Benjamin Appleby respectfully petitions for a writ of certiorari to review the April 30, 2021 judgment of the Kansas Supreme Court in this case.

OPINION BELOW

The April, 2021 Kansas Supreme Court decision at issue in this certiorari petition acknowledged the unconstitutionality of Kansas' "Hard 50" sentencing scheme, which had previously been applied against Petitioner Appleby by a judge rather than a jury, resulting in a mandatory-minimum 50-year prison sentence. But the Kansas Supreme Court refused to resentence Appleby as required by the Kansas legislature, which specifically mandated resentencings if the "Hard 50" ever later was declared unconstitutional by either the Kansas Supreme Court or the United States Supreme Court. See K.S.A. 21-4639 (now renumbered as K.S.A. 21-6628). The Kansas Supreme Court's decision is reported. and is published at State v. Appleby, 485 P.3d 1148 (Kan. April 30, 2021, *reconsid. denied,* June 8, 2021)(motion to correct illegal sentence per K.S.A. 22-3504). This decision appears at Appendix A, pages 1a-19a.

JURISDICTION

The decision of the Kansas Supreme Court was entered on April 30, 2021, but a timely reconsideration motion was submitted. The motion was denied June 8, 2021. Per this Court's "Covid" Order of July 19, 2021, this petition is timely because it is being filed within 150 days from the date of the Kansas Supreme Court's June 8, 2021

order denying reconsideration of the judgment for which certiorari review is being sought. This Court's jurisdiction is statutorily granted by 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Constitutional provisions involved in this case are the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

and the Fourteenth Amendment, Section 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.

Kansas' "Hard 50" sentencing scheme, K.S.A. 21-4635 to K.S.A. 21-4638, applied against Petitioner in 2006, but subsequently declared unconstitutional in 2014, is found at Appx. H, pp. 168a-173a. The last provision of the "Hard 50" scheme, K.S.A. 21-4639 (now renumbered as K.S.A. 21-6628), promises re-sentencing upon a judicial declaration of the scheme's unconstitutionality, without cumbersome retroactivity considerations:

> In the event the mandatory term of imprisonment or any provision of this act authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law.

See Appx. H, pp. 174a-176a.

STATEMENT OF THE CASE

The Kansas legislature in 1994 enacted a sentencing scheme for homicides (among other crimes) nicknamed the "Hard 50" because its mandatory-minimum punishment for premeditated murder would be 50 years, if aggravating factors were found by a judge who would employ the preponderance standard. K.S.A. 21-4635-4638. The legislature seemingly questioned the constitutionality and longevity of its scheme from its inception, because lawmakers contemporaneously tacked on a final

statutory provision in the scheme, guaranteeing that if "any provision" of the "Hard 50" was later deemed unconstitutional by either the Kansas Supreme Court or the United States Supreme Court, those affected shall be re-sentenced to a term without a minimum-mandatory component. K.S.A. 21-4639. As the saying goes, "Shall means must."

This final statutory provision is significant because it promises re-sentencing to prisoners previously incarcerated under K.S.A. 21-4635 et seq. without them first needing to endure and prevail in rounds of post-conviction litigation lobbying for retroactive application of any case precedents ultimately declaring the "Hard 50" unconstitutional, i.e., the first two cases to do so, State v. Soto, 299 Kan. 102, 322 P.3d 334 (Kan. 2014) and State v. Hilt, 299 Kan. 176, 322 P.3d 367 (Kan. 2014), or the United States Supreme Court decision on which they were based, Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The constitutional premise for these cases is the Sixth Amendment, specifically its guarantee of a jury trial in criminal cases. See Alleyne, 133 S.Ct. at 2155 (holding that "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."); see also, Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(same, but in context of increasing statutory maximum sentences).

Petitioner, sentenced to the "Hard 50" in 2006, has been trying for years to overturn his unconstitutional sentence, like the other 50 or so Kansas inmates affected. He has been forced to resort to the protracted post-conviction litigation that K.S.A. 21-4639 was designed to circumvent. Still getting

nowhere, Petitioner asks this Court to accept review under 28 U.S.C. 1257(a) and require Kansas to fulfill its statutory promise, as constitutionally compelled by the Fourteenth Amendment's due process guarantee.

The procedural history, and the preservation of issues underlying this Petition, are as follows:

1. After a seven day trial in Johnson County, Kansas District Court, which ended in early December, 2006,Petitioner Benjamin Appleby was convicted of capital murder for the 2002 killing of A.K. After the trial judge - not Appleby's jury - found "aggravating factors," the judge sentenced Appleby on December 26, 2006 to Kansas' "Hard 50" prison term, which mandates 50 be served before parole eligibility. K.S.A. 21-4635, 21-4636(f), and 21-4638.

2. Appleby unsuccessfully challenged his conviction and the constitutionality of his sentence on direct appeal. State v. Appleby, 289 Kan. 1017,221 P.3d 525 (Kan. 2009)(Appx. E, pp. 78a, 151a-152a). He then lost his attempt at State post-conviction relief, before bringing his case to Federal court via 28 U.S.C. 2254. See Appleby v. State, 318 P.3d 1019 (Kan. App. 2014). Although the Kansas Supreme Court in April, 2014, declared the "Hard 50" sentencing scheme unconstitutional in Soto, 322 P.3d 334, the United States District Court for the District of Kansas rejected Appleby's "2254" application in December, 2016. Appleby v. Cline, 15-3038-JTM (D. Kan. 2016)(Appx. D, pp. 50a, 69a-72a). The Tenth Circuit denied Appleby a Certificate of Appealability in 2017. Appleby v. Cline, 711 Fed. Appx. 459 (10th Cir. 2017) (Appx. C, pp. 34a, 42a-43a). This Court declined certiorari review on February 26, 2018, in Case No. 17-1039.

3. Following the Kansas Supreme Court's 2014 declaration in Soto and Hilt that the "Hard 50" sentencing scheme was unconstitutional, Appleby was among the first group of inmates to pursue their statutory right to resentencing up through the Kansas courts. On April 10, 2019, Appleby filed a "Motion to Correct Illegal Sentence" under K.S.A. 22-3504 (illegal sentence can be corrected "at any time") in his trial court, the District Court of Johnson County, Kansas. Appleby's motion was rooted in the legislative guarantee of K.S.A. 21-4639, which commanded the judiciary to resentence Appleby and others similarly situated if either the Kansas Supreme Court or the United States Supreme Court ever declared the "Hard 50" scheme unconstitutional. Appleby's motion was denied by the trial court on October 24, 2019, and appealed directly to the Kansas Supreme Court, which refused enforcement of K.S.A. 21-4639 on April 30, 2021 (with rehearing denied on June 8, 2021). State v. Appleby, 313 Kan. 352, 485 P.3d 1148,1150-1152 (Kan. 2021)(Appx. A, pp. 1a-19a, Appx. G, p. 167a).

4. The first basis for certiorari review is whether due process guaranteed under the Fourteenth Amendment requires the State of Kansas to resentence Appleby as was statutorily guaranteed to him, per K.S.A. 21-4639. Though not briefed specifically as a "liberty interest" argument, the Fourteenth Amendment was cited by Appleby's attorney when she pointed out to the district court that Kansas' "Hard 50" sentencing scheme had been declared unconstitutional, which is the condition precedent to enforcement of K.S.A. 21-4639. (In the 2014 Soto and Hilt decisions, Kansas' "Hard 50" scheme was held violative of the Sixth Amendment's right to trial by jury as established a year earlier by Alleyne, extended to Kansas inmates by the Due Process Clause of the

Fourteenth Amendment.) The district court in its ruling acknowledged the statute, but decided that Appleby's "Hard 50" sentence, itself, had been upheld prior to Soto and Hilt, and therefore did not qualify Appleby for the relief promised by the legislature:

> K.S.A. 21-4639 applies to cases where a court has found that a defendant's sentence is unconstitutional and vacated the sentence. Appleby's Hard 50 sentence has been found constitutional and legal under K.S.A. 21-4635. ... The provisions of K.S.A. 21-4635 were constitutional at the time the sentence was handed down against Mr. Appleby. His 6th and 14th Amendment rights were not violated.

See Appx. B, pp. 20a, 22a, 29a-30a, 31a.

In making this ruling, the district court paid only passing reference to the Fourteenth Amendment's applicability to this case:

> As noted, the defendant is not arguing against the constitutionality of the Hard 50 law, although mixed in through that argument is that his rights under the due process clause of the 14th Amendment and 6th Amendment guarantee a trial by jury has been violated under the sentencing structure under which Mr. Appleby was subjected in 2006 and as finalized after his direct appeal and the finality of that appeal 90 days after the mandate was issued by the Kansas Supreme Court.

See Appx. B, p. 30a.

On appeal from this decision, Appleby's counsel cited to the Fourteenth Amendment in her briefing to the Kansas Supreme Court, though her briefing was concededly based almost exclusively on Kansas law. (She did rely heavily on United States Supreme Court precedent interpreting and applying the Sixth and Fourteenth Amendments, i.e., Alleyne and Apprendi, but more so in the context of why Appleby's "Hard 50" sentence was unconstitutional, as opposed to the violation of his liberty interest by refusing to resentence him.) However, as will be demonstrated below, Appleby's liberty interest arising under the Fourteenth Amendment did not fully ripen until the Kansas Supreme Court's ruling made clear that there was no procedural vehicle through which Appleby could access his resentencing promised by the Kansas legislature in K.S.A. 21-4639. The Kansas Supreme Court acknowledged its 2014 declaration that the "Hard 50" scheme was unconstitutional, but sidestepped the consequences mandated by the Kansas legislature in K.S.A. 21-4639 (cited by the Court under its current number, 21-6628), which dispensed with the retroactivity considerations behind which the Kansas courts have hidden when refusing Appleby his resentencing:

> This court extended *Alleyne* to Kansas' hard 50 sentencing statutes (hard 40 for crimes committed before July 1, 1999) in *Soto*, 299 Kan. at 122-24. We later held the rule of law declared in *Alleyne* cannot be applied retroactively to invalidate a sentence that was final before the date of the *Alleyne* decision. *Kirtdoll v. State*, 306 Kan. 335, Syl. ¶ 1, 393 P.3d 1053 (2017).

*****

Finally, like Coleman, Appleby offers K.S.A. 2020 Supp. 21-6628(c) as a basis for relief. In fact, Appleby solely relies on this provision. But we concluded in Coleman that K.S.A. 2020 Supp. 21-6628(c) does not provide defendants in Appleby's position a mechanism for relief. 312 Kan. at 121-24. We interpreted K.S.A. 2020 Supp. 21-6628 to be a "fail-safe provision" that "[b]y its clear and unequivocal language . . . applies only when the term of imprisonment or the statute authorizing the term of imprisonment are found to be unconstitutional." 312 Kan. at 124.

Appleby disagrees with Coleman's statutory analysis. He argues K.S.A. 2001 Supp. 21-4635 authorized his sentence and this court ruled K.S.A. 21-4635 was unconstitutional in *Soto*, 299 Kan. at 124. Coleman, however, held K.S.A. 21-4635 "was part of the procedural framework by which the enhanced sentence was determined" and the root authorization for Coleman's sentence was the statute that provided for a life sentence. Coleman, 312 Kan. at 124. Here, Appleby committed capital murder, and the Legislature has authorized a life sentence for someone convicted of that crime. See K.S.A. 2001 Supp. 21-3439; K.S.A. 2001 Supp. 21-4706. A life sentence has "never been determined to be categorically unconstitutional" and "such sentences continue to be imposed in qualifying cases in Kansas." Coleman, 312 Kan. at 124.

> Thus, Appleby's sentence does not trigger the "fail-safe" provision of K.S.A. 2020 Supp. 21-6628(c).
>
> Thus, K.S.A. 2020 Supp. 21-6628(c) does not require resentencing Appleby.

See Appx. A, pp. 1a, 6a, 9a-10a.

The second basis for certiorari is whether those aggrieved like Appleby are entitled to full hearings, or only *Crosby* hearings, when resentenced. The circuit split over this issue was not cited by Appleby's counsel below. She did, however, exhaustively brief the applicable Kansas sentencing guidelines analysis, as K.S.A. 21-4639 all but guarantees a full resentencing, not a *Crosby* hearing. Because the Kansas courts refused to avail Appleby of K.S.A. 21-4639 and resentence him, they did not address the type of resentencing Appleby should have received.

The degree to which these issues were framed under Federal law may well be an issue for further briefing if certiorari is granted. See Puckett v. United States, 556 U.S. 129, 134-135,129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (four-factor test for "plain error review" discussed, and applied to "forfeited" claim; "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed."). Appleby's "liberty interest" argument made here certainly satisfies all four of the "plain error review" prerequisites. His Kansas counsel certainly was advocating for the resentencing promised by the Kansas legislature in K.S.A. 21-4639, and did not intentionally relinquish or abandon the

argument that the Fourteenth Amendment supports the Kansas resentencing statute. The Kansas judiciary's refusal to resentence those previously aggrieved by the unconstitutionality of the "Hard 50" sentencing scheme is unjustifiable, and not reasonably debatable. Likewise, it cannot be argued that Appleby's substantial rights are unaffected. After all, K.S.A. 21-4639 guarantees a resentencing with no mandatory minimum term of incarceration, whereas he currently is serving life, with a 50 year minimum. And lastly, discretion ought to be exercised here, to ensure that citizens see that a State's judiciary cannot wholesale ignore a legislative directive that inures to the benefit of those in the State whose constitutional rights had previously been violated by the judiciary. To not accept review and order a remedy here would seriously undermine the "public reputation of judicial proceedings" in Kansas. Puckett, 556 U.S. at 135; see also, Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)(ineffective assistance of counsel at initial-review collateral proceedings may excuse procedural default if cause and prejudice shown).

REASONS FOR GRANTING THE PETITION

In April, 2014, eight years after Petitioner Appleby's "Hard 50" sentence was imposed, and five years after its 2009 affirmance by the Kansas Supreme Court, the "Hard 50" scheme was declared unconstitutional, just as Appleby and those similarly situated had been arguing for years. Soto, 322 P.3d 334; Hilt, 322 P.3d 367. However, since 2014 the Kansas Supreme Court has steadfastly refused to make Soto, Hilt or any of its other "Hard 50" decisions retroactive. State v. Coleman, 312 Kan. 114, 472 P.3d 85, 89-90 (2020); State v. Johnson, 313 Kan. 339, 486

P.3d 544, 547-548 (2021); State v. Trotter, 313 Kan. 365, 485 P.3d 649, 652-653 (2021).

But the Kansas legislature foresaw this possibility way back in 1994, and so as part of the "Hard 50" scheme, it included a final provision numbered K.S.A. 21-4639, which dispenses with judicially-ordered retroactivity of any declaration of unconstitutionality, and instead mandates resentencing for those like Appleby who received a "Hard 50" sentence prior to Soto and Hilt.

Beginning back in the trial court in April, 2019, Appleby has been seeking his legislatively-guaranteed resentencing, but to no avail. Earlier this year, in order to avoid the resentencings envisioned by the Kansas legislature, the Kansas Supreme Court in a convoluted decision ruled that K.S.A. 21-4639 (now K.S.A. 21-6628) only applies to the procedural part of the "Hard 50" scheme, i.e., K.S.A. 21-4635 and its mandatory-minimum, but not to the statutory maximum part of such sentences, i.e., "life." Therefore, no one sentenced under the "Hard 50" prior to Soto, Hilt and their progeny can get relief under the Kansas legislature's "Hard 50" resentencing statute. Appleby, 485 P.3d at1150-1152, *citing* Coleman, 472 P.3d at 92. Tortured reasoning, to say the least. Especially given that the Kansas legislature penned that the unconstitutionality of "any provision" in the "Hard 50" sentencing scheme would trigger resentencings across the board.

When a State court denies prisoners access to the courts to claim a liberty interest promised by the legislature, procedural due process is impinged, and the vested liberty interest is stolen back. Appleby asks that

this Court rectify this wrong, as phrased in the first Question Presented, and order a full resentencing by a jury, as addressed in the second Question Presented, thereby resolving a sixteen year-old circuit split:

1. **Whether the Fourteenth Amendment's guarantee of procedural due process is violated when a State supreme court refuses to enforce its legislature's directive that all prisoners subjected to the State's unconstitutional judicially-decided enhanced-punishment scheme must be resentenced, thereby depriving those aggrieved of a valuable, statutorily-vested liberty interest.**

Liberty Interest and Due Process:

To state the issue distinctly is to resolve the issue decisively. Must the Kansas judiciary provide a procedure for the statutorily guaranteed resentencing of Benjamin Appleby under K.S.A. 21-4639 following the Kansas Supreme Court's declaration in 2014 that the "Hard 50" sentencing scheme used against Appleby is unconstitutional? Of course.

The Kansas legislature in a 1994 directive to the Kansas judicial branch commanded that district court judges "shall" resentence any defendant punished under the "Hard 50" scheme if *any* of its provisions are later declared unconstitutional:

> In the event the mandatory term of imprisonment or any provision of this act authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United

> States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law.

K.S.A. 21-4639 (now K.S.A. 21-6628(c) (2011)); Appx. H, p. 174a; see also, pp. 175a-176a.

This legislative directive is not discretionary. It is not aspirational. It does not require a motion from a "Hard 50" defendant as a condition precedent to its invocation. Its resentencing relief is not subject to a waiver argument by the State. Rather, the courts of Kansas have been directed to resentence any defendant who had been sentenced to a "Hard 50" punishment prior to the sentencing scheme being declared unconstitutional. The Kansas Supreme Court's refusal earlier this year to apply this remedial statute in the case of Appleby (and others) violates procedural due process by putting beyond all possible reach a statutorily-created and vested liberty interest. The Kansas Supreme Court's decision renders K.S.A. 21-4639 (now K.S.A. 21-6628) meaningless, and thus must be reversed by this Court under the Fourteenth Amendment's Due Process Clause.

The underlying analysis for a due process/ liberty interest claim under the Fourteenth Amendment begins with the language of the provision, itself: "No State shall ... deprive any person of life, liberty, or property, without due process of law..." In assessing due process claims, courts are to ask two questions: "(1) whether the plaintiff

has shown the deprivation of an interest in 'life, liberty, or property' and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with 'due process of law.'" Elliott v. Martinez, 675 F.3d 1241, 1244 (10th Cir. 2012).

To invoke procedural protection, a person "must establish that one of these rights is at stake." Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). Liberty interests can either arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," or may arise from an expectation or interest created by State laws or policies. Cordova v. City of Albuquerque, 816 F.3d 645, 656–57 (10th Cir. 2016); Fetzer v. Raemisch, 803 Fed. Appx. 181, 183–84 (10th Cir. 2020).

Granted, not all State laws create constitutionally protected liberty interests. To determine which statutes create liberty interests, courts must look to "the language of the statutes themselves." Montero v. Meyer, 13 F.3d 1444, 1448 (10th Cir.1994). "[A] State creates a protected liberty interest by placing substantive limitations on official discretion." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 462, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), *quoting* Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). So "[a] statute which allows a decisionmaker to deny the requested relief within its unfettered discretion does not create a constitutionally-recognized liberty interest." Stine v. Fox, 731 Fed. Appx. 767, 769 (10th Cir. 2018), *quoting* Fristoe v. Thompson, 144 F.ed 627, 630 (10th Cir. 1998). But when States do "plac[e] substantive limitations on official discretion," they do "create[ ] a protected liberty interest." Stine, 731 Fed. Appx. at 769-770.

Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment. Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968). And prisoners may also claim the protections of the Due Process Clause. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

"When [] a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication — and federal courts will review the application of those constitutionally required procedures." Swarthout v. Cooke, 562 U.S. 216, 220, 131 S. Ct. 859, 862, 178 L. Ed. 2d 732 (2011).

The liberty interest at issue here is an inmate's freedom from restraint, "which imposes atypical and significant hardship on the inmate." Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418 (1995). Although "his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." Wolff v. McDonnell, 418 U.S. 539, 555–56, 94 S. Ct. 2963, 2974, 41 L. Ed. 2d 935 (1974). "There is no iron curtain drawn between the Constitution and the prisons of this country." Id. Prisoners retain the right of access to the courts. Younger v. Gilmore, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971), *aff'g* Gilmore v. Lynch, 319 F.Supp. 105 (ND Cal.1970); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941).

A person's liberty is to be equally protected, even when the liberty itself is a statutory creation of the State.

Wolff, 94 S. Ct. at 2975–76. "The touchstone of due process is protection of the individual against arbitrary action of government." Id. Here, the Kansas legislature, itself, has not only provided a statutory right to the sentence reduction, but the legislature also specified that it is to be mandatorily applied retroactively upon the ruling of an unconstitutional sentencing provision either by the Supreme Court of Kansas or the Supreme Court of the United States. See K.S.A. 21-4639 (now K.S.A. 21-6628; " ... the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence ..."). See Thompson, 109 S.Ct. at 1909-1910 (predicates for liberty interest are "substantive predicates" limiting exercise of discretion, and "mandatory language" requiring a particular outcome of "substantive predicates" found).

In Wolff, the Court concluded that a State-created right to "good time credits" against the remainder of a prison sentence constituted a liberty interest of "real substance" such that certain procedural requirements were necessitated. Id., 94 S.Ct. at 2975. If "good time credits" - which are *granted* by the State *when earned by the inmate* - constitute a liberty interest, then it goes without saying that a statutory promise of a sentence reduction upon a declaration of sentencing-law unconstitutionality - which is *guaranteed* by the State *in remedy for its own error* - is also a liberty interest. In other words, the Kansas legislature's promise of a sentence reduction to the State's "Hard 50" inmates whose sentences had been determined by judicial fact-finding constitutes a statutorily-created true liberty interest, not the type of trivial prisoner claim that the Court in Sandin and other cases has been concerned with eliminating from

the litigation pipeline. See, e.g., Neitzke v. Williams, 490 U.S. 319, 325-326, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989)(recognizing "meritless ... complaints in the federal courts" cause problems for judiciary).

Here, Mr. Appleby's current sentence - without reduction - keeps him incarcerated for a mandatory minimum of 50 years, whereas the State-created liberty interest would work to resentence him to a term with no mandatory minimum at all, which obviously clears by leaps and bounds the Sandin Court's test of an "atypical and significant hardship" in relation to ordinary prison life. Id., 115 S.Ct. at 2300. (In Sandin, the inmate, Conner, was serving a sentence of 30-years-to-life for murder, kidnapping, and burglary, when he was subjected to a strip search and a rectal examination, during which he directed foul language at a correctional officer. Conner was charged with disciplinary infractions. When he appeared before a prison disciplinary committee, his request to present witnesses was refused. Conner later brought suit alleging deprivation of his rights. The case ascended to this Court, where the majority held that neither the State's prison regulations or the Due Process Clause of the 14th amendment offered Conner a protected liberty interest that would entitle him to procedural due process rights in prison disciplinary proceedings. Nevertheless, Sandin deals with prison regulations in internal disciplinary proceedings, not a State statute remedying unconstitutional district court sentencing procedures. Because the latter involves a determination of an individual's substantive right to exercise freedom of action without "government restraint," it is a liberty interest in the truest sense. Id., 115 S.Ct. at 2307.)

The State of Kansas - having created the right to retroactive application of a sentence reduction and itself recognizing that its application is entangled with an inmate's freedom from restraint - cannot be heard to disclaim that it has created a true liberty interest in every sense of the concept. See Sandin, 115 S.Ct. at 2297-2300 (second way liberty interest is created is by the State through a statute); Renchenski v. Williams, 622 F.3d 315, 325 (3rd Cir. 2010)(distinguishing "state-created liberty interest" from "independent due process liberty interest"). All Kansas prisoners subjected to the unconstitutional version of the "Hard 50" sentencing scheme have a State-created liberty interest with real substance, one which is sufficiently embraced within Fourteenth Amendment's notion of "liberty" to entitle them to the statutory remedial procedure crafted by the Kansas legislature. Nothing short of resentencing is appropriate under the plain language of K.S.A. 21-4639, and this result is required by the Due Process Clause to ensure that the State-created right is not arbitrarily abrogated. Wolff, 94 S. Ct. at 2975–76.

With a liberty interest established, the next task is to evaluate the due process, if any, afforded to said liberty interest. The "analysis [] parallels the accepted due process analysis as to property [interests]." Id. Thus, courts are expected to provide some kind of hearing before a person is finally deprived of his or her liberty interest. For example, in Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the Court found that a prisoner subject to a parole statute received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied. The

Greenholtz Court held that "[t]he Constitution does not require more." Id.

Placing Greenholtz in context so that it can be contrasted against Mr. Appleby's situation, the Greenholtz inmates alleged that they had been unconstitutionally denied parole. Id. Their claim centered on a State statute that set the date for discretionary parole at the time the minimum term of imprisonment less good time credits expired. Id. The statute ordered release of a prisoner at that time, unless one of four specific conditions were shown. Id. at 2105–2106. The Court apparently accepted the inmates' argument that the word "shall" in the statute created a legitimate expectation of release absent the requisite finding that one of the justifications for deferral existed, since the Court concluded that some measure of constitutional protection was due. Id. Nevertheless, the State ultimately prevailed because the minimal process it had awarded the prisoners was deemed sufficient under the Fourteenth Amendment. Id.

By contrast, K.S.A. 21-4639 does not create or accept contingencies for resentencings beyond the threshold that the "Hard 50" be declared unconstitutional by either the Kansas Supreme Court or this Court, which happened in 2014 in the aforementioned Kansas cases of Soto and Hilt. The Kansas legislature in K.S.A. 21-4639 also provided the exact procedure to be followed, which allows for no discretion, in that the sentencing court is directed to "cause such person [inmate] to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law." This procedure comports with what this Court has held, namely that "(t)he very

nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria and Restaurant Workers Union, Loacl 473, AFL-CIO v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Id. Therefore, while the minimum levels of procedure that a prisoner is owed has yet to be determined in its entirety by this Court, this is not a concern here because the Kansas legislature has already provided direction and remedy. This is therefore consistent with the due process suggested by the Greenholtz case.

As has been demonstrated, K.S.A. 21-4639 vests Mr. Appleby with a statutorily-created and indisputable liberty interest, in that it commands the Kansas judicial branch to resentence Appleby and others similarly situated now that the "Hard 50" sentencing scheme has been declared unconstitutional by the Kansas Supreme Court. This same statute even provides the procedure to remedy the previous wrong - imposition of an illegal sentence - and vindicate the liberty interest. The Kansas Supreme Court's abject refusal to recognize and enforce Mr. Appleby's right to his liberty interest and due process cries out for action by this Court in the form of a grant of certiorari, and a reversal-and-remand with instructions to the Kansas Supreme Court that it order a new sentencing hearing for Appleby.

Mr. Appleby is not the only stakeholder for whom a certiorari grant will mean a measure of justice. See, e.g.,

Johnson, 313 Kan. 339, 486 P.3d 544; Trotter, 313 Kan. 365, 485 P.3d 649; State v. Hill, -- Kan. --, -- P.3d --, 2021 Westlaw 3573664 (Kan. 2021).

Periphery Considerations:

No doubt the State of Kansas will attempt to evade the this Court's grant of certiorari, and the undertaking by this Court of substantive analysis, by instead redirecting the Court to potential procedural hurdles. But any of those would be easily surmounted. Principles of comity between the Federal and State systems will not be affronted by the granting of certiorari review here, because Kansas law does not erect any walls which serve to insulate the underlying Kansas Supreme Court decision behind a barrier of unique State law. Stated another way, there is no sovereignty interest Kansas has which would somehow trump this Court's recognition of Mr. Appleby's constitutionally protected liberty interest.

For example, all of the reversals of "Hard 50" sentences and remands for resentencings found in Kansas jurisprudence since April 11, 2014 (the decision date for Soto and Hilt) have all occurred in the direct-appeal process, not in collateral review proceedings. The significance of this fact is that K.S.A. 21-4639 and its later version, K.S.A. 21-6628, have never been deployed by the Kansas appellate courts. Instead, the Kansas Supreme Court simply reversed the sentences in those case, resulting in an automatic remand for resentencing. See State v. Astorga, 299 Kan. 395, 324 P.3d 1046 (May 23, 2014); State v. DeAnda, 299 Kan. 594, 324 P.3d 1115 (May 23, 2014); State v. Lloyd, 299 Kan. 620, 325 P.3d 1122 (May 30, 2014); State v. Molina, 299 Kan. 651, 325 P.3d 1142 (May 30, 2014); State v. Hayes, 299 Kan.

861, 327 P.3d 414 (June 13, 2014); State v. Carr, 331 P.3d 544, 2014 Westlaw 3681049 (July 25, 2014)(death penalty case discussing unconstitutional "Hard 50" statutes being amended by legislature after Alleyne); State v. Roeder, 300 Kan. 901, 336 P.3d 831 (October 24, 2014); State v. Holt, 300 Kan. 985, 336 P.3d 312 (October 31, 2014); State v. Coones, 301 Kan. 64, 339 P.3d 375 (December 12, 2014); State v. Killings, 301 Kan. 214, 340 P.3d 1186 (January 16, 2015); State v. Salary, 301 Kan. 586, 343 P.3d 1165 (March 13, 2015); State v. Warren, 302 Kan. 601, 356 P.3d 396 (August 28, 2015); State v. Moore, 302 Kan. 685, 356 P.3d 275 (August 28, 2015); State v. Sprague, 303 Kan. 418, 362 P.3d 828 (December 4, 2015); State v. Logson, 304 Kan. 3, 371 P.3d 836 (April 1, 2016); and, State v. Mattox, 305 Kan. 1015, 390 P.3d 514 (March 10, 2017).

As the post-conviction cases trickled through the litigation pipeline, virtually every single attorney seeking relief overlooked K.S.A. 21-4639 and K.S.A. 21-6628, and instead argued over and over again that Alleyne v. United States, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) - the case upon which Soto and Hilt are based – should be declared retroactive. However, on May 12, 2017, the Kansas Supreme Court in Kirtdoll v. State, 306 Kan. 335, 393 P.3d 1053 (2017), ruled that Alleyne is not available, via the rules for retroactivity, to correct sentences imposed upon those defendants sentenced before Alleyne's inception date. The same day, the Kansas Supreme Court released State v. Brown, 306 Kan. 330, 393 P.3d 1049 (2017), explicitly declining retroactive application of Soto as well. In neither case did appellate counsel for Messrs. Kirtdoll or Brown seek invocation of K.S.A. 21-4639 as an alternative basis for relief.

Kirtdoll and Brown thus both overlook the fact that the Kansas legislature had actually superseded

(or, circumvented) all judicially-conducted retroactivity analysis way back in 1994, when - as part of the "Hard 50" sentencing scheme - it passed K.S.A. 21-4639 (now K.S.A. 21-6628). Oddly, this statute has never been raised or discussed in any "Hard 50" case in the State's jurisprudence, until recently. Yet this statute is plain and direct in its command to the judicial branch that Kansas courts must resentence any "Hard 50" inmate who had been sentenced under that scheme, K.S.A. 21-4635 et seq., upon later determination that "any provision" of this legislative scheme is judicially determined to be unconstitutional. There are no exceptions to the legislative branch's directive in this regard. The resentencing relief ordered by K.S.A. 214639 and K.S.A. 21-6628 is not dependent upon judicially-determined retroactivity, nor a condition precedent of a motion filed by the defendant. The relief accorded by the legislature in K.S.A. 21-4639 and K.S.A. 21-6628 is mandatory. The courts of Kansas are *not* free to ignore the clear and express intent of the Kansas legislature, which provided this liberty interest and the due process of a resentencing to each and every aggrieved defendant.

As for which statute the Court should focus upon when conducting its due process analysis, K.S.A. 21-4639 versus K.S.A. 21-6628, there is no distinction between the two for that purpose. This is so because when the Kansas legislature amended the former in favor of the latter, it expressly provided in K.S.A. 21-6629(c):

> K.S.A. 21-4633 through 21-4640, prior to their repeal, and K.S.A. 21-6620 through 21-6625 and subsection (c) of 21-6628, and amendments thereto, shall be applicable only

> to persons convicted of crimes committed on or after July 1, 1994.

Pursuant to K.S.A. 21-6629(c), the statutory provision K.SA. 21-6628(c) (former K.SA. 21-4639) applies to Mr. Appleby's case, as he was convicted of crimes committed in 2002, well after July 1, 1994.

Moreover, in Kansas it has long been the rule that criminal statutes and penalties in effect at the time of the criminal offense are controlling. State v. Sylva, 248 Kan. 118, Syl. 4, 804 P.2d 967 (1991); State v. Ramos, 240 Kan. 485, 490, 731 P.2d 837 (1987); State v. Armstrong, 238 Kan. 559, 566, 712 P.2d 1258 (1986). When Appleby was convicted, the version of the resentencing provision of the "Hard 50" scheme was K.S.A. 21-4639, and thus it is the law to be applied.

Kansas law also recognizes that "[c]riminal statutes must be strictly construed in favor of the accused. Any reasonable doubt about the meaning is decided in favor of anyone subjected to the criminal statute. The rule of strict construction, however, is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent." State v. McGill, 271 Kan. 150, 154, 22 P.3d 597 (2001). Likewise, Kansas law requires sentencing statutes that are part of the same scheme to be read and applied in *pari materia*. State v. Nguyen, 304 Kan. 420, 425, 372 P.3d 1142 (2016); *accord* State v. Brown, 303 Kan. 995, 368 P.3d 1101 (2016)(court does not interpret statutes in isolation but considers provisions of an act in *pari materia* with a view to reconciling, brining provisions into workable harmony).

Finally, Kansas law also recognizes that the plain language of a statute must be given effect to the intention of the Kansas legislature as expressed, rather than be parsed in an effort to determine what the law should or should not be. State v. Sedillos, 33 Kan.App.2d 141, 146, 98 P.3d 651 (2004), *citing* Williamson v. City of Hays, 275 Kan. 300, 305, 64 P.3d 364 (2003). See also Nguyen, 372 P.3d at 1144 ("When statutory language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there."); State ex rel. Schmidt v. City of Wichita, 303 Kan. 650, 659, 367 P.3d 282 (2016).

By its plain wording, K.S.A. 21-4639 does not provide any exception to the requirement of modifying the sentence of persons like Appleby, whose original sentence was determined and imposed under a scheme like K.S.A. 21-4635 et seq., later found to be unconstitutional. Because language not existing in a statute cannot be read into the statute, modification of Appleby's sentence is required.

To the extent that there might be a question over whether there is a procedure available in Kansas law through which the liberty interest created by K.S.A. 21-4639 can be vindicated, there are arguably two. Mr. Appleby brought his claim via K.S.A. 22-3504, which mandates the correction of an illegal sentence "at any time." There is also the Kansas post-conviction statute, K.S.A. 60-1507. The Kansas appellate courts have held that neither is available to aggrieved "Hard 50" prisoners like Appleby. See Appleby, 485 P.3d at 1153-1154 ("3504"

and "1507" are not available for correction of "Hard 50" sentences); Kirtdoll, 393 P.3d at 1057 ("1507" not available for correction of "Hard 50" sentences). Of course, taking this at face value directly from these Kansas cases, if it is indeed procedurally accurate that Kansas law has no path for the "Hard 50" resentencings promised by the Kansas legislature, then the Kansas judiciary has violated the second part of the Wolff analysis, by neglecting to provide at least some minimal, meaningful procedural vehicle through which to seek pursue this liberty interest. The Due Process Clause of the Fourteenth Amendment is therefore violated. Wolff, 94 S.Ct. at 2975; see also, Greenholtz, 99 S.Ct. at 2105-2106 (some measure of procedural due process must be shown by State).

The reality is that Kansas case law has recognized the unconstitutionality of Mr. Appleby's "Hard 50" sentence. The original "Hard 50" sentencing scheme was declared so in 2014 by the Kansas Supreme Court's rulings in Soto and Hilt. And the reality is that the Kansas legislature promised all prisoners like Appleby a resentencing if their "Hard 50" sentences were later found to be unconstitutional. K.S.A. 21-4639 commands this relief, and the Fourteenth Amendment requires that the Kansas judiciary provide the remedy.

When reading K.S.A. 21-4639, some axioms come to mind: Ordinary words are given their ordinary meanings. A statute should not be read to add language that is not found in it or to exclude language that is found in it. Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, 1738, 207 L.Ed.2d 218 (2020)(employment law case; Civil Rights Act, Title VII) . It is only if the statute's language or text is unclear or ambiguous

that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature 's intent. See Lamie v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004)(bankruptcy statute governing compensation of professionals, though "awkward, and even ungrammatical," not ambiguous and therefore must be applied according to its plain meaning).

There is no debate that Mr. Appleby's "Hard 50" sentence was imposed in violation of the Sixth Amendment. In the end, this Court may be both figuratively and literally Mr. Appleby's court of last resort. A grant of certiorari would permit him to argue against the arbitrary and capricious Catch-22 set up by the Kansas judiciary, acknowledging the liberty interest penned by the Kansas legislature back in 1994, but concluding there is no way to avail oneself of its promise. The Fourteenth Amendment guarantees Appleby and others like him more than that, though. A right without a procedure is akin to no right at all.

With it established that Mr. Appleby has a State-created liberty interest entitled to due process protection, the next step is to determine what his resentencing should look like, i.e., a full proceeding or a partial remand. This is the focus of the second Question Presented, which if accepted for certiorari review, will resolve a circuit split which is now sixteen years-old.

2. Whether the Sixth Amendment's guarantee of a trial by jury requires a remand for a full resentencing trial after an Alleyne violation is recognized.

There exists a circuit split concerning the type of remand to be accorded to litigants like Mr. Appleby whose original sentences have been recognized as violative of this Court's directive that all facts which increase a defendant's mandatory minimum sentence must submitted to a jury and found true beyond a reasonable doubt. See Morrell v. Wardens, 12 F.4th 626, 632 (6th Cir. 2021)("The United States Supreme Court has not clearly established whether a defendant sentenced under an unconstitutional sentencing scheme is entitled to a full resentencing or only a *Crosby* hearing. ... [T]he Supreme Court has not spoken to this issue, and there is a circuit split concerning whether violations of the Sixth Amendment require a full resentencing or a *Crosby* hearing."); see also, Alleyne, 133 S.Ct. at 2155 (holding that "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

Several circuits have held that a defendant is entitled to a full remand so that he or she can demonstrate that the plain error affected the original sentence imposed. See United States v. Hughes, 401 F.3d 540, 547-55 (4th Cir. 2005)(concluding that the appellate court should consider whether plain error has been shown, without regard to whether the sentencing judge would have reached a different result); United States v. Oliver, 397 F.3d 369, 378-80 (6th Cir. 2005)(defining plain error as making findings under mandatory guidelines that increase a sentence and therefore requiring resentencing in every

such case); United States v. Pirani, 406 F.3d 543, 553 (8th Cir. 2005)(holding that, to show that plain error affected substantial rights, a defendant must demonstrate that he would have received a more favorable sentence under an advisory guideline regime); United States v. Dazey, 403 F.3d 1147, 1176-797 (10th Cir. 2005)(where there is a reasonable probability that the district court would have imposed a different sentence under advisory guidelines, remand for resentencing is required).

Other circuits have instead ruled that a limited remand is acceptable, wherein the appellate court retains jurisdiction while asking the trial judge whether he or she would have imposed the same sentence, regardless of the sentencing error identified by the appellate court. See United States v. Antonakopoulos, 399 F.3d 68, 75, 81-82 (1st Cir. 2005)("There is another type of Booker argument available but which Antonakopoulos has not made: that there is a reasonable probability that the district court, freed of mandatory guidelines, would have given him a lower sentence."; further briefing ordered); United States v. Crosby, 397 F.3d 103, 117 (2nd Cir. 2005); United States v. Mares, 402 F.3d 511, 521 (5th Cir. 2005); United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005); United States v. Ameline, 409 F.3d 1073, 1081 (9th Cir. 2005); United States v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir. 2005); United States v. Coles, 403 F.3d 764, 770 (D.C. Cir. 2005).

Of course, the irony with the "limited remand" approach is that it does not remedy the Alleyne problem at all, because the remand allows for the sentencing judge - not a jury - to determine whether the facts increasing punishment were proven, and whether the resulting sentence would have been the same. So the error is

compounded rather than cured. See Ameline, 409 F.3d at 1082 ("Our colleagues in dissent criticize our adoption of the approach articulated in *Crosby*, characterizing the limited remand procedure as contradicting *Booker*, abdicating our obligation to conduct appellate review, subsuming an inaccurate prejudice inquiry, disregarding district court judges who have left the bench, embracing illusory efficiencies, and encouraging cursory review.").

This circuit split needs to be resolved. A grant of certiorari is thus needed.

In Mr. Appleby's situation, the Kansas legislature has made clear that the sentence to be imposed on remand is to contain no mandatory-minimum component. See K.S.A. 21-4639 ("... the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law."). Appleby urged his trial court and the Kansas Supreme Court to provide him with a full resentencing hearing, per this statute. In Appleby's case, a resentencing would require fact-finding and application of the Kansas Sentencing Guidelines Act, K.S.A. 21-4701 et seq.

At the time of Appleby's offense, the alternative to the "Hard 50" sentence per K.S.A. 21-4638 was a life sentence with a mandatory minimum of 25 years imprisonment. As K.S.A. 21-4639 prohibits imposition of that sentence because it has a mandatory-minimum component, Kansas law defaults to the State's Sentencing Guidelines Act. State v. Horn, 288 Kan. 690, 206 P.3d 526, 527-528 (2009) (when "Jessica's Law Hard 25" found inapplicable, resort

is to KSSGA). The maximum penalty for the most severe offense, Severity Level 1, ranged between 165 and 653 months, depending upon criminal history. K.S.A. 21-4723; K.S.A. 21-4704; see also, Kansas Sentencing Guidelines Grid.

CONCLUSION

The Kansas legislature has spoken clearly about what is to happen to "Hard 50" inmates if the sentencing scheme is found to be unconstitutional. The legislature went out of its way to distinguish these defendants from others whose cases might have been afflicted with other types of error which the Kansas judicial branch refuses to remedy under K.S.A. 22-3504 or K.S.A. 60-1507 on grounds that retroactivity for a newly-recognized error is unavailable. By enacting K.S.A. 21-4639 in 1994, the Kansas legislature intentionally circumvented traditional procedural hurdles in Kansas law (i.e., the limitations contained within K.S.A. 22-3504 and K.S.A. 60-1507). The Kansas legislature in K.S.A. 21-4639 spoke clearly and concisely on what is to become of the "Hard 50" defendants aggrieved by the sentencing scheme if and when "any provision" in the scheme is found unconstitutional. These inmates are to be resentenced. The Kansas judicial branch cannot ignore this legislative directive without violating these inmates' vested liberty interests, and moreover, without offending both the "separation of powers" doctrine, and "traditional notions of … substantial justice."

Upon remand, a full resentencing hearing involving a jury should be ordered, not a limited one involving only a judge, thereby resolving the circuit split raised in the second Question Presented.

In light of the foregoing arguments and authorities, Petitioner Benjamin Appleby respectfully requests that this Court accept certiorari review of this case, vacate his "Hard 50" sentence, and remand for a new, complete sentencing hearing.

Respectfully submitted,

JONATHAN LAURANS, ESQ.
Counsel of Record
1609 West 92nd Street
Kansas City, Missouri 64114
(816) 421-5200
jlaurans@msn.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF KANSAS, FILED APRIL 30, 2021

SUPREME COURT OF KANSAS

April 30, 2021,
Opinion Filed

No. 122,281

STATE OF KANSAS,

Appellee,

v.

BENJAMIN A. APPLEBY,

Appellant.

Opinion

Per Curiam:

Benjamin Appleby attacks the portion of his life sentence for capital murder that sets a minimum sentence of 50 years. Appleby argues he is entitled to resentencing under K.S.A. 2020 Supp. 21-6628(c), formerly K.S.A. 21-4639, because the sentencing judge engaged in judicial fact-finding to determine that aggravating factors justified a minimum sentence of 50 years instead of the 25-year minimum that would otherwise apply.

K.S.A. 2020 Supp. 21-6628(c) does not create an avenue or independent means by which a convicted person can challenge his or her underlying sentence. We thus affirm the district court's denial of Appleby's request for relief.

Facts and Procedural Background

A jury convicted Appleby of capital murder and attempted rape committed in June 2002. *State v. Appleby*, 289 Kan. 1017, 1025, 221 P.3d 525 (2009). The district court judge, without jury findings, imposed a hard 50 life sentence for capital murder and a 228-month consecutive sentence for attempted rape. This court reversed the attempted rape conviction as multiplicitous of the capital murder count on direct appeal. 289 Kan. at 1026-33, 1069. We also rejected Appleby's other challenges, including a constitutional challenge to his hard 50 sentence based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). See *Appleby*, 289 Kan. at 1021, 1069.

Appleby has since sought relief through several avenues. He first filed a motion under K.S.A. 60-1507, alleging both trial and appellate counsel rendered ineffective assistance. The district court denied relief. He appealed, and a Court of Appeals panel rejected his arguments. *Appleby v. State*, 318 P.3d 1019, 2014 Kan. App. Unpub. LEXIS 125, 2014 WL 801921 (Kan. App. 2014) (unpublished opinion).

Appleby later petitioned for federal habeas relief. These claims were also denied. See *Appleby v. Cline*, No.

15-3038-JTM, 2016 U.S. Dist. LEXIS 178975, 2016 WL 7440821 (D. Kan. 2016) (unpublished opinion); *Appleby v. Cline*, No. 17-2003, 711 Fed. Appx. 459 (10th Cir. 2017) (unpublished opinion) (denying certificate of appealability and dismissing appeal), *cert. denied* 138 S. Ct. 1173, 200 L. Ed. 2d 316 (2018).

Appleby then moved to correct an illegal sentence. The State moved to summarily deny the motion. The district court ruled against Appleby, and Appleby then brought this appeal.

While his appeal was pending, this court decided *State v. Coleman*, 312 Kan. 114, 472 P.3d 85 (2020). There, we held that K.S.A. 2020 Supp. 21-6628(c) does not create a new avenue or independent means by which a convicted person can challenge his or her underlying sentence. 312 Kan. at 121-24. Both parties filed Rule 6.09 letters addressing *Coleman*. (2021 Kan. S. Ct. R. 40.)

The State also moved for summary disposition, arguing *Coleman* is a controlling decision dispositive of the appeal. See Supreme Court Rule 7.041(b) (2021 Kan. S. Ct. R. 48). Appleby filed a timely response. We then requested supplemental briefing.

This court has jurisdiction under K.S.A. 2020 Supp. 22-3601(b)(3) (allowing appeal of life sentence to Supreme Court, except for sentence imposed under K.S.A. 21-4643 or K.S.A. 2020 Supp. 21-6627).

Appendix A

Analysis

Standard of Review

This case involves issues of statutory interpretation and constitutional claims. Both are questions of law subject to de novo or unlimited review. *Coleman*, 312 Kan. at 117.

History of Caselaw on Judicial Fact-finding

Appleby raises the same complaint as had Curtis L. Coleman Jr.: A judge, not a jury, found aggravating factors that served as the basis for increasing the minimum term of their life sentences from 25 years to either 40 years in Coleman's case or 50 years in Appleby's. Like Coleman, Appleby contends his sentence should be vacated because the Sixth Amendment to the United States Constitution requires a jury determine these aggravating factors. See *Coleman*, 312 Kan. at 117-18; *Appleby*, 289 Kan. at 1065-69.

When judges sentenced Appleby and Coleman, Kansas law allowed judicial fact-finding. And this court upheld judicial fact-finding in Appleby's and many other cases. *Appleby*, 289 Kan. at 1069 (citing cases reaching same holding). But, about five years after Appleby's direct appeal ended, this court held it was unconstitutional for a judge to increase the minimum sentence a defendant must serve based on findings made by the judge, not a jury. See *State v. Soto*, 299 Kan. 102, 122-24, 322 P.3d 334 (2014) (citing *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 [2013]).

This court in *Coleman* detailed this history. 312 Kan. at 118-19. We need not discuss all the detail here; a short history provides context for our holding that, like Coleman, Appleby has no right to relief.

Coleman began with a discussion of *Apprendi*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435. In *Apprendi*, the United States Supreme Court held that any fact other than the existence of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. That holding applied explicitly only to the determination of statutory *maximum* sentences and, that same year, this court declined to extend the *Apprendi* rule to findings made by a district court judge before imposing a mandatory *minimum*—the complaint Appleby makes. See *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000) (relying on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 [1986]).

Two years later, the United States Supreme Court walked the line between *Apprendi* and *McMillan* by characterizing a judge's finding that a defendant possessed, brandished, or discharged a firearm during the commission of an offense as a judicial sentencing factor rather than an element of the crime. *Harris v. United States*, 536 U.S. 545, 556, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). And that same year, the Supreme Court held unconstitutional Arizona's capital sentencing statutes that allowed a judge to find and balance mitigating circumstances in determining whether to impose a death sentence. *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Ten years later, the United States Supreme Court overruled *Harris* in *Alleyne*. The Court found "no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum." *Alleyne*, 570 U.S. at 116. Thus, the Court held that any fact that increases the minimum sentence must "be submitted to the jury and found beyond a reasonable doubt." 570 U.S. at 116.

This court extended *Alleyne* to Kansas' hard 50 sentencing statutes (hard 40 for crimes committed before July 1, 1999) in *Soto*, 299 Kan. at 122-24. We later held the rule of law declared in *Alleyne* cannot be applied retroactively to invalidate a sentence that was final before the date of the *Alleyne* decision. *Kirtdoll v. State*, 306 Kan. 335, Syl. ¶ 1, 393 P.3d 1053 (2017).

Modification of Appleby's Sentence

While that history explains the legal basis for Appleby's complaint, it does not address the pivotal question in his appeal: Can he obtain relief from his sentence given that it was final several years before our decision in *Soto* and the United State Supreme Court's decision in *Alleyne*? The finality of his sentence means no court has jurisdiction to modify the sentence unless there is a jurisdictional basis for presenting the argument to the court. *Coleman*, 312 Kan. at 119-20 (quoting *State v. Trotter*, 296 Kan. 898, 905, 295 P.3d 1039 [2013]). Requests for a sentence modification must be "dismissed for lack of jurisdiction unless there is statutory language authorizing the specific requested relief." 312 Kan. at 120 (citing *State v. Anthony*, 274 Kan. 998, 1002, 58 P.3d 742 [2002]).

Given that, the *Coleman* decision explored the potential ways a court could have jurisdiction to hear the claim of someone like Appleby or Coleman who seeks relief from the hard 40 or 50 minimum term of his or her life sentence. We considered options, even if not raised by Coleman, because "pro se postconviction pleadings must be analyzed by their content, not necessarily by their label." *Coleman*, 312 Kan. at 120. But we concluded no procedure offers a path to jurisdiction. See *Coleman*, 312 Kan. at 121-24. Appleby's briefing does not persuade us to depart from *Coleman*'s holdings.

One of the procedural mechanisms discussed in *Coleman* is a motion to correct an illegal sentence. Appleby filed his motion as one to correct an illegal sentence under K.S.A. 2020 Supp. 22-3504. That statute allows courts to consider an illegal sentence at any time, which includes after a direct appeal is final. But what constitutes an illegal sentence is not open ended, and this court has made clear that "a sentence imposed in violation of *Alleyne* does not fall within the definition of an 'illegal sentence' that may be addressed by K.S.A. 22-3504." *Coleman*, 312 Kan. at 120 (citing *State v. Brown*, 306 Kan. 330, Syl. ¶ 1, 393 P.3d 1049 [2017]; *State v. Moncla*, 301 Kan. 549, Syl. ¶ 4, 343 P.3d 1161 [2015]). Appleby offers no argument that counters this holding in *Coleman*, *Brown*, and *Moncla*.

Coleman also discussed and rejected another mechanism that can lead to post-judgment relief from a sentence: a motion for habeas relief under K.S.A. 60-1507. This statute grants a court jurisdiction to consider a collateral attack on an unconstitutional sentence. Generally, a movant is allowed only one motion and that

motion must be filed within one year of the movant's direct appeal ending. Exceptions apply, however. A court can allow a second motion if the movant establishes exceptional circumstances, and the one-year limitation does not apply if a court finds it necessary to lift the bar to prevent a manifest injustice. See *Coleman*, 312 Kan. at 120; K.S.A. 2020 Supp. 60-1507(c), (f).

Coleman filed his 60-1507 motion seeking to set aside his hard 50 sentence more than one year after the conclusion of his final appeal and after he had filed two previous 60-1507 motions. He claimed manifest injustice and exceptional circumstances justified allowing him to file this third motion more than a year after his appeal was final. But this court rejected his argument based on *Kirtdoll*, 306 Kan. at 341. There, this court had held "for 60-1507 motions to be considered hereafter, *Alleyne*'s prospective-only change in the law cannot provide the exceptional circumstances that would justify a successive 60-1507 motion or the manifest injustice necessary to excuse the untimeliness of a 60-1507 motion." *Kirtdoll*, 306 Kan. at 341. We thus held that Coleman could not obtain relief through a 60-1507 motion. *Coleman*, 312 Kan. at 120-21.

Perhaps because of this line of cases and the fact a 60-1507 motion would be successive and out-of-time, Appleby advances no argument to counter *Kirtdoll*'s or *Coleman*'s holding on this point. But we still mention this procedural mechanism because courts sometimes treat a pro se motion as a motion filed under 60-1507 even if labeled as something else. Yet, consistent with *Coleman* and *Kirtdoll*, converting his motion to correct an illegal

sentence to a 60-1507 motion would not benefit Appleby because he has no right to relief under K.S.A. 2020 Supp. 60-1507.

Finally, like Coleman, Appleby offers K.S.A. 2020 Supp. 21-6628(c) as a basis for relief. In fact, Appleby solely relies on this provision. But we concluded in *Coleman* that K.S.A. 2020 Supp. 21-6628(c) does not provide defendants in Appleby's position a mechanism for relief. 312 Kan. at 121-24. We interpreted K.S.A. 2020 Supp. 21-6628 to be a "fail-safe provision" that "[b]y its clear and unequivocal language . . . applies only when the term of imprisonment or the statute authorizing the term of imprisonment are found to be unconstitutional." 312 Kan. at 124.

Appleby disagrees with *Coleman*'s statutory analysis. He argues K.S.A. 2001 Supp. 21-4635 authorized his sentence and this court ruled K.S.A. 21-4635 was unconstitutional in *Soto*, 299 Kan. at 124. *Coleman*, however, held K.S.A. 21-4635 "was part of the procedural framework by which the enhanced sentence was determined" and the root authorization for Coleman's sentence was the statute that provided for a life sentence. *Coleman*, 312 Kan. at 124. Here, Appleby committed capital murder, and the Legislature has authorized a life sentence for someone convicted of that crime. See K.S.A. 2001 Supp. 21-3439; K.S.A. 2001 Supp. 21-4706. A life sentence has "never been determined to be categorically unconstitutional" and "such sentences continue to be imposed in qualifying cases in Kansas." *Coleman*, 312 Kan. at 124. Thus, Appleby's sentence does not trigger the "fail-safe" provision of K.S.A. 2020 Supp. 21-6628(c).

Thus, K.S.A. 2020 Supp. 21-6628(c) does not require resentencing Appleby.

Conclusion

The district court properly denied Appleby's motion for sentence modification. There is no procedural mechanism by which a Kansas court may reconsider his sentence. *Appleby* and *Soto* do not operate retroactively to afford a remedy. And K.S.A. 2020 Supp. 21-6628(c) does not apply. We affirm the judgment of the district court.

Luckert, C.J., concurring:

In *State v. Coleman*, 312 Kan. 114, 472 P.3d 85 (2020), I joined this court's statutory analysis of K.S.A. 2020 Supp. 21-6628(c). Benjamin A. Appleby and defendants in other cases now persuade me we erred in *Coleman* when we held that K.S.A. 21-4635 "was not a statute authorizing [a] hard 40 life sentence," and that Curtis L. Coleman Jr.'s life sentence was instead "authorized by virtue of his commission of premeditated first-degree murder, an offense qualifying for such sentence under Kansas law." *Coleman*, 312 Kan. at 124. Yet my reexamination of the statutory analysis does not lead me to conclude that Appleby (or Coleman) is entitled to relief. I, therefore, concur in the decision to affirm the district court.

K.S.A. 2020 Supp. 21-6628(c), formerly K.S.A. 2001 Supp. 21-4639, provides:

> "In the event the mandatory term of imprisonment or any provision of chapter 341 of the 1994 Session Laws of Kansas authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law."

> Appleby asks us to focus on the meaning of the word "authorizing." This court previously did so in *Smith v. Printup*, 254 Kan. 315, 339, 866 P.2d 985 (1993). *Printup* included two definitions. First, Webster's New International Dictionary defined "authorize" as: "'to endorse, empower, justify, or permit by or as if by some recognized or proper authority (as custom, evidence, personal right, or regulating power) . . . : SANCTION.'" *Printup*, 254 Kan. at 339 (quoting Webster's Third New International Dictionary 146 [1986]). Second, Black's Law Dictionary's defined it to mean:
>
> "'To empower; to give a right or authority to act. To endow with authority or effective legal power, warrant, or right. [Citation omitted.] To permit a thing to be done in the future. It has a mandatory effect or meaning, implying a direction to act.
>
> "'"Authorized" is sometimes construed as equivalent to "permitted"; or "directed", or to similar mandatory language. Possessed of authority; that is, possessed of legal or rightful power, the synonym of which is "competency." [Citation omitted.]'" *Printup*, 254 Kan. at 339 (quoting Black's Law Dictionary 133 [6th ed. 1990]).

Current definitions are consistent. E.g., Black's Law Dictionary 165 (11th ed. 2019) ("To give legal authority; to empower <he authorized the employee to act for him>. 2.

To formally approve; to sanction <the city authorized the construction project>."); Merriam Webster ("1: to endorse, empower, justify, or permit by or as if by some recognized or proper authority such as custom, evidence, personal right, or regulating power) a custom *authorized* by time [;] 2: to invest especially with legal authority: EMPOWER// She is *authorized* to act for her husband."), at https://www.merriam-webster.com/dictionary/authorize.

Under these definitions, "authorizing" as used in K.S.A. 2020 Supp. 21-6628(c) means having or empowering with legal authority. I thus interpret K.S.A. 2020 Supp. 21-6628(c) to be implicated when any provision authorizing or empowering a court to impose a hard 50 sentence (or another sentence above the statutory minimum) is held to be unconstitutional.

The statutory framework in June 2002 when Appleby committed capital murder was a life sentence. See K.S.A. 2001 Supp. 21-4706(c). The sentencing statutes empowered the court to impose a mandatory term of imprisonment of 50 years if, after hearing evidence on aggravating and mitigating circumstances, the court concluded the aggravating circumstance or circumstances were not outweighed by mitigating circumstances. See K.S.A. 2001 Supp. 21-4635(a); K.S.A. 2001 Supp. 21-4638. If the court concluded the aggravating circumstance or circumstances were outweighed by mitigating circumstances, the defendant was sentenced "as provided by law," which meant a life sentence with no minimum. K.S.A. 2001 Supp. 21-4635(b), (c); K.S.A. 2001 Supp. 21-4638; see K.S.A. 2001 Supp. 21-4706(c) (imposing life sentence for capital

murder, defined in K.S.A. 21-3439). If the sentencing court imposed no minimum sentence, a defendant still served at least 25 years based on statutory terms defining when he or she became parole eligible. See K.S.A. 2001 Supp. 22-3717(b)(1) (inmates sentenced for capital murder or premeditated first-degree murder parole eligible "after serving 25 years of confinement, without deduction of any good time credits").

These statutes only authorized or empowered the district court to impose a hard 50 life sentence on Appleby *after* the district court weighed aggravating and mitigating circumstances as provided in K.S.A. 2001 Supp. 21-4635. The district court had no authority to impose a hard 50 sentence without first walking through the weighing of circumstances provided in K.S.A. 2001 Supp. 21-4635, a provision of chapter 341 of the 1994 Session Laws of Kansas. L. 1994, ch. 341. Thus, K.S.A. 2001 Supp. 21-4635 authorized Appleby's sentence.

This court held K.S.A. 21-4635 unconstitutional in *State v. Soto*, 299 Kan. 102, Syl. ¶ 9, 124, 322 P.3d 334 (2014). There, this court concluded K.S.A. 21-4635 violated the Sixth Amendment to the United States Constitution as applied in *Alleyne* "because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt." 299 Kan. 102, 322 P.3d 334, Syl. ¶ 9. I thus conclude this court's ruling in *Soto* triggers application of K.S.A. 2020 Supp. 21-6628(c) because *Soto* held unconstitutional a provision of chapter

341 of the 1994 Session Laws of Kansas authorizing the mandatory term.

My analysis does not end there, however. Instead, it circles back to the jurisdiction issue discussed by the majority opinion. I make this circle because K.S.A. 2020 Supp. 21-6628(c), after saying a holding of the United States Supreme Court or this court that a statute authorizing a mandatory term is unconstitutional may trigger application of the statute, directs that "the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court." Under this provision, Appleby must still show that a court has jurisdiction over him. K.S.A. 2020 Supp. 21-6628(c) does not itself contain any language granting jurisdiction; the language just quoted refers to a court having jurisdiction, meaning one that already has jurisdiction. Because the court that had jurisdiction to impose sentence lost jurisdiction once the judgment became final, I look back to statutes that provide jurisdiction through collateral proceedings.

As the majority discusses, only two possibilities exist as a procedure authorizing Appleby's collateral attack on his sentence: a motion to correct an illegal sentence under K.S.A. 2020 Supp. 22-3504 or a motion under K.S.A. 2020 Supp. 60-1507. A motion to correct illegal sentence does not extend to claims based on *Alleyne*, because "a sentence imposed in violation of *Alleyne* does not fall within the definition of an 'illegal sentence' that may be addressed by K.S.A. 22-3504." *Coleman*, 312 Kan. at 120 (citing *State v. Brown*, 306 Kan. 330, Syl. ¶ 1, 393 P.3d 1049 [2017]; *State v. Moncla*, 301 Kan. 549, Syl. ¶ 4, 343 P.3d 1161 [2015]).

But a 60-1507 motion could grant a court jurisdiction over an *Alleyne* violation. See K.S.A. 2020 Supp. 60-1507(a) ("A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, . . . may, pursuant to the time limitations imposed by subsection [f], move the court which imposed the sentence to vacate, set aside or correct the sentence").

Appleby did not meet the requirements imposed by K.S.A. 2020 Supp. 60-1507(c) and (f), however, because he had filed prior 60-1507 motions and he filed this one past the time limitation. He therefore must establish exceptional circumstances and manifest injustice. But in *Kirtdoll v. State*, 306 Kan. 335, 341, 393 P.3d 1053 (2017), this court held "for 60-1507 motions to be considered hereafter, *Alleyne*'s prospective-only change in the law cannot provide the exceptional circumstances that would justify a successive 60-1507 motion or the manifest injustice necessary to excuse the untimeliness of a 60-1507 motion." Appleby does not ask us to overturn *Kirtdoll*.

Speaking generally, it is easy to imagine situations in which a court could find exceptional circumstances exist or that the time limitation should be extended to prevent a manifest injustice and K.S.A. 2020 Supp. 21-6628 could apply. For example, if the United States Supreme Court held that either the death penalty or the hard 50 sentencing statutes was categorically unconstitutional—that is the entire scheme was invalid rather than an aspect of it—a time extension based on manifest injustice would likely apply and the "fail safe" provisions of K.S.A. 2020 Supp.

21-6628 could be used to provide relief. See *Coleman*, 312 Kan. at 123-24 (discussing *Hurst v. State*, 202 So. 3d 40, 63-66 [Fla. 2016], which determined Florida statute like K.S.A. 2020 Supp. 21-6628 was a fail-safe provision that was not triggered when United States Supreme Court invalidated only part of Florida's death penalty law allowing judicial findings for imposition of a death).

Appleby does not present a situation that demands an extension to prevent manifest injustice, however. See *Kirtdoll*, 306 Kan. at 341. Nothing in K.S.A. 2020 Supp. 21-6628 demands a result different from *Kirtdoll*. See *Coleman*, 312 Kan. at 122-24; *Hurst*, 202 So. 3d at 63-66. Nor does K.S.A. 2020 Supp. 60-1507. While the Legislature provided that 60-1507 motions could challenge the constitutionality of a sentence, it also provided that, if the movant did not meet the one-year limitation period, he or she must show manifest injustice to proceed. This signals that an unconstitutional sentence does not always equate to manifest injustice. And the Legislature signaled an intent that an *Alleyne* violation did not trigger the fail-safe of K.S.A. 2020 Supp. 21-6628.

The Legislature sent this signal after the United States Supreme Court issued its *Alleyne* opinion and the Governor called a special session to address the hard 50 sentencing statutes. The Legislature acted expeditiously to assure courts could constitutionally impose hard 50 sentences in pending criminal cases. The Legislature's staff advised the Legislature that the *Alleyne* rule did not apply to sentences final before the *Alleyne* decision. See Preliminary Report of the 2013 Special Committee on Judiciary, 3; Revisor Office's Memorandum on the

Potential Impact of *Alleyne v. United States* on Kansas Law (Aug. 16, 2013), 4. And the Legislature took no action to provide relief in those cases. While legislative inaction is not always indicative of legislative intent, see *State v. Quested*, 302 Kan. 262, 279, 352 P.3d 553 (2015), a failure to act when addressing the subject matter provides some indication the Legislature did not intend there to be relief.

Appleby failed to establish exceptional circumstances or manifest injustice as necessary to allow a court to have jurisdiction to grant him relief under K.S.A. 2020 Supp. 21-6628 based on *Alleyne*.

Appleby makes an argument that could avoid or change the *Kirtdoll* holding, however. He contends his request for relief is based not on *Alleyne* but on *Apprendi*, which the United States Supreme Court decided before he was sentenced. He asserts we need not apply *Alleyne* retroactively to provide him relief.

His argument requires a conclusion that *Alleyne* was a mere extension of *Apprendi*. But, as discussed in *Coleman*, it was not. See *Coleman*, 312 Kan. at 117-19. The United States Supreme Court itself, after deciding *Apprendi*, affirmed a sentence that imposed a mandatory minimum based on judicial fact-finding—exactly the circumstance here. *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). *Harris* remained the law until the Court overturned it in *Alleyne*. See *Alleyne*, 570 U.S. at 116. Had *Harris* merely been an extension of *Apprendi*, the Court could have simply distinguished it in *Alleyne*. Instead, it overruled the holding and thus changed the law. Appleby's argument is thus unpersuasive.

In conclusion, while I now depart from one portion of the analysis in *Coleman*, I still conclude K.S.A. 2020 Supp. 21-6628(c) did not require the district court to vacate Appleby's hard 50 life sentence.

I therefore concur in the result.

Wilson and Standridge, JJ., join the foregoing concurrence.

APPENDIX B — TRANSCRIPT OF JUDGE'S RULING IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS, CRIMINAL COURT DEPARTMENT, DATED OCTOBER 24, 2019

[1]IN THE DISTRICT COURT
OF JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

Case No. 04CR02934

Division No. 17

STATE OF KANSAS,

Plaintiff,

v.

BENJAMIN A. APPLEBY,

Defendant.

TRANSCRIPT OF JUDGE'S RULING
ON DEFENDANT'S MOTION TO CORRECT
ILLEGAL SENTENCE

PROCEEDINGS had before the Honorable T. Kelly Ryan, District Judge of the Tenth Judicial District of the State of Kansas, on the 24th day of October, 2019, in the Johnson County Courthouse, 100 N. Kansas Ave., Olathe, Kansas 66061.

Appendix B

APPEARANCES:

The State of Kansas appeared by and through its attorney, Jacob Gontesky, Assistant District Attorney, P.O. Box 728, Olathe, Kansas 66061-0728.

The Defendant, Benjamin A. Appleby, appeared in person and with his counsel, Wendie C. Miller, Kenneth B. Miller, Atty at Law, LLC, 1540 N. Broadway St., Suite 201, Wichita, Kansas 67214.

[2]THURSDAY, OCTOBER 24, 2019, 4:17 P.M.

PROCEEDINGS

(The following proceedings were had before the Court with all parties present. The defendant was present in person along with his counsel.)

THE COURT: Please be seated. I'll call for hearing Case No. 04CR2934, State of Kansas vs. Benjamin A. Appleby.

MR. GONTESKY: Good afternoon, Your Honor. May it please the Court, the State of Kansas appears by Jacob Gontesky.

MS. MILLER: May it please the Court, Benjamin Appleby appears in person and by counsel, Wendie Miller.

THE COURT: Okay. Thank you. In this case the defendant has filed a motion to correct illegal sentence

pursuant to K.S.A. 22-3504. I'll go through the history as I announce the decision from that motion. The State had filed its response. The defendant had filed a sur-reply, if you will, to that response by the State. We set the matter over. We scheduled it for a hearing previously on August 30th of this year. The matter was taken under advisement and, as Ms. Miller made her [3]argument that day and cited to some cases that were not contained in her briefing, asked for the transcript of that motion hearing to be produced, which has been done, and I've reviewed all of the parties' submissions, as well as their arguments from back in August.

The defendant's motion is noted under K.S.A. 22-3504. Mr. Appleby's argument is that a resentencing is required, in fact, is mandatory under K.S.A. 21-4639. I want to cite to that statute because that is the crux of the matter now pending.

At the time of the actions, the offense which occurred for which Mr. Appleby was convicted, K.S.A. 21-4639 read, "In the event a mandatory term of imprisonment for any provision of this act authorizing such mandatory term is held to be unconstitutional by the Supreme Court of Kansas or the United States Supreme Court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law."

The parties also argue different [4]interpretations, obviously, on the law and the law that applied here, in fact,

disagreeing on what the other side's arguments, in fact, were in support for those arguments.

The defendant maintains that Mr. Appleby's sentence must be -- it is mandatory that it be -- a new sentencing occur under his theory, a modification of that sentence from an off-grid, if you will, mandatory, enhanced Hard 50 should be back to a grid sentence for a resentencing. Further, the defendant argues that the sentencing in the original court by Judge Leben in December of 2006 was erroneously entered because Judge Leben found aggravating factors which outweighed mitigating factors in imposing the Hard 50 sentence. The parties aptly noted that the law was effected by both the *Apprendi* and the *Alleyne* cases that came from the United States Supreme Court.

The defendant argued the plain language of K.S.A. 21-4639 mandates a resentencing and that the prospective application of that statute, which is now K.S. A. 21-6628(c), applies to a person previously being sentenced, for that reason that statute applies to Mr. Appleby.

[5]The parties disagree on how the State responded to the motion filed back in April of this year by Mr. Appleby. Counsel stated in her motion and argued that Mr. Appleby is not making a constitutional claim, is not seeking a retroactive application under the *Alleyne* holding which would invoke a mandatory provision for resentencing under 4639.

In trying to put together the argument here because it is interwoven and sometimes seemingly contradictory,

in making this out, I think the essence of how Mr. Appleby through counsel clarified his argument was that the argument was because *Apprendi* was in place at the time of Mr. Appleby's sentencing, that the principles in *Apprendi* applied to the determination of whether any aggravating factors outweighed mitigating factors which would allow the imposition of the Hard 50 sentence.

Defendant argues that because *Alleyne* is an application of *Apprendi* and that Mr. Appleby's prosecution and conviction and his sentence did not arise until well after *Apprendi* was decided, which was the stated law at that time, that applying *Alleyne* would not require retroactive application of [6]case law to identify the constitutional rights at stake.

The State made a direct argument that said the sentence has been entered, it was constitutional, it was statutorily proper at the time it was entered, and, therefore, there is no resentencing, no modification, no illegal sentence. It's appropriate and I want to give just a brief history that leads up to this argument.

On December 5, 2006, Benjamin Appleby was convicted by a jury of attempted rape and capital murder. On December 26, 2006, the trial court imposed the Hard 50 or life imprisonment sentence on the murder conviction under K.S.A. 21-4635, and, further, a consecutive sentence on an attempted rape conviction for a sentence of 228 months.

On November 20, 2009, the Kansas Supreme Court affirmed the capital murder conviction and vacated the

defendant's attempted rape conviction based on the theory of multiplicity. In that same mandate, the Kansas Supreme Court also upheld Mr. Appleby's Hard 50 sentence as being constitutional under K.S. A. 21-4635 and, further, that it was constitutional under *Apprendi* having been decided by the U.S. Supreme Court in 2000.

[7]And I'll quote from that decision: "This Court has repeatedly rejected similar arguments challenging the constitutionality of the hard-40/hard-50 sentencing scheme and held that our Hard 50 scheme is constitutional," citing to *State v. Johnson, State v. Warledo,* and noting that the United States Supreme Court has not "altered decisions in which it recognized that the *Apprendi* prohibition does not apply when considering the minimum sentence to be imposed. Appleby presents no persuasive reason to abandon this long line of precedent." As counsel note, the law subsequently was changed in that regard under *Alleyne.*

Mr. Appleby subsequently filed an appeal -- excuse me, a 60-1507 motion. While the appeal was pending, the *Alleyne v. The United States* case was decided holding that any fact that increased a mandatory minimum sentence for -- it is an element of the crime that must be submitted to a jury, that it's not proper for a judge to make that determination.

In light of the *Alleyne* decision, Mr. Appleby filed a motion with the Kansas Court of Appeals requesting permission to file a brief based on *Alleyne.* The Court of Appeals denied that [8]request. Ultimately, Mr. Appleby's

1507 appeal was denied by the district court after an evidentiary hearing. It was affirmed by the Kansas Court of Appeals on February 28, 2014. Petitions for review of that matter for *cert* to the United States Supreme Court -- excuse me, to the Kansas Supreme Court were denied.

On February 25, 2015, Mr. Appleby filed a habeas petition under 28 U.S.C. 2254 alleging several grounds for relief. The respondents in that case sought denial of the habeas relief by Mr. Appleby arguing that he could not demonstrate any constitutional errors or that the state court decisions failed to comport with clearly established federal law.

On December 27, 2016, Mr. Appleby's 2254 petition was summarily denied. The court stating in that decision, "Appleby now argues that he's entitled to federal habeas relief because his Hard 50 sentence violates *Alleyne* and *State v. Soto,* 299 Kan. 102, and its progeny, all of which were decided after the Kansas Supreme Court affirmed Appleby's convictions. He says these cases constitute an intervening change in law which excuses any failure to raise this issue in the 1507 [9]proceedings. He also argues that *Alleyne* is a new rule of criminal procedure that should be applied retroactively in his case because he raised the constitutionality of the Hard 50 statute under *Apprendi* on direct appeal. The Court finds Appleby's arguments unpersuasive."

A further quote from that decision, "The Court finds Appleby's reliance upon *Soto* misplaced. *Soto* is factually distinguishable because *Alleyne* was decided during

Soto's direct appeal. More importantly, a prisoner seeking federal habeas relief may rely on new constitutional rules of criminal procedure announced before the prisoner's conviction became final," citing to *Teague v. Lane.* "Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from the United States Supreme Court has become time barred or has been disposed of. The Kansas Supreme Court affirmed Appleby's convictions on November 20, 2009. Appleby did not file a petition for writ of certiorari to the United States Supreme Court, thus his convictions and sentence became final on February 18, 2010," which was 90 days after the Kansas Supreme Court decision since there was no petition for writ of certiorari. "Because *Alleyne* [10]was decided after his conviction became final, Appleby may not rely upon *Alleyne.* The fact that *Alleyne* is an extension of *Apprendi* does not change when the *Alleyne* rule was announced. Appleby's argument for retroactive application of *Alleyne* lacks legal support. The Supreme Court has not made *Alleyne's* new rule of constitutional law retroactive to cases on collateral review, and the Tenth Circuit has determined that *Alleyne* does not apply retroactively to cases on collateral review. The Supreme Court" -- I'm sorry, that cites to *In re Payne,* 733 F.3d. 1027, 1029, from 2013. "The Supreme Court has held that rules based on *Apprendi* do not apply retroactively on collateral review," citing *Schriro v. Summerlin,* 542 U.S. 348, a 2004 decision, "thus, it is unlikely that the Supreme Court will declare *Alleyne* retroactive in the future." Mr. Appleby's request for a rehearing was denied and the U.S. Supreme Court denied Appleby's petition for certiorari in that matter.

Appendix B

That brings us to 2019 and the present motion. As argued by counsel clarifying that Mr. Appleby is not seeking a constitutional challenge to *Alleyne,* in fact, it's relying on *Apprendi,* Ms. Miller argued in our August 30th [11]hearing, "a challenge to the trial court's determination of aggravating factors outweighed any mitigating factors to support a Hard 50 sentence is necessarily a challenge to Appleby's sentence that those factors helped produce. If the aggravating factors are incorrect, the resulting sentence cannot conform with the statutory provision and the term of the punishment authorized and, consequently, is an illegal sentence. The resulting Hard 50 sentence cannot conform with the statutory provisions of K.S.A. 21-4635 or 21-4639 and the term of the punishment authorized."

Appleby's challenge to the trial court's incorrect finding of aggravating factors to impose a Hard 50 sentence and the trial court's findings therefore resulted in the invocation of K.S.A. 21-4639 which mandates modification of Appleby's sentence and concluding by stating, "Mr. Appleby's sentence is illegal under K.S.A. 21 -3504."

In further clarifying the argument, Ms. Miller stated that the district court was precluded -- this being the sentencing judge in 2006, the district court was precluded from finding any facts to support a Hard 50 sentence under [12]*Apprendi.* Because the sentence imposed was unconstitutional under *Apprendi,* retroactive application of *Alleyne* is unnecessary and modification was required under K.S.A. 21-4639, the statute in effect at the time of

the offense, and that that modification was required at the time Appleby's sentence was imposed. The bottom line being the defendant argues that the Hard 50 sentence was prohibited at that time based upon *Apprendi.*

Mr. Appleby's motion was filed April 10, 2019, captioned "Motion to Correct Illegal Sentence" pursuant to K.S. A. 22-3504(1). K.S. A. 22-3504 authorizes a court to correct an illegal sentence at any time. There is no question as to that meaning of that statute. An illegal sentence, however, is not illegal because of unconstitutionality that arises after the fact. The Kansas Supreme Court specifically found that "A claim that a term of punishment was later declared unconstitutional does not satisfy the requirements for finding a sentence illegal." That is *State v. Lee,* 304 Kan. 416 at 417. That decision was from 2016.

Even if the unconstitutionality of the Hard 50 statute as established later would make Appleby's sentence illegal today, it would be [13]subject to K.S.A. 22-3504, the sentence must have been illegal at the time of his sentencing. Citing -- I will cite to *State v. Murdock* which states, "Under K.S.A. 22-3504, the legality of a sentence is controlled by the law in effect at the time the sentence was pronounced. Therefore, a sentence that was legal when pronounced does not become illegal if the law subsequently changes." That is *Murdock* at 309 Kan. 585 and 591.

Appleby contends that K.S.A. 21-4639, which was the statute in effect at the time of the offense, requires the court to bring him before the court and modify his sentence to require no mandatory term of imprisonment

and a sentence that was otherwise provided by law. This is not a correct reading in this case. K.S.A. 21-4639 applies to cases where a court has found that a defendant's sentence is unconstitutional and vacated the sentence. Appleby's Hard 50 sentence has been found constitutional and legal under K.S.A. 21-4635.

As noted, the defendant is not arguing against the constitutionality of the Hard 50 law, although mixed in through that argument is that his rights under the due process clause of the 14th Amendment and 6th Amendment guarantee a trial [14]by jury has been violated under the sentencing structure under which Mr. Appleby was subjected in 2006 and as finalized after his direct appeal and the finality of that appeal 90 days after the mandate was issued by the Kansas Supreme Court.

The Hard 50 rule under Kansas statutes at the time of Mr. Appleby's sentencing when viewed in the light of *Apprendi,* as well as *McMillan* and *Harris,* demonstrate that that sentence was constitutional. The Hard 50 law created a minimum sentence rather than a maximum sentence. The maximum sentence and penalties for first degree murder is life in prison. Therefore, *Apprendi* did not reach Kansas's Hard 50 statutory scheme because it did not affect in any way the statutory maximum of life in prison.

Alleyne, on the other hand, held that the mandatory minimum sentences increase the penalty for a crime. The fact that it increases the minimum sentence is an element should that be submitted to a jury and proved beyond a

reasonable doubt. That is different from the *Apprendi* ruling the defendant argues here.

Again we're back to whether or not the defendant's argument withstands scrutiny here under [15]his theory. He's cited to the *Lee* case before, *State v. Lee,* 304 Kan. 416. As the State argued in its response, "Even if the unconstitutionality of the Hard 50 statute made Appleby's sentence illegal, to be subject to the statute that is -- this motion is brought, K.S.A. 22-3504(1), the sentence must have been illegal at the time of his sentencing. Under K.S.A. 22-3504, the legality of a sentence is controlled by the law in effect at the time the sentence was pronounced. Therefore, a sentence that was legal when pronounced does not become illegal if the law subsequently changes." Again citing *State v. Murdock.*

Mr. Appleby argues that *Apprendi* controls when the defendant's sentence is unconstitutional; however, the case of *Kirtdoll v. State,* 306 Kan. 335, that argument was rejected by the Kansas Supreme Court finding *Alleyne* cannot be applied retroactively to cases that were final when *Alleyne* was decided. The defendant argues that the *Apprendi* decision should be retroactively applied to his sentence. The matter has been determined and decided.

The provisions of K.S.A. 21-4635 were constitutional at the time the sentence was handed [16]down against Mr. Appleby. His 6th and 14th Amendment rights were not violated. *Apprendi* was the applicable law at the time of Mr. Appleby's sentencing. As Mr. Appleby argues in his motion, *Apprendi* states "Other than the fact of a prior

conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The *Harris* case was later decided that clears those doubts that *Apprendi* did not apply to statutory minimums but only to statutory maximums. Mr. Appleby's Hard 50 sentence did not increase the statutory maximum, it increased the statutory minimum. The *Alleyne* decision later changed the Kansas Hard 50 sentencing scheme, but it was not until after Mr. Appleby's case was final.

Mr. Appleby now seeks to have the Court resentence him arguing that under *Apprendi,* the Hard 50 sentence was illegal at that time, in fact, would lead to his sentencing and a resentencing on the grid, so to speak, is the terminology used, on the grid without the enhancement beyond the sentencing guidelines for a capital murder conviction which he stands and is serving for at this time.

[17]The trial court in 2006 sentenced Mr. Appleby legally and constitutionally and was affirmed both by the Kansas Court of Appeals and the Kansas Supreme Court. The defendant's argument that his sentence would have to be in violation of *Apprendi* at the time he was sentenced is not with basis as I see this argument here, the law and -- the various case law as argued by counsel; therefore, the defendant's motion to correct an illegal sentence is considered and denied.

Mr. Gontesky, anything that you want to state for the record in this matter?

MR. GONTESKY: There's nothing else the State needs at this time, Judge.

THE COURT: Ms. Miller, is there anything that you wish to state for the record?

MS. MILLER: None by the defense, Your Honor.

THE COURT: Okay. There being nothing else before the Court, the defendant will be ordered transported back to the custody of the Department of Corrections. I will advise counsel on the record that if you wish to appeal the ruling of the Court, you must file a notice of appeal within 14 days from today.

[18]Thank you all for your presentations earlier and the matter will be in adjournment.

(The hearing concluded at 4:49p.m.)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-3002

BENJAMIN APPLEBY,

Petitioner-Appellant,

v.

SAM CLINE, WARDEN; ATTORNEY GENERAL OF KANSAS,

Respondents-Appellees.

September 28, 2017, Filed

Before LUCERO, HOLMES, and BACHARACH, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY*

* After examining the brief and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix C

Jerome A. Holmes, Circuit Judge.

Benjamin Appleby, a Kansas prisoner, seeks a certificate of appealability (COA) to challenge the district court's denial of his habeas petition filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (providing that no appeal may be taken from a final order denying a § 2254 petition unless the petitioner obtains a COA). We deny a COA and dismiss the appeal.

I

A Kansas jury convicted Mr. Appleby for the 2002 capital murder and attempted rape of a 19-year-old college student. After the murder, Mr. Appleby fled Kansas and eventually was apprehended in Connecticut in 2004. He was arrested by Connecticut police on an outstanding warrant from 1998 on unrelated charges—risk of injury to a minor, disorderly conduct, and public indecency. *See State v. Appleby*, 289 Kan. 1017, 221 P.3d 525, 532, 538-39 (Kan. 2009). Kansas detectives were present for the arrest and questioned Mr. Appleby, who confessed to committing both the murder and the attempted rape. The state trial court sentenced him to a life sentence without the possibility of parole for 50 years ("hard 50") on the capital murder conviction and a consecutive 19-year term on the attempted rape conviction. On direct appeal, the Kansas Supreme Court vacated as multiplicitous the attempted rape conviction and sentence but otherwise affirmed. Mr. Appleby unsuccessfully sought post-conviction relief in the state courts and then filed a federal habeas petition under 28 U.S.C. § 2254.

Relevant here, Mr. Appleby claimed that (1) submitting his confession to the jury violated his Fifth and Fourteenth Amendment rights against compelled self-incrimination; (2) Kansas's hard 50 sentencing scheme violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), because it permits sentencing courts to find aggravating factors by a preponderance of the evidence; (3) trial and appellate counsel were ineffective in failing to raise suppression issues based on arguments that (a) the Connecticut warrant was stale and (b) the Kansas detectives acted outside of their geographic jurisdiction; and (4) trial and appellate counsel were ineffective in failing to present evidence from a mental health expert and raising the issue on appeal. The district court determined these claims, all of which the state courts rejected on the merits, did not warrant relief. Mr. Appleby now seeks a COA from this court.

II

A COA is a jurisdictional prerequisite to our review. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a petitioner to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."

Miller-El, 537 U.S. at 336 (internal quotation marks omitted).

Because the state courts denied Mr. Appleby's claims on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "requires federal courts to give significant deference to [the] state court decisions." *Lockett v. Trammel*, 711 F.3d 1218, 1230 (10th Cir. 2013). Under AEDPA, a petitioner is not entitled to federal habeas relief unless the state-court decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). "A state-court decision is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) if it applies a rule that contradicts the governing law set forth in Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *Smith v. Duckworth*, 824 F.3d 1233, 1241 (10th Cir. 2016) (internal quotation marks omitted), *cert. denied*, 137 S. Ct. 1333, 197 L. Ed. 2d 526 (2017). "A state-court decision is an unreasonable application of Supreme Court precedent if the decision correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* (internal quotation marks omitted). A state court's factual determinations are presumed correct and are rebuttable only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). We consider only "the record that was

before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

A. Confession

Mr. Appleby first claims that submitting his confession to the jury violated his Fifth and Fourteenth Amendment rights against compelled self-incrimination because he confessed after repeatedly asking about an attorney. During the book-in process on the Connecticut charges, and before ever speaking with the Kansas detectives or even knowing they were present, Mr. Appleby asked a Connecticut detective if he could speak to an attorney about refusing to submit to a DNA swab; three other times during the book-in process on the Connecticut charges, he asked more generally if he would have an opportunity to speak with an attorney. But once he was transferred to the Kansas detectives, Mr. Appleby agreed to answer their questions about the murder, waived his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and gave the Kansas detectives a two-and-a-half hour interview without requesting to speak with or have the assistance of an attorney.

The Kansas Supreme Court rejected this claim on direct appeal, and the federal district court denied habeas relief, concluding that the Kansas Supreme Court applied legal standards consistent with federal law in a reasonable manner.[1] Under the controlling COA

1. Mr. Appleby asserts the Kansas Supreme Court's decision was contrary to, or involved an unreasonable application of, *Davis v.*

standards, no reasonable jurist could debate the district court's resolution of the claim.

Initially, the district court noted that the Kansas Supreme Court reasonably applied *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), in declining to broadly construe any mention of an attorney as a request for counsel for purposes of interrogation. In *Davis*, the Supreme Court held that a "suspect must unambiguously request counsel." *Id.* at 459. As the Court explained, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* In light of *Davis*, the Kansas Supreme Court evaluated the circumstances of Mr. Appleby's inquiries to determine whether he invoked his Fifth Amendment right to counsel and, applying *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), and *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009), concluded he did not.

In *McNeil*, the Supreme Court distinguished the Sixth Amendment right to counsel in criminal prosecutions from the Fifth Amendment right to counsel to assist

---

United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991); *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988); *Smith v. Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984); *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); and *Miranda*.

with custodial interrogations. "The Sixth Amendment right," the Court explained, is "offense specific" and "cannot be invoked once for all future prosecutions." 501 U.S. at 175. But the right to counsel emanating from the Fifth Amendment's guarantee against compelled self-incrimination is intended "to counteract the inherently compelling pressures of custodial interrogation." *Id.* at 176 (internal quotation marks omitted). Although it is not offense specific, given its purpose, it is invoked "only when the suspect has *expressed* his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*." *Id.* at 178 (brackets and internal quotation marks omitted). The suspect must express "a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *Id.*

Building on *McNeil*, the *Montejo* Court dismissed concerns that a suspect could anticipatorily invoke his Fifth Amendment right to counsel at a preliminary hearing, in advance of interrogation:

> "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' . . . ." *McNeil*, 501 U.S. at 182 n.3. What matters for *Miranda* and *Edwards [v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981),] is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.

556 U.S. at 797.

Applying these authorities, the Kansas Supreme Court analyzed the timing, content, and context of Mr. Appleby's inquiries and concluded that he failed to unambiguously invoke his Fifth Amendment right to counsel for purposes of interrogation on the Kansas charges. *See Appleby*, 221 P.3d at 542, 548. As the district court observed, the Kansas Supreme Court determined that Mr. Appleby's request for counsel in response to the DNA swab sought only limited assistance for purposes of refusing the DNA swab, not to assist with his custodial interrogation. *See id.* at 542. His other references to an attorney, the Kansas Supreme Court ruled, generally inquired during the book-in process on the Connecticut charges whether he would have an *opportunity* to talk to a lawyer. *See id.* at 548. At that time, he did not know about the Kansas case, nor had he been questioned on any charges from either Connecticut or Kansas. *Id.* Moreover, the Connecticut detective to whom he inquired told him that someone else would be questioning him. *Id.* Under these circumstances, the district court concluded that the Kansas Supreme Court's decision was consistent with, and a reasonable application of, federal law. No reasonable jurist could debate the district court's conclusion. Consequently, Mr. Appleby fails to show he is entitled to a COA on this claim.[2]

---

2. Mr. Appleby refers in passing to what he asserts is the Kansas Supreme Court's unreasonable determination of the facts. Citing testimony he gave later at his state post-conviction evidentiary hearing, he says he asked to call his lawyer as soon as he was brought into the interrogation room and realized he was being questioned about the Kansas case. We decline to consider this issue because Mr. Appleby did not raise it in the district court. *See Ochoa v. Workman*, 669 F.3d 1130, 1146 n.15 (10th Cir. 2012).

B. Hard 50 Sentencing Scheme Under *Apprendi*

Mr. Appleby was sentenced to life in prison without the possibility of parole for 50 years under Kansas's hard 50 sentencing scheme, which at the time permitted sentencing courts to find aggravating circumstances based on a preponderance of the evidence. On direct appeal, he claimed the hard 50 sentence violated *Apprendi*, 530 U.S. at 490, which held that other than a prior conviction, any fact that increases the *maximum* sentence is an element of the offense that must be submitted to the jury and proven beyond a reasonable doubt. The Kansas Supreme Court rejected Mr. Appleby's claim in its 2009 decision, holding that Kansas's hard 50 sentencing scheme was constitutional because it enhanced the *minimum* sentence a defendant must serve, without exposing a defendant to a greater maximum sentence. *See Appleby*, 221 P.3d at 558 (citing *State v. Johnson*, 284 Kan. 18, 159 P.3d 161, 166 (Kan. 2007)). Nearly four years later, the Supreme Court extended *Apprendi* to require that any fact that increases the mandatory minimum sentence is an element that must be submitted to a jury and proven beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2155. Mr. Appleby now seeks a COA, claiming the Kansas Supreme Court's decision is contrary to, or an unreasonable application of, *Apprendi* and *Alleyne*.

We deny a COA on this claim because no reasonable jurist could debate the district court's conclusion that federal courts measure the state-court decisions against Supreme Court precedent "as of the time the state court renders its decision." *Cullen*, 563 U.S. at 182 (internal

quotation marks omitted); *see Smith*, 824 F.3d at 1241 ("In analyzing a state-court decision's compliance with clearly established federal law, we measure the decision against the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."). When the Kansas Supreme Court adjudicated this claim in 2009, its decision complied with *Apprendi*; *Alleyne* was not decided until nearly four years later.

C. Ineffective Assistance

We turn now to Mr. Appleby's ineffective-assistance claims, which were rejected by the state courts on post-conviction review. Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Mr. Appleby "must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense." *Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012) (internal quotation marks omitted). "These two prongs may be addressed in any order, and failure to satisfy either is dispositive." *Id.* "Surmounting this high bar is not an easy task," and "[a] state prisoner in the § 2254 context faces an even greater challenge." *Id.* at 1187 (internal quotation marks omitted). In the § 2254 context, a federal court must "defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client." *Id.* (brackets and internal quotation marks omitted). Thus, habeas review of counsel's performance is "doubly deferential." *Yarborough v. Gentry*, 540 U.S. 1, 6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (per curiam). To show

prejudice, a prisoner "must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Premo v. Moore*, 562 U.S. 115, 122, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) (internal quotation marks omitted).

1. Suppression Arguments

Mr. Appleby contends his trial and appellate attorneys were ineffective in failing to raise suppression arguments based on the outstanding Connecticut warrant from 1998 and the extra-jurisdictional work of the Kansas detectives. Reasonable jurists could not debate the district court's denial of relief on these claims because in each instance, the Kansas Court of Appeals reasonably applied *Strickland* in concluding that Mr. Appleby failed to show either that counsel's performance was deficient or that he was prejudiced.

a. Outstanding Warrant

The state courts rejected Mr. Appleby's claims that his attorneys were ineffective in failing to seek the suppression of evidence based on the delay in executing the Connecticut warrant from 1998. The Kansas Court of Appeals ruled that even if his trial attorneys acted deficiently in failing to pursue this theory, Mr. Appleby showed no prejudice because his arrest was legal, given that he caused the delay by eluding Connecticut authorities to prevent them from executing the warrant. *See Appleby v. State*, 318 P.3d 1019, 2014 Kan. App. Unpub. LEXIS 125, *37, 2014 WL 801921, at *13-15 (Kan. Ct. App. 2014) (per curiam)

(unpublished). The court explained that delay in executing an arrest warrant may be reasonable under Connecticut law if a suspect "consciously eluded the authorities[] or for other reasons was difficult to apprehend." 2014 Kan. App. Unpub. LEXIS 125 at *37 (internal quotation marks omitted). The court then detailed Mr. Appleby's efforts to evade the Connecticut police, which included giving them his alias—Teddy Hoover—and fleeing the state less than two months after he confessed to committing the crime (risk of injury to a minor). 2014 Kan. App. Unpub. LEXIS 125 at *36. The court also described information indicating that Mr. Appleby had been in Connecticut, Missouri, and Kansas, and possibly Nevada and Texas as well, using both his real name and his alias. *Id.* Thus, the court concluded that the delay in executing his warrant was not unreasonable and his stale-warrant argument failed. 2014 Kan. App. Unpub. LEXIS 125 at *41.

The district court, citing the Kansas Court of Appeals' conclusion that any motion to suppress based on staleness would have failed, determined that the Kansas Court of Appeals reasonably applied *Strickland*. This conclusion is not subject to reasonable debate because the outstanding-warrant determination, which precluded Mr. Appleby from showing the result of the proceedings would have been different, reasonably applied *Strickland*'s prejudice prong.

Also, absent evidence that Mr. Appleby's appellate counsel unreasonably declined to raise this issue on appeal or that Mr. Appleby was prejudiced by her failure to do so, the Kansas Court of Appeals determined that

appellate counsel was not ineffective in failing to challenge the warrant on direct appeal. 2014 Kan. App. Unpub. LEXIS 125 at *23. The district court concluded this was a reasonable application of *Strickland*. Again, jurists of reason could not debate the district court's conclusion.

b. Geographic Jurisdiction of Kansas Detectives

Mr. Appleby also contends his attorneys were ineffective in failing to pursue suppression issues based on the Kansas detectives' extra-jurisdictional work in Connecticut. The Kansas Court of Appeals examined the relevant Kansas statute, which authorized officers to exercise their police powers anywhere their assistance is requested or when they are in fresh pursuit. 2014 Kan. App. Unpub. LEXIS 125 at *41. The court observed that trial counsels' performance was not objectively unreasonable in failing to object on this basis because they sought to suppress evidence from his interview on numerous other grounds. 2014 Kan. App. Unpub. LEXIS 125 at *41. Further, the court concluded that Mr. Appleby was not prejudiced because the statute did not prohibit the Kansas detectives from questioning him in Connecticut, and although the Kansas detectives collaborated with Connecticut officers, it was Connecticut officers who executed the warrant, which was issued by that state, in that state, for charges filed in that state, and Mr. Appleby agreed to talk with the Kansas detectives. 2014 Kan. App. Unpub. LEXIS 125 at *48. Additionally, the court noted the lack of any evidence either that appellate counsel was deficient in failing to raise this issue on appeal or that Mr.

Appleby was prejudiced by her failure to do so. Under these circumstances, the district court determined that this, too, was a reasonable application of *Strickland*, both as it relates to trial counsel and appellate counsel. Again, no reasonable jurist would debate the district court's resolution of these claims.

2. Mental Health Expert

Finally, Mr. Appleby contends his trial counsel rendered ineffective assistance by failing to proffer the testimony of Dr. George Hough, a clinical psychologist and mental health expert. Before trial, Dr. Hough diagnosed Mr. Appleby with intermittent explosive disorder and antisocial personality disorder. According to Mr. Appleby, Dr. Hough's testimony would have supported his theory of defense that he lacked the requisite intent of premeditation to commit capital murder due to a mental disease or defect. The Kansas Court of Appeals rejected this claim and concluded that defense counsel's decision not to call Dr. Hough failed to satisfy either prong of the *Strickland* test. 2014 Kan. App. Unpub. LEXIS 125 at *25. Here again, no reasonable jurist could debate the district court's conclusion that the Kansas Court of Appeals reasonably applied *Strickland*.

In evaluating counsel's performance, courts "apply a strong presumption that counsel's representation was within a wide range of reasonable professional assistance." *Premo*, 562 U.S. at 121. Consistent with this standard, the Kansas Court of Appeals concluded there were several reasons why trial counsel acted reasonably in declining

to call Dr. Hough. First, Mr. Appleby's trial attorney did not believe his diagnosis of antisocial personality disorder would benefit their case, and indeed, Dr. Hough acknowledged that his testimony would not be helpful. *See Appleby*, 2014 Kan. App. Unpub. LEXIS 125, *27, 2014 WL 801921, at * 10. Second, Dr. Hough refused to offer an opinion whether Mr. Appleby could form the requisite criminal intent of premeditation and counsel believed there was other evidence that Mr. Appleby did form the requisite intent. *Id.* Third, co-counsel agreed that Dr. Hough could be a detrimental witness and that the better strategy was to attack the prosecution's timeline of events. *Id.* Last, Mr. Appleby's trial attorneys consulted with a nationally recognized capital defense attorney, who concurred that Dr. Hough's testimony would not benefit the defense. *Id.* Under these circumstances, the Kansas Court of Appeals determined that counsels' strategy not to call Dr. Hough was not so unreasonable as to fall outside of prevailing professional norms. *Id.* Further, the court determined there was no evidence that appellate counsel was ineffective in failing to raise this issue on appeal. 2014 Kan. App. Unpub. LEXIS 125 at *23.

The district court concluded that the Kansas Court of Appeals' decision reasonably applied *Strickland* 's deficient-performance prong as it related to trial counsel and also reasonably applied the relevant *Strickland* standards to deny the claims of ineffective assistance of appellate counsel. Because the district court's conclusions are not subject to reasonable debate, Mr. Appleby is not entitled to a COA.

Appendix C

III

Accordingly, we deny a COA and dismiss this appeal.

Entered for the Court

Jerome A. Holmes
Circuit Judge

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FILED DECEMBER 27, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 15-3038-JTM

BENJAMIN APPLEBY,

Petitioner,

v.

SAM CLINE, *et al.*,

Respondents.

December 27, 2016, Decided
December 27, 2016, Filed

MEMORANDUM AND ORDER DENYING HABEAS PETITION

J. Thomas Marten, Chief United States District JUDGE

This matter comes before the court on Benjamin Appleby's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Dkt. 1), Respondents' Answer and Return (Dkt. 16), and the relevant state court records (Dkt. 17). Appleby, through counsel, alleges numerous grounds for relief, including ineffective assistance of

counsel, evidentiary errors, a jury instruction error, and a sentencing error. For the reasons set forth below, the court concludes that Appleby is not entitled to federal habeas corpus relief and denies the petition.

I. Federal Habeas Standards

A. Generally

A federal court reviews a state prisoner's challenge to matters decided in state court proceedings pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which "requires federal courts to give significant deference to state court decisions" on the merits. *Lockett v. Trammel*, 711 F.3d 1218, 1230 (10th Cir. 2013). A federal court may not grant a state prisoner habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the prisoner can show that the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "Clearly established law" refers to the Supreme Court's holdings, as opposed to its dicta. *Lockett*, 711 F.3d at 1231. A state court decision is "contrary to" the Supreme Court's clearly established precedent "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (quotations omitted). "Factual determinations by state courts are

presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003).

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a petitioner must show both that his counsel's performance "fell below an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Failure under either prong is dispositive. *Id.* at 697. In reviewing counsel's performance, courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011). "To be deficient, the performance must be outside the wide range of professionally competent assistance. In other words, it must have been completely unreasonable, not merely wrong." *Id.* (internal quotations and citations omitted). Petitioner bears a heavy burden of overcoming the presumption that counsel's actions were sound trial strategy. *Id.* This burden increases doubly at the § 2254 proceeding level as federal courts defer not only to the attorney's decision in how to best represent a client, but also to the state court's determination that counsel's performance was not deficient. *Id.*

II. Factual and Procedural History

The court presumes the state court's factual determinations are correct, unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Appleby has not proffered any evidence in support of that burden. Thus, the court adopts the following facts as taken from the Kansas Supreme Court's ("KSC") opinion affirming his conviction.

> On June 18, 2002, A.K. was murdered while working alone as an attendant at a swimming pool near her family's home. Her brother, who also worked as a pool attendant, arrived at the pool around 5 p.m. to relieve A.K. after her shift ended, but he could not find her. He called their father, R.K., who came to the pool and searched for his daughter. Around 5:30 p.m., R.K. found A.K. in the pool's pump room, lying face down under a pool cover. She had been severely beaten, her face was battered and bloody, and her hair was matted with blood. A.K. was naked from the waist down, her sports bra had been pushed up under her arms, and her T-shirt was wrapped tightly around her neck.
>
> Soon after this tragic discovery, police arrived and secured the pool area. In doing so, an officer recorded the name of everyone present at the scene, including a "Teddy Hoover" who was later identified as Appleby. The police also secured evidence, some of which was tested for

DNA. This testing revealed DNA that did not match A.K.'s. Few other leads developed from the initial investigation.

An autopsy led to the conclusion that A.K.'s death was caused by strangulation and multiple blunt force injuries, although the strangulation would have been enough to kill A.K. Dr. Michael Handler—the forensic neuropathologist who performed the autopsy and who is board certified in anatomic pathology, neuropathology, and forensic pathology—concluded there had been both ligature and manual strangulation. According to him, it would have taken approximately 10—and perhaps as many as 16—minutes for the assailant to strangle A.K. Because there was petechial hemorrhaging, Dr. Handler believed there were periods when the force of strangulation was stopped.

Dr. Handler also identified other injuries, which made it appear A.K. had been in a horrible fight. Both of her eyes were blackened, her lip was cut, and her arms were bruised and scraped. A.K.'s hands, especially the knuckles and fingers, were cut, and the fingers on her left hand were contorted and broken. A.K. also had bruises on her face and both hip bones, knees, feet, and upper thighs. There were two lacerations on the back of A.K.'s head, which could have been caused by a fall or by someone beating her head against the floor.

Appendix D

Several months after A.K.'s death, Sergeant Scott Hansen of the Leawood Police Department went to Appleby's home in Kansas City, Kansas. At that point in time, the police knew Appleby by his alias of Teddy Hoover. Appleby agreed to speak with Sergeant Hansen and indicated that he was a self-employed pool maintenance contractor. Hansen requested a DNA elimination sample from Appleby, who said he would talk to his attorney about providing a sample. When Hansen tried to follow up later, he discovered that Appleby had left town.

Subsequent leads caused police to seek more information from Appleby, who they still knew as Teddy Hoover. In November 2004, the investigation led Kansas detectives to Connecticut, where Appleby was living. Connecticut State Police discovered an outstanding arrest warrant for Appleby from 1998 and agreed to execute the warrant when Kansas detectives could be present. The purpose of this arrest was to give Kansas detectives an opportunity to question Appleby.

After Kansas detectives arrived in Connecticut, they worked with Connecticut officers to prepare and obtain search warrants that authorized a search of Appleby's house and the swabbing of Appleby's mouth for the purpose of obtaining a DNA sample. Then, Connecticut

police arrested Appleby at his home and executed the residential search warrant.

While the search warrant was being executed, Appleby was transported to a nearby Connecticut police station by Connecticut Detective Daniel Jewiss. On the way, Appleby volunteered that after some "trouble" in his past, he had taken on the name of his childhood friend, Teddy Hoover, who had died in an accident.

At the police station, Detective Jewiss started processing Appleby on the Connecticut arrest warrant. During the book-in process, another detective from Connecticut's major crime unit executed the search warrant that allowed swabbing Appleby's inner mouth for purposes of DNA testing. As we will discuss in more detail as part of our analysis of the second issue, when served with the DNA search warrant Appleby asked if he could speak to an attorney regarding his right to refuse the swabbing and, at three other points during the book-in process, asked whether he would have a chance to talk to an attorney. Appleby was told he did not have a right to refuse the execution of the warrant allowing the DNA swabbing but was told he would have the opportunity to call an attorney.

After completing most of the book-in process, Detective Jewiss told Appleby that other

detectives wanted to speak to him about "an unrelated matter" and asked if Appleby was willing to talk to them. Appleby agreed and was taken upstairs to an interrogation room where the Kansas detectives waited. The detectives asked Appleby if he would answer some questions about A.K.'s murder. Up to this point, Appleby had not been told that Kansas detectives were involved or that some of the warrants were related to the A.K. murder investigation.

Appleby told the Kansas detectives he wanted to speak with them and straighten out some details from the time Sergeant Hansen interviewed him at his home in Kansas City. After being Mirandized, Appleby told the Kansas detectives that while he lived in Kansas City he used the name Teddy Hoover and had a pool company named Hoover Pools. Appleby indicated that he moved to Texas shortly after his interview with Sergeant Hansen and went back to using his real name, Benjamin Appleby; then he moved to Connecticut.

The detectives repeatedly asked Appleby if he had been at the pool where A.K. died, but Appleby told them he had never been there. After approximately 1 hour, the detectives moved him to an adjoining interview room. The second room contained items from the police investigation, such as a time line of the

investigation, A.K.'s photograph and obituary, an aerial photograph of the pool, a videotape, a notebook labeled with the name Teddy Hoover, and two additional notebooks labeled as crime scene and autopsy photographs. The detectives then confronted Appleby with the fact that an officer at the pool on the day of the murder had logged the presence of a man who gave the name Teddy Hoover and a telephone number. At that point, Appleby acknowledged he had been at the pool that day.

About 15 or 20 minutes later, Appleby admitted he had killed A.K. Appleby told the detectives A.K. was in the pump room when he arrived at the pool. Finding A.K. attractive, Appleby tried to "hit on her," but A.K. rejected his advances and tried to leave the pump room. Appleby stood in her way and tried to grab her breasts and her waist. A.K. pushed Appleby and then punched him. This angered Appleby, who "lost it" and, in his own words, "just beat the shit out of her." Appleby described the ensuing struggle during which the two fell and Appleby hit A.K. twice in the back of the head, which rendered her unconscious. Then he straddled A.K. and removed her shorts and panties, intending to have sex with her. Appleby next stood up and found a first-aid kit stored in the pump room. From the kit, the defendant said he took a tube of ointment and used the ointment as a sexual lubricant, but he could not obtain an erection.

Appleby also admitted to strangling A.K., although he told the detectives he could not remember what he used. At one point, Appleby suggested he used the rope on the pool thermometer in the pump room. At other times he stated he did not remember strangling A.K.

In describing what happened next, Appleby stated that as he was leaving, he thought he heard A.K. breathing and "didn't want to leave her that way," so he covered her up with the pool cover. He then left as a young woman drove up and honked a horn. He waved, got into his truck, and left. Appleby returned to the pool later, about 5:30 p.m., because he wanted to see what had happened; as a result, he was on the scene when the police created the crime scene log.

DNA testing performed by two crime labs matched Appleby's DNA to the DNA found mixed with A.K.'s DNA on the ointment tube and on her sports bra and T-shirt. In addition, Appleby was linked to the crime by the young woman who pulled up as Appleby was leaving the pool; she identified him as the man she saw.

The State charged Appleby with capital murder for the death of A.K. (Count I), under K.S.A. 21–3439(a)(4) (intentional premeditated killing in the commission of or subsequent to the offense of attempted rape), and attempted rape (Count II), under K.S.A. 21–3301 and K.S.A.

> 21–3502. The jury found Appleby guilty of both charges. The trial court imposed a hard 50 life imprisonment sentence for the murder conviction and a consecutive sentence of 228 months' imprisonment for the attempted rape conviction.

State v. Appleby, 289 Kan. 1017, 1021-25 (2009).

Appleby appealed his convictions, raising the following issues: 1) his convictions were multiplicitous and his punishment for both crimes violated the double jeopardy clause; 2) the trial court erred by admitting into evidence the incriminating statements he made to Kansas detectives; 3) the trial court erred by admitting into evidence a computer-generated report regarding population statistics on DNA testing; and 4) the jury instruction defining "premeditation" did not direct the jury on how to apply the evidence or unduly emphasized the State's case. On November 20, 2009, the Kansas Supreme Court affirmed the capital murder conviction and Hard 50 sentence, but vacated the attempted rape conviction and the correlating sentence as multiplicitous. *Id.*

On October 4, 2010, Appleby filed a motion for post-conviction relief under Kan. Stat. Ann. § 60-1507 in the District Court of Johnson County, Kansas ("the 1507 Motion"). On August 1, 2012, that court denied that motion. The Kansas Court of Appeals ("KCOA") affirmed that decision on February 28, 2014, and the KSC denied review. *Appleby v. State*, No. 108,777, 2014 WL 801921 (Kan. Ct. App. 2014), review denied (Feb. 25, 2015).

On February 25, 2015, Appleby filed this habeas petition, alleging seven grounds for relief. Respondents urge denial of habeas relief because Appleby cannot demonstrate any constitutional errors or that the state court decisions failed to comport with clearly established federal law.

III. Analysis

Because both parties recite the state court decisions at length, the court will not repeat them except as necessary to the analysis.

A. Ineffective Assistance of Counsel (Grounds 1-3)

Appleby alleges his trial attorneys provided ineffective assistance three different ways. The KCOA rejected all three claims, finding trial counsels' performance was not deficient. Appleby now argues that the KCOA's decision was based on an unreasonable determination of the facts in light of the evidence presented and an unreasonable application of *Strickland*.

1. Failing to Call Expert to Raise Mental Defect Defense at Trial

Appleby maintains his attorneys were ineffective for failing to call Dr. George Hough to present a defense of mental disease or defect at trial. Appleby argues that Dr. Hough's testimony would have provided evidence that he suffered from intermittent explosive disorder, which would have negated the State's theory of premeditation.

Appendix D

The KCOA concluded that counsels' decision not to call Dr. Hough constituted permissible trial strategy. *Appleby v. State*, 318 P.3d 1019, *10 (Feb. 28, 2014). Appleby contends the state district court's conclusion overlooked Dr. Hough's testimony at sentencing that his diagnosis of Appleby included intermittent explosive disorder, that Appleby's behavior was "driven by uncontrolled emotion, mainly rage" and was "manifested by such correlates as hyperarousal, a collapse of thinking or cognitive mediation," and that "as best as [he] can tell[, A.K's murder] was not planned or organized or rehearsed." Dkt. 2 at 22.

The court finds Appleby's arguments unavailing. First, the KCOA did not overlook that testimony. The KCOA actually recited that testimony in its opinion but concluded "a reasonable juror could have interpreted Dr. Hough's statement to mean that while Appleby did not initially think of killing A.K. when he first arrived at the pool or first became enraged, he thought about killing A.K. after the attack began but before the actually killing occurred." *Appleby*, 318 P.3d at *11. The court agrees with that assessment. Second, Appleby fails to recognize that Dr. Hough's testimony was a double-edged sword. Dr. Hough testifying at trial included the following potential dangers: 1) he also diagnosed Appleby with antisocial personality disorder, which could have outweighed the intermittent explosive disorder diagnosis; and 2) he would have refused to give a professional opinion that Appleby could not form the requisite criminal intent of premeditation. Dr. Hough even agreed with defense counsels' conclusion that his testimony would not have been helpful since he was

unwilling to give that professional opinion. As the KCOA noted, "a less than favorable expert witness called by the defense can do more harm than several good witnesses can repair." *Id.* at 10. Moreover, because other evidence showed that Appleby could have formed the requisite intent, the decision to attack the State's timeline rather than present a potentially damaging witness was an objectively reasonable one. The court finds the record supports the KCOA's determination that defense counsels' decision to not call Dr. Hough at trial was reasonable.

2. Failing to Call Expert to Dispute Strangulation Time

Appleby next argues that his attorneys were ineffective for failing to call Dr. Edward Friedlander to present expert testimony disputing the length of time A.K. was strangled. Dkt. 2 at 26-27. Appleby claims that Dr. Friedlander would have testified that: 1) he did not see evidence of petechial hemorrhaging, thus the strangulation time was uncertain; and 2) it would have taken three to five minutes of strangulation to cause the artifacts seen on A.K.'s body (rather than 10 to 16 minutes as the State's expert testified). The KCOA found that counsels' decision not to call Dr. Friedlander constituted permissible trial strategy. 318 P.3d at *12. The record supports this conclusion. Defense counsel Keck testified that she spent hours with Dr. Friedlander preparing for trial, he told her not to call him as a witness, he changed his opinion from two minutes to three to five minutes, and she did not believe he would hold up under cross-examination. Moreover, even if the jury accepted

Dr. Friedlander's opinion that the strangulation time was three to five minutes, that remained ample time to form premeditation. Appleby's arguments focus on his disappointment in not having his own expert contradict the state's expert. But Appleby's expectations are irrelevant to whether the decision not to call Dr. Friedlander as a witness was objectively reasonable.

3. Failing to Raise Suppression Issues

Appleby maintains that his attorneys were ineffective for failing to file a motion to suppress the statements he made to Kansas detectives while in custody in Connecticut on the grounds that: 1) the Connecticut arrest warrant was stale, and 2) the Kansas detectives acted outside of their territorial jurisdiction. The trial court and the KCOA concluded that the delay in executing the warrant would have been found reasonable under Connecticut law because Appleby provided Connecticut law enforcement with a false name and then fled the state for several years. As a result, the arrest warrant remained valid at the time of Appleby's arrest and any motion to suppress based on staleness would have failed. Appleby argues that this conclusion overlooks the fact that he provided Connecticut officers with the name "Hoover," his address, and a confession. He also provided Kansas law enforcement with his "Hoover" name and his address near the crime scene. He argues that going by another name does not support any affirmative attempt to conceal his identity. He also argues that moving at some point is not evidence of fleeing to avoid apprehension. The court finds these arguments unpersuasive. These facts support an inference

that Appleby was attempting to conceal his identity and to evade capture.

The state courts also rejected Appleby's extra-territorial argument, finding nothing unlawful in the Kansas detectives' actions. *Appleby*, 2014 WL 801921 at *16-18. The court agrees with the state courts' analysis of Kan. Stat. Ann. § 22-2401a. It does not prohibit Kansas officers from going out of state to interview a witness nor does it prohibit them from assisting officers in other jurisdictions in submitting affidavits for search warrants. Appleby suggests that the Kansas officers directed the timing of events, thus they controlled the Connecticut arrest and search. The court disagrees. The Kansas detectives collaborated with the Connecticut officers, but did not control the Connecticut investigation. Appleby was arrested under a Connecticut arrest warrant executed by Connecticut officers, who ultimately decided when to act. Although the Kansas detectives may have assisted Connecticut officers in applying for the search warrants and may have been present during the search, they did not lead the search. A Connecticut judge signed the search warrant and the State of Connecticut issued the warrant. The Kansas detectives did not question Appleby until after he agreed to speak with them about "an unrelated matter." The court finds the record supports the KCOA's conclusion that counsels' performance was not deficient for failing to raise these issues in a motion to suppress.

4. Failing to object to testimony regarding Appleby's credibility

Appleby maintains that his attorneys should have objected to portions of the detectives' trial testimony that commented on his credibility; specifically, their comments that Appleby's explanation for returning to the crime scene was "pretty hard to believe" and "did not make sense." The KCOA concluded that trial counsels' failure to object to this testimony did not deprive Appleby of his right to a fair trial because there was no reasonable probability that objecting would have produced a different result since there was sufficient evidence that Appleby killed A.K.

A successful ineffective assistance of counsel claim requires satisfaction of two prongs: 1) performance below an objective standard of reasonableness, and 2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88. Appleby offers nothing more than a conclusory argument that these comments prejudiced his right to a fair trial. The record supports the KCOA's conclusion that the outcome would not have been different given the following evidence: 1) Appleby was present at the scene shortly after the killing; 2) Appleby's DNA was on several items found in the pump room, including A.K.'s bra, t-shirt, and the ointment tube; 3) Appleby knew details about the crime that no one else could have known; and 4) an eyewitness saw Appleby at the crime scene. Thus, the KCOA applied *Strickland*'s second prong in an objectively reasonable manner. This claim therefore does not provide a basis for federal habeas relief.

5. Appellate Counsel's Failure to Raise the Above Issues

Having rejected all of Appleby's claims that his trial attorneys were ineffective, it necessarily follows that appellate counsel was not ineffective for failing to raise those issues on direct appeal. The court finds the KCOA applied *Strickland* in an objectively reasonable manner with respect to Appleby's appellate counsel.

For these reasons, petitioner's ineffective assistance of counsel claims provide no basis for habeas relief.

B. Kansas Hard 50 Sentence (Ground 4)

On direct appeal, Appleby challenged the constitutionality of the Kansas Hard 50 statute because it permits the sentencing court to find the aggravating circumstances for a Hard 50 sentence, utilizing a preponderance of the evidence standard, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The KSC rejected this challenge, stating:

> This court has repeatedly rejected similar arguments challenging the constitutionality of the hard 40/hard 50 sentencing scheme and held our hard 50 scheme is constitutional. *State v. Johnson*, 284 Kan. 18, 22-23, 159 P.3d 161 (2007), *cert. denied*, 552 U.S. 1104, 128 S.Ct. 874, 169 L.Ed.2d 737 (2008); *see also State v. Warledo*, 286 Kan. 927, 954, 190 P.3d 937 (2008) (reaffirming *State v. Conley*, 270 Kan. 18, 11

> P.3d 1147 [2000], citing *Johnson* with approval, and noting that the United States Supreme Court has not "altered decisions in which it recognized that the [*Apprendi*] prohibition does not apply when considering the minimum sentence to be imposed"); *State v. Albright*, 283 Kan. 418, 424 153 P.3d 497 (2007). Appleby presents no persuasive reason to abandon this long line of precedent.

Appleby did not raise this challenge in the 1507 Motion and appeal.

Appleby now argues that he is entitled to federal habeas relief because his Hard 50 sentence violates *Alleyne v. United States*, 133 S.Ct. 2151 (June 17, 2013) and *State v. Soto*, 299 Kan. 102 (2014) and its progeny—all of which were decided after the KSC affirmed his convictions. He says these cases constitute an intervening change in law, which excuses any failure to raise this issue in the 1507 proceedings. Dkt. 2 at 101. He also argues that *Alleyne* is a new rule of criminal procedure that should be applied retroactively in his case because he raised the constitutionality of the Hard 50 statute under *Apprendi* on direct appeal. *Id.* at 99-101. The court finds Appleby's arguments unpersuasive.

First, the court finds Appleby's reliance upon *Soto* misplaced. *Soto* is factually distinguishable because *Alleyne* was decided during *Soto*'s direct appeal. *Soto*, 299 Kan. at 344 (after the parties filed their initial briefs, the United States Supreme Court issued the *Alleyne* decision).

More importantly, a prisoner seeking federal habeas relief may rely on new constitutional rules of criminal procedure announced *before* the prisoner's conviction became final. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from the United States Supreme Court has become time barred or has been disposed of. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987). The KSC affirmed Appleby's convictions on November 20, 2009. Appleby did not file a petition for writ of certiorari to the United States Supreme Court, thus his convictions and sentence became final on February 18, 2010, ninety days after the KSC decision. *See Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001) (a conviction becomes final for habeas purposes when the ninety-day period for filing a petition for a writ of certiorari to the United States Supreme Court has expired). Because *Alleyne* was decided after his conviction became final, Appleby may not rely upon *Alleyne*. The fact that *Alleyne* is an extension of *Apprendi* does not change when the *Alleyne* rule was announced.

Appleby's argument for retroactive application of *Alleyne* lacks legal support. The Supreme Court has not made *Alleyne*'s new rule of constitutional law retroactive to cases on collateral review, and the Tenth Circuit has determined that *Alleyne* does not apply retroactively to cases on collateral review. *See In re Payne*, 733 F.3d 1027, 1029 (10th Cir. 2013). The Supreme Court has held that rules based on *Apprendi* do not apply retroactively on collateral review, *see Schriro v. Summerlin*, 542 U.S. 348 (2004), thus it is unlikely that the Supreme Court will declare *Alleyne* retroactive in the future.

Appendix D

Section 2254(d)(1) requires federal courts to measure state-court decisions against the United States Supreme Court's precedents as of "the time the state court renders its decision." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (internal quotations and citation omitted). The court finds the KSC's decision a reasonable determination of the law at the time Appleby's conviction and sentence became final. Accordingly, Ground 4 provides no basis for habeas relief.

C. Confession (Ground 5)

Appleby maintains the admission of his confession violated his right against self-incrimination under the Fifth and Fourteenth Amendment because his confession was obtained after he had unambiguously requested counsel. He argues the state court's conclusion that at the time he requested counsel, interrogation was clearly not imminent or impending, was an unreasonable application of the facts because he was interrogated minutes later by Kansas detectives. He also argues that the state court's reliance on his actions after his requests for counsel (*i.e.*, agreeing to speak to Leawood detectives, waiving *Miranda*, and talking to them for two hours without requesting counsel) to conclude that his request for counsel was ambiguous was contrary to *Smith v. Illinois*, 469 U.S. 91 (1984). Dkt. 2 at 126-27. In sum, he contends the state courts' adjudication of this claim was contrary to federal law, namely *Miranda*, *Edwards*, *Davis*, *McNeil*, *Roberson*, *Minnick*, and *Smith*.[1]1 The court disagrees.

---

1. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *Edwards v. Arizona*, 451 U.S. 477, (1981); *Davis v. United States*, 512 U.S. 452 (1994*); McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Arizona v.*

The KSC's analysis was comprehensive and consistent with federal law. The KSC followed *Davis v. United States*, 512 U.S. 452 (1994), when it rejected Appleby's invitation to give broad effect to any mention of counsel by a suspect. *Appleby*, 289 Kan. at 1039-41. *Davis* requires suspects to unambiguously request counsel for the purpose of assisting with custodial interrogation. Thus, as the KSC concluded, the trial court was correct in examining the circumstances surrounding the request to determine whether Appleby's questions were unambiguous requests for the assistance of counsel with custodial interrogation.

The KSC then examined and followed the tenets set out in *McNeil v. Wisconsin*, 501 U.S. 171 (1991) and *Montejo v. Louisiana*, 556 U.S. 778 (2009). In *McNeil*, the Supreme Court distinguished the Sixth Amendment right to counsel from the Fifth Amendment right recognized in *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court held that an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the Fifth Amendment right to counsel. *McNeil*, 501 U.S. at 171. The Supreme Court explained that "[t]o invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest." *Id.* at 178 (italics in original). The Supreme Court further explained that an invocation of the Fifth Amendment right "requires, at a minimum, some statement that can be reasonably construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *Id.*

Roberson, 486 U.S. 675 (1988); *Minnick v. Mississippi*, 498 U.S. 146 (1990); and *Smith v. Illinois*, 469 U.S. 91 (1984).

Appendix D

In *Montejo*, the Supreme Court summarized Fifth Amendment jurisprudence: 1) any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right; 2) once such a defendant "has invoked his right to have counsel present," interrogation must stop; and 3) no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." *Montejo*, 556 U.S. at 794 (citing *Miranda*, 384 U.S. at 474;*Edwards*, 451 U.S. at 484; *Minnick*, 498 U.S. at 153). The Supreme Court stressed that "[w]hat matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation." *Id.* at 797. The Supreme Court also noted that it "had never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial investigation." *Id., citing McNeil*, 501 U.S. at 182, n.3.

Applying these tenets, the KSC concluded that "Appleby's references to an attorney during the book-in process on the Connecticut charges did not constitute a clear and unambiguous assertion of his Fifth Amendment right as protected by *Miranda*." 289 Kan. at 1052. The record supports the trial court's conclusion that Appleby clearly requested an attorney, but he did not make it clear he wanted the attorney to assist with questioning rather than assistance with his case. Appleby made four requests for counsel. The request made in response to the DNA swabs was clearly not related to custodial interrogation. The other three requests were more general. He made them before or during the book-in process. At that time,

Appleby only knew of the Connecticut case. No one had told Appleby that his arrest was connected to the murder of A.K. Detective Jewiss told Appleby that he would not be questioning him. These facts support the KSC's conclusion that when Appleby made his requests, interrogation was not imminent or impending. *Appleby*, 289 Kan. at 1052. The fact that a custodial interrogation took place minutes later does not make this conclusion unreasonable.

Finally, the trial court did not rely solely on Appleby's post-request responses to reach the conclusion that his requests for counsel were ambiguous. Events preceding the requests, the timing as well as the content and context of his reference to counsel supported the court's conclusion as to ambiguity. Appleby's post-request responses provided further support.

The court finds the KSC applied a legal standard consistent with federal law and applied it in an objectively reasonable manner. Thus, Ground 5 fails as a basis for habeas relief.

D. DNA Population Study (Ground 6)

Appleby maintains the admission into evidence of a computer-generated report containing statements regarding population statistics on DNA testing violated his right to confrontation under the Sixth Amendment and was contrary to or an unreasonable application of *Crawford v. Washington*, 541 U.S. 36 (2004). The KSC rejected this argument after determining that the population frequency data, the statistical programs used to make that data

meaningful, and the DNA itself are nontestimonial. The experts developed their personal opinions from these data and were available for cross-examination, thus Appleby was able to confront the witnesses. The court finds the KSC's analysis comports with federal law. The Confrontation Clause bars the introduction of testimonial hearsay against a criminal defendant, unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. *Id.* at 53-54. Because the nature of the challenged information is nontestimonial, the KSC's determination on this issue was not legally unreasonable. Thus, Ground 6 fails as a basis for habeas relief.

E. Jury Instruction on Premeditation (Ground 7)

Appleby argues that the jury instruction on premeditation (Instruction No. 16) violated his Fourteenth Amendment right to a fair trial because it unfairly emphasized the State's theory of premeditation. Appleby challenges the italicized language that was added to the pattern jury instruction:

> Premeditation means to have thought the matter over beforehand. In other words, to have formed the design or intent to kill before the killing. *Stated another way, premeditation is the process of thinking about a proposed killing before engaging in the act that kills another person, but premeditation doesn't have to be present before a fight, quarrel, or struggle begins.* There is no specific time period

> required for premeditation, but it does require more than the instantaneous, intentional act of taking another person's life. *Premeditation can occur at any time during a violent episode that ultimately causes the victim's death.* (Emphasis added.)

Appleby, however, concedes the italicized statements are correct statements of Kansas law. Dkt. 2 at 176.

A federal habeas court can set aside a state conviction based on an erroneous instruction only when the "ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Petitioner bears the burden of proving that an erroneous instruction was so prejudicial and so infected the entire trial that the resulting conviction violates due process. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (to overturn state conviction petitioner must establish not merely that instruction is undesirable, erroneous or even "universally condemned," but that it violated constitutional right). In reviewing the instruction, the court considers the instruction in the context of the trial record and the instructions as a whole. *Cupp v. Naughten,* 414 U.S. 141, 147 (1973).

The court finds Petitioner's arguments conclusory and insufficient to establish a constitutional violation. The challenged instruction correctly stated Kansas law and did not tell the jury how to apply the evidence. The Kansas Supreme Court reasonably found that viewed in

the light most favorable to the prosecution, the evidence supported a conviction for premeditated murder. *Appleby*, 289 Kan. at 1064. On this record, the allegedly erroneous instruction did not so infect the entire trial as to deprive defendant of his constitutional rights. *Estelle*, 502 U.S. at 72. Accordingly, Appleby is not entitled to habeas relief on this ground.

IV. Evidentiary Hearing

The court finds no need for an evidentiary hearing. *Anderson v. Attorney Gen. of Kansas*, 425 F.3d 853, 859 (10th Cir. 2005) ("[A]n evidentiary hearing is unnecessary if the claim can be resolved on the record."); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

V. Certificate of Appealability

Under Rule 11(a) of the Rules Governing Section 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the movant must demonstrate that " 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.' " *Saiz v. Ortiz*, 392 F.3d 1166, 1171 n. 3 (10th Cir. 2004) (*quoting Tennard v. Dretke*, 542 U.S. 274, 282

(2004)). While a movant is not required to demonstrate that his appeal will succeed to be entitled to a COA, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003) (quotation omitted). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336. The rulings made above are not the type that reasonable jurists could debate or would conclude were wrong. Therefore, the court declines to issue a certificate of appealabilty for this Order.

IT IS THEREFORE ORDERED this 27th day of December, 2016, that Appleby's petition for habeas corpus relief (Dkt. 1) is **DENIED**.

APPENDIX E — OPINION OF THE SUPREME COURT OF KANSAS, DATED NOVEMBER 20, 2009

SUPREME COURT OF KANSAS

No. 98,017

STATE OF KANSAS,

Appellee,

v.

BENJAMIN A. APPLEBY,

Appellant.

November 20, 2009

OPINION

The opinion of the court was delivered by LUCKERT, J.:

Benjamin A. Appleby was convicted of the attempted rape and capital murder of A.K., a 19–year–old college student, in Johnson County, Kansas.

The following issues are raised on appeal: (1) Are Appleby's convictions of capital murder and attempted rape multiplicitous, meaning his sentences for both convictions result in a double jeopardy violation? (2) Did the trial court violate Appleby's right against self-incrimination by admitting into evidence custodial statements made after

Appleby had asked, while being booked on a different case, whether he would be able to talk to an attorney? (3) Did the trial court violate Appleby's right to confrontation by admitting into evidence a computer-generated report regarding population statistics related to DNA testing? (4) Did the trial court err by giving a jury instruction containing an expanded definition of "premeditation"? (5) Did the trial court abuse its discretion in weighing aggravating and mitigating circumstances in determining whether to impose the hard 50 sentence? and (6) Is the hard 50–sentencing scheme unconstitutional under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)?

On review, we agree with Appleby's arguments regarding issue one, hold that his attempted rape conviction is multiplicitous with his capital murder conviction, and vacate the sentence imposed for the attempted rape conviction. However, we affirm Appleby's conviction and sentence for capital murder, finding that Appleby failed to establish error resulting from any of the complaints raised in issues two through six.

FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2002, A.K. was murdered while working alone as an attendant at a swimming pool near her family's home. Her brother, who also worked as a pool attendant, arrived at the pool around 5 p.m. to relieve A.K. after her shift ended, but he could not find her. He called their father, R.K., who came to the pool and searched for his daughter. Around 5:30 p.m., R.K. found A.K. in the pool's

pump room, lying face down under a pool cover. She had been severely beaten, her face was battered and bloody, and her hair was matted with blood. A.K. was naked from the waist down, her sports bra had been pushed up under her arms, and her T-shirt was wrapped tightly around her neck.

Soon after this tragic discovery, police arrived and secured the pool area. In doing so, an officer recorded the name of everyone present at the scene, including a "Teddy Hoover" who was later identified as Appleby. The police also secured evidence, some of which was tested for DNA. This testing revealed DNA that did not match A.K.'s. Few other leads developed from the initial investigation.

An autopsy led to the conclusion that A.K.'s death was caused by strangulation and multiple blunt force injuries, although the strangulation would have been enough to kill A.K. Dr. Michael Handler—the forensic neuropathologist who performed the autopsy and who is board certified in anatomic pathology, neuropathology, and forensic pathology—concluded there had been both ligature and manual strangulation. According to him, it would have taken approximately 10—and perhaps as many as 16—minutes for the assailant to strangle A.K. Because there was petechial hemorrhaging, Dr. Handler believed there were periods when the force of strangulation was stopped.

Dr. Handler also identified other injuries, which made it appear A.K. had been in a horrible fight. Both of her eyes were blackened, her lip was cut, and her arms were bruised and scraped. A.K.'s hands, especially the knuckles

and fingers, were cut, and the fingers on her left hand were contorted and broken. A.K. also had bruises on her face and both hip bones, knees, feet, and upper thighs. There were two lacerations on the back of A.K.'s head, which could have been caused by a fall or by someone beating her head against the floor.

Several months after A.K.'s death, Sergeant Scott Hansen of the Leawood Police Department went to Appleby's home in Kansas City, Kansas. At that point in time, the police knew Appleby by his alias of Teddy Hoover. Appleby agreed to speak with Sergeant Hansen and indicated that he was a self-employed pool maintenance contractor. Hansen requested a DNA elimination sample from Appleby, who said he would talk to his attorney about providing a sample. When Hansen tried to follow up later, he discovered that Appleby had left town.

Subsequent leads caused police to seek more information from Appleby, who they still knew as Teddy Hoover. In November 2004, the investigation led Kansas detectives to Connecticut, where Appleby was living. Connecticut State Police discovered an outstanding arrest warrant for Appleby from 1998 and agreed to execute the warrant when Kansas detectives could be present. The purpose of this arrest was to give Kansas detectives an opportunity to question Appleby.

After Kansas detectives arrived in Connecticut, they worked with Connecticut officers to prepare and obtain search warrants that authorized a search of Appleby's house and the swabbing of Appleby's mouth for the purpose of obtaining a DNA sample. Then, Connecticut

police arrested Appleby at his home and executed the residential search warrant.

While the search warrant was being executed, Appleby was transported to a nearby Connecticut police station by Connecticut Detective Daniel Jewiss. On the way, Appleby volunteered that after some "trouble" in his past, he had taken on the name of his childhood friend, Teddy Hoover, who had died in an accident.

At the police station, Detective Jewiss started processing Appleby on the Connecticut arrest warrant. During the book-in process, another detective from Connecticut's major crime unit executed the search warrant that allowed swabbing Appleby's inner mouth for purposes of DNA testing. As we will discuss in more detail as part of our analysis of the second issue, when served with the DNA search warrant Appleby asked if he could speak to an attorney regarding his right to refuse the swabbing and, at three other points during the book-in process, asked whether he would have a chance to talk to an attorney. Appleby was told he did not have a right to refuse the execution of the warrant allowing the DNA swabbing but was told he would have the opportunity to call an attorney.

After completing most of the book-in process, Detective Jewiss told Appleby that other detectives wanted to speak to him about "an unrelated matter" and asked if Appleby was willing to talk to them. Appleby agreed and was taken upstairs to an interrogation room where the Kansas detectives waited. The detectives asked

Appleby if he would answer some questions about A.K.'s murder. Up to this point, Appleby had not been told that Kansas detectives were involved or that some of the warrants were related to the A.K. murder investigation.

Appleby told the Kansas detectives he wanted to speak with them and straighten out some details from the time Sergeant Hansen interviewed him at his home in Kansas City. After being *Mirandized,* Appleby told the Kansas detectives that while he lived in Kansas City he used the name Teddy Hoover and had a pool company named Hoover Pools. Appleby indicated that he moved to Texas shortly after his interview with Sergeant Hansen and went back to using his real name, Benjamin Appleby; then he moved to Connecticut.

The detectives repeatedly asked Appleby if he had been at the pool where A.K. died, but Appleby told them he had never been there. After approximately 1 hour, the detectives moved him to an adjoining interview room. The second room contained items from the police investigation, such as a time line of the investigation, A.K.'s photograph and obituary, an aerial photograph of the pool, a videotape, a notebook labeled with the name Teddy Hoover, and two additional notebooks labeled as crime scene and autopsy photographs. The detectives then confronted Appleby with the fact that an officer at the pool on the day of the murder had logged the presence of a man who gave the name Teddy Hoover and a telephone number. At that point, Appleby acknowledged he had been at the pool that day.

About 15 or 20 minutes later, Appleby admitted he had killed A.K. Appleby told the detectives A.K. was in

the pump room when he arrived at the pool. Finding A.K. attractive, Appleby tried to "hit on her," but A.K. rejected his advances and tried to leave the pump room. Appleby stood in her way and tried to grab her breasts and her waist. A.K. pushed Appleby and then punched him. This angered Appleby, who "lost it" and, in his own words, "just beat the shit out of her."

Appleby described the ensuing struggle during which the two fell and Appleby hit A.K. twice in the back of the head, which rendered her unconscious. Then he straddled A.K. and removed her shorts and panties, intending to have sex with her. Appleby next stood up and found a first-aid kit stored in the pump room. From the kit, the defendant said he took a tube of ointment and used the ointment as a sexual lubricant, but he could not obtain an erection.

Appleby also admitted to strangling A.K., although he told the detectives he could not remember what he used. At one point, Appleby suggested he used the rope on the pool thermometer in the pump room. At other times he stated he did not remember strangling A.K.

In describing what happened next, Appleby stated that as he was leaving, he thought he heard A.K. breathing and "didn't want to leave her that way," so he covered her up with the pool cover. He then left as a young woman drove up and honked a horn. He waved, got into his truck, and left. Appleby returned to the pool later, about 5:30 p.m., because he wanted to see what had happened; as a result, he was on the scene when the police created the crime scene log.

Appendix E

DNA testing performed by two crime labs matched Appleby's DNA to the DNA found mixed with A.K.'s DNA on the ointment tube and on her sports bra and T-shirt. In addition, Appleby was linked to the crime by the young woman who pulled up as Appleby was leaving the pool; she identified him as the man she saw.

The State charged Appleby with capital murder for the death of A.K. (Count I), under K.S.A. 21–3439(a)(4) (intentional premeditated killing in the commission of or subsequent to the offense of attempted rape), and attempted rape (Count II), under K.S.A. 21–3301 and K.S.A. 21–3502. The jury found Appleby guilty of both charges. The trial court imposed a hard 50 life imprisonment sentence for the murder conviction and a consecutive sentence of 228 months' imprisonment for the attempted rape conviction. Appleby now appeals.

After oral arguments before this court, an order was entered staying a decision pending the United States Supreme Court's decisions in two cases. The first, *Montejo v. Louisiana,* 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), which relates to Appleby's second issue regarding the admission of his confession, was filed on May 26, 2009. The second, *Melendez–Diaz v. Massachusetts,* 557 U.S. ––––, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), which relates to Appleby's third issue regarding the admission of the DNA testing, was filed on June 25, 2009. Following each decision, Appleby filed letters of supplemental authority pursuant to Supreme Court Rule 6.09(b) (2008 Kan. Ct. R. Annot. 47), and this matter is now ready for decision pursuant to this court's jurisdiction under K.S.A. 22–

3601(b)(1) (off-grid crime).

ISSUE 1. MULTIPLICITY OF CAPITAL MURDER AND ATTEMPTED RAPE

Appleby's first issue on appeal is a multiplicity and double jeopardy objection that he first asserted in a pretrial motion to dismiss the attempted rape charge. In the motion, he argued the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, § 10 of the Kansas Constitution Bill of Rights, and K.S.A. 21–3107 prohibit convictions on both counts alleged against him—*i.e.,* capital murder and attempted rape. The trial court set the motion to dismiss for hearing along with several other pretrial motions. Although a ruling on this motion is not contained in the record on appeal, presumably the motion was denied because the case proceeded on both counts. Because the issue is purely one of law, we are not hindered in our review by the absence of the ruling from the record on appeal.

A. Standard of Review

When an appellate court reviews a ruling on a double jeopardy or multiplicity issue, an unlimited scope of appellate review applies. *State v. Thompson,* 287 Kan. 238, 243, 200 P.3d 22 (2009); *State v. Harris,* 284 Kan. 560, Syl. ¶ 3, 162 P.3d 28 (2007).

B. Strict–Elements Test

In raising this issue before pretrial, Appleby argued the charges of attempted rape and capital murder based on the aggravating crime of attempted rape were multiplicitous.

> " ' "Multiplicity is the charging of a single offense in several counts of a complaint or information. The reason multiplicity must be considered is that it creates the *potential* for multiple punishments for a single offense in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and section 10 of the Kansas Constitution Bill of Rights." ' [Citations omitted.]" *State v. Schoonover,* 281 Kan. 453, 475, 133 P.3d 48 (2006).

The procedural objection of multiplicity preserves a claim of double jeopardy, which arises when a defendant is actually sentenced twice for one offense. See *Schoonover,* 281 Kan. at 475, 133 P.3d 48. When analyzing a claim of double jeopardy,

> "the overarching inquiry is whether the convictions are for the same offense. There are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one?" *Schoonover,* 281 Kan. at 496, 133 P.3d 48.

Appendix E

The State does not argue that the offenses were two acts of discrete conduct. Consequently, we accept that the convictions arose from unitary conduct and focus on the second inquiry of whether the conduct constituted one or two offenses by statutory definition.

When analyzing whether sentences relating to two convictions that arise from unitary conduct result in a double jeopardy violation, the test to be applied depends on whether the convictions arose from one or two statutes. If the double jeopardy issue arises from convictions for multiple violations of a single statute, the unit of prosecution test is applied. If the double jeopardy issue arises from multiple convictions of different statutes, in other words if it is a multiple-description issue, the strict-elements test is applied. *Schoonover,* 281 Kan. at 497, 133 P.3d 48.

Because Appleby raises a double jeopardy argument arising from his convictions under two different statutes, the strict-elements test applies to this analysis. The strict-elements test "serves as a rule of statutory construction to discern whether [a legislature] intended multiple offenses and multiple punishments" when a court is analyzing the claim under the Double Jeopardy Clause of the Fifth Amendment. *Schoonover,* 281 Kan. at 498, 133 P.3d 48. Similarly, when analyzing a claim under § 10 of the Kansas Constitution Bill of Rights, "the same-elements test is applied to implement the legislative declaration in [K.S.A. 21–3107] that a defendant may be convicted of two crimes arising from the same conduct unless one is a lesser included offense of the other." *Schoonover,* 281 Kan. at 498, 133 P.3d 48. Finally, K.S.A. 21–3107 provides

a statutory defense when charges arise from the "same conduct."

K.S.A. 21–3107 provides:

> "(1) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. Each of such crimes may be alleged as a separate count in a single complaint, information or indictment.
>
> "(2) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, *but not both.* A lesser included crime is:
>
> (a) A lesser degree of the same crime;
>
> (b) *a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;*
>
> (c) an attempt to commit the crime charged; or
>
> (d) an attempt to commit a crime defined under subsection (2)(a) or (2)(b)." (Emphasis added.)

C. Application of Strict–Elements Test

Recently, in *Trotter v. State,* 288 Kan. 112, Syl. ¶ 1, 200 P.3d 1236 (2009), we applied these principles and K.S.A. 21–3107 to a defendant's argument that his premeditated first-degree murder conviction under K.S.A. 21–3401 and his capital murder conviction under K.S.A. 21–3439(a)(6) were improperly multiplicitous and his punishment for both crimes violated the Double Jeopardy Clause. Because Trotter was convicted of crimes defined by two separate statutes, he argued the strict-elements test applied and noted that *all* of the elements of premeditated first-degree murder had to be proven as *some* of the elements of capital murder under K.S.A. 21–3439(a)(6), which defines capital murder as the "intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct." We agreed with the defendant's argument and concluded the premeditated first-degree murder conviction was a lesser included offense of the capital murder count and must be reversed under K.S.A. 21–3107(2). *Trotter,* 288 Kan. at 120–24, 200 P.3d 1236.

In reaching this holding in *Trotter,* we relied on earlier decisions in which we had held that K.S.A. 21–3439(a)(6) created a unit of prosecution that is comprised of the premeditated first-degree murder of one victim and the commission of an additional, aggravating premeditated first-degree murder as part of the same transaction or common scheme. The combination of the two murders

elevated the crime to a capital offense, and the two first-degree murders were recognized as lesser included offenses of the capital murder. See *State v. Scott,* 286 Kan. 54, 65–66, 183 P.3d 801 (2008); *State v. Martis,* 277 Kan. 267, Syl. ¶ 1, 83 P.3d 1216 (2004).

Further, the *Trotter* court noted that the key inquiry in a double jeopardy analysis is to determine what measure of punishment the legislature intended. Consequently, the *Trotter* court considered whether there was a legislative intent to allow the multiple punishment and concluded the plain language of K.S.A. 21–3439 did not express a legislative intent to override K.S.A. 21–3107(2), which clearly states that a defendant cannot be convicted of both a primary and lesser included offense. See *Trotter,* 288 Kan. at 122–23, 200 P.3d 1236 (citing *Scott,* 286 Kan. at 65–66, 68, 183 P.3d 801).

The *Trotter* analysis guides our consideration of Appleby's claim of statutory multiplicity. Although Trotter's capital murder conviction was based on K.S.A. 21–3439(a)(6) and Appleby's conviction is based on K.S.A. 21–3439(a)(4), we find no basis to reach a different conclusion simply because the aggravating felony is attempted rape rather than a premeditated first-degree murder. In the same manner that the State must prove the elements of the lesser offense of premeditated first-degree murder when the charge arises under K.S.A. 21–3439(a)(6), the State must prove the lesser offense of a sex crime—in this case, attempted rape—when the capital murder charge is brought under K.S.A. 21–3439(a)(4). To prove the elements of capital murder, the State

had to prove beyond a reasonable doubt that Appleby intentionally, and with premeditation, killed A.K. in the commission of, or subsequent to, the crime of attempted rape. Hence, *all* of the elements of attempted rape were identical to *some* of the elements of the capital murder, meaning the attempted rape was a lesser included offense. Under K.S.A. 21–3107(2), Appleby could not be convicted of both, and imposing sentences for both convictions violated Appleby's rights to be free from double jeopardy as guaranteed by the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

Recognizing this potential extension of our holding in *Trotter,* the State urges our reconsideration of that decision, arguing the decision is contrary to the holding in *Harris,* 284 Kan. 560, 162 P.3d 28, and the felony-murder rule, as applied through the inherently dangerous felony statute. We reject both arguments.

Regarding the first argument, the holding in *Harris* does not apply to the issue in this case. The specific issue raised in *Harris* was whether there was a double jeopardy violation because two of the defendant's three convictions of capital murder were based on the same group of related murders. The issue arose from Harris' multiple convictions under a single statute—K.S.A. 21–3439(a)(6), the multiple-murder subparagraph of the capital murder statute. This contrasts with Trotter's convictions which arose under two statutes—K.S.A. 21–3439(a)(6), the multiple murder subparagraph of the capital murder statute, and K.S.A. 21–3401, the first-degree murder statute.

Appendix E

Because Harris' convictions arose from a single statute, the "unit of prosecution" test was applied to determine if there had been a double jeopardy violation. Under that test, the question is: What did the legislature intend as the unit of prosecution in a capital murder case? See *Schoonover,* 281 Kan. at 497–98, 133 P.3d 48. In *Harris,* we answered this question by determining that the legislature has proscribed the unit of prosecution as the murder of more than one person in one act or transaction or in related acts or transactions joined by a common scheme. *Harris,* 284 Kan. 560, Syl. ¶ 6, 162 P.3d 28. This meant that two of Harris' capital murder convictions had to be reversed because the State charged the murders as part of one scheme. *Harris,* 284 Kan. at 577–78, 162 P.3d 28.

In reaching that holding, we recognized that "under other circumstances, a defendant may be convicted and punished appropriately and constitutionally on multiple counts of capital murder, as that offense is defined in K.S.A. 21–3439(a)(1) through (7)." *Harris,* 284 Kan. at 578, 162 P.3d 28. In this case, the State suggests that this statement in *Harris* supports cumulative punishment under the facts in *Trotter* and, by extension, in this case. The State's argument fails, however, because it does not recognize that the comment in *Harris* was intended to recognize the possibility of charges being brought under different subparagraphs of the capital murder statute—*i.e.,* two different theories—resulting in multiple counts. Further, the State confuses the unit of prosecution test applied in *Harris* with the multiple-description, *i.e.,* the strict elements, test applied in *Trotter.*

The distinction is clarified when the sentence from *Harris* is read in context; doing so explains the court was referring to a potential issue not reached in *Harris* and not at issue in this case. Specifically, after the sentence relied on by the State, the court cited *Brooks v. State,* 973 So.2d 380 (Ala.Crim.App.2007), in which the defendant had been convicted of four counts of capital murder in connection with the murder of a 12–year–old boy. The offense satisfied four definitions of capital murder contained in Ala.Code § 13A–5–40(a) (2006). That potential situation and the situation actually at issue in *Harris* raised unit of prosecution questions, not strict-elements issues. Our holding in *Trotter* is consistent with the unit of prosecution analysis in *Harris* because, in both cases, we considered multiple murders to be one unit of prosecution.

Nevertheless, such a conclusion did not resolve the issue in *Trotter* because Trotter was not convicted of multiple counts arising from the same statute and, therefore, the unit of prosecution test was not the controlling test. Rather, Trotter's convictions arose from multiple statutes; specifically, the issue presented in *Trotter* was whether the defendant could be convicted of one count under K.S.A. 21–3439(a)(6)—capital murder—and of another count under K.S.A. 21–3401—premeditated first-degree murder. Under those circumstances—*i.e.,* when punishment is imposed for violations of two different statutes—the multiple-description, otherwise known as the strict-elements, test under K.S.A. 21–3107 applies. See *Schoonover,* 281 Kan. at 497–98, 133 P.3d 48.

Appendix E

This case, like *Trotter,* presents a multiple-description issue: Can Appleby be convicted of both capital murder under K.S.A. 21–3439(a)(4) and attempted rape under K.S.A. 21–3301 (attempt) and K.S.A. 21–3502 (rape)? The multiple-description, strict-elements test applies to the determination of this issue and *Harris'* unit of prosecution analysis has no application.

The second argument raised by the State is that the felony-murder rule, as applied through the inherently dangerous felony statute, specifically allows multiple convictions for both the homicide and an underlying felony. The State cites to *State v. Holt,* 260 Kan. 33, 917 P.2d 1332 (1996), for its holding that convictions for a felony murder and the underlying felony did not violate double jeopardy. The State relies on the *Holt* court's statements that there is a " 'distinction between the "lesser included offense" doctrine and the "felony murder" doctrine. Each is a separate theory of law. Each exists in a distinct legal pigeonhole.' " *Holt,* 260 Kan. at 45, 917 P.2d 1332; see also *Schoonover,* 281 Kan. at 489–92, 133 P.3d 48 (discussing felony-murder doctrine and double jeopardy).

The most obvious problem with the State's argument is that the inherently dangerous felony statute, K.S.A. 21–3436, does not apply to the capital murder statute. Rather, the inherently dangerous felony statute defines the homicides to which it applies by stating:

> "(a) Any of the following felonies shall be deemed an inherently dangerous felony whether or not such felony is so distinct from the homicide

> alleged to be a violation of subsection (b) of K.S.A. 21–3401, and amendments thereto, as not to be an ingredient of the homicide alleged to be a violation of subsection (b) of K.S.A. 21–3401, and amendments thereto." K.S.A. 21–3436.

The referenced homicide statute—the *only* referenced homicide statute—is K.S.A. 21–3401(b), the felony-murder statute, which applies "to the killing of a human being ... in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in K.S.A. 21–3436." K.S.A. 21–3439—the capital murder statute—is neither referenced nor incorporated into the inherently dangerous felony statute—K.S.A. 21–3436.

In addition, as we noted in *Trotter,* the capital murder statute does not contain language similar to that found in the inherently dangerous felony statute, which provides that the homicide and the inherently dangerous felony are distinct and do not merge. *Trotter,* 288 Kan. at 122–23, 200 P.3d 1236 (citing *Scott,* 286 Kan. at 68, 183 P.3d 801); compare K.S.A. 21–3107 with K.S.A. 21–3439. As we have frequently recognized, this language in the inherently dangerous felony statute reflects that the legislature understands the need to express an intent to allow convictions under two statutes for the same conduct and knows how to do so. See *Schoonover,* 281 Kan. at 490–91, 133 P.3d 48; see also *State v. Farmer,* 285 Kan. 541, Syl. ¶ 4, 175 P.3d 221 (2008); *State v. Conway,* 284 Kan. 37, 57, 159 P.3d 917 (2007); *State v. Walker,* 283 Kan. 587, 611, 153 P.3d 1257 (2007).

Because the legislature did not include similar language in the capital murder statute, our analysis is governed by the expression of legislative intent stated in K.S.A. 21–3107(2)(b). Applying the same-elements test under that provision, Appleby's two convictions—one for capital murder based upon the intentional and premeditated killing of A.K. in the commission of, or subsequent to, the attempted rape of A.K. under K.S.A. 21–3439(a)(4) and the other for the attempted rape of A.K. under K.S.A. 21–3301 and K.S.A. 21–3502—are improperly multiplicitous and violate Appleby's right to be free from double jeopardy. Appleby's sentence for the attempted rape conviction must be vacated.

ISSUE 2. SUPPRESSION OF CONFESSION

Next, Appleby contends the trial court erred by admitting into evidence the incriminating statements he made to Kansas detectives. Appleby argues the statements must be suppressed because he asked about an attorney while he was being booked on the Connecticut arrest warrant.

A. Attorney Requests

This argument differs from the typical issue arising from the application of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, *reh. denied* 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966), in that Appleby was arrested in another state on unrelated charges, and the arresting officer, Detective Jewiss, had no intention of interrogating Appleby; typically a *Miranda* issue arises

when there is custodial interrogation related to the crime on which the arrest was based. Under the circumstances of this case, the State argues Appleby's questions about whether he would be allowed to talk to an attorney were, at most, an invocation of Sixth Amendment rights related to the Connecticut charges. Appleby argues that he was asserting his Fifth Amendment rights and the assertion applied to both cases. To understand these arguments, a more detailed discussion of the interaction is necessary.

When Appleby was arrested in Connecticut, he was arrested on the Connecticut charges only, even though the arrest was timed to occur when Kansas detectives were in Connecticut and the arrest may not have occurred if Kansas law enforcement had not contacted the Connecticut State Police Department to request assistance in investigating Appleby. But this involvement was behind the scene; the Kansas detectives did not directly participate when Detective Jewiss took Appleby into custody at his home, and Appleby was not aware of their presence until after he had asked the Connecticut detectives the four questions about whether he could talk to an attorney. Appleby did ask Detective Jewiss why there were so many officers at his house, and the detective explained a search warrant was being executed and the officers were going to search the home. Appleby questioned what the search was about, and Jewiss replied that he "wasn't going to talk to him any further about the case; that somebody else would talk to him."

During the approximately 3–mile drive to the station, Detective Jewiss did not ask Appleby any questions, but

Appleby volunteered information about his use of the alias of Teddy Hoover.

When Detective Jewiss and Appleby arrived at the station, Detective Jewiss began the routine book-in process on the Connecticut arrest warrant. At this point, before Appleby had been *Mirandized,* Appleby asked "if he was going to have the opportunity to talk to an attorney." Detective Jewiss replied "absolutely." Detective Jewiss testified he understood this to be a question regarding procedure, not an invocation of the right. While testifying at the suppression hearing, Detective Jewiss was asked if he was questioning Appleby at this point in time. He answered: "Not at all. I even informed him that I wouldn't be questioning him, and that I wouldn't talk to him about either of these cases."

After Appleby asked about an attorney, he was read a notice of rights form that listed the three Connecticut charges—risk of injury to a minor, disorderly conduct, and public indecency. The form also advised of *Miranda* rights and stated in part: "You may consult with an attorney before being questioned; you may have an attorney present during questioning, and you cannot be questioned without your consent." Appleby signed the notice of rights form, which was an acknowledgment, not a waiver of rights.

Soon after that exchange, another Connecticut detective advised Appleby of the search warrant that authorized the officer to swab the inside of Appleby's mouth in order to obtain a DNA sample. Detective Jewiss testified that Appleby asked if he had the right to say "no"

and then asked if he could speak to an attorney about his right to refuse the testing. According to Detective Jewiss, the detectives advised Appleby he could not talk to an attorney at that point regarding a search that had been authorized by a judge.

Following the DNA swabbing, Detective Jewiss continued with the book-in process on the Connecticut charges. Appleby was fingerprinted and photographed, the property on his person was inventoried, and a personal information data sheet was completed. During that process, Appleby asked two more times whether he would have an opportunity to talk to an attorney.

At the suppression hearing, Detective Jewiss repeatedly testified that he understood Appleby to be "asking about our procedure as in ... will he have the opportunity to talk to an attorney." According to Detective Jewiss, the question was never in the context of, "I don't want to talk to you" or "I don't want to talk to anybody without an attorney here."

Detective Jewiss testified that during the book-in process he asked Appleby his name, date and place of birth, residence, and similar book-in questions. The only other question he asked came about 30 minutes after they arrived at the police station when Detective Jewiss asked Appleby if he wanted to talk to some people about an unrelated matter. Appleby said he would. Detective Jewiss was asked if Appleby brought up the word "attorney" at that time, and he replied, "No, he didn't."

Detective Jewiss was also asked why he did not give Appleby the opportunity to speak to an attorney before sending him upstairs to be interrogated by the Kansas detectives. Detective Jewiss, who had repeatedly stated that he had understood Appleby to be asking about procedure and had explained that a defendant would typically be allowed to contact an attorney only after the book-in process was complete, testified that "[t]here was still some processing that I had to continue with."

When Detective Jewiss transferred Appleby to the Kansas detectives, he reported that Appleby had not invoked his right to counsel, "but he has asked something about an attorney when the [DNA] search warrant was being conducted." Detective Jewiss did not tell the Kansas detectives about the other instances when Appleby asked whether he would be able to talk to an attorney.

After Detective Jewiss left, the two Kansas detectives asked Appleby if he wanted to answer some questions about the murder of A.K. He said he wanted to talk to them, and the detectives then told him he would be read his *Miranda* rights again since he was being interviewed "on a different charge from what he was arrested." After being read his rights, Appleby said he understood them and was willing to answer some questions. He was questioned for approximately 2 and 1/2 hours, the final 20 minutes on videotape. At no point during the questioning by the Kansas detectives did Appleby indicate he wished to speak to or have the assistance of an attorney.

B. Trial Court's Findings

Appleby filed three pretrial motions to suppress the statements he made to the Kansas detectives. After hearing the testimony we have described above, the trial court denied Appleby's motions in a memorandum decision. The trial court explained that although Appleby's initial motion to suppress cited to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and to three provisions of the Kansas Constitution Bill of Rights, he later limited his claim to "the admissibility [of the statements] under the Fifth and Fourteenth Amendments." Therefore, the trial court limited its scope of analysis.

The trial court recognized there are two questions to ask in the determination of whether a suspect has invoked his or her Fifth Amendment right to counsel: (1) whether the suspect articulated a desire to have an attorney present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for an attorney and (2) whether an attorney is being requested for purposes of interrogation rather than in regard to later hearings or proceedings. See *State v. Walker*, 276 Kan. 939, 945, 80 P.3d 1132 (2003). The trial court concluded Appleby clearly requested an attorney, but he did not make it clear he wanted the attorney to assist with questioning rather than to have assistance with his case.

Regarding the clear indication that Appleby wanted the assistance of counsel, the trial court noted Appleby

had asked four times about contacting an attorney in a period of approximately 30 minutes. The trial court found that, although Appleby's requests were never phrased as a demand, "they clearly communicated a desire to call his attorney without substantial further delay."

Yet, in concluding the purpose of Appleby's request was not clear, the trial court stated:

> "There are many purposes Appleby could have sought to accomplish by contacting his lawyer. At the time he made those requests, no one had indicated to him that his arrest was connected in any way to the [A.K.] murder investigation. He may have wanted his attorney to try to determine whether that was the real reason multiple officers had shown up to search his residence. Or Appleby may simply have wanted to learn the procedural steps that might take place following his arrest. Or he may have wanted his attorney to take steps to secure his release on bond. Other purposes could have been present as well, including the desire to obtain the assistance of counsel in dealing with any questioning that might ensue after 'processing' was completed."

In addition, the trial court found:

> "Appleby's lack of intent to obtain a lawyer to assist with any pending custodial interrogation is an inference supported by his later (a) saying

> affirmatively that he wanted to speak to the [Kansas] detectives, (b) making an explicit *Miranda* waiver for them, (c) speaking with them for two and a half hours, and (d) never mentioning a lawyer during that interview."

Consequently, the trial court denied Appleby's motion to suppress, finding that based upon Appleby's statements and the context in which they were made, "he did not ask for counsel for the purpose of assisting him with an imminent custodial interrogation."

C. Standard of Review

In reviewing the trial court's decision regarding suppression, this court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard. We do not reweigh evidence or assess the credibility of witnesses but will give deference to the trial court's findings of fact. *State v. Warledo,* 286 Kan. 927, 934–35, 190 P.3d 937 (2008); *State v. Ackward,* 281 Kan. 2, 8, 128 P.3d 382 (2006).

D. Defendant's Arguments

Appleby argues his requests for an attorney were clear and sufficient to require the Kansas detectives to refrain from questioning him until his requests were honored or until he had initiated contact with them. Appleby contends that his statements to the Kansas detectives, therefore, should have been suppressed. To support his argument,

he (1) cites a Montana case holding that law enforcement officers and, in turn, courts must broadly interpret any reference to an attorney by a suspect; (2) cites an Oregon decision to suppress a suspect's statements under circumstances Appleby argues are factually similar to this case; and (3) argues the trial court's reasoning imposes too exacting a standard, essentially requiring the suspect to use the specific words of "I want an attorney to assist me with your purposed custodial interrogation," and that his statements to Detective Jewiss were sufficiently clear to invoke his Fifth Amendment right to counsel.

In making these arguments, Appleby groups together all of the instances where he referred to an attorney during the book-in process. Nevertheless, as we analyze his arguments, we recognize that one of the instances was of a different character than the others; that was the one made in response to the execution of the search warrant for purposes of obtaining DNA swabs. In that instance, Appleby clearly asked if he could talk to his attorney about whether he could refuse to allow the swabbing. In the three other instances, his questions were more general, as he asked whether he would have the opportunity to talk to an attorney. The differing nature of these questions is important as we consider the cases cited by Appleby.

1. Broad Interpretation

In arguing that any mention of an attorney must be broadly interpreted, Appleby cites *State v. Buck,* 331 Mont. 517, 134 P.3d 53 (2006), in which the request made for an attorney was similar to Appleby's question about

whether he could talk to an attorney about the DNA search warrant. However, *Buck* is not cited by Appleby because of its factual similarity but because of the court's recognition that law enforcement officers and courts should give broad effect to any mention of an attorney by a suspect.

In *Buck,* when served with a search warrant allowing officers to obtain fingernail scrapings, the suspect said, " 'I'll just wait and talk to a lawyer.' " *Buck,* 331 Mont. at 521, 134 P.3d 53. Yet, when given the opportunity to call a lawyer, the suspect refused to do so. Several days later, the suspect—who had remained in custody—was again taken to the police station, *Mirandized,* and asked if he would answer questions. He agreed and confessed. The suspect later sought suppression of his confession, arguing his statement that he wanted to talk to an attorney before submitting to the fingernail scraping was an unambiguous invocation of his *Miranda* rights.

In considering this argument, the Montana court noted that in *Connecticut v. Barrett,* 479 U.S. 523, 529–30, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987), the United States Supreme Court observed its past decisions had "given broad effect to requests for counsel" and that Montana had a long-standing rule of liberally construing any mention of an attorney by a suspect. *Buck,* 331 Mont. at 536–37, 134 P.3d 53. The Montana court stated:

> "[N]o suspect has an affirmative obligation to explain precisely why he or she wants legal assistance.... [I]f there is any reasonable doubt as to whether a suspect's request for counsel

> is limited to only certain aspects of his or her interaction with investigating officers, the request must be construed as an invocation of the right to counsel in custodial interrogation." *Buck,* 331 Mont. at 537, 134 P.3d 53.

Appleby urges our adoption of the same viewpoint. We reject that invitation for several reasons. First, the Montana court's statement cannot be isolated from the holding in the case, which followed *Barrett.* In *Barrett,* the United States Supreme Court refused to suppress a verbal statement made after a suspect told law enforcement officers he would talk to them, but he would not give a written statement before talking to his attorney. *Barrett,* 479 U.S. at 529–30, 107 S.Ct. 828. Considering *Barrett* and factually similar cases from other states, the Montana court concluded that Buck had not invoked his right to the assistance of counsel for the purpose of assisting with interrogation when he refused to submit to fingernail scraping until he had talked to an attorney. The Montana court stated:

> "[A] suspect may seek legal assistance for only limited purposes in his or her dealings with law enforcement. Based upon this recognition, and pursuant to *Barrett,* we hold that a suspect's request for counsel which is unambiguously limited to a police procedure that does not involve verbal inquiry, does not constitute an invocation of the right to counsel in custodial interrogation. Rather, a clearly limited request is properly construed according to its plain

> meaning, assuming that the suspect fully understands his or her right to counsel." *Buck,* 331 Mont. at 536–37, 134 P.3d 53.

The same conclusion applies in this case to the one comment made by Appleby in the context of the DNA search warrant. Detective Jewiss testified that after being presented with the warrant, "Mr. Appleby then asks if he has the right to say no. He also asks if—at that point if he can talk to his attorney about his right to say no for that." This statement was unambiguous and was a request for limited assistance. Clearly, it was not a request for the assistance of an attorney for the purpose of assisting with the custodial interrogation. Undoubtedly, it is because of the precedent of *Barrett* that Appleby does not isolate the DNA search-warrant comment as a clear invocation of his Fifth Amendment right to counsel and relies on *Buck* only for its dicta about broadly construing a suspect's comments.

As to this latter point, we reject the Montana court's analysis because of decisions of the United States Supreme Court decided after *Barrett* that are not discussed in *Buck.* Significant to Appleby's argument is *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The *Davis* Court noted that *Barrett,* 479 U.S. at 529–30, 107 S.Ct. 828, and *Smith v. Illinois,* 469 U.S. 91, 96 & n. 3, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), mentioned the issue of ambiguous and equivocal requests for counsel but had "not addressed the issue on the merits. We granted certiorari, [citation omitted], to do so." *Davis,* 512 U.S. at 456, 114 S.Ct. 2350.

Faced squarely with the issue, the Court held that "the suspect must unambiguously request counsel." *Davis,* 512 U.S. at 459, 114 S.Ct. 2350. Stating the holding in another way, the Court said: "We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. [Citation omitted.]" *Davis,* 512 U.S. at 459, 114 S.Ct. 2350. Further, the Court declined to adopt a rule requiring officers to ask clarifying questions. *Davis,* 512 U.S. at 461, 114 S.Ct. 2350. The Court reasoned:

> "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.' [Citation omitted.] A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." *Davis,* 512 U.S. at 460–61, 114 S.Ct. 2350.

Applying this authority, we reject Appleby's argument that any mention of counsel must be construed broadly. Rather, the trial court was correct in examining whether Appleby's questions were unambiguous requests for the assistance of counsel for the purpose of the interrogation.

2. Oregon Case Law

Alternatively, Appleby argues his assertion of Fifth Amendment rights was not ambiguous or equivocal. To support this argument, he cites *State v. Dahlen,* 209 Or.App. 110, 146 P.3d 359, *modified* 210 Or.App. 362, 149 P.3d 1234 (2006) (remanded for further proceedings, not new trial).

In *Dahlen,* the defendant was placed in a holding cell after his arrest. Approximately 8 hours later, the suspect knocked on his cell door to get the attention of jailers and asked, " 'When can I call my attorney?' " 209 Or.App. at 115, 146 P.3d 359. Less than an hour later, the suspect asked the same question. Then, 11 hours after his arrest, officers *Mirandized* the suspect, the suspect waived his rights, the officers asked questions, and the suspect confessed.

The Oregon Court of Appeals suppressed the confession after concluding the suspect's question of when he could call his attorney was unequivocal and objectively would be understood to mean that the suspect wanted to call his attorney as soon as possible. *Dahlen,* 209 Or.App. at 117–19, 146 P.3d 359. In reaching this conclusion, the court distinguished a decision of the Oregon Supreme

Court, *State v. Charboneau,* 323 Or. 38, 54, 913 P.2d 308 (1996). In *Charboneau,* the suspect asked, " 'Will I have an opportunity to call an attorney tonight?' "; the Oregon Supreme Court held this request was equivocal and ambiguous and did not require the suppression of the suspect's confession. *Charboneau,* 323 Or. at 52, 55–56, 913 P.2d 308.

As we compare the questions asked by the suspects in *Dahlen* and *Charboneau* with Appleby's repeated questions of whether he would be able to talk to an attorney, the *Charboneau* question—"Will I have an opportunity to call an attorney tonight?"—is more similar. The discussion in *Dahlen* cites dictionary definitions and other sources to substantiate the view that asking "when" is a more definite statement than asking "will." *Dahlen,* 209 Or.App. at 118, 146 P.3d 359. As we apply that discussion to this case, we note that asking "will" is essentially the same as asking "whether." Hence, we find the Oregon Supreme Court's analysis of the defendant's question in *Charboneau* to be more applicable and the analysis of the question in *Dahlen* to be inapposite.

Interestingly, the contrast between the two statements and the discussion in *Dahlen* actually raises questions about the trial court's conclusion that Appleby asserted a right to counsel even for Sixth Amendment purposes. We need not parse that question any further, however, because we agree with the trial court's conclusion that Appleby's statements were ambiguous and not a clear invocation of Fifth Amendment rights. As noted earlier, because of the interplay of two investigations the potential for this

type of ambiguity is greater in this case than the typical scenario and, on this basis, *Dahlen* is distinguishable. The potential for this ambiguity did not arise under the facts of *Dahlen* and, consequently, did not need to be addressed.

Consequently, Appleby's reliance on *Dahlen* is misplaced.

3. Fifth and Sixth Amendment Rights

Finally, disagreeing with the trial court's conclusion that the circumstances created ambiguity, Appleby asserts that the potential interplay between Fifth and Sixth Amendment rights did not need to be considered in this case. He argues that the trial court improperly created two tests that place too exacting a standard on a suspect's attempts to request the assistance of counsel. Further, he argues a reasonable law enforcement officer would have understood he was asserting his Fifth Amendment rights.

In response, the State contends that Appleby's requests for an attorney are more akin to a Sixth Amendment invocation of the right to counsel than a Fifth Amendment invocation of the right to counsel. It argues Appleby's requests could not reasonably be construed to be requests for assistance with custodial interrogation because he was not being interrogated at the time he made those requests. In addition, the State asserts that the *Miranda* right to counsel may not be anticipatorily invoked.

The State's arguments bring into issue the interrelationship of Fifth and Sixth Amendment rights, which was discussed by the United States Supreme Court in *McNeil v. Wisconsin,* 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), under circumstances similar to those in this case—*i.e.,* where an arrest is made in one case and an interrogation relates to another. In *McNeil,* the defendant was arrested in Omaha, Nebraska, pursuant to a Wisconsin warrant based on charges of an armed robbery outside Milwaukee. Milwaukee detectives went to Omaha to retrieve McNeil. The detectives advised McNeil of his *Miranda* rights and began to ask questions. McNeil refused to answer any questions, the interview ended, and he was taken to Wisconsin where an attorney was appointed to represent him.

Later that day, McNeil was visited by officers from a different Wisconsin county. The county detectives advised McNeil of his *Miranda* rights, and McNeil signed a form waiving those rights. The county detectives then asked McNeil about charges of murder, attempted murder, and armed robbery. McNeil denied any involvement in the crimes. Two days later the county detectives returned and again advised McNeil of his *Miranda* rights. McNeil again waived his rights and this time confessed.

McNeil sought suppression of his statement to the county detectives asserting a Sixth Amendment right to counsel, but the Supreme Court determined his confession was admissible. *McNeil,* 501 U.S. at 175–76, 181–82, 111 S.Ct. 2204. The ruling was based on the distinction between McNeil's Fifth and Sixth Amendment rights. The

Supreme Court explained that the Sixth Amendment right to counsel had attached in the Milwaukee case. *McNeil,* 501 U.S. at 175, 111 S.Ct. 2204; see *Brewer v. Williams,* 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424, *reh. denied* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 240 (1977) (Sixth Amendment right to counsel attaches on filing of formal charges, indictment, or information; on arraignment; or on arrest on warrant and arraignment thereon). But that right, the Court explained, is offense specific and cannot be invoked once for all future prosecutions. *McNeil,* 501 U.S. at 175, 111 S.Ct. 2204. As a result, " '[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at the trial of those offenses.' [Citation omitted.]" *McNeil,* 501 U.S. at 176, 111 S.Ct. 2204.

A similar dividing line is not drawn, however, when the Fifth Amendment right to counsel—which is protected by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, *reh. denied* 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966)—is invoked (which McNeil did not do in arguing his appeal). In other words, Fifth Amendment rights are not offense specific. See *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Thus, the *McNeil* Court noted that "[o]nce a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present. [Citation omitted.]" (Emphasis added.) *McNeil,* 501 U.S. at 177, 111 S.Ct. 2204. Further, *Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378, *reh. denied* 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981),

> "established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him,' [*Edwards*], 451 U.S. at 484–485[, 101 S.Ct. 1880],—which means, we have most recently held, that counsel must be present, *Minnick v. Mississippi,* 498 U.S. 146[, 112 L.Ed.2d 489, 111 S.Ct. 486] (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights,' *Michigan v. Harvey,* 494 U.S. 344, 350[, 108 L.Ed.2d 293, 110 S.Ct. 1176] (1990)." *McNeil,* 501 U.S. at 176–77, 111 S.Ct. 2204.

See also *State v. Morris,* 255 Kan. 964, 976–79, 880 P.2d 1244 (1994) (discussing *McNeil*).

Recently, in *Montejo v. Louisiana,* 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), the Supreme Court reaffirmed this Fifth Amendment jurisprudence, concluding the three layers of protection—*Miranda, Edwards,* and *Minnick*—are sufficient. *Montejo,* 556

U.S. at ––––, 129 S.Ct. at 2089, 173 L.Ed.2d at 968. However, the *Montejo* Court modified some aspects of its Sixth Amendment jurisprudence. Specifically, it overruled *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), because of that decision's " 'wholesale importation of the *Edwards* rule into the Sixth Amendment.' " *Montejo,* 556 U.S. at ––––, 129 S.Ct. at 2085, 173 L.Ed.2d at 964; 556 U.S. at ––––, 129 S.Ct. at 2091, 173 L.Ed.2d at 970 (overruling *Jackson*).

However, except to separate the exclusionary rule that would apply under the Sixth Amendment from that which applies when Fifth Amendment rights are violated, the *Montejo* Court did not modify *McNeil's* dividing lines between Fifth and Sixth Amendment analysis, even though much of that analysis was based on *Jackson,* which the *Montejo* Court overruled. In particular, the *Montejo* Court did not alter the *McNeil* requirement that, even if Sixth Amendment rights have been invoked, a defendant must affirmatively assert Fifth Amendment rights if subjected to a custodial interrogation in another case. See *Montejo,* 556 U.S. at ––––, 129 S.Ct. at 2089–92, 173 L.Ed.2d at 968–70 As a result, if Appleby asserted Sixth Amendment rights, as the State suggests, the assertion was effective only in the Connecticut case.

Moreover, a Sixth Amendment assertion is not an assertion of the right to counsel during an interrogation—the right protected by the Fifth Amendment. The *McNeil* Court explained: "To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda–Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many

matters, but not the matter under prosecution." *McNeil,* 501 U.S. at 178, 111 S.Ct. 2204; see *Rhode Island v. Innis,* 446 U.S. 291, 300, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (*Miranda's* safeguards and procedural protection of Fifth Amendment rights "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.").

Because the accused's purpose in requesting an attorney must be determined in order to sort the interplay of these rights, the *McNeil* Court concluded that an effective invocation of the Fifth Amendment right to counsel

> "applies only when the suspect 'ha[s] expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda.* [Citation omitted.] It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*" *McNeil,* 501 U.S. at 178, 111 S.Ct. 2204.

See *State v. Walker,* 276 Kan. 939, 945, 80 P.3d 1132 (2003) (recognizing two aspects to assertion of Fifth Amendment rights: [1] a reasonable police officer in the circumstances would understand request was made for an attorney and [2] the request was for assistance with a custodial interrogation, not for subsequent hearings or proceedings).

The *Montejo* Court reiterated this analysis and provided some guidance in making the determination of whether a request is for an attorney's assistance with a custodial interrogation. It stated:

> " 'We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"....' *McNeil, supra* [501 U.S.] at 182, n. 3, 111 S.Ct. 2204, 115 L.Ed.2d 158. What matters for *Miranda* and *Edwards* is *what happens when the defendant is approached for interrogation,* and (if he consents) what happens during the interrogation...." (Emphasis added.) *Montejo,* 556 U.S. at ––––, 129 S.Ct. at 2080, 173 L.Ed.2d at 970.

Even before the *Montejo* decision, the State in its brief in this case focused on *McNeil's* statement and argued that Appleby could not anticipatorily assert his Fifth Amendment right. This view is supported by a majority of federal and state courts that have relied on the language in *McNeil* to hold that one cannot anticipatorily invoke the right to counsel prior to any custodial interrogation. See, *e.g., United States v. Grimes,* 142 F.3d 1342, 1347–48 (11th Cir.1998), *cert. denied* 525 U.S. 1088, 119 S.Ct. 840, 142 L.Ed.2d 695 (1999); *United States v. LaGrone,* 43 F.3d 332, 337–38 (7th Cir.1994); *United States v. Thompson,* 35 F.3d 100, 103–04 (2d Cir.1994); *Alston v. Redman,* 34 F.3d 1237, 1246 (3d Cir.1994), *cert. denied* 513 U.S. 1160, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995); *United States v. Wright,* 962 F.2d 953, 955 (9th Cir.1992); *United States*

v. Kelsey, 951 F.2d 1196, 1198–99 (10th Cir.1991); *People v. Nguyen,* 132 Cal.App.4th 350, 357, 33 Cal.Rptr.3d 390 (2005); *Pardon v. State,* 930 So.2d 700, 703–04 (Fla.App. 4 Dist.), *rev. denied* 944 So.2d 346 (Fla.2006); *People v. Villalobos,* 193 Ill.2d 229, 240–42, 250 Ill.Dec. 17, 737 N.E.2d 639 (2000); *Sauerheber v. State,* 698 N.E.2d 796, 802 (Ind.1998); *Costley v. State,* 175 Md.App. 90, 110–12, 926 A.2d 769 (2007); *State v. Aubuchont,* 147 N.H. 142, 149–50, 784 A.2d 1170 (2001); *State v. Warness,* 77 Wash. App. 636, 640–41, 893 P.2d 665 (1995).

Some courts have been liberal in determining the temporal range in which interrogation could be considered "imminent." *E.g., Kelsey,* 951 F.2d at 1198–99 (defendant, who asked three or four times to see his lawyer while in custody during search of home, had reasonable belief that interrogation was imminent or impending, making request for counsel effective invocation of Fifth Amendment *Miranda* right to counsel).

Other courts have been very restrictive in defining "imminent," allowing no intervening activity between the invocation of the right and the planned initiation of questioning. *E.g., Nguyen,* 132 Cal.App.4th at 357, 33 Cal. Rptr.3d 390 (suspect did not invoke *Miranda's* protections by attempting to call attorney during arrest); *Pardon,* 930 So.2d at 703–04 (interrogation of suspect was not imminent; he was merely being booked into detention, albeit on same charge on which he was later questioned); *Sauerheber,* 698 N.E.2d at 802 (*McNeil* "strongly suggests that the rights under *Miranda* and *Edwards* do not extend to permit anticipatory requests for counsel to preclude

waiver at the time interrogation begins"; assertion of right when not being questioned ineffective even if in custody); *Costley,* 175 Md.App. at 111, 926 A.2d 769 (*McNeil* " suggests that custody, absent interrogation, is insufficient.").

Similarly, in a case cited by the trial court—*Aubuchont,* 147 N.H. 142, 784 A.2d 1170—the court refused to suppress a statement simply because a suspect, while being arrested, yelled at his wife to call an attorney. The New Hampshire Supreme Court noted: "[T]he timing of the defendant's request controls whether he invoked his *Miranda* rights. The purpose of the defendant's request was ambiguous, because he made his request before he was subject to interrogation or under the threat of imminent interrogation." *Aubuchont,* 147 N.H. at 149, 784 A.2d 1170. As a result, the court concluded: "[I]t is unclear whether the defendant simply wished to seek advice from his attorney or whether he wished to obtain assistance of counsel for some future interrogation." *Aubuchont,* 147 N.H. at 149–50, 784 A.2d 1170.

This restrictive view is supported by the statements in *Montejo* that the Court had " 'in fact never held that a person can invoke his *Miranda* rights anticipatorily, *in a context other than "custodial interrogation* " ' " and "[w]hat matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation." (Emphasis added.) *Montejo,* 556U.S. at ––––, 129 S.Ct. at 2091, 173 L.Ed.2d at 970.

Yet the Court did not clearly explain what was meant by the context of a custodial interrogation or a context other than a custodial interrogation, and the facts of *Montejo* are very different from those in this case and therefore do not help to explain the meaning as it would be applied in this case. As in *McNeil,* the focus in *Montejo* was whether there had been an assertion of Sixth Amendment rights that prevented further interrogation. In fact, upon his arrest, Montejo waived his *Miranda* rights and gave police various versions of events related to the crime. A few days later at a preliminary hearing, known in Louisiana as a "72–hour hearing," counsel was appointed for Montejo even though he had not requested the appointment and had stood mute when asked if he wanted the assistance of an attorney. Later that same day, police approached Montejo, *Mirandized* him again, and asked him to accompany them to locate the murder weapon. During the drive, Montejo wrote an inculpatory letter of apology to the victim's widow. After the drive, Montejo met his attorney for the first time. At trial, he objected to the admission of the letter, basing his objection on *Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631. The Supreme Court held that the letter need not be suppressed based on an objection under *Jackson,* which it overruled. The Court concluded Montejo had not asserted his Sixth Amendment right to counsel. Yet, the Court concluded the case should be remanded to allow Montejo to assert an objection under *Edwards,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, in other words, a Fifth Amendment objection. In discussing the Fifth Amendment right, the Court stressed that the *Edwards* rule was meant to prevent police from badgering defendants into changing their minds about the right to

counsel once they had invoked it. *Montejo,* 556 U.S. at ––––, 129 S.Ct. at 2080, 173 L.Ed.2d at 959. The Court made no attempt to suggest how these various Fifth Amendment principles would apply to Montejo's circumstances.

Here, Appleby does not assert that a Sixth Amendment right to counsel requires the suppression of his confession. Nor did the trial court suppress on that basis. The trial court merely pointed to the possibility of a Sixth Amendment assertion in another case—or perhaps even the Kansas case—as a circumstance that caused Appleby's assertion to be ambiguous. He relies on a Fifth Amendment right to counsel and suggests his questions during the book-in process asserted that right. This argument brings us to the State's position that the right was not effectively asserted because Appleby was not in the interrogation room.

Recently, in a pre-*Montejo* case, the Wisconsin Supreme Court examined what the Supreme Court might have meant by its statement in *McNeil* that Fifth Amendment rights could not be asserted in a "context other than 'custodial interrogation'...." *McNeil,* 501 U.S. at 182 n. 3, 111 S.Ct. 2204 (*language quoted in Montejo,* 556 U.S. at ––––, 129 S.Ct. at 2091, 173 L.Ed.2d at 970). In *State v. Hambly,* 307 Wis.2d 98, 745 N.W.2d 48 (2008), the Wisconsin court noted a tension between statements in various decisions of the United States Supreme Court. Specifically, the *Hambly* court attempted to reconcile the above-stated *McNeil* language with the *Miranda* Court's statement that "a pre-interrogation request for a lawyer

... affirmatively secures [the] right to have one." *Miranda,* 384 U.S. at 470, 86 S.Ct. 1602. In doing so, the Wisconsin court noted the *Miranda* Court did not specifically address what is meant by a "pre-interrogation request" for counsel during custody and did not address at what point prior to custodial interrogation a suspect may effectively invoke the Fifth Amendment *Miranda* right to counsel. Likewise, the *McNeil* Court did not address the question of whether the " 'context' " of a custodial interrogation could cover circumstances before an actual interrogation begins. *Hambly,* 307 Wis.2d at 111, 745 N.W.2d 48.

In light of that tension, the *Hambly* court felt it important to also consider the *McNeil* Court's recognition that, under *Edwards,* an effective invocation of the Fifth Amendment *Miranda* right to counsel " 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.' " *Hambly,* 307 Wis.2d at 112, 745 N.W.2d 48 (quoting *McNeil,* 501 U.S. at 178, 111 S.Ct. 2204). With this in mind, the *Hambly* court concluded the timing of the request for counsel may help determine whether the request is for the assistance of an attorney in dealing with a custodial interrogation by the police. *Hambly,* 307 Wis.2d at 112, 745 N.W.2d 48. While the *Hambly* court rejected the notion that a request for counsel can never be effective if made prior to interrogation, it concluded that the United States Supreme Court's case law recognizes that a suspect in custody may request counsel and effectively invoke the "*Miranda* right to counsel when faced with 'impending interrogation' or when interrogation is 'imminent' and the

request for counsel is for the assistance of counsel during interrogation." *Hambly,* 307 Wis.2d at 114–15, 745 N.W.2d 48; see also 2 LaFave, Israel, King & Kerr, Criminal Procedure § 6.9(g), p. 869 n. 200 (3d ed.2007) (citing cases for proposition that *Miranda* right to counsel may be validly asserted only when authorities are conducting custodial interrogation or such interrogation is imminent and request for counsel is for assistance of counsel during interrogation).

E. Imminent Questioning/Equivocal Assertion

This approach is similar to that followed by the trial court in this case and in past decisions of this court where the context of a statement regarding an attorney has been analyzed to view whether an objective law enforcement officer would understand there had been an invocation of Fifth Amendment rights. For example, in *State v. Gant,* 288 Kan. 76, 201 P.3d 673 (2009), when considering facts very similar to those in *Aubuchont,* 147 N.H. 142, 784 A.2d 1170—the case cited by the trial court—this court recently held a defendant did not assert his Fifth Amendment rights when he yelled to his companions while being arrested that they should call a lawyer. Although we did not consider the question of whether interrogation must be imminent, we did conclude the factual context revealed the defendant was directing his comments toward his companions, not police, and was not clearly and unambiguously asserting his right to counsel. *Gant,* 288 Kan. at 81, 201 P.3d 673; see *Walker,* 276 Kan. at 945, 80 P.3d 1132; *Morris,* 255 Kan. at 976–81, 880 P.2d 1244.

Now, we explicitly recognize what was implicit in many of our prior decisions: The timing as well as the content and context of a reference to counsel may help determine whether there has been an unambiguous assertion of the right to have the assistance of an attorney in dealing with a custodial interrogation by law enforcement officers.

This is the approach adopted by the trial court. In reaching the conclusion that the context in this case created ambiguity, the trial court made several findings that are supported by substantial competent evidence. Specifically, the trial court found that Appleby was aware he was being arrested by Connecticut authorities and was being charged for crimes committed in Connecticut. Further, Appleby had not been subjected to interrogation at that point in time about anything, in either the Connecticut or the Kansas case, and no one had indicated to him that his arrest was in any way connected the murder of A.K. See *Pennsylvania v. Muniz,* 496 U.S. 582, 601, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (recognizing " 'routine booking question' exception which exempts from *Miranda's* coverage questions to secure the ' "biographical data necessary to complete booking or pretrial services." ' " Moreover, Detective Jewiss had informed Appleby that he would not be questioning him and that someone else would be talking to him about "the case." At that point in time, Appleby only knew of the Connecticut case. Hence, when Appleby asked whether he would have a chance to talk to an attorney, he knew he was not going to be questioned by Detective Jewiss. At that point in time, interrogation was clearly not imminent or impending.

It was not until minutes before the custodial interrogation with the Kansas detectives that Appleby was asked by Detective Jewiss if he would talk to some people about an unrelated matter. The trial court concluded that at that time: "Appleby undoubtedly believed that matter to be the [A.K.] murder investigation." Yet Appleby agreed without hesitation to speak to the detectives. Then Appleby was given his *Miranda* rights, which he clearly waived. He never asked about an attorney again. Thus, when questioning was imminent—when Appleby was approached for interrogation—he clearly waived his right to counsel.

We agree with the conclusion reached by the trial court that Appleby's references to an attorney during the book-in process on the Connecticut charges did not constitute a clear and unambiguous assertion of his Fifth Amendment right as protected by *Miranda.* The trial court did not err in denying Appleby's motion to suppress his custodial statements made to the Kansas detectives.

ISSUE 3. POPULATION STATISTICS RELATED TO DNA TESTING

Next, Appleby contends the trial court erred by admitting into evidence a computer-generated report regarding population statistics as they relate to DNA testing. Specifically, he argues his confrontation rights under the Sixth Amendment to the United States Constitution were violated as those rights were defined in *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Appendix E

The trial court admitted the testimony of Dana Soderholm, formerly a forensic scientist for the Johnson County Crime Laboratory —now with the Kansas Bureau of Investigation (KBI) Kansas City Regional Laboratory— who used the Polymerase Chain Reaction–Short Tandem Repeat (PCR–STR) DNA analysis to test various items containing mixtures of blood, and Lisa Dowler, a Kansas City Crime Laboratory forensic chemist, who ran DNA tests on A.K.'s sports bra. These experts were permitted to testify regarding the DNA statistical population data that was generated when they compared, via a computer software program, their tested DNA profiles with databases of DNA profiles. Dowler and the Kansas City laboratory where she is employed use a regional database. Soderholm and the Johnson County laboratory where she was employed use the Federal Bureau of Investigation's (FBI) national DNA database known as the Combined DNA Indexing System (CODIS); the Johnson County laboratory is certified by the FBI to use the database. As Soderholm explained, when a DNA profile from a crime matches the DNA profile from a suspect, a statistical analysis is performed to determine how rare or common that particular DNA profile is in the general population. Soderholm testified:

> "There is a software called Pop–Stats that is given to the labs by the CODIS group, and that is the information that we use. It is software that is already built in, and you do not get into the frequencies. You don't change any of that. You type in your alleles and the information is then calculated within the computer, and then you print it out.

Appendix E

....

> "... The normal procedure is if you have an inclusion, that you use Pop–Stats to generate your statistics."

For example, with regard to the blood on the ointment tube, Soderholm testified that it was consistent with Appleby's and the "probability of selecting an unrelated individual at random from the population whose DNA would match that DNA profile from the tube was 1 in 14.44 billion." And with regard to one of the blood stains from the sports bra, Dowler's testimony indicated that the chances of randomly selecting someone else in the population other than Appleby whose DNA would match the male DNA profile from the bra was "1 in 2 quadrillion."

Appleby filed a motion to exclude the State's DNA evidence, arguing,*inter alia,* that evidence of the application and use of population frequency databases by any witness who is not an expert in that field would violate his right of confrontation. After conducting a hearing, the trial court found that the use of DNA population databases did not present a *Crawford* issue because those databases are not, in and of themselves, testimonial in nature.

The trial court relied on *State v. Lackey,* 280 Kan. 190, Syl. ¶ 5, 120 P.3d 332 (2005), *cert. denied* 547 U.S. 1056, 126 S.Ct. 1653, 164 L.Ed.2d 399 (2006), *overruled on other grounds State v. Davis,* 283 Kan. 569, 158 P.3d 317 (2006), where this court concluded that "[f]actual, routine, descriptive, and nonanalytical findings made in an autopsy report are nontestimonial" and, therefore,

"may be admitted without the testimony of the medical examiner" who performed the autopsy. The trial court found:

> "The CODIS database simply represents a compilation of DNA information obtained over an extended time period from a large population sample, along with the ability to easily compare any sample with those already compiled. The CODIS database provides routine, descriptive information that, under *Crawford,* is nontestimonial, at least when presented through the testimony of a qualified DNA expert."

Disputing this conclusion, Appleby takes issue with the fact that Soderholm admitted during recross-examination that she did not know who provided the samples for the frequencies or how the databases were made. And although Soderholm had undergone some training regarding CODIS and population genetics, she was admittedly not a statistician.

Appleby, therefore, contends that he had the right to confront a statistician to explain the statistical principles used in the calculations. And he argues that he was denied any opportunity to cross-examine the FBI's random match probability estimates because the witnesses presented at trial did not prepare the database and had no personal knowledge of the methods and procedures the FBI used to compute the statistical estimates or the set of data upon which the calculations were based.

Appendix E

A. Standard of Review

Appleby's argument is subject to a de novo standard of review because he challenges the legal basis of the trial court's admission of evidence, specifically that the evidence was admitted in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Reid,* 286 Kan. 494, 503, 186 P.3d 713 (2008) (de novo standard applies to review of legal basis of admission of evidence); *State v. Henderson,* 284 Kan. 267, Syl. ¶ 2, 160 P.3d 776 (2007) (de novo standard applies to determination of whether the right to confrontation has been violated).

B. Testimonial

The starting point for Appleby's Sixth Amendment Confrontation Clause objection is the United States Supreme Court's holding in *Crawford* that the "testimonial statements" of witnesses absent from trial are admissible over a Confrontation Clause objection only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354. This analysis altered the prior rule of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *abrogated in Crawford,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, under which a hearsay statement made by an unavailable witness could be admitted without violating the Confrontation Clause if the statement contained adequate guarantees of trustworthiness or indicia of reliability. *Roberts,* 448 U.S. at 66, 100 S.Ct. 2531. Post-*Crawford,* the threshold question in any Confrontation Clause analysis is whether

the hearsay statement at issue is testimonial in nature. *State v. Brown,* 285 Kan. 261, 285, 173 P.3d 612 (2007).

The Supreme Court did not explicitly define the term "testimonial" in *Crawford.* The Court did state, however, that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354; see also *Davis v. Washington,* 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (in context of police interrogations, statements are nontestimonial when made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency).

Recently, in *Melendez–Diaz v. Massachusetts,* 557 U.S. ––––, 129 S.Ct. 2527, 174 L.Ed.2d 314, 321–22, 332–33 (2009), the second of the cases that led us to stay this opinion pending a United States Supreme Court decision, the Supreme Court held that forensic laboratory certificates of analysis were testimonial and the admission of the certificates without the testimony of the analysts violated a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment. In reaching the conclusion that the certificates were testimonial, the Supreme Court focused on two factors, stating: (1) "The 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' [Citation omitted]"; and (2) "the affidavits [were] ' "made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial.'" [Citation omitted.]" *Melendez–Diaz,* ––– U.S. at ––––, 129 S.Ct. at 2531, 174 L.Ed.2d at 321; *cf. Brown,* 285 Kan. at 291, 173 P.3d 612 (listing these and other factors to consider in determining if an eyewitness' statement is testimonial).

After finding the laboratory analysts' certificates met these tests to define testimonial hearsay, the *Melendez–Diaz* Court rejected the argument that a different result was justified by the objectivity of the scientific testing and reliability of the test results. The *Melendez–Diaz* majority, discussing this topic in the context of responding to points made by the four dissenting justices, observed:

> "This argument is little more than an invitation to return to our overruled decision in *Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the Confrontation Clause. [*Roberts,* 448 U.S.] at 66[, 100 S.Ct. 2531][ ]. What we said in *Crawford* in response to that argument remains true:
>
> "'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.... Dispensing with

> confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.' [*Crawford,*] 541 U.S. at 61–62 [, 124 S.Ct. 1354] [ ]." *Melendez–Diaz,* [––– U.S. at ––––, 129 S.Ct. at 2535–37,] 174 L.Ed.2d at 325–26.

This discussion is particularly relevant in this case because the State argues the scientific, objective nature of the DNA testing and the statistical probability program means the evidence at issue in this case is nontestimonial. The trial court accepted this argument and partially based its decision on such a rationale, as evidenced by the trial court's reliance on and citation to *Lackey,* 280 Kan. 190, Syl. ¶ 5, 120 P.3d 332, which in turn was partially based on the rationale that an autopsy report recorded objective, scientific evidence. *Melendez–Diaz* undercuts this rationale.

Nevertheless, *Melendez–Diaz* does not answer the question of whether there was a Confrontation Clause violation in this case. Here, unlike in *Melendez–Diaz,* the laboratory analysts who performed the DNA testing were in court and subject to cross-examination. The hearsay at issue is the data that was relied on by laboratory analyst Soderholm in reaching her opinion regarding population frequency of specific DNA profiles. The closest the *Melendez–Diaz* Court came to answering this question was to rebut the dissenting justices' argument that the holding would require several individuals from a laboratory to testify. The Court stated:

Appendix E

> "[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.... [D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Melendez–Diaz,* ––– U.S. at ––––, 129 S.Ct. at 2532 n. 1, 174 L.Ed.2d at 322 n. 1.

While this statement suggests that not all aspects of the testing process are testimonial and therefore subject to a defendant's rights under the Confrontation Clause, the examples differ from the question of whether the data that underlies an expert's opinion is testimonial. Therefore, the decision does not directly answer our question.

Nevertheless, applying the tests utilized in *Melendez–Diaz,* we conclude the population frequency data and the statistical programs used to make that data meaningful are nontestimonial. We first note that DNA itself is physical evidence and is nontestimonial. *Wilson v. Collins,* 517 F.3d 421, 431 (6th Cir.2008); *United States v. Zimmerman,* 514 F.3d 851, 855 (9th Cir.2007); see also *Schmerber v. California,* 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that "blood test evidence, although an incriminating product of compulsion, [is] neither ... testimony nor evidence relating to some communicative act or writing" and is therefore not protected by the Fifth Amendment).

Placing this physical evidence in a database with other physical evidence—*i.e.,* other DNA profiles—does not convert the nature of the evidence, even if the purpose of pooling the profiles is to allow comparisons that identify criminals. See 42 U.S.C. §§ 14132(b)(3), 14135e (2006) (stating purposes of CODIS and clearly recognizing use during trial when rules of evidence allow). The database is comprised of physical, nontestimonial evidence. Further, the acts of writing computer programs that allow a comparison of samples of physical evidence or that calculate probabilities of a particular sample occurring in a defined population are nontestimonial actions. In other words, neither the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination. Rather, it is the expert's opinion, which is subjected to cross-examination, that is testimonial.

At least one other court has reached the same conclusion that the statistical data obtained from CODIS is nontestimonial. See *State v. Bruce,* 2008 WL 4801648 (Ohio App.2008) (unpublished opinion). More generally, several courts have reasoned that the Confrontation Clause is not violated if materials that form the basis of an expert's opinion are not submitted for the truth of their contents but are examined to assess the weight of the expert's opinion. *E.g., United States v. Lombardozzi,* 491 F.3d 61, 73 (2d Cir.2007); *United States v. Henry,* 472 F.3d 910, 914 (D.C.Cir.2007); *United States v. Adams,* 189 Fed.Appx. 120, 124, 2006 WL 1888737 (3d Cir.2006) (unpublished opinion); *United States v. Stone,* 222 F.R.D. 334, 339 (E.D.Tenn.2004); *People v. Sisneros,* 174 Cal.

App.4th 142, 153–54, 94 Cal.Rptr.3d 98 (2009); *State v. Lewis,* 235 S.W.3d 136, 151 (Tenn.2007); see Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 after Crawford v. Washington,* 55 Hastings L.J. 1539, 1540 (2004).

Here, as explained in the testimony in this case, the database and the statistical program are accepted sources of information generally relied on by DNA experts. Based on this scientific data—which by itself is nontestimonial—the experts in this case developed their personal opinions. See *State v. Dykes,* 252 Kan. 556, 562, 847 P.2d 1214 (1993). These experts were available for cross-examination and their opinions could be tested by inquiry into their knowledge or lack of knowledge regarding the data that formed the basis for their opinion. Consequently, the right to confront the witnesses was made available to Appleby.

The trial court did not err in admitting the opinions of the DNA experts.

ISSUE 4. JURY INSTRUCTION ON PREMEDITATION

Appleby next contends that the trial court's instruction defining "premeditation," to which Appleby objected at trial, unfairly emphasized the State's theory and violated his right to a fair trial.

Appendix E

A. Standard of Review

When a party has objected to an instruction at trial, the instruction will be examined on appeal to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury. In making this determination an appellate court is required to consider the instructions as a whole and not isolate any one instruction. *State v. Scott,* 286 Kan. 54, 75, 183 P.3d 801 (2008); *State v. Edgar,* 281 Kan. 47, 54, 127 P.3d 1016 (2006).

B. Instruction and Arguments

The premeditation instruction given in this case tracks substantially with the pattern instruction defining premeditation, PIK Crim.3d 56.04(b). However, it contains some additional language, and it is this additional language to which Appleby objects. The instruction, with the language added to the PIK instruction in italics, stated:

> "Premeditation means to have thought the matter over beforehand. In other words, to have formed the design or intent to kill before the killing. *Stated another way, premeditation is the process of thinking about a proposed killing before engaging in the act that kills another person, but premeditation doesn't have to be present before a fight, quarrel, or struggle begins.* There is no specific time period required for premeditation, but it does require

> more that the instantaneous, intentional act of taking another person's life. *Premeditation can occur at any time during a violent episode that ultimately causes the victim's death.*" (Emphasis added.)

Appleby concedes in his appellate brief that the additional statements in the trial court's definition of premeditation are correct statements of law. See *State v. Gunby,* 282 Kan. 39, Syl. ¶ 9, 144 P.3d 647 (2006) ("Premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct, but it does not have to be present before a fight, quarrel, or struggle begins. Death by manual strangulation can be strong evidence of premeditation."); *State v. Scott,* 271 Kan. 103, 108, 21 P.3d 516, *cert. denied* 534 U.S. 1047, 122 S.Ct. 630, 151 L.Ed.2d 550 (2001) ("Premeditation does not have to be present *before* a fight, quarrel, or struggle begins."); see also *State v. Jones,* 279 Kan. 395, 404, 109 P.3d 1158 (2005) (citing *Scott,* 271 Kan. at 111, 21 P.3d 516, for the rationale that the jury could find defendant's "state of mind" changed from acting with intent to acting with premeditation "at any time during the violent episode before he caused the victim's death, including at any time during the strangulation.").

In fact, the record reflects that the trial court relied on *Gunby,* 282 Kan. 39, 144 P.3d 647, which was also a strangulation case, in drafting the instruction. The State suggests the trial judge in this case "believed his instruction was helpful to the jury to give them additional general rules that were not arguing one side or another of the case."

As Appleby notes, however, in *Gunby* the additional language was used in answering a question from the jury, not as part of the initial instruction to the jury. Appleby argues that including the language in the initial instruction unduly favored the State's theory of the case. More fundamentally, he argues it was per se error to deviate from the pattern instruction.

C. Deviation from Pattern Instruction

First, we address Appleby's general argument that it was inappropriate to deviate from a pattern instruction. Contrary to the implication of this argument, it is not mandatory for Kansas courts to use PIK instructions, although it is strongly advised. *State v. Mitchell,* 269 Kan. 349, 355–56, 7 P.3d 1135 (2000). As this court has stated:

> "The pattern jury instructions for Kansas (PIK) have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction or the addition of some instruction not included in PIK, the trial court should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed." *State v. Johnson,* 255 Kan. 252, Syl. ¶ 3, 874 P.2d 623 (1994).

Hence, we find no merit to Appleby's argument that error occurred simply because the trial court deviated from the pattern instruction.

D. Undue Emphasis

Second, we address Appleby's contention that the alteration to a PIK instruction may not single out and give undue emphasis to particular evidence, even if it correctly states the law. To support his argument, Appleby advances *State v. Cathey,* 241 Kan. 715, 741 P.2d 738 (1987), *disapproved on other grounds State v. Schoonover,* 281 Kan. 453, 133 P.3d 48 (2006).

In *Cathey,* the jury was instructed that evidence that a defendant had fled soon after the commission of the alleged offense could be considered as evidence of guilt if the jury found the defendant fled to avoid arrest and trial. The *Cathey* court observed that the instruction was a correct statement of the law; evidence to establish the defendant's consciousness of guilt such as flight, concealment, fabrication of evidence, or the giving of false information is admissible as evidence in a criminal case. *Cathey,* 241 Kan. at 730, 741 P.2d 738. But the *Cathey* court held it was clearly erroneous for the trial court to instruct the jury on the defendant's consciousness of guilt by flight because in *State v. McCorgary,* 218 Kan. 358, 365, 543 P.2d 952 (1975), *cert. denied* 429 U.S. 867, 97 S.Ct. 177, 50 L.Ed.2d 147 (1976), the court directed that in subsequent trials the entire instruction on consciousness of guilt should be omitted from the instructions to the jury; the *Cathey* court noted that the reason the instruction had been disapproved is that it emphasized and singled

out certain evidence admitted at a criminal trial. *Cathey,* 241 Kan. at 730–31, 741 P.2d 738.

In responding to Appleby's reliance on *Cathey,* the State makes two arguments. First, the State points out that *Cathey* was distinguished in *State v. Williams,* 277 Kan. 338, 85 P.3d 697 (2004). Second, the State argues *Cathey* can also be distinguished because the instruction in this case merely provides a correct legal definition of the term "premeditation" rather than instructs the jury how to apply the evidence as did the *Cathey* instruction.

Regarding the first point, the State is correct—*Williams* does distinguish *Cathey.* See *Williams,* 277 Kan. at 352–53, 85 P.3d 697. However, the distinction made in *Williams* bolsters Appleby's argument that there is a difference between emphasizing a theory when answering a question from a jury and when giving the initial instructions.

In *Williams,* as in *Gunby,* the defendant argued that the trial court erred in responding to the jury's question about premeditation. During its deliberations, the *Williams* jury asked: "How long beforehand does the thought have to occur to make it premeditation?"; the word "beforehand" was circled. *Williams,* 277 Kan. at 351, 85 P.3d 697. While the court responded that no particular amount of time was required, the jury later sought a more detailed definition of premeditation. It asked whether premeditation included a preconceived plan and asked for an explanation of the relationship between intent and premeditation. The trial court responded with a correct

statement of law, which was taken from *State v. Jamison,* 269 Kan. 564, 571–72, 7 P.3d 1204 (2000).

Williams, citing *Cathey,* 241 Kan. at 730–31, 741 P.2d 738, argued that the trial court's second response, without mention of his mental defect, emphasized the weight of the State's evidence of premeditation and, by the same token, deemphasized the weight of his evidence of mental defect. The *Williams* court found this reliance on *Cathey* to be faulty in that a response to an inquiry, unlike an instruction, is formulated in response to the particular question asked by the jury. A trial court's task in responding to an inquiry is to provide guidance with regard to the subject of the inquiry. "If the subject of the inquiry involves primarily the evidence of one party," said the *Williams* court, "the trial court may be hard pressed, in drafting a helpful response, to avoid singling out and emphasizing the weight of any party's evidence." *Williams,* 277 Kan. at 353, 85 P.3d 697. The *Williams* court concluded that the trial court appropriately gave a response that was formulated to help the jury understand premeditation, which had been the specific question asked by the jury. Furthermore, the *Williams* court stated that if the defendant had wanted the trial court to remind the jury of the mental defect or disease defense, he could have made a request to include the mental defect instruction among those the trial court asked the jury to reread. The *Williams* court held that there was no abuse of discretion. *Williams,* 277 Kan. at 353, 85 P.3d 697. As Appleby notes, however, the issue arises in this case because of the trial court's initial instructions, not because of an answer to a jury question.

The State recognizes this difference but argues the trial court was stating the law without emphasizing one side of the case or the other. To support this suggestion, the State cites *State v. Green,* 245 Kan. 398, 781 P.2d 678 (1989), which in turn is based on *State v. Beebe,* 244 Kan. 48, 766 P.2d 158 (1988). The State argues these cases suggest that the rationale of *Cathey* does not apply in this case because in *Cathey,* the instruction told the jury how to *apply* certain evidence in assessing the defendant's guilt or innocence and in this case—as in *Green* and *Beebe*—the instruction merely provided the legal *definition* of an element of the crime or factors to be considered. We agree this is a valid distinction and, in this regard, find *Beebe* to be the most analogous and helpful case for purposes of our analysis.

In *Beebe,* the defendant, who was appealing his jury trial convictions of first-degree murder and aggravated kidnapping, argued the trial court erred in instructing the jury it could infer malice, premeditation, and deliberation from the use of a deadly weapon in the killing. The *Beebe* court concluded it was error to instruct that premeditation and deliberation could be inferred from the use of a deadly weapon because that fact, standing alone, does not support such an inference. Rather, a gun could be used to kill in first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter. *Beebe,* 244 Kan. at 58, 766 P.2d 158.

On the other hand, the portion of the instruction relative to the inference of malice was upheld. Unlike the premeditation portion, the malice portion was an accurate

statement of the law, and the *Beebe* court pointed out that the instruction did not require or direct that malice be found from the use of a deadly weapon. The court stated: "The use of a deadly weapon is one of the evidentiary facts from which the jury could infer malice, but we conclude it is the better practice not to give a separate instruction thereon." *Beebe,* 244 Kan. at 60, 766 P.2d 158.

As in *Beebe,* the jury instruction defining premeditation in this case contained valid statements of Kansas law. While those statements of the law were added because of the facts of the case, they did not direct the jury to a result. In other words, in contrast to the instruction at issue in *Cathey*—where the instruction stated that evidence of flight could be considered as evidence of guilt—there was no statement in the instruction at issue in this case that evidence of a prolonged struggle or of strangulation could be considered as evidence of premeditation. Rather, the added language explained the law recognizing that premeditation must be present before the homicidal conduct but does not have to be present before a struggle begins.

Further, Appleby fails to show that the jury instruction in this case misled the jury or prejudiced him. Certainly, the instruction included an explanation of premeditation that Appleby would like to ignore; he would have liked the jury to have believed he had to have premeditated the murder before he entered the pool pump room because there was no evidence to support such a finding, while there was direct and overwhelming evidence of premeditation formed before A.K.'s death. A.K. suffered

a severe beating in which she sustained numerous cuts, bruises, and lacerations. And the back of A.K.'s head was bashed open in two places. Blood from A.K. and Appleby was found mixed together. There was evidence of both manual strangulation and ligature strangulation. According to expert testimony, it would have taken approximately 10 minutes—and perhaps as many as 16 minutes—for Appleby to strangle A.K. There were some periods when the force of strangulation was stopped, causing petechial hemorrhaging. The law supports a conclusion that under those facts there could have been premeditation, and the instruction merely informed the jury of that law. It did not direct them how to apply the evidence or unduly emphasize the State's case.

While we again emphasize that trial courts should follow the pattern instructions whenever possible, we find no error in the premeditation instruction given in this case.

ISSUE 5. HARD 50 SENTENCE: WEIGHING AGGRAVATING AND MITIGATING FACTORS

Next, Appleby argues the trial court abused its discretion in weighing the aggravating and mitigating circumstances in determining whether to impose the hard 50 sentence. Specifically, he contends that in weighing the circumstances, the court improperly viewed some of the mitigating evidence as being a negative or aggravating factor.

When reviewing the imposition of a sentence of life imprisonment without the possibility of parole for 50

years, an appellate court reviews the sentencing court's weighing of aggravating and mitigating circumstances under an abuse of discretion standard. *State v. Jones,* 283 Kan. 186, 215, 151 P.3d 22 (2007); *State v. Engelhardt,* 280 Kan. 113, 144, 119 P.3d 1148 (2005).

Because the crime in this case occurred in June 2002, the applicable sentencing statute is K.S.A.2001 Supp. 21–4635(a), which provided in part:

> "[I]f a defendant is convicted of the crime of capital murder and a sentence of death is not imposed, ... the court shall determine whether the defendant shall be required to serve ... for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law."

K.S.A.2001 Supp. 21–4635(b) directs the sentencing court to consider evidence of aggravating and mitigating circumstances in determining whether to impose a hard 50 sentence. If the court finds that one or more of the aggravating circumstances enumerated in K.S.A.2001 Supp. 21–4636 exist and that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances, the defendant "shall" receive the hard 50 sentence. K.S.A.2001 Supp. 21–4635(c).

Here, the sentencing court found that one aggravating circumstance existed—the defendant committed the crime in an especially heinous, atrocious, or cruel manner. K.S.A.2001 Supp. 21–4636(f). As a basis for

the aggravating circumstance, the court found (1) there was infliction of mental anguish or physical abuse before the victim's death and (2) there were continuous acts of violence before and continuing after the killing. K.S.A. 2001 Supp. 21–4636(f)(3), (5). Appleby does not raise any arguments disputing these findings.

At sentencing, Appleby asserted two statutory mitigating circumstances. See K.S.A. 21–4637 ("Mitigating circumstances shall include, but are not limited to" the listed factors.). First, he argued he was under the influence of extreme mental and emotional disturbances at the time of the incident. K.S.A. 21–4637(b). Second, Appleby contended his capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired because of his mental condition at the time of the incident. K.S.A. 21–4637(f). He also presented nonstatutory mitigating evidence that he was exposed to violence, substance abuse, lawless behavior, and abandonment during his youth.

At the sentencing hearing, Appleby presented the testimony of two experts, Dr. David George Hough, a clinical psychologist, and Dr. Edward Robert Friedlander, a board-certified anatomical and clinical pathologist.

Dr. Hough, who conducted psychological testing on Appleby, diagnosed him with intermittent explosive disorder, which Dr. Hough explained, is recognized as a mental disease or defect. According to Dr. Hough, such behavior is "driven by uncontrolled emotion, mainly rage," and it is "manifested by such correlates as hyperarousal,

a collapse of thinking or cognitive mediation." Focusing on the crime in this case, Dr. Hough opined that "something got kindled inside [Appleby], and what got kindled was this enormous rage that was way out of proportion to anything [A.K.] could have said or done.... The best I can tell is that this was not planned or organized or premeditated or rehearsed." Dr. Hough concluded that Appleby did not have complete control of himself during the event.

Dr. Friedlander gave expert opinion testimony regarding the events in the pool pump room. He did not view the crime scene or the autopsy, but he reviewed the report of Dr. Handler, who performed the autopsy in this case, spoke with Dr. Handler, and reviewed some of Dr. Handler's microscopic slides. Dr. Friedlander testified that in his opinion, A.K. was knocked out when she fell to the ground after being struck only one or two times in the mouth. Dr. Friedlander further opined that Appleby punched both of A.K.'s eyes while she was on the ground, unconscious. And he testified that he did not see evidence of petechial hemorrhaging; thus, one could not say with certainty how long A.K. had been strangled.

Appleby contends that the sentencing court did not give proper weight to his mitigating circumstances and went so far as to use the mental disorder as an aggravating circumstance against him in the balancing equation. He is specifically bothered by the court's asking at the sentencing hearing why the mental disorder was not an aggravating circumstance: "If [Appleby] has intermittent explosive disorder and is prone to strong outpourings of rage and behavior far out of proportion to anything that

occurs to him, why is that a reason for a lesser sentence instead of a greater sentence?" Defense counsel explained immediately, however, that it would show "he was not necessarily in control of his actions like the rest of us would be." The court then pointed to the jury's finding that the crime was premeditated. The court was clearly trying to understand how the two concepts could coexist.

Appleby also points to this statement in the court's sentencing memorandum: "To the extent that the defendant has 'intermittent explosive disorder,' as testified to by Dr. George Hough, that does not suggest a need to lock the defendant up for a shorter, rather than a longer, period." But Appleby fails to look at the surrounding context. In the preceding sentences, the court states that it gave "due consideration" to the mitigating circumstances presented by the defense, including the evidence, affidavits, and letters submitted by the defense. Then, in the sentence on which Appleby focuses, the court's statements regarding Dr. Hough's testimony suggest that the court *was* looking at the evidence as presented—mitigating circumstances. In the next sentence, the court indicates that Dr. Hough's testimony failed to explain the defendant's premeditated conduct, despite ample evidence to support the jury's verdict. Nowhere did the court say or even imply that Appleby was going to receive a longer sentence due to his alleged mental defect.

Appleby contends that the present case is similar to *Miller v. State,* 373 So.2d 882, 885 (Fla.1979), in which the Florida Supreme Court vacated the trial court's sentence of death because the trial court "considered as an aggravating factor the defendant's allegedly incurable

and dangerous mental illness." In addition, Appleby cites *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), which expressly left open the possibility that in a "weighing" state, infection of the process with an invalid aggravating factor might require invalidation of a death sentence. Both of these cases are inapplicable; in this case, the trial court considered the factor as a mitigator and did not improperly consider the factor as an aggravating circumstance.

The final authority advanced by Appleby is *State v. Legendre,* 522 So.2d 1249 (La.App.1988), where the defendant was convicted of second-degree battery and received 5 years of hard labor, the maximum sentence. The evidence supported the conclusion that the defendant had the necessary specific intent to inflict serious bodily injury on the victim. According to Louisiana law, maximum sentences could "be justified only in cases classified as 'extreme' by the factual circumstances of the offense and the apparent [dangerousness] of the defendant." *Legendre,* 522 So.2d at 1252.

The sentencing court had evidence that the defendant was a chronic paranoid schizophrenic, and Louisiana case law indicated that mental illness should be used as a mitigating circumstance. See *Legendre,* 522 So.2d at 1252. The Louisiana appellate court found that the trial court did not consider the defendant's mental condition a mitigating circumstance in imposing the sentence. Instead, the trial court seemed to consider it an aggravating circumstance by stating that the defendant's main problem was " 'his lack of insight to his illness and his refusal to take prescribed medication away from the

hospital.' " *Legendre,* 522 So.2d at 1253. The case was remanded for resentencing, the appellate court holding that when a person with a recognized, diagnosed mental illness is convicted of crimes, that condition should be considered to mitigate the type and length of sentence imposed on the offender, "even if he has been ruled legally sane." *Legendre,* 522 So.2d at 1253.

The laws in *Legendre* are inapplicable to the present case. Appleby essentially argues that the court failed to properly and carefully consider the mitigating evidence and, instead, focused only on evidence supporting the aggravating circumstance. But the sentencing court's comments clearly show that the court did properly consider and weigh the defendant's mitigators.

In this case, the trial court simply found that the State's aggravating circumstance outweighed the defendant's mitigating circumstances. It is well established that "'[w]eighing aggravating and mitigating circumstances is not a numbers game. "One aggravating circumstance can be so compelling as to outweigh several mitigating circumstances"' and vice versa. [Citations omitted.]" *Engelhardt,* 280 Kan. at 144, 119 P.3d 1148.

Appleby has failed to establish an abuse of discretion.

ISSUE 6. HARD 50 SENTENCE: CONSTITUTIONALITY

Appleby contends that the hard 50 sentencing scheme is unconstitutional because it permits the sentencing court

to find facts that enhance the available sentencing range, utilizing a preponderance of the evidence standard, in violation of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

This court has repeatedly rejected similar arguments challenging the constitutionality of the hard 40/hard 50 sentencing scheme and held our hard 50 scheme is constitutional. *State v. Johnson,* 284 Kan. 18, 22–23, 159 P.3d 161 (2007), *cert. denied,* 552 U.S. 1104, 128 S.Ct. 874, 169 L.Ed.2d 737 (2008); see also *State v. Warledo,* 286 Kan. 927, 954, 190 P.3d 937 (2008) (reaffirming *State v. Conley,* 270 Kan. 18, 11 P.3d 1147 [2000], citing *Johnson* with approval, and noting that the United States Supreme Court has not "altered decisions in which it recognized that the [*Apprendi*] prohibition does not apply when considering the minimum sentence to be imposed"); *State v. Albright,* 283 Kan. 418, 424, 153 P.3d 497 (2007). Appleby presents no persuasive reason to abandon this long line of precedent.

Affirmed in part, reversed in part, and sentence vacated in part.

McFARLAND, C.J., not participating.

DANIEL L. LOVE, District Judge, assigned.

Appendix E

JOHNSON, J., concurring in part and dissenting in part:

Beginning with the suppression issue, I first acknowledge the majority's thorough and thoughtful analysis of the more recent post-*Miranda* decisions. In my view, such a detailed synthesization of the cases is testament to the manner in which appellate courts have worked diligently and creatively to unnecessarily complicate, and thus emasculate, the straight-forward directive, pronounced in *Miranda* some 43 years ago and quoted by the majority, that "a pre-interrogation request for a lawyer ... affirmatively secures [the] right to have one." *Miranda v. Arizona,* 384 U.S. 436, 470, 86 S.Ct. 1602, 16 L.Ed.2d 694, *reh. denied* 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966). Nevertheless, even in the current environment, I would find that Appleby effectively invoked his Fifth Amendment right to counsel.

First, I would not require a detainee to possess the knowledge of a constitutional scholar well-versed in Fifth and Sixth Amendment jurisprudence. Rather, I would view the circumstances from the perspective of an objectively reasonable layperson interacting with an objectively reasonable law enforcement officer. In that context, even though only the officer knew that the arrest was pretextual, both could not have questioned that Appleby was actually in custody on the 6–year–old Connecticut charges, so as to trigger the protections applicable to custodial interrogations.

In that setting, Appleby asked Detective Jewiss about consulting with an attorney not once, but four times. The trial court found that Appleby had asserted his right to an attorney, albeit perhaps only for Sixth Amendment purposes. The majority questions, but does not decide, whether the wording of Appleby's requests was sufficient to support the trial court's finding. Without belaboring the point, I would simply submit that one might expect a detainee, who has been confronted in his home by a multitude of armed officers, arrested, and taken to jail, to propound a request for an attorney in a most polite and nonconfrontational manner. Moreover, Appleby's persistence in making a number of requests in a short period of time belies any equivocation as to his desire to have an attorney present or as to Detective Jewiss' understanding of that desire.

Granted, the majority discards two of Appleby's requests; one because it was made prior to his receiving the *Miranda* warnings and one because it was tied to the execution of the DNA search warrant. Even without those requests, however, Appleby still asked about consulting with an attorney twice after receiving the following Notice of Rights:

> "1. You are not obligated to say anything, in regard to this offense you are charged with but may remain silent.
>
> "2. Anything you may say or any statements you make may be used against you.

"3. You are entitled to the services of an attorney.

"4. If you are unable to pay for the services of an attorney you will be referred to a Public Defender Office where you may request the appointment of an attorney to represent you.

"5. You may consult with an attorney before being questioned, you may have an attorney present during questioning and you can not be questioned without your consent. X [Initialed:] BA

"6. (*Not applicable if you were arrested on a Superior Court Warrant which specified that bail should be denied or which ordered that you be brought before a clerk or assistant clerk of the Superior Court.*)

You have a right to be promptly interviewed concerning the terms and conditions of your release pending further proceedings, and upon request, counsel may be present during this interview."

A reasonably intelligent person could not read the plain language of paragraph 3 of that form and know, or even guess, that the "services of an attorney" to which he or she is facially unequivocally entitled are, as a matter of law, divided into two categories, *i.e.,* Fifth Amendment services and Sixth Amendment services. Accordingly, a detainee would need to possess excellent clairvoyance—or astute constitutional acumen—to ascertain that, if there is any way in which the detainee's request for an attorney

might be construed as being for Sixth Amendment purposes, then the right would not actually accrue or the request become effective until some undisclosed later time, after the detainee has been subjected to a custodial interrogation.

Likewise, the language of paragraph 5 would not, on its face, be confusing to a layperson. The detainee may consult with an attorney "*before being questioned* "; then the detainee may have an attorney present "*during questioning* "; but ultimately, the detainee may withhold consent to be questioned at all. However, from a temporal standpoint, a detainee dare not take his or her stated rights literally at the risk of being legally sandbagged. Under the authority cited by the majority, the right to consult with an attorney may be validly asserted only when authorities are conducting a custodial interrogation or when such interrogation is imminent. See 2 LaFave, Israel, King & Kerr, Criminal Procedure § 6.9(g), p. 869 n. 200 (3d ed.2007). In other words, contrary to the plain language in the Notice of Rights, an attempt to exercise of the right to "consult with an attorney *before* being questioned" will be deemed invalid as anticipatory, unless it is asserted *during* questioning.

Appleby faced one more explosive in the minefield that lay between the receipt of the Notice of Rights and the exercise of those rights. The form told Appleby that he could have an attorney present during questioning. Detective Jewiss propounded questions to Appleby during the book-in process, and Appleby twice asked about consulting an attorney while answering those questions. The majority flicks away that circumstance as

not being an "interrogation," noting parenthetically that the courts have recognized a "'routine booking question'" exception to *Miranda* for questions designed to obtain the "'"biographical data necessary to complete booking or pretrial services."'" *Pennsylvania v. Muniz,* 496 U.S. 582, 601, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

How was Appleby to know of this court-made exception? The Notice of Rights form did not suggest any exceptions. Detective Jewiss' self-serving testimony that he advised Appleby that someone else would be talking to him about the case does not change the fact that Detective Jewiss was "questioning" Appleby, even if it was not a legal interrogation for *Miranda* purposes. Moreover, the distinction between booking questions and case interrogation is less defined in this case, given that part of the biographical data, specifically Appleby's use of an alias, was to be an integral part of the prosecution. Nevertheless, I reject the notion that Appleby's invocation of his right to an attorney, made while he was in custody and being questioned by a law enforcement officer, was an anticipatory request that did not manifest an intent to have an attorney present during questioning, as he had been advised was his right.

Under the circumstances of this case, I would find that Appleby effectively invoked his Fifth Amendment right to counsel with respect to the Connecticut charges and in conformance with the Notice of Rights he had been given in that case. As the majority notes, *McNeil v. Wisconsin,* 501 U.S. 171, 176–77, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), instructs us that Appleby could not thereafter

be approached for further interrogation by the Kansas detectives. Accordingly, I would reverse the denial of the suppression motion.

I concur with the majority's result on the other issues. However, I feel compelled to voice my concerns, or perhaps merely display my lack of comprehension, on the stated law applicable to the double jeopardy and premeditation issues.

The majority notes that a constitutional claim of double jeopardy arises when a defendant is actually punished more than once for committing one offense. It then turns to the *State v. Schoonover,* 281 Kan. 453, 133 P.3d 48 (2006), paradigm of applying the strict-elements test to a unitary conduct, multiple-description scenario to determine what constitutes one offense. The rationale for that approach is to "implement the legislative declaration in [K.S.A. 21–3107] that a defendant may be convicted of two crimes arising from the same conduct unless one is a lesser included offense of the other." *Schoonover,* 281 Kan. at 498, 133 P.3d 48. In other words, if a person commits a single act, rather than two acts of discrete conduct, that person may be punished as many times as the legislature may dictate through its definition of the elements of various crimes.

In my view, that is tantamount to letting the tail wag the dog in the arena of constitutional jurisprudence. Under the separation of powers doctrine, the judiciary is to interpret the Constitution, *i.e.,* determine whether a person is being unconstitutionally subjected to multiple

punishments, rather than abdicating that responsibility to the legislature. To the contrary, by developing a test that implements K.S.A. 21–3107, we have permitted the legislature to tell the judiciary that the prohibition against multiple punishments guaranteed by the Double Jeopardy Clauses of our state and federal Constitutions simply does not apply in this state, unless perhaps a lesser included offense is involved. For instance, the legislature could effect a multiple punishment in nearly every speeding or other traffic infraction case by creating the crime of possessing a motor vehicle with the intent to use it to commit a traffic offense. See *State v. Cooper,* 285 Kan. 964, Syl. 3, 4, 179 P.3d 439 (2008) (offense of manufacturing methamphetamine does not have the same elements as offense of using drug paraphernalia to manufacture methamphetamine; multiple punishments for the same conduct is constitutional so long as the crimes have different elements). I simply cannot accept that constitutional rights are to be determined by the legislature.

Finally, tilting at one last windmill, I must express my frustration with the complete adulteration of the rather simple concept of premeditation. In my view, that concept was aptly described in a portion of the definition proffered in *State v. Gunby,* 282 Kan. 39, Syl. ¶ 9, 144 P.3d 647 (2006), which stated that "[p]remeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct." Unfortunately, that case, and others, have gone further by opining that premeditation does not have to be present before the commencement of a fight, quarrel, or struggle and declaring that manual

strangulation is strong evidence of premeditation. 282 Kan. 39, Syl. ¶ 9, 144 P.3d 647. Apparently, the suggestion is that, even though a killer may commence the homicidal conduct of manual strangulation without having thought over the matter beforehand, he or she may be deemed to have premeditated the killing if there is a possibility that the killer ruminated upon what he or she was doing *during* the murderous act, but before it actually caused the victim's death. To the contrary, I would find that premeditation, as the very word contemplates, requires that the matter be thought over *before* commencement of the homicidal conduct, whether the killing method be shooting, stabbing, strangulation, or some other means. Nevertheless, I concur with the majority in this case because of the evidence supporting two instances of strangulation, which would allow for a period of time to premeditate the killing before commencing the second, fatal strangulation.

APPENDIX F — SUPPLEMENTAL MEMORANDUM OF THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS CRIMINAL DEPARTMENT, FILED DECEMBER 27, 2006

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 04CR2934
Div. No. 8

STATE OF KANSAS,

Plaintiff,

vs.

BENJAMIN APPLEBY,

Defendant.

SUPPLEMENTAL MEMORANDUM EXPLAINING PRETRIAL CONFERENCE RULINGS

At the final pretrial conference, held November 21, 2006, the Court took up several motions filed by the defendant. The Court ruled on those motions at that time, but indicated that it would supplement its oral ruling with a more detailed memorandum.[1]

The motions addressed here raise issues relating to statutes defining the crimes charged against the

1. Though prepared before trial, this supplemental memorandum was inadvertently not filed at that time.

defendant or the potential sentences he could be given. Because the crime charged here occurred on June 18, 2002, all of the statutes have been cited and quoted as they existed at that time.

Motion to Preclude State from Pursuing the Capital-Murder Charge

Defendant seeks to force the State to change its charge against the defendant from capital murder to first-degree murder. In its complaint, the State has charged the defendant with capital murder and attempted rape. After arraignment, however, the State did not file a notice under K.S.A. 21-4624 that it would seek a death sentence upon conviction. Accordingly, a death sentence may not be sought. Defendant argues that since the death penalty is no longer an option in the case, the State should not be allowed to proceed on a capital-murder charge because doing so would only serve to sensationalize the charge.

Under Kansas law, all crimes are statutory: there are no common-law crimes.[2] Thus, in the first instance, it is up to the Legislature to define what is a crime. The Legislature has separately established the crimes of capital murder[3] and first-degree murder.[4] The Legislature has also recognized that a prosecutor may — or may not

2. K.S.A. 21-3102; *State v. Gloyd*, 148 Kan. 706, 709, 84 P.2d 966, 968 (1938).

3. K.S.A. 21-3439.

4. K.S.A. 21-3401.

— seek the death penalty in a capital-murder case: K.S.A. 21-4624 requires notice within five days of arraignment if the death penalty is to be sought. That statute makes no suggestion that the failure to provide that notice eliminates the State's ability to proceed on a charge of capital murder.

In response to the defendant's motion, the State properly notes that the prosecutor is given the responsibility of determining what charges will be brought against a defendant. As the Kansas Supreme Court noted in *State v. Williamson*,[5] the discretion given to a prosecutor includes the discretion "to determine who shall be prosecuted and what crimes shall be charged."[6] The main function provided by a trial court in checking abuse of the discretion of the prosecutor comes at preliminary hearing, when the court determines whether the prosecutor has presented sufficient evidence against the defendant to proceed with the case.[7] After an extensive preliminary hearing in this case, the Court found sufficient evidence to bind this defendant over on both charges.

In support of his motion, defendant cites no case remotely on point. This is because there simply is no

5. 253 Kan. 163, 165, 853 P. 2d 56, 58 (1993). *Accord: State v. Cope*, 30 Kan. App. 2d 893, 893, 50 P.3d 513, 514 (2002) (Syl. ¶12).

6. 253 Kan. at 165, 853 P.2d at 58.

7. *See generally* Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 14.1 (4th ed. 2004) (primary purpose of preliminary hearing is as an independent screening of the prosecutor's charging decision, which provides a check on malicious or oppressive prosecutions).

authority for a court to tell a prosecutor that he may not proceed against a defendant on a statutorily defined charge when there is sufficient evidence in place to support the charge. Those decisions are properly made in the Executive Branch, represented by the prosecutor, not the Judicial Branch, represented by the trial judge. The Kansas Supreme Court made this point quite clearly in *Williamson:* "Allowing judicial oversight of what is essentially a function of the prosecutor's office amounts to an impermissible judicial intrusion into the prosecutor's function and erodes executive power."[8] Defendant's motion must be denied.

Motion to Declare K.S.A. 21-4635 Unconstitutional

Defendant next asks the Court to declare the sentencing process mandated by K.S.A. 21-4635 unconstitutional. Under that statute, if a defendant is convicted either of capital murder or the lesser-included offense of first-degree murder, the trial judge determines in a separate sentencing proceeding whether a mandatory prison term of 50 years should be imposed. Such a sentence is generally referred to as a "hard 50" sentence, since it must be fully served—with no credits for good behavior in prison—before a defendant is eligible for parole. What the judge is determining through this process actually is not the sentence the defendant will receive—K.S.A. 21-4706(c) provides for a sentence of life in prison on conviction either for capital murder or first-degree murder. The judge merely determines when the defendant will be eligible for parole: 25 years, as provided for in most cases under

8. 253 Kan. at 163, 853 P.2d at 57 (Syl. ¶5).

K.S.A. 22-3717(b)(l), or 50 years, as provided for in K.S.A. 21-4635 *et seq.* when aggravating circumstances are not outweighed by mitigating ones.

Defendant argues that the procedure of K.S.A. 21-4635 is flawed because factual findings are made during the sentencing hearing by the judge, not a jury. Defendant concedes that his argument is contrary to the Kansas Supreme Court's 2000 ruling in *State v. Conley,*[9] but argues that this Court should grant his motion either by finding that the Kansas Supreme Court got it wrong in *Conley* or that the reasoning of *Conley* has, in effect, been overruled by later United States Supreme Court decisions. The State counters that the Kansas Supreme Court rejected a constitutional challenge to this statute within the past two months in *State v. Reed.*[10]

It is fundamental to the rule of law that trial courts follow the precedents of the appellate courts. Lower courts are "duty bound" to follow the precedents of the Kansas Supreme Court "absent some indication that the court is departing from its previous position."[11] The Kansas Supreme Court has upheld the hard-50 sentencing statute three times in the past six months—in *Reed,*[12] *State v.*

9. 270 Kan. 18, 11 P.3d 1147 (2000).

10. __ Kan. __, 144 P.3d 137 (2006).

11. *State v. Smith*, __ Kan. App. 2d __, 142 P.3d 739, __ (2006) (holding that the Kansas Court of Appeals is so limited).

12. __ Kan. __, 144 P.3d 137 (2006).

Kirtdoll,[13] and *State v. Lawrence*.[14] This Court is clearly bound by those decisions. Defendant's motion must be denied.

/s/_____
Steve Leben
District Judge

13. 281 Kan. 1138, 136 P.3d 417 (2006).

14. 281 Kan. 1081, 135 P.3d 1211 (2006).

APPENDIX G — DENIAL OF REHEARING OF THE SUPREME COURT OF KANSAS, DATED JUNE 8, 2021

SUPREME COURT OF KANSAS

Appellate Case No. 19-122281-S

District Court Case No. 04CR2934

STATE OF KANSAS,

Appellee,

v.

BENJAMIN A. APPLEBY,

Appellant.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION FOR REHEARING OR MODIFICATION BY PARTY.

CONSIDERED BY THE COURT AND DENIED.

Dated: June 8, 2021

Douglas T. Shima
Clerk of the Appellate Courts

APPENDIX H — RELEVANT STATUTORY PROVISIONS

2006 Kansas Code - 21-4635

21-4635. Sentencing of certain persons to mandatory term of imprisonment of 40 or 50 years or life without the possibility of parole; determination; evidence presented; balance of aggravating and mitigating circumstances. (a) Except as provided in K.S.A. 21-4622, 21-4623 and 21-4634 and amendments thereto, if a defendant is convicted of the crime of capital murder and a sentence of death is not imposed pursuant to subsection (e) of K.S.A. 21-4624, and amendments thereto, or requested pursuant to subsection (a) or (b) of K.S.A. 21-4624, and amendments thereto, the defendant shall be sentenced to life without the possibility of parole.

(b) If a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law.

(c) In order to make such determination, the court may be presented evidence concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4636 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be

received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing shall be admissible and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

(d) If the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 21-4636 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced pursuant to K.S.A. 21-4638 and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The court shall designate, in writing, the statutory aggravating circumstances which it found. The court may make the findings required by this subsection for the purpose of determining whether to sentence a defendant pursuant to K.S.A. 21-4638 and amendments thereto notwithstanding contrary findings made by the jury or court pursuant to subsection (e) of K.S.A. 21-4624 and amendments thereto for the purpose of determining whether to sentence such defendant to death.

Appendix H

2006 Kansas Code - 21-4636

21-4636. Same; aggravating circumstances. Aggravating circumstances shall be limited to the following:

(a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

(b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

(c) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(d) The defendant authorized or employed another person to commit the crime.

(e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(f) The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. In making a determination that the crime was committed in an especially heinous, atrocious or cruel manner, any of the

following conduct by the defendant may be considered sufficient:

(1) Prior stalking of or criminal threats to the victim;

(2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;

(3) infliction of mental anguish or physical abuse before the victim's death;

(4) torture of the victim;

(5) continuous acts of violence begun before or continuing after the killing;

(6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or

(7) any other conduct in the opinion of the court that is especially heinous, atrocious or cruel.

(g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

Appendix H

2006 Kansas Code - 21-4637

21-4637. Same; mitigating circumstances. Mitigating circumstances shall include, but are not limited to, the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

(c) The victim was a participant in or consented to the defendant's conduct.

(d) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

(e) The defendant acted under extreme distress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

Appendix H

2006 Kansas Code - 21-4638

21-4638. Same; imposition of sentence of mandatory imprisonment of 40 years or 50 years. When it is provided by law that a person shall be sentenced pursuant to this section, such person shall be sentenced to imprisonment for life and shall not be eligible for probation or suspension, modification or reduction of sentence. Except as otherwise provided, in addition, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 40 years' imprisonment, and such 40 years' imprisonment shall not be reduced by the application of good time credits. For crimes committed on and after July 1, 1999, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 50 years' imprisonment, and such 50 years' imprisonment shall not be reduced by the application of good time credits. Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced pursuant to K.S.A. 21-4638 and amendments thereto.

Appendix H

2006 Kansas Code - 21-4639

21-4639. Same; provisions of act held unconstitutional; modification of sentence previously determined under this act. In the event the mandatory term of imprisonment or any provision of this act authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law.

Appendix H

2019 Kansas Code - 21-6628

21-6628. Provisions of certain sentencing rules held unconstitutional; modification of sentence previously determined. (a) In the event the term of imprisonment for life without the possibility of parole or any provision of K.S.A. 2019 Supp. 21-6626 or 21-6627, and amendments thereto, authorizing such term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no term of imprisonment for life without the possibility of parole and shall sentence the defendant to the maximum term of imprisonment otherwise provided by law.

(b) In the event a sentence of death or any provision of chapter 252 of the 1994 Session Laws of Kansas authorizing such sentence is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law.

(c) In the event the mandatory term of imprisonment or any provision of chapter 341 of the 1994 Session Laws of Kansas authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such

person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law.