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STATUTORY PROVISION

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING CERTIFICATE OF APPEALABILITY* (SEPTEMBER 9, 2021)

858 Fed. Appx. 278 (2021)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMONEO LEE,

Petitioner-Appellant,

v.

DAN SCHNURR; DEREK SCHMIDT,

Respondents-Appellees.

No. 21-3098

(D.C. No. 5:20-CV-03231-SAC) (D. Kan.)

Before: HOLMES, KELLY, and McHUGH, Circuit Judges.

Petitioner-Appellant Amoneo Lee, a state inmate represented by counsel, seeks a Certificate of Appealability (COA) to appeal from the district court's

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

dismissal of his habeas petition, 28 U.S.C. § 2254, as time barred. *See Lee v. Schnurr*, No. 20-3247, 2021 WL 1840054, at *3 (D. Kan. May 7, 2021). Mr. Lee was sentenced to life imprisonment without the possibility of parole for 40 years, otherwise known as "a hard 40 sentence." He argues that reasonable jurists could debate whether the limitations period of 28 U.S.C. § 2244(d)(1) should be equitably tolled because he is actually innocent of the sentence, relying upon *Alleyne v. United States*, 570 U.S. 99 (2013). He also contends that *Alleyne* should be applied retroactively. Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

To obtain a COA, Mr. Lee must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court rejected the petition on procedural grounds, the petitioner must demonstrate not only that reasonable jurists would find the district court's resolution of the procedural issue debatable, but also whether the petition states a valid constitutional claim regarding the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Mr. Lee argues that the limitation period should be equitably tolled based on his claim that he is actually innocent of the sentence and that Alleyne should be applied retroactively.

BACKGROUND

In 1997, Mr. Lee was sentenced after a jury convicted him of first-degree murder and criminal possession of a firearm, and his convictions were affirmed on direct appeal. *State v. Lee*, 977 P.2d 263 (Kan. 1999). The Kansas courts have rejected his claim that his sentence is unconstitutional given judge-

found aggravating facts that increased his sentence, most recently in *Lee v. State*, 419 P.3d 81 (Kan. Ct. App. 2018) (unpublished), *review denied* (Kan. Feb. 28, 2019).

DISCUSSION

Mr. Lee argues that the one-year limitation period should be equitably tolled based on his claim of actual innocence. Aplt. Br. at 5, 10. Equitable tolling or a fundamental miscarriage of justice in the form of actual innocence may excuse a time bar. Compare

Holland v. Florida, 560 U.S. 631, 649 (2010), with *McQuiggin v. Perkins*, 569 U.S. 383, 392–94 (2013). For equitable tolling to apply, Mr. Lee must show that an "'extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Mr. Lee's only alleged extraordinary circumstance is *Alleyne*, which does not qualify. *United States v. Hopson*, 589 F. App'x 417, 418 (10th Cir. 2015) (unpublished).[1]

To qualify for a miscarriage of justice exception, he must show an actual innocence that means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Mr. Lee acknowledges that we have held that a person cannot be innocent of a non-capital sentence given a statutory sentence enhancement. *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993). We have concluded that such claims are not reasonably debatable. *See Jones v. Martin*, 622 F. App'x 738, 739–40 (10th Cir. 2015) (unpublished). This claim fares no better under more

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[1] We cite this and other unpublished dispositions only for their persuasive value. 10th Cir. R. 32.1.

recent decisions. *Brooks-Gage v. Martin*, No. 21-7008, 2021 WL 3745199, at *3 (10th Cir. Aug. 25, 2021); *see also, e.g., Reeves v. Fayette SCI*, 897 F.3d 154, 160 (3d Cir. 2018); *United States v. Jones*, 758 F.3d 579, 584–86 (4th Cir. 2014).

Moreover, Alleyne's status as non-retroactive on collateral review is "a settled rule," *United States v. Jackson*, 995 F.3d 1308 (11th Cir. 2021) (en banc) (Pryor, C.J., respecting denial of reh'g en banc), and one observed by all 11 circuit courts to have considered it, including this one, *see United States v. Salazar*, 784 F. App'x 579, 584 (10th Cir. 2019) (unpublished).

We DENY the COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

**MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(MAY 7, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMONEO LEE,

Petitioner,

v.

DAN SCHNURR, WARDEN, HUTCHINSON CORRECTIONAL FACILITY, ET AL.,

Respondents.

Case No. 20-3247-SAC

Before: Sam A. CROW, U.S. Senior District Judge.

This matter is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The Court entered an Order to Show Cause (Doc. 3) ("OSC"), directing Petitioner to show good cause why his Petition should not be dismissed for failure to commence this action within the one-year limitation period. This matter is before the Court on Petitioner's Response (Doc. 4).

Petitioner filed the instant § 2254 petition in this Court on September 13, 2020. Petitioner alleges as Ground One that the Supreme Court's decision in

Alleyne announced a new substantive rule of constitutional law, which must be applied retroactively to cases on collateral review. As Ground Two, Petitioner claims in the alternative that *Alleyne* announced a watershed rule of criminal procedure that must be applied retroactively to cases on collateral review under *Teague v. Lane*. Petitioner alleges that he raised the issues in Grounds One and Two in Case No. 16–CV–2009.

The Court's OSC set forth the procedural background and found that the Petition is not timely and is subject to dismissal unless Petitioner can demonstrate grounds for equitable or statutory tolling. Petitioner acknowledges in his Response that the one-year statute of limitations expired before the filing of his Petition, and that there is no statutory basis for tolling. (Doc. 4, at 2.) However, he argues that the limitation period should be equitably tolled based on his actual innocence. *Id*.

The Court noted in the OSC that the one-year limitation period is subject to equitable tolling "in rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (2000) (citation omitted). Where a prisoner seeks equitable tolling on the ground of actual innocence, the prisoner "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536–37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The prisoner must come forward with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

Petitioner argues in his Petition that *United States v. Alleyne*, 570 U.S. 99 (2013), was not decided until 2013, and "[t]he one-year statute of limitations should be equitably tolled because the Petitioner is innocent of the Hard 40 sentence, as the statute under which the sentence was imposed was unconstitutionally void from its inception, and any sentence imposed under said statute is void ab initio." (Doc. 1, at 12.) Likewise, in his Response he argues that "actual innocence" claims are not limited to assertions of factual innocence; rather "actual innocence" can be asserted through a claim that the petitioner is actually innocent of the underlying sentence. (Doc. 4, at 2.)

The Tenth Circuit has rejected similar arguments. In *Jones v. Martin*, the Tenth Circuit held that the equitable exception for a "fundamental miscarriage of justice" applies only when "new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *Jones v. Martin*, 622 F. App'x 738, 739 (10th Cir. 2015) (unpublished) (citations omitted). The Tenth Circuit found that the petitioner could not meet this standard because he did not "assert actual innocence of the crimes for which he was convicted" and instead asked the court to expand the exception, "arguing he is innocent of his *sentence*." *Id*. at 739–40 (emphasis in original). The Tenth Circuit noted that the court has held that a "person cannot be actually innocent of a noncapital sentence." *Id*. at 740 (citing *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993) (concluding that petitioner's claim of actual innocence did not satisfy fundamental-miscarriage-of-justice exception to procedural bar because he sought only a shorter sentence and did not claim innocence of the offense); *accord United States*

v. Denny, 694 F.3d 1185, 1190–91 (10th Cir. 2012); *see also Sawyer v. Whitley*, 505 U.S. 333, 341–42 (1992) (explaining that "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp"—it means "the State has convicted the wrong person of the crime.")).

Petitioner attempts to distinguish this case by arguing that under *Alleyne* "the aggravating circumstances under the Kansas Hard 40 statute are elements of a new and aggravated crime, *i.e.* the core crime of premeditated murder plus one or more aggravating circumstances that must be found by a jury beyond a reasonable doubt." (Doc. 4, at 4.) However, arguments relying on *Alleyne* to show actual innocence or to provide equitable tolling have likewise been rejected.

The Tenth Circuit has noted that *Alleyne* allocates decision-making authority between the judge and jury and "the Court has repeatedly held '[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules.'" *United States v. Salazar*, 784 F. App'x 579, 583 (10th Cir. 2019) (unpublished) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). In *Salazar*, the petitioner argued his sentence was illegal and that he was actually innocent of any sentence above his statutory maximum. *Salazar*, 784 F. App'x at 585. The Tenth Circuit held that no reasonable jurist could debate the district court's rejection of this claim "because Salazar's contentions only challenged the 'legal sufficiency of his sentence and d[id] not demonstrate that he is innocent of the underlying offense.'" *Id*. (citation omitted). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Id*. (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)); *see also United States v. Olvera*, 775 F.3d

726, 731 (10th Cir. 2015) (finding that *Alleyne* extended *Apprendi* and that neither were within the "watershed" exception because "the accuracy improved by *Apprendi* is in the imposition of a proper sentence rather than the determination of guilt or innocence"); *see also McCoy v. Maye*, No. 14-3104-RDR, 2015 WL 413642, at *3 (D. Kan. Jan. 30, 2015) ("Petitioner's allegations that he was sentenced under a statute that did not apply to him and that *Alleyne* entitles him to relief are legal arguments that do not qualify him for the 'actual innocence exception'".).

The Tenth Circuit has rejected arguments that the Supreme Court's decision in *Alleyne* "restarts the clock" to render a petition timely. *United States v. Hopson*, 589 F. App'x 417 (10th Cir. 2015) (unpublished). The Tenth Circuit found that the decision in *Alleyne* did "not constitute an extraordinary circumstance that merits equitable tolling." *Id*. at 418 (citing *United State v. Tenderholt*, No. 14-8051, 587 F. App'x 505, 2014 WL 7146025, at *2 (10th Cir. Dec. 16, 2014) (unpublished) (rejecting equitable tolling argument premised on *Descamps*); *Clark v. Bruce*, 159 F. App'x 853, 856 (10th Cir. 2005) (unpublished) (rejecting equitable tolling argument where Supreme Court decisions at issue were not made retroactively applicable)).

Petitioner cites *McQuiggin v. Perkins*, for the proposition that the miscarriage of justice exception survived the AEDPA's passage, and states that the petitioner in *McQuiggin* "asserted a claim of factual innocence as a gateway through which he could assert defaulted constitutional claims, such as ineffective assistance of counsel." (Doc. 4, at 2.) However, Petitioner does not merely argue that *Alleyne* is the gateway for him to assert his claims, his claims are

also based on *Alleyne*. Thus, even if he could successfully argue for equitable tolling, his underlying claims based on *Alleyne* would need retroactive application to survive.

Petitioner cannot rely on a retroactive application of the decision in *Alleyne*. The Tenth Circuit has held that *Alleyne* does not apply retroactively. *See Salazar*, 784 F. App'x at 584 (stating that "[n]o court has ever recognized *Alleyne* as retroactive") (citing *United State v. Hoon*, 762 F.3d 1172, 1173 (10thCir. 2014)); *United States v. Stang*, 561 F. App'x 772, 773 (10th Cir. May 28, 2014) (unpublished) (stating that "[w]e have held that, although the Supreme Court in *Alleyne* did recognize a new rule of constitutional law, the Supreme Court did not hold that the new rule was retroactively applicable to cases on collateral review") (citing *In re Payne*, 733 F.3d 1027, 1029–30 (10th Cir. 2013)); *see also United States v. Rogers*, 599 F. App'x 850, 851 (10th Cir. April 17, 2015) (unpublished) (stating "[b]ut *Alleyne* wasn't decided until after Mr. Roger's sentencing, we have held that *Alleyne* doesn't apply retroactively on collateral review").

Petitioner has failed to show good cause why the Petition should not be dismissed. Therefore, the Petition is dismissed for the reasons set forth herein and in the OSC.

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability ("COA") upon entering a final adverse order. A COA may issue only if the petitioner made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim,

a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The failure to satisfy either prong requires the denial of a COA. *Id*. at 485. The Court finds nothing in the present record that suggests its ruling is debatable or an incorrect application of the law and therefore declines to issue a certificate of appealability.

IT IS THEREFORE ORDERED THAT the Petition is dismissed as barred by the statute of limitations.

IT IS FURTHER ORDERED that a Certificate of Appealability will not issue.

IT IS SO ORDERED.

Dated May 7, 2021, in Topeka, Kansas.

/s/ Sam A. Crow
U.S. Senior District Judge

ORDER TO SHOW CAUSE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (NOVEMBER 16, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMONEO LEE,

Petitioner,

v.

DAN SCHNURR, WARDEN, HUTCHINSON CORRECTIONAL FACILITY, ET AL.,

Respondents.

Case No. 20-3247-SAC

Before: Sam A. CROW, U.S. Senior District Judge.

This matter is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The Court has conducted an initial review of the Petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. For the reasons that follow, the Court directs Petitioner to show cause why this matter should not be dismissed.

BACKGROUND

Petitioner was convicted by a jury of first-degree murder and criminal possession of a firearm. *State v. Lee*, Case No. 96-CR-1375 (Sedgwick County District Court). Petitioner was sentenced in 1997 to a hard 40 sentence. Petitioner appealed and the Kansas Supreme Court affirmed on March 5, 1999. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

Petitioner filed his first state habeas petition in Sedgwick County District Court (Case No. 00-CV-1206) on April 17, 2000, which remained pending until the Kansas Supreme Court denied review in 2001. *Lee v. State*, No. 86,058 (Kan. Ct. App. Oct. 12, 2001), *rev. denied* 272 Kan. 1418 (2001). Petitioner filed four additional state petitions or motions in Sedgwick County District Court: the second petition (Case No. 04-CV-2700) was filed on June 25, 2004, and the Kansas Court of Appeals affirmed on July 20, 2007 (Case No. 96,286); the first motion to correct illegal sentence (Case No. 96-CR-1375) was filed on July 28, 2008, and remained pending until the Kansas Supreme Court affirmed on January 21, 2011 (*State v. Lee*, Case No. 101,638, 245 P.3d 1056 (Table), 2011 WL 433533); the second motion to correct illegal sentence was filed on August 11, 2014, and remained pending through April 29, 2016, when the Kansas Supreme Court reversed the district court's decision granting the motion (*State v. Lee*, 304 Kan. 416, 372 P.3d 415 (April 29, 2016)); and the third petition (Case No. 16-CV-2009) was filed on September 1, 2016, and remained pending through February 28, 2019, when the Kansas Supreme Court denied review (*Lee v. State*, Case No. 117,813, 419 P.3d 81 (Table), 2018 WL 2271398 (Kan. Ct. App. May 18, 2018), *rev. denied* (Feb. 28, 2019)).

Petitioner filed the instant § 2254 petition in this Court on September 13, 2020. Petitioner alleges as Ground One that the Supreme Court's decision in *Alleyne* announced a new substantive rule of constitutional law, which must be applied retroactively to cases on collateral review. As Ground Two, Petitioner claims in the alternative that *Alleyne* announced a watershed rule of criminal procedure that must be applied retroactively to cases on collateral review under *Teague v. Lane*. Petitioner alleges that he raised the issues in Grounds One and Two in Case No. 16-CV-2009.

DISCUSSION

This action is subject to the one-year limitation period established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in 28 U.S.C. § 2244(d). Section 2244(d)(1) provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

> recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The one-year limitation period generally runs from the date the judgment becomes "final," as provided by § 2244(d)(1)(A). *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000). Under Supreme Court law, "direct review" concludes when the availability of direct appeal to the state courts and request for review to the Supreme Court have been exhausted. *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). The Rules of the U.S. Supreme Court allow ninety days from the date of the conclusion of direct appeal to seek certiorari. Sup. Ct. R. 13(1). "[I]f a prisoner does not file a petition for writ of certiorari with the United States Supreme Court after [his] direct appeal, the one-year limitation period begins to run when the time for filing a certiorari petition expires." *United States v. Hurst*, 322 F.3d 1256, 1259 (10th Cir. 2003). The limitation period begins to run the day after a conviction becomes final. *See Harris v. Dinwiddie*, 642 F.3d 902, 906-07 n.6 (10th Cir. 2011).

The statute also contains a tolling provision:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

> counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Finally, the one-year limitation period is subject to equitable tolling "in rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (2000) (citation omitted). This remedy is available only "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). Circumstances that warrant equitable tolling include "for example, when a prisoner is actually innocent, when an adversary's conduct—or other uncontrollable circumstances—prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a deficient pleading during the statutory period." *Gibson*, 232 F.3d at 808 (internal citations omitted). Likewise, misconduct or "egregious behavior" by an attorney may warrant equitable tolling. *Holland v. Florida*, 560 U.S. 631, 651 (2010). However, "[s]imple excusable neglect is not sufficient." *Gibson*, 232 F.3d at 808 (citation omitted).

Where a prisoner seeks equitable tolling on the ground of actual innocence, the prisoner "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The prisoner must come forward with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

Petitioner's conviction and sentence were affirmed by the Kansas Supreme Court on March 5, 1999. Petitioner had ninety days from the date of the conclusion of direct appeal to seek certiorari. Where a prisoner declines to seek review in the Supreme Court, the limitation period begins to run the day after the ninety-day period for seeking review in the Supreme Court expires. *See Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011). Because Petitioner did not seek review in the Supreme Court, his time began to run on or about June 4, 1999, and ran until he filed his first state habeas action on April 17, 2000. Thus, approximately 315 days ran prior to his first state habeas action, leaving 50 days remaining. Even if any periods between his state petitions and motions are not counted, Petitioner's last petition ceased to be pending on February 28, 2019, when the Kansas Supreme Court denied review. Petitioner did not file the instant federal petition until September 13, 2020, more than a year later.

Petitioner argues that *Alleyne* was not decided until 2013, and "[t]he one-year statute of limitations should be equitably tolled because the Petitioner is innocent of the Hard 40 sentence, as the statute under which the sentence was imposed was unconstitutionally void from its inception, and any sentence imposed under said statute is void ab initio." (Doc. 1, at 12.)

Petitioner made the same arguments in his state habeas petition. The state district court denied Petitioner's state habeas petition in Case No. 16CV2009, based on the Kansas Supreme Court's decision in *Kirtdoll v. State*, No. 114,465 (Kan. May 12, 2017). *Lee v. State*, Case No. 16CV2009 (Sedgwick County District Court, April 21, 2017). The district court noted that

the court in *Kirtdoll* held that the rule of law declared in *Alleyne* "cannot be applied retroactively to cases that were final when Alleyne was decided." *Id.* The court then found that Petitioner's case was final when *Alleyne* was decided and "*Alleyne's* prospective-only change in the law cannot provide the exceptional circumstances that would justify a successive 60-1507 motion." *Id.* The Kansas Court of Appeals affirmed the denial of Petitioner's state habeas petition. *Lee v. State*, No. 117,813, 419 P.3d 81(Table) (Kan. Ct. App. May 18, 2018).

Plaintiff's claims are based on his argument that the Kansas state courts improperly ruled that the Supreme Court's decision in *Alleyne* did not apply retroactively to provide Plaintiff with relief. The Tenth Circuit has likewise held that *Alleyne* does not apply retroactively. *See United States v. Stang*, 561 F. App'x 772, 773 (10th Cir. May 28, 2014) (unpublished) (stating that "[w]e have held that, although the Supreme Court in *Alleyne* did recognize a new rule of constitutional law, the Supreme Court did not hold that the new rule was retroactively applicable to cases on collateral review") (citing *In re Payne*, 733 F.3d 1027, 1029-30 (10th Cir. 2013)); *see also United States v. Rogers*, 599 F. App'x 850, 851 (10th Cir. April 17, 2015) (unpublished) (stating that "[b]ut *Alleyne* wasn't decided until after Mr. Roger's sentencing, we have held that *Alleyne* doesn't apply retroactively on collateral review").

The *Rooker-Feldman* doctrine establishes that a federal district court lacks jurisdiction to review a final state court judgment because only the Supreme Court has jurisdiction to hear appeals from final state court judgments. *See Bear v. Patton*, 451 F.3d 639, 641

(10th Cir. 2006). The doctrine prevents a party who lost in state court proceedings from pursuing "what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994).

The instant Petition is not timely and is subject to dismissal unless Petitioner can demonstrate grounds for equitable or statutory tolling. The Court will direct him to show cause why his Petition should not be dismissed.

IT IS THEREFORE ORDERED THAT Petitioner is granted until December 16, 2020, in which to show good cause, in writing, to the Honorable Sam A. Crow, United States District Judge, why his habeas claims should not be dismissed due to his failure to commence this action within the one-year limitation period.

IT IS SO ORDERED.

MEMORANDUM OPINION OF THE COURT OF APPEALS OF KANSAS (MAY 18, 2018)

COURT OF APPEALS OF KANSAS

AMONEO LEE,

Appellant,

v.

STATE OF KANSAS,

Appellee.

No. 117, 813

Appeal from Sedgwick District Court; Kevin J. O'Connor, Judge

Before: MALONE, P.J., BUSER and GARDNER, JJ.

PER CURIAM

1. Amoneo D. Lee appeals from an order denying his K.S.A. 60-1507 motion which challenged the constitutionality of his hard 40 sentence. Based on a recent Kansas Supreme Court decision which refutes each claim of error Lee makes, we affirm.

Factual and procedural background

In November 1995, Lee was charged with first-degree murder and criminal possession of a firearm. Lee's first trial ended in a mistrial. Upon retrial, a

jury convicted Lee of first-degree murder and criminal possession of a firearm.

At the time of Lee's sentencing, the penalty for first-degree murder was life without parole eligibility for 25 years. K.S.A. 22-3717(b)(1) (Furse 1995). The State requested a mandatory 40-year sentence pursuant to K.S.A. 21-4635 (Furse 1995) based on Lee's previous felony conviction for aggravated battery. To prove Lee inflicted great bodily injury—the aggravating circumstance—the victim testified regarding the injuries he had suffered as a result of Lee's aggravated battery. The district court found the aggravating circumstances requirement was met and sentenced Lee to a hard 40.

Lee unsuccessfully appealed his convictions to the Kansas Supreme Court. *State v. Lee,* 266 Kan. 804, 977 P.2d 263 (1999) (*Lee I*). Lee next filed his first K.S.A. 60-1507 motion, which the district court and this court summarily denied. *Lee v. State,* No. 86,058, unpublished opinion filed October 12, 2001 (Kan. App.) (*Lee II*). Lee then filed a second K.S.A. 60-1507 proceeding, which the district court and this court denied as successive. *Lee v. State,* No. 96,286, 2007 WL 2080436 (Kan. App. 2007) (unpublished opinion) (*Lee III*).

Next, Lee filed a motion to correct illegal sentence claiming that his hard 40 sentence was unconstitutional in violation of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), because it permitted a judge to find the aggravating factors listed under K.S.A. 21-4638 by a preponderance of the evidence, instead of requiring a jury to make that finding beyond a reasonable doubt. *State v. Lee,* No. 101,638, 2011 WL 433533 (Kan. 2011) (unpublished opinion) (*Lee IV*). The district court denied relief, and

our Supreme Court upheld the denial, finding that aggravating factors may have affected Lee's parole eligibility but not his maximum sentence. 2011 WL 433533, at *1.

Lee then pursued a second motion to correct illegal sentence. *State v. Lee,* 304 Kan. 416, 372 P.3d 415 (2016) (*Lee V*). He asserted that his hard 40 sentence was illegal because it was imposed under a statutory procedure found unconstitutional in *State v. Soto,* 299 Kan. 102, 322 P.3d 334 (2014), based on the United States Supreme Court decision in *Alleyne v. United States,* 570 U.S. 99, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013). The district court granted Lee's motion, and the State appealed. The Kansas Supreme Court reversed the district court and vacated its order of resentencing because constitutional claims cannot be made in a motion to correct an illegal sentence. *Lee V,* 304 Kan. at 417-19.

2. Lee then filed his third K.S.A. 60-1507 motion, which underlies this appeal. It raised essentially the same issues Lee raised in his second motion to correct illegal sentence, the merits of which the Kansas Supreme Court did not reach. The district court found that *Alleyne* does not apply retroactively, citing *Kirtdoll v. State,* 306 Kan. 335, 393 P.3d 1053 (2017). The district court also found Lee's state constitutional claims regarding Sections 5 and 18 of the Kansas Constitution Bill of Rights untimely. Lee timely appealed, raising four issues.

Is Lee entitled to relief based on the retroactive application of Alleyne?

We first examine Lee's claim that *Alleyne,* decided in 2013, should be applied retroactively, making his

hard 40 sentence, which became final in 1999, unconstitutional. The Supreme Court in *Alleyne* expanded the reach of the Sixth Amendment's right to a jury trial by requiring that any fact which increases a sentence beyond the mandatory minimum be submitted to a jury and proven beyond a reasonable doubt. 570 U.S. at 115-16. This rendered unconstitutional Kansas' hard 40/50 sentencing statutes because they allowed a judge, rather than a jury, to determine facts that would enhance one's mandatory minimum sentence. *Soto,* 299 Kan. at 124. Cases involving hard 40/50 sentences on appeal when *Alleyne* was decided were thus reversed.

Standard of Review

Where, as here, the district court summarily denies a K.S.A. 2017 Supp. 60-1507 motion, this court conducts an unlimited review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Sola-Morales v. State,* 300 Kan. 875, 881, 335 P.3d 1162 (2014).

Analysis

The Kansas Supreme Court rejected an argument similar to Lee's in *Kirtdoll* and held that *Alleyne* does not provide retroactive relief. *Kirtdoll,* 306 Kan. 335, Syl. ¶ 1. This court follows Kansas Supreme Court precedent unless we find some indication that it is departing from its previous position. *State v. Meyer,* 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). Here, we find none.

In *Kirtdoll,* the Kansas Supreme Court squarely held that *Alleyne* does not apply retroactively. 306 Kan. at 341. *Kirtdoll* applied the three-step analysis

from *Gaudina v. State,* 278 Kan. 103, 105, 92 P.3d 574 (2004), for determining whether a change in the law should apply retroactively in a criminal case under collateral attack: (1) whether the issue is properly raised in the collateral attack; (2) whether the case was final when the new law was established; and (3) if a case was final, if an exception to the general rule against retroactive applicability applies. A conviction is generally considered final when the judgment of conviction has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing or final review has passed. *Kirtdoll,* 306 Kan. at 339-40. *Kirtdoll*'s analysis and conclusion govern here.

Lee tries to avoid *Kirtdoll*'s precedential effect by claiming that *Alleyne* was not new law, but was merely a reiteration of law earlier established by the United States Supreme Court in *Jones v. United States,* 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999). Specifically, Lee claims that "[t]he `common law tradition' referenced in Justice Stevens' concurring opinion in *Jones* was expanded upon by Justice Thomas in his concurring opinion in *Apprendi*" and that *Alleyne* "was merely an extension of *Apprendi*" foreshadowed by *Jones*.

3. The chronology of the events underlies Lee's argument that his case was not final when the rule in *Alleyne* was first articulated in *Jones*. In *Lee I,* the Kansas Supreme Court affirmed Lee's convictions on March 5, 1999. *Jones* was decided on March 24, 1999—before Lee's time to seek rehearing or request review from the United States Supreme Court expired. Lee sought no further direct relief, and *Alleyne* was decided 13 years later. According to Lee, he is entitled to relief

because his case was not final when the rule in *Alleyne* was first articulated in *Jones*.

We are unpersuaded by Lee's argument, which is unsupported by citation to any case in which a court has treated *Jones* as the controlling law for this purpose. Nothing in *Alleyne* indicates that the *Jones*' holding controls. Further, *Apprendi* is not treated as a "mere extension" of *Jones,* so there is no reason *Alleyne* should be treated differently. We find that the district court properly denied Lee's K.S.A. 60-1507 motion because *Alleyne* does not apply retroactively to cases that were final when *Alleyne* was decided, as Lee's was.

Was the district court constitutionally required to apply* Alleyne *retroactively because it announced a new substantive rule of constitutional law?

Lee alternatively claims that *Alleyne* announced a new substantive rule of law; thus, the district court was required to apply it retroactively.

Lee concedes that the Kansas Supreme Court in *Kirtdoll* analyzed *Alleyne* under the procedural rubric but argues that it did not address the specific issue of whether *Alleyne* announced a new rule of substantive or procedural law. Having reviewed *Kirtdoll,* we agree that the Supreme Court did not expressly state that it considered *Alleyne* to announce a procedural, rather than a substantive, rule. Nonetheless, its analysis and findings render that conclusion inescapable. *See Schriro v. Summerlin,* 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004) (finding a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes; in contrast, rules that regulate only the manner of

determining the defendant's culpability are procedural); *State v. Hutchison,* 228 Kan. 279, 287, 615 P.2d 138 (1980).

The Kansas Supreme Court treated *Alleyne* as a procedural rule in *Kirtdoll,* and we do so likewise. *Alleyne* announced a new procedural rule of law; thus, the district court was not required to apply it retroactively.

Did* Alleyne *announce a watershed rule of criminal procedure that must be retroactively applied?

Lee next invokes an exception to the general rule that a new law established after a case is final will not be applied to that case on collateral attack. He contends that *Alleyne,* even if it is a procedural rule, should apply retroactively because it is a "watershed rule," which involves "procedures implicit in the concept of ordered liberty." *Kirtdoll,* 306 Kan. at 340; *Teague v. Lane,* 489 U.S. 288, 311-13, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989).

The Kansas Supreme Court in *Kirtdoll* expressly addressed this issue and held that the *Alleyne* holding was not a watershed rule. 306 Kan. at 341 (finding that because *Alleyne* is an extension of *Apprendi,* "it would be counterintuitive, at best, to elevate *Alleyne* to the watershed rule status that was denied to *Apprendi*"). Lee acknowledges this point and concedes that his argument is being made solely to preserve it for further review. Based on *Kirtdoll,* we find that *Alleyne* did not announce a watershed rule of criminal procedure warranting retroactive applicability.

Does Kansas' hard 40 statute violate Sections 5 and 18 of the Kansas Constitution Bill of Rights?

4. Lee's final claim is that K.S.A. 21-4635 (Furse 1995), the former hard 40 statute, is facially unconstitutional because it is a constitutionally inadequate substitution for an integral part of the right to trial by jury that existed at the time the Kansas Constitution was adopted, *i.e.*, that any fact essential to punishment had to be found by a jury beyond a reasonable doubt. But this claim is untimely and successive so we do not reach its merits.

Lee's K.S.A. 60-1507 motion is untimely. Generally, a defendant has one year after a conviction becomes final to file a motion under K.S.A. 2017 Supp. 60-1507(a). K.S.A. 2017 Supp. 60-1507(f)(1). But individuals, such as Lee, who had claims preexisting the 2003 statutory amendment had until June 30, 2004, to file a K.S.A. 60-1507 motion. *Pabst v. State,* 287 Kan. 1, 22, 192 P.3d 630 (2008). It is uncontested that Lee filed his motion long after that deadline. This time limit may be extended only to prevent a manifest injustice. K.S.A. 2017 Supp. 60-1507(f)(2). *State v. Trotter,* 296 Kan. 898, 905, 295 P.3d 1039 (2013).

To determine whether manifest injustice exists, "the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence." K.S.A. 2017 Supp. 60-1507(f)(2)(A). If the motion is outside of the time limitations and if the dismissal of the motion would not amount to manifest injustice, the motion must be dismissed as untimely. K.S.A. 2017 Supp. 60-1507(f)(3).

Lee fails to show why he failed to file the motion within the one-year time limitation and makes no colorable claim of actual innocence. Instead, Lee claims

his motion is timely, relying on *Alleyne* to justify an extension of his rights to a jury trial. But we have rejected above Lee's attempt to extend the "finality" of his case, and *Alleyne* itself does not amount to manifest injustice and cannot justify his untimeliness. *See Kirtdoll,* 306 Kan. at 341.

Lee's motion is also successive. Kansas courts are not required to entertain successive motions. K.S.A. 60-1507(c). We do so only upon a showing of exceptional circumstances justifying consideration. *State v. Kelly,* 291 Kan. 868, Syl. ¶ 2, 248 P.3d 1282 (2011); *Walker v. State,* 216 Kan. 1, Syl. ¶ 2, 530 P.2d 1235 (1975) (stating that a movant is presumed to have listed all grounds for relief and subsequent motion need not be considered in the absence of the circumstances justifying the original failure to list a ground). This is Lee's third K.S.A. 60-1507 motion, and he failed to raise his Kansas constitutional claims in either of his previous motions. He alleges no exceptional circumstances convincing this court to entertain his successive motion. Further, the *Alleyne* decision itself does not provide exceptional circumstances that would impact his claim. *Kirtdoll,* 306 Kan. at 341.

Alleyne does not help Lee on either of these two issues, as "*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. The district court correctly denied Lee's state constitutional claims, as they were raised in an untimely and successive motion without the necessary showing of manifest injustice or exceptional circumstances.

Affirmed.

**OPINION OF THE
SUPREME COURT OF KANSAS
(APRIL 29, 2016)**

304 Kan. 416 (2016)

SUPREME COURT OF KANSAS

STATE OF KANSAS,

Appellant,

v.

AMONEO LEE,

Appellee.

No. 113, 562

Before: ROSEN, Judge.

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

The State of Kansas appeals from an order by the district court that granted Amoneo D. Lee's motion to correct an illegal sentence. Lee was convicted by a jury for a 1995 murder, and the judge imposed a life sentence without the possibility of parole for 40 years. The conviction was affirmed by this court in *State v. Lee,* 266 Kan. 804, 977 P.2d 263 (1999). The validity of the sentencing procedure was not raised in the direct appeal.

In 2008, Lee filed a motion "for correction of sentence pursuant to K.S.A. 22-3504(1)," alleging, *inter alia,* that the sentencing court denied him "his due process rights of allowing the jury to participate in the sentencing proceeding that was not waived by the defendant." The district court summarily denied the motion. This court affirmed the judgment of the district court, relying on the then-current understanding of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000): Because the sentencing court did not enhance Lee's maximum sentence but only his sentence relating to parole eligibility, the sentence did not violate his Sixth Amendment right to a jury trial. *State v. Lee,* No. 101,638, 2011 WL 433533 (Kan. 2011) (unpublished opinion).

On August 11, 2014, Lee filed through counsel a second motion to correct an illegal sentence, based on *Alleyne v. United States,* 570 U.S. ___, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013), and *State v. Soto,* 299 Kan. 102, 322 P.3d 334 (2014). Following a hearing, the district court granted Lee's motion. It is this motion and order that is the subject of the current appeal.

Whether a sentence is illegal under K.S.A. 22-3504 is a question of law subject to de novo review. *State v. Mitchell,* 284 Kan. 374, 376, 162 P.3d 18 (2007).

At sentencing, the district court judge considered Lee's three prior convictions of aggravated battery, as well as convictions of carrying concealed weapons, burglaries, and thefts. He also took into account the nature of the crime at hand and concluded: "Clearly the aggravating factors in this case, the prior conviction, the severity of it, those findings I've already made, clearly outweigh beyond a reasonable doubt any mitigating factor that exists in this case." Based on

this finding, the judge sentenced Lee to a life term without eligibility for parole for a minimum of 40 years. These determinations were made exclusively by the sentencing judge.

In granting Lee's motion to correct the sentence, the Sedgwick County District Court agreed with him that the sentencing procedure violated *Alleyne.* The district court then held that retroactivity was not a relevant inquiry, because it would be unfair to punish a defendant who was the victim of bad timing. The court then ordered that Lee be brought back into court for resentencing.

Under K.S.A. 22-3504(1), a defendant may file a motion to correct an illegal sentence at any time. An illegal sentence is a sentence imposed by a court without jurisdiction; a sentence that does not conform to the statutory provision, either in the character or the term of the punishment authorized; or a sentence that is ambiguous with respect to the time and manner in which it is to be served. *Mitchell,* 284 Kan. at 376, 162 P.3d 18. A sentence is illegal only if it fits within these categories. *State v. Gayden,* 281 Kan. 290, 293, 130 P.3d 108 (2006). A claim that a term of punishment was later declared unconstitutional does not satisfy the requirements for finding a sentence illegal. 281 Kan. at 292, 130 P.3d 108.

This court addressed that issue squarely in *State v. Moncla,* 301 Kan. 549, 553-54, 343 P.3d 1161 (2015), holding:

> "Moncla also argues that his sentence is illegal because a judge rather than a jury determined the existence and weight of the aggravating factor that led to the hard 40. He cites *Alleyne*

> *v. United States,* 570 U.S. ___, 133 S. Ct. 2151, 2162-63, 186 L.Ed.2d 314 (2013), which held that, under the Sixth Amendment, any fact that increased a sentence must be found by a jury rather than a judge. `Because the definition of an illegal sentence does not include a claim that the sentence violates a constitutional provision, a defendant may not file a motion to correct an illegal sentence based on constitutional challenges to his or her sentence.' *State v. Mitchell,* 284 Kan. 374, 377, 162 P.3d 18 (2007); *see Verge v. State,* 50 Kan.App.2d 591, 598-99, 335 P.3d 679 (2014) (motion to correct illegal sentence based on *Alleyne* improper constitutional challenge to sentence)."

See also State v. Warrior, 303 Kan. 1008, 368 P.3d 1111 (2016) (motion to correct illegal sentence inappropriate vehicle for challenges under *Alleyne*); *State v. Noyce,* 301 Kan. 408, 409-10, 343 P.3d 105 (2015) (*Alleyne* constitutional issues not proper basis for motion to correct illegal sentence); *State v. Peirano,* 289 Kan. 805, 217 P.3d 23 (2009) (failure of sentencing court to carry out statutorily mandated balancing of aggravating and mitigating factors did not render sentence illegal).

Lee seeks to frame his main argument as being something other than a constitutional challenge. As artfully crafted as his arguments are, they all seek application of later caselaw to the statute that was in effect at the time that he was sentenced. Lee was sentenced under a statute that did not, at the time, conflict with any higher court decision on the jury-determination question.

The statute, K.S.A. 22-3504, was not void at the time, because no court had held it to be void. *Apprendi* was not issued until June 2000, and Lee's conviction, sentence, and appeal had become final by that time. The 1997 statute was not vacated as having no effect. *See, e.g., Whisler v. State,* 272 Kan. 864, 877-79, 36 P.3d 290 (2001) (*Apprendi* represented procedural, not substantive change and was not a "watershed rule" of criminal procedure implicating fundamental fairness of trial; could not be applied in collateral attacks on sentences). Whether the timing of subsequent decisions gives the appearance of "unfairness," as the district court ruled, is irrelevant: Lee's claim is inappropriate because a motion to correct an illegal sentence cannot be used to attack the constitutionality of a sentencing statute.

The decision of the district court granting the motion to correct an illegal sentence is reversed, and the order that Lee be resentenced is vacated.

MEMORANDUM OPINION OF THE COURT OF APPEALS OF KANSAS (JANUARY 21, 2011)

COURT OF APPEALS OF KANSAS

STATE OF KANSAS,

Appellee,

v.

AMONEO D. LEE,

Appellant.

No. 96,286

Appeal from Sedgwick District Court; Paul W. Clark, judge. Opinion filed July 20, 2007. Affirmed.

Before: HILL, P.J., MCANANY, J., and BRAZIL, S.J.

PER CURIAM:

Amoneo Lee, serving a life sentence for first-degree murder, asks us to reverse the district court's denial of his motion to correct an illegal sentence. Lee contends the Kansas "hard 40" sentencing procedure in K.S.A. 21-4638 is unconstitutional because it allows a sentencing court and not a jury to find facts that work to increase the sentence. Because the law allows a judge to find these aggravating facts by a preponderance of the evidence, in Lee's view, the procedure violates the United States Supreme Court's holding in

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* ruled that facts used to enhance a sentence must be proved to a jury beyond a reasonable doubt. 530 U.S. at 490. We have consistently held to the contrary because the maximum sentence—life imprisonment—is unaffected by whatever minimum sentence is passed by the court. *See, e.g., State v. Warledo*, 286 Kan. 927, 954-55, 190 P.3d 937 (2008). We hold so again. Therefore, we affirm the district court.

When Lee committed murder, premeditated first-degree murder was an off-grid person felony with a penalty of life imprisonment without parole eligibility for 25 years. *See* K.S.A. 21-3401; K.S.A. 22-3717 (Furse). However, the judge found aggravating circumstances and increased Lee's minimum sentence to 40 years. After unsuccessfully pursuing an appeal and, later, habeas corpus relief, Lee returned to the district court and, without counsel, asked it to correct an illegal sentence under K.S.A. 22-3504(1). The court denied his motion.

While his motion in the district court cited some mistaken statutory grounds and did not specifically rely on the Sixth Amendment to the United States Constitution, in the end, Lee did argue his due process rights were violated because a jury did not decide the aggravating factors. Therefore, we consider the issue because pro se pleadings are to be liberally construed. *Rice v. State*, 278 Kan. 309, 320, 95 P.3d 994 (2004).

The district court's finding of aggravating factors that increased Lee's minimum sentence did not affect his maximum sentence. In other words, the court did not enhance his maximum sentence, only his sentence affecting parole eligibility. Lee is serving a life sentence.

See State v. Appleby, 289 Kan. 1017, 1069, 221 P .3d 525 (2009) ("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. Conley,* 270 Kan. 18, 33-34, 11 P.3d 1147 (2000), *cert. denied* 532 U.S. 932 (2001). Therefore, we hold Lee's constitutional rights were not violated by the sentencing procedure followed by the district court.

Affirmed.

HILL, J., assigned.

MEMORANDUM OPINION OF THE COURT OF APPEALS OF KANSAS (JULY 20, 2007)

COURT OF APPEALS OF KANSAS

AMONEO D. LEE,

Appellant,

v.

STATE OF KANSAS,

Appellee.

No. 96,286

Appeal from Sedgwick District Court; Paul W. Clark, judge. Opinion filed July 20, 2007. Affirmed.

Before: HILL, P.J., MCANANY, J., and BRAZIL, S.J.

PER CURIAM

Amoneo D. Lee appeals the district court's summary denial of his motion pursuant to K.S.A. 60-1507. Lee generally argues the district court should have held an evidentiary hearing to determine the issues raised in his K.S.A. 60-1507 motion. We affirm.

The district court shall hold an evidentiary hearing on a K.S.A. 60-1507 motion and make findings of fact and conclusions of law with respect thereto, unless the motion and the files and records of the case conclusively show the prisoner is not entitled to relief. K.S.A. 60-

1507(b); Supreme Court Rule 183(f), (g), and (j) (2006 Kan. Ct. R. Annot. 227). The burden is on the movant to allege facts sufficient to warrant a hearing on the motion. *Doolin v. State*, 24 Kan.App.2d 500, 501, 947 P.2d 454 (1997); Supreme Court Rule 183(g).

> "When acting on a 60-1507 motion, the court may determine that potential issues of fact are raised in the motion, supported by the files and record, and hold a preliminary hearing to determine if the issues in the motion are substantial. [Citation omitted.] It is erroneous to deny a 60-1507 motion without an evidentiary hearing where the motion alleges facts which do not appear in the original record, which if true would entitle the movant to relief, and it identifies readily available witnesses whose testimony would support such facts or other sources of evidence. [Citation omitted.] The motion must set forth a factual background, names of witnesses, or other sources of evidence demonstrating movant's entitlement to relief. [Citation omitted.]" *State v. Holmes*, 278 Kan. 603, 629, 102 P.3d 406 (2004).

The district court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing. Supreme Court Rule 183(h). A district court's decision on whether to hold an evidentiary hearing on a K.S.A. 60-1507 motion is reviewed for an abuse of discretion. *Lujan v. State,* 270 Kan. 163, 169, 14 P.3d 424 (2000). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *State v. Lopez,* 271 Kan. 119, 136, 22 P.3d 1040 (2001).

As a preliminary matter, Lee has not briefed most of the issues he asserted in the 60-1507 motion. An issue not briefed by the appellant is deemed waived or abandoned. *Holmes,* 278 Kan. at 622. Thus, these issues are not properly before this court for review.

In his brief, Lee discusses four of the issues he raised in the 60-1507 motion. Specifically, Lee argues his trial counsel was ineffective because counsel failed to impeach witnesses with their prior inconsistent statements; properly assert a defense of self-defense; and request an eyewitness instruction. Lee also contends the State allowed Karen Sandoval to commit perjury at trial.

The State, however, argues that the district court properly denied Lee's 60-1507 motion as successive. In a K.S.A. 60-1507 proceeding, the court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner. K.S.A. 60-1507(c); Supreme Court Rule 183(d). A post-conviction motion is presumed to have listed all grounds for relief, so unless exceptional circumstances are shown, the court may properly dismiss a second 60-1507 motion on abuse of remedy grounds. *Dunlap v. State*, 221 Kan. 268, 270, 559 P.2d 788 (1977); *Brooks v. State*, 25 Kan.App.2d 466, 467, 966 P.2d 686 (1998); see also *State v. Mebane*, 278 Kan. 131, 135, 91 P.3d 1175 (2004) (a motion to correct illegal sentence filed more than 10 days after sentencing is routinely treated as a K.S.A. 60-1507 motion and cannot be used as a substitute for a direct appeal involving mere trial errors).

"'Exceptional circumstances are unusual events or intervening changes in the law which prevent a movant from reasonably being able to raise all of the trial errors in the first post-conviction proceeding.'

[Citation omitted.]" *Woodberry v. State*, 33 Kan.App.2d 171, 175, 101 P.3d 727, *rev. denied* 278 Kan. 852 (2004). The rationale for this rule is "to prevent endless piecemeal litigation in both the state and federal courts." *Dunlap*, 221 Kan. at 270.

In the present case, it is apparent Lee's motion is successive. Lee has filed a direct appeal, and he has filed a prior motion that sought post-conviction relief. The district court denied Lee's prior 60-1507 motion, and this court affirmed the court's decision on appeal. Lee has not presented any arguments on appeal that exceptional circumstances exist in this case. Although the 60-1507 motion includes both previously asserted issues and claims that were not raised in the earlier motion, there is no indication Lee was prevented from raising these claims earlier or that other circumstances existed that required the district court to rule on the merits of the allegations.

Lee's failure to bring all his claims in the earlier motion and failure to show exceptional circumstances preclude review of the claims raised in Lee's 60-1507 motion. The district court correctly concluded that Lee's motion is a prohibited successive motion.

Affirmed.

OPINION OF THE
SUPREME COURT OF KANSAS
(MARCH 5, 1999)

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266 Kan. 804 (1999)

SUPREME COURT OF KANSAS

STATE OF KANSAS,

Appellee,

v.

AMONEO D. LEE,

Appellant.

No. 79,008

Before: SIX, J., LARSON, J.,
MCFARLAND, C.J., LOCKETT, J.

SIX, J.:

Amoneo D. Lee was convicted by a jury of first-degree murder (K.S.A. 21-3401[a]) and criminal possession of a firearm (K.S.A. 21-4204[a][4]).

We review whether the district court erred in: (1) finding probable cause at the preliminary hearing to bind Lee over for trial on his first-degree murder charge and (2) admitting a journal entry as evidence of the type and nature of Lee's prior conviction of aggravated battery in the State's proof of the firearms

charge. We answer the first issue, "no" and the second, "yes." Finding no reversible error, we affirm.

Our jurisdiction is under K.S.A. 22-3601(b)(1); Lee's murder conviction is an off-grid crime.

FACTS

The victim, Carl G. Mason, Jr., was shot in the head at close range during the early morning hours of November 3, 1995. The events leading to Mason's death were testified to at the preliminary hearing by a detective and Lee's girlfriend, Karen Sandoval, and at trial by a variety of witnesses including Sandoval. Sandoval, who had given a tape-recorded statement shortly after the shooting, was a reluctant witness at the preliminary hearing. A transcript of her tape-recorded statement was admitted as evidence. During the trial, Sandoval's tape-recorded statement was played for the jury. Lee was convicted of criminal possession of a firearm under K.S.A. 21-4204(a)(4). Before trial, he filed a motion in limine, requesting an order prohibiting: (1) the State from eliciting testimony regarding his probation and/or parole and (2) the State's witnesses or counsel from testifying or listing testimony concerning the fact that he was convicted of aggravated battery.

Lee agreed that rather than putting the felony conviction of aggravated battery before the jury, he would "stipulate that he has been convicted of a felony within ten years of allegedly possessing the firearm at the time of the commission of the present offense and that such felony conviction has not been expunged nor pardoned." He relied on *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed 2d 574, 117 S. Ct. 644 (1997), as support for his motion.

The hearing on Lee's motion in limine took place during a recess in the voir dire proceedings. District Judge Ballinger granted the first request and denied the second, saying:

> "And the record needs to reflect this issue was originally submitted to Judge Pilshaw, who was assigned to rehear this case a couple [of] weeks ago. Things fell apart. It was continued. Judge Pilshaw did not rule on that motion in limine. She did give some thoughts on it. She actually didn't rule on it.
>
> "I am going to be consistent. I was the trial court at the first trial. I'm going to deny that motion, and I look forward to the Court of Appeals telling me whether I'm wrong in following the law that's been part of the State of Kansas for, oh, 20 or 30 years. So overruled at this point, Mr. Brown [defense counsel]."

Defense counsel added:

> "And to elaborate on that, that is correct; she [Judge Pilshaw] indicated if the case was reassigned to her then she would announce her ruling, but we're back here."

The State, through the testimony of the detective who investigated the prior felony, introduced a certified copy of the journal entry of judgment of the aggravated battery conviction. Lee presented no evidence. Additional facts are set out in our discussion.

DISCUSSION

The Preliminary Hearing

Lee's claim of inadequate evidence at the preliminary hearing is controlled by *State v. Henry*, 263 Kan. 118, 129-30, 947 P.2d 1020 (1997). *See State v. Butler*, 257 Kan. 1043, 1059, 897 P.2d 1007 (1995), *modified on other grounds* 257 Kan. 1110, 1112-13, 916 P.2d 1 (1996).

Where a defendant has been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is harmless unless it appears that the error caused prejudice at trial. *Henry*, 263 Kan. at 129; *Butler*, 257 Kan. at 1062.

Lee argues that the State failed to introduce evidence sufficient to cause a reasonable person to believe Lee had committed the crime. Lee's primary objection appears to center on Sandoval's statement to police. He asserts the statement was coerced and, therefore, incompetent evidence was introduced, violating due process.

Lee acknowledges that *Butler* states the law on this issue. However, Lee does not show how the alleged preliminary hearing error prejudiced him during trial. In fact, Lee's appellate brief stops in mid-sentence:

> "This Court has held that, in any event, 'where an accused has gone to trial and been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is harmless unless it appears that the error caused prejudice at trial' (Emphasis added.)

Butler, 257 Kan. at 1062. Here, the error caused"

The State's evidence at the preliminary hearing was sufficient to show that a felony was committed and that defendant could have committed the felony.

We find no merit in Lee's preliminary hearing claim. We have reviewed the evidence presented at trial. Even without Sandoval's statement, the evidence at trial was sufficient to establish beyond a reasonable doubt that Lee murdered the victim. Various people heard Lee's threats, observed his anger, heard him say he shot Mason and was going to dump the body, and saw him point the gun at Mason. He also was seen with Mason's body.

The Firearms Charge

Lee contends that because he offered to stipulate to the prior felony conviction of aggravated battery, it was error for the district court to admit evidence of the conviction. Lee also asserts that Judge Pilshaw sustained his motion in limine and that the motion was reconsidered and later denied by Judge Ballinger. While there is a minute sheet indicating that Judge Pilshaw sustained Lee's motion in limine, there is no journal entry. Defense counsel agreed with Judge Ballinger that Judge Pilshaw had not ruled on the motion. There is no merit to this assertion by Lee.

Our standard of review on admissibility of evidence is abuse of discretion. *State v. Wagner*, 248 Kan. 240, 243, 807 P.2d 139 (1991).

K.S.A. 21-4204(a)(4), under which Lee was charged, provides in part,

> "(a) Criminal possession of a firearm is:
>
> . . . .
>
> "(4) possession of any firearm by a person who, within the preceding 10 years, has been convicted of: (A) A felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4127b or K.S.A. 1995 Supp. 65-4160 through 65-4164, and amendments thereto. . . . "

The State presented evidence that Lee had a prior conviction for aggravated battery (K.S.A. 21-3414). Aggravated battery is one of the specific crimes listed in K.S.A. 21-4204(a)(4).

We turn now to our case law addressing the firearm possession issue. In *State v. Farris*, 218 Kan. 136, 542 P.2d 725 (1975), Farris was charged with two counts of unlawful possession of a firearm, under an earlier version of K.S.A. 21-4204. The State introduced an entire court file which showed that Farris had been convicted of a variety of crimes and had his probation revoked. The file was introduced to prove an element of the two current firearms charges. Farris objected to the file's admission, arguing that his character and credibility had been drawn into question through this evidence.

We disapproved the admission, saying:

> "The admission of the entire file in this case was not a proper practice for the file contained much extraneous and irrelevant material which could be confusing to the jury. We

> cannot condone such a practice. An authenticated copy of the journal entry of conviction should have been edited to remove reference to felony charges which were not established and upon which the state was not relying to prove the necessary element of prior conviction of crime. The practice of introducing an entire court file in such cases should be discontinued." 218 Kan. at 139.

However, based on the particular facts of the case, Farris' conviction was affirmed. 218 Kan. at 140.

Earlier, in *State v. Johnson*, 216 Kan. 445, 532 P.2d 1325 (1975), we reviewed facts similar to the facts here. Johnson was charged with aggravated robbery and unlawful possession of a firearm, again, based on an earlier version of K.S.A. 21-4204. Immediately before trial, Johnson offered a signed admission to the court, acknowledging that he had been convicted of a felony within 5 years of the current offenses. Johnson filed a motion in limine, requesting that the State not be allowed to introduce evidence at trial of his prior convictions for rape and second-degree kidnapping. The district court denied Johnson's motion. 216 Kan. at 446.

Johnson contended that the district court erred in allowing the State to introduce the nature of his prior felony convictions in light of his admission of those prior convictions. We rejected his contention. Citing *State v. Wilson*, 215 Kan. 28, 523 P.2d 337 (1974), we endorsed the established rule that a defendant's admission does not prevent the State from presenting separate and independent proof of the fact admitted. 216 Kan. at 448. We note that the *Wilson* court relied on the Florida Supreme Court's opinion *Arrington v.*

State, 233 So.2d 634 (Fla. 1970). 215 Kan. at 32. *Arrington* was overruled by *Brown v. State*, 719 So.2d 882, 886, 889 (Fla. 1998). *Brown*, which we discuss later in this opinion, supplies the rationale we adopt in resolving the firearms charge issue.

The district court here, following *Farris* and *Johnson,* admitted the journal entry proving Lee's prior conviction. A witness was permitted to testify concerning the nature of the conviction.

Lee suggests that Kansas law should be changed to conform to *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed.2d 574, 117 S. Ct. 644 (1997). Old Chief was convicted of assault with a dangerous weapon, use of a firearm, and possession of a firearm by anyone with a prior felony conviction. Before trial, he moved for an order requiring the government to limit its evidence to a statement that Old Chief had been convicted of a felony. He offered to stipulate that he had been convicted of a prior felony. The government refused to join in the stipulation, insisting on its right to prove the case its own way. The district court agreed with the government. The Ninth Circuit Court of Appeals affirmed in a May 31, 1995, unpublished opinion. *See* 519 U.S. at 177.

The Supreme Court reversed. *Old Chief* stands as a narrow exception to "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." 519 U.S. at 189. Justice Souter, authoring the majority opinion for a divided court, framed the principal issue as one concerning

> "the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' Fed. Rule Evid. 403." 519 U.S. at 180.

Although the *Old Chief* Court believed that the risk of unfair prejudice would vary from case to case, the majority reasoned that such risk

> "will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious. . . ." 519 U.S. at 185.

Old Chief concluded:

> "Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other.

> In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available." 519 U.S. at 191.

The facts in *Old Chief* are similar to the facts here. The element the prosecution was required to prove in both cases was the status of the defendant. *Old Chief* was construing a federal statute and federal rules of evidence. 18 U.S.C. § 922(g)(1) (1994); Fed. R. Evid. 403. We are construing our own rules of evidence. *Old Chiefs* construction is not binding here. *See Atteberry v. Ritchie*, 243 Kan. 277, 284, 756 P.2d 424 (1988) (state courts are not bound to follow a decision of a federal court, including the United States Supreme Court dealing with state law). However, the rationale of *Old Chief* is persuasive.

K.S.A. 60-445 is the evidentiary rule most similar to Fed. R. Evid. 403. K.S.A. 60-445 provides:

> "Except as in this article otherwise provided, the judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party who had not had reasonable opportunity to anticipate that such evidence would be offered."

In *State v. Higgenbotham,* 264 Kan. 593, 957 P.2d 416 (1998), we distinguished *Old Chief* on its facts.

Higgenbotham offered to stipulate to his true identity for the State's admitting into evidence a fraudulent Arizona driver's license issued in the name of an alias.

> "This case is distinguishable from *Old Chief* in that Higgenbotham's legal status at the time of the crime was not an issue. His obtaining the fraudulent Arizona driver's license was relevant to both the identity issue and his behavior during the criminal investigation. The general rule that a party need not be required to accept a stipulation is applicable." 264 Kan. at 604.

Higgenbotham was not a status case.

The impact of *Old Chief* on a state conviction has been considered by two other state Supreme Courts. In *Brown v. State*, 719 So.2d 882, Brown was convicted of possession of a firearm by a convicted felon. Certified copies of prior convictions were admitted into evidence despite Brown's offer to stipulate to his convicted felon status. The Florida Appeals Court approved the admission of the evidence in question, relying on an earlier Florida case. 700 So.2d at 448. The Florida Supreme Court reversed, adopting the rationale of *Old Chief*. The new Florida rule is:

> "[W]hen a criminal defendant offers to stipulate to the convicted felon element of the felon-in-possession of a firearm charge, the Court must accept that stipulation, conditioned by an on-the-record colloquy with the defendant acknowledging the underlying prior felony conviction(s) and acceding to the stipulation. The State should also be allowed to place into evidence, for record purposes

> only, the actual judgment(s) and sentence(s) of the previous conviction(s) used to substantiate the prior convicted felon element of the charge." 719 So.2d at 884.

The *Brown* court was reviewing the Florida Evidence Code, "which is in essence a restatement of the Federal Rule 403." 719 So.2d at 887.

Brown relied on *State v. Alexander*, 214 Wis.2d 628, 571 N.W. 2d 662 (1997). The Wisconsin statute construed in *Alexander* also parallels Federal Rule 403. Alexander was convicted of operating a motor vehicle while having a prohibited alcohol concentration of.08 or more. One of the elements of this offense is that the defendant must have two or more prior convictions, suspensions, or revocations. The *Alexander* court posed the issue as

> "whether the circuit court erroneously exercised its discretion when it allowed the introduction of evidence of two or more prior convictions, suspensions or revocations as counted under Wis. Stat. § 343.307(1), and further submitted that element to the jury when the defendant fully admitted to the element and the purpose of the evidence was solely to prove that element." 214 Wis.2d at 634.

The *Alexander* court concluded:

> "Because . . . the purpose of the evidence was solely to prove the element of two or more prior convictions, suspensions or revocations, its probative value was far outweighed by the danger of unfair prejudice to the defendant. We conclude that admitting any evidence

> of the element of prior convictions, suspensions or revocations and submitting the element to the jury in this case was an erroneous exercise of discretion." 214 Wis.2d at 634.

Because the evidence of guilt was overwhelming, *Alexander* reasoned the error was harmless and affirmed.

Old Chief was remanded to the Ninth Circuit with the observation that "we imply no opinion on the possibility of harmless error, an issue not passed upon below." 519 U.S. at 192, n.11. In *U.S. v. Harris*, 137 F.3d 1058 (8th Cir. 1998), a divided panel held that to "warrant relief under *Old Chief*, the asserted error must not be harmless. [Citations omitted.] When evidence of a defendant's guilt is overwhelming, the *Old Chief* violation is harmless." 137 F.3d at 1060.

Federal Rule 403 authorizes the exclusion of relevant evidence where its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Old Chief* relied on the danger of unfair prejudice. K.S.A. 60-445 does not have the "unfair prejudice" language. K.S.A. 60-445 refers to the exercise of discretion by the trial court when the evidence relates only to surprise. We have endorsed a trial court's inherent power, "a rule of necessity," to exclude any evidence which may unfairly prejudice a jury. *State v. Davis*, 213 Kan. 54, 57, 515 P.2d 802 (1973). We placed "unfair prejudice" in K.S.A. 60-445 when we held: "Evidence which is more prejudicial than probative is inadmissible pursuant to K.S.A. 60-445." *Ratterree v. Bartlett*, 238 Kan. 11, Syl. ¶ 3, 707 P.2d 1063 (1985). Thus, K.S.A. 60-

445, Federal Rule 403, and the Florida and Wisconsin statutes at issue in *Brown* and *Alexander* are similar.

We are involved here with balancing the legitimate interests of Lee and of the State at trial. In a firearm criminal possession case, what fact does the State seek to establish by offering into evidence a defendant's prior record through a journal entry? The answer is the defendant's status as a prior convicted felon. Lee agreed to stipulate to prior convicted felon status. We see no need to admit into evidence a journal entry reflecting the type and nature of a prior conviction in order to prove that Lee was a convicted felon.

Our holding today is consistent with *U.S. v. Wacker*, 72 F.3d 1453 (10th Cir. 1995) (decided before *Old Chief). Wacker* reviewed the exact question now before us. Lipp, one of the defendants, objected to the admission of journal entries detailing his prior felony convictions. The federal district court for Kansas overruled the objection. *Wacker* reversed, finding: (1) the admission was an abuse of discretion but (2) it was harmless error. 72 F.3d at 1474.

Wacker reasoned:

> "Whereas the fact of a defendant's prior felony conviction is material to a felon in possession charge, the nature and underlying circumstances of a defendant's conviction are not. [Citations omitted.] The details of the defendant's prior crime do not make it 'more probable or less probable' that the defendant is a convicted felon. *See* Fed. R. Evid. 401. Rather, this information tends only to color the jury's

> perception of the defendant's character, thereby causing unnecessary prejudice to the defendant. . . .
>
> " . . . Today we hold that where a defendant offers to stipulate as to the existence of a prior felony conviction, the trial judge should permit that stipulation to go to the jury as proof of the status element [that the defendant is a convicted felon of 18 U.S.C. § 922(g)(1) (1994)], or provide an alternate procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance. [Citation omitted.] Correspondingly, in those situations where the defendant is willing to concede the existence of the prior felony conviction, the trial judge should ordinarily preclude the government from introducing any evidence as to the nature or substance of the conviction, as the probative value of this additional information generally will be overshadowed by its prejudicial effect under Federal Rule of Evidence 403." 72 F.3d at 1472-73.

We adopt a limited rule for application in a status case. We hold: (1) The district court abused its discretion when it rejected Lee's offer to stipulate to the fact of a prior conviction; (2) *Brown*'s evidentiary requirements are adopted for proof of convicted felon status in K.S.A. 21-4204(a)(4) firearm possession violation cases; and (3) any error in admitting the journal entry of Lee's prior conviction was harmless. The result would not have been different if the prior conviction had come in by stipulation.

We are persuaded that the reasoning of *Old Chief, Brown, Alexander*, and *Wacker* should be adopted. The issue here and the new rule we apply in resolving the issue carry an extremely narrow focus. We are reviewing only the status element in a charged crime. We find no distinction between Federal Rule 403 and K.S.A. 60-445 based on the absence from 60-445 of the phrase "unfair prejudice." Exclusion of evidence on the basis of undue prejudice has always been a prerogative of a common-law trial judge. Trial judges in this state have authority to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Under K.S.A. 60-445 "much is left to implication, but despite the deficiencies in language the rule operates in Kansas in conventional manner." 1 Gard's Kansas C. Civ. Proc.3d Annot. § 60-445 (1997). Any doubt on this question is settled by *Davis* and *Ratterree.*

Unless there is a dispute over the status of the prior conviction (for example, was it or was it not a felony), the admission of the type and nature of the prior crime can only prejudice the jury. *See Brown*, 719 So.2d at 886. Under the limited focus here, what countervailing interests support admission of the type and nature of the felony? There are none in a status case. If Lee's previous conviction had been for any one of the more than 40 felonies not listed in K.S.A. 21-4204(a)(4), he would not be facing the criminal possession charge.

We acknowledge that the State has the right and, in fact the duty, to establish the elements of the crime charged. The State also has an interest in presenting its case in its own way by telling the story as the State wishes. But, Lee should be judged only on the crimes

charged and, as *Brown* observed, "not being convicted on an improper ground due to the admission of evidence that carries unfairly prejudicial baggage." 719 So.2d at 887. As *Old Chief* reasoned:

> "This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." 519 U.S. at 190.

The element in dispute is whether Lee possessed the firearm on the date charged.

CONCLUSION

We adopt *Brown*'s analysis and hold: (1) When requested by a defendant in a criminal possession of a firearm case, the district court must approve a stipulation whereby the parties acknowledge that the defendant is, without further elaboration, a prior convicted felon. (2) At the same time, the State may place into the record, at its discretion, the actual judgment(s) and sentence(s) of the prior felony conviction(s). (3) Neither these documents nor the number and nature of the prior convictions should be disclosed to the trial jury. (4) Out of the jury's presence and after consultation with counsel, the defendant should be required to personally acknowledge the stipulation and his or her voluntary waiver of his or her right to have the State otherwise prove the convicted felon status element beyond a reasonable doubt. (5) The defendant's stipulation of convicted felon status satisfies

the prosecution's burden of proof for that element of the crime. (6) If the element of "convicted felon" is established by stipulation, "the judge may thereafter instruct the jury that it can consider the convicted felon status element of the crime as proven by agreement of the parties in the form of a stipulation." *Brown*, 719 So.2d at 889.

Our views should not be read as limiting the State in presenting a full in-depth story of a prior crime when the prior crime has relevance independent of merely proving prior felony status for K.S.A. 21-4204(a)(4).

We disapprove of the language in *Farris, Johnson*, and *Wilson* inconsistent with this opinion.

The rule we are adopting today applies to pending K.S.A. 21-4204(a)(4) criminal possession of a firearm status cases in which the issue was asserted in the trial court and remains an issue on appeal. The rule has no retroactive application to cases final as of the date of this opinion.

Affirmed.

CONCURRING AND DISSENTING OPINION OF JUSTICE LARSON

LARSON, J., concurring and dissenting: I concur in the result reached by the majority in affirming the trial court.

I dissent from the majority opinion insofar as it suggests the wording of Fed. R. Evid. 403 is sufficiently similar to K.S.A. 60-445 to justify the judicial adoption of a new evidence rule that removes the trial court's discretion and restricts the manner in which a prosecutor is allowed to prove a charge of criminal possession of a firearm under K.S.A. 21-4204(a)(4)(A).

The prevailing rule in Kansas as to proof of the elements of a charged crime is set forth in *State v. Wilson*, 215 Kan. 28, 31-33, 523 P.2d 337 (1974). Justice Kaul, speaking for a unanimous court, stated:

> "Defendant claims error in the admission of evidence of a previous felony conviction of burglary and larceny. The trial court admitted the testimony on the basis that it went to prove the firearm possession count. Defendant, prior to trial, offered to stipulate that he had a previous felony conviction and presented a motion to the trial court that the prosecuting attorney be restrained from submitting evidence pertaining thereto. The prosecuting attorney refused to so stipulate and insisted on presenting the evidence. Defendant claims reversible error in this regard. The state responds that there is no law that requires any party to stipulate to any fact in a lawsuit and, further, that even though the stipulation

had been entered into, the fact of a prior conviction had to be presented to the jury since it was a necessary element of the firearm offense defined in K.S.A. 1973 Supp. 21-4204. This court has often held that evidence otherwise relevant in a criminal prosecution is not rendered inadmissible simply because it may show a crime other than that charged. (*State v. Calvert*, 211 Kan. 174, 505 P.2d 1110; *State v. Pierce, et al.*, 208 Kan. 19, 490 P.2d 584; and *State v. Crowe*, 207 Kan. 473, 486 P.2d 503.) It is an established rule of law that an admission by a defendant does not prevent the state from presenting separate and independent proof of the fact admitted. (*Bizup v. People*, 150 Colo. 214, 371 P.2d 786, *cert. den.* 371 U.S. 873, 9 L. Ed.2d 112, 83 S. Ct. 114; and *Parr v. United States* [5th Cir. 1958], 255 F. 2d 86, *cert. den.* 358 U.S. 824, 3 L. Ed.2d 64, 79 S. Ct. 40.)

"The prevailing rule in this regard is stated in Wharton's Criminal Evidence [12th Ed. 1972 Cumulative Supp.], Confessions and Admissions, § 399:

"'The making of an admission by the defendant does not bar the prosecution from proving the fact independently thereof as though no admission had been made, particularly since facts when voluntarily admitted often lose much of their probative force in the eyes of the jury,' (p. 63.)

"To the same effect the rule is stated in 31A C.J.S., Evidence, § 299:

> "'A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.' (p. 766.)"

This rule was followed by *State v. Johnson*, 216 Kan. 445, 532 P.2d 1325 (1975), and *State v. Farris*, 218 Kan. 136, 542 P.2d 725 (1975), as set forth in the majority opinion, but the holding of both cases was grounded on the reasoning of *Wilson* set forth above. There is not, in my opinion, any reason to change this rule based on the holding of *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed.2d 574, 117 S. Ct. 644 (1997); *Brown v. State*, 719 So.2d 882 (Fla. 1998), or *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

As the majority correctly points out we construe our own rules of evidence and *Old Chief* is not binding in Kansas. *See Atteberry v. Ritchie*, 243 Kan. 277, 284, 756 P.2d 424 (1988). While the majority may find *Old Chief* persuasive, my comparison of the wording of Fed. R. Evid. 403 to K.S.A. 60-445 leads to a different conclusion.

K.S.A. 60-445 states:

> "Except as in this article otherwise provided, the judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered."

Federal Rule of Evidence 403 states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The scope and extent of the rule and statute quoted above differ materially. K.S.A. 60-445 is directed solely to "surprise" and "reasonable opportunity to anticipate." There is no "surprise" when a prosecutor is proving an element of a crime charged.

The scope and extent of Rule 403 is widely broader and speaks of "unfair prejudice," "misleading the jury," "undue delay," "waste of time," and "needless cumulative evidence." To suggest that these provisions are similar is to read into K.S.A. 60-445 wording that it does not contain. The provisions of the Wisconsin or Florida statutes or rules of evidence may match precisely with the Federal Rules of Evidence, but ours in Kansas do not.

A better argument for the majority position might exist if any felony conviction could be the basis for a criminal possession of a firearm charge. However, the specific identification of felonies one must have previously committed to be charged under K.S.A. 21-4204(a)(4)(A) strongly suggests the Kansas Legislature intended the name and nature of the prior felony to be an element of the State's proof in a criminal possession of a firearm charge. An examination of the standard instruction to be given when the charge is criminal possession of a firearm is as follows:

> "The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> . . . .
>
> "C. 1. That the defendant knowingly had possession of a firearm;
>
> "2. That the defendant within 10 years preceding such possession had been (convicted of_____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony);
>
> "3. That the defendant (did not have the conviction of such crime expunged) (had not been pardoned for such crime); and
>
> . . . .
>
> "4. That this act occurred on or about the ____ day of _____ 19__in_____, County, Kansas." PIK Crim.3d 64.06.

Under this instruction, an element of the illegal possession of a firearm charge is the specific description of the felony the accused has previously committed. Under the facts of this case, it can only be one of those felonies listed in K.S.A. 21-4204(a)(4)(A). The wording of K.S.A. 21-4204(a)(4)(A) was set forth in the majority opinion, but more importantly to a juror's consideration is the common names of the crime. Jurors should be entitled to know that K.S.A. 21-3401 is murder in the first degree, K.S.A. 21-3402 is murder in the second

degree, K.S.A. 21-3403 is voluntary manslaughter, K.S.A. 21-3404 is involuntary manslaughter, K.S.A. 21-3410 is aggravated assault, K.S.A. 21-3411 is aggravated assault of a law enforcement officer, K.S.A. 21-3414 is aggravated battery, K.S.A. 21-3415 is aggravated battery against a law enforcement officer, K.S.A. 21-3419 is criminal threat, K.S.A. 21-3420 is kidnapping, K.S.A. 21-3421 is aggravated kidnapping, K.S.A. 21-3427 is aggravated robbery, K.S.A. 21-3502 is rape, K.S.A. 21-3506 is aggravated criminal sodomy, K.S.A. 21-3518 is aggravated sexual battery, K.S.A. 21-3716 is aggravated burglary, K.S.A. 65-4127a, K.S.A. 65-4127b, and K.S.A. 1995 Supp. 65-4160 through K.S.A. 1995 Supp. 65-4164 are unlawful acts relating to possession or sale of opiates, narcotic drugs, or designated stimulants. The reasons for the charge come alive when the underlying felony is stated and proved. When they are allowed to be admitted generically, they lose their probative force in the eyes of the jury as this court observed in *Wilson.*

While I believe it is a mistake for us to change the long-time rule of *Wilson, Johnson*, and *Farris*, it would be more palatable if an accused were at least required to stipulate and admit that he or she had within the preceding 10 years been convicted of the named crime that was included in the listing in K.S.A. 21-4204(a)(4)(A). This would allow the jury to know the precise felony that had previously been committed which is the basis for prohibiting the carrying of a firearm. This is what the legislature intended when it enumerated only certain specific felonies that can be the basis for a criminal possession of a firearm charge.

While the majority holding is fact specific to the crime charged, this ruling opens up the whole area of

stipulation or admission to accuseds in any status element or status crime. To remain consistent with this ruling, we will be asked to allow those accused of crimes to have the right to limit or control the evidence to be presented when they are tried. This is not the first step we should or need to take. I fear unending controversy will result from our actions.

If the Federal Rules of Evidence had been adopted by the Kansas Legislature, our following *Old Chief* would be more defensible. These rules have not been adopted by our legislature and we should not impose them judicially. This is contrary to our traditional judicial role of allowing this kind of change to be legislatively made.

While logical and sufficient reasons have been previously given for us not to abandon a long-standing rule, it must be also pointed out that in doing so, we violate the doctrine of stare decisis. We need not discuss the history or reason for this doctrine which are well set forth in *Jones v. Hansen*, 254 Kan. 499, 512-13, 867 P.2d 303 (1994), and *Bowers v. Ottenad*, 240 Kan. 208, 226-27, 729 P.2d 1103 (1986). We should not adhere to precedent when substantial and compelling reasons dictate a change, but I do not find sufficient justification to abandon our prior decisions under the circumstances of this case.

McFARLAND, C.J., and LOCKETT, J., join the foregoing dissenting opinion.

28 U.S.C.A. § 2244—FINALITY OF DETERMINATION

(a)No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment or a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.