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FILED
United States Court of Appeals
Tenth Circuit

March 3, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TIMOTHY SUMPTER,

Petitioner - Appellee/Cross-Appellant,

v.

STATE OF KANSAS,

Respondent - Appellant/Cross-Appellee.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Amicus Curiae.

Nos. 20-3186 & 20-3206
(D.C. No. 5:19-CV-03267-JWL)
(D. Kan.)

ORDER

Before **HOLMES**, Chief Judge, and **KELLY**, and **MATHESON**, Circuit Judges.

These matters are before the court on the Petition for Rehearing filed by Petitioner-Appellee/Cross-Appellant. We also have a response from Respondent-Appellant/Cross-Appellee.

Pursuant to Fed. R. App. P. 40, panel rehearing is granted in part to the extent of the modifications in the attached revised opinion. The court's December 28, 2022 opinion

is withdrawn and replaced by the attached revised opinion effective *nunc pro tunc* to the date the original opinion was filed.

The petition for rehearing and the attached revised opinion were transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the request for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Petitioner-Appellee/Cross-Appellant's January 18, 2023 "Motion for Extension of Time to File Brief" is denied as moot.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

December 28, 2022

Christopher M. Wolpert
Clerk of Court

PUBLISH

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Nos. 20-3186 & 20-3206

Appeal and Cross-Appeal from the United States District Court for the District of Kansas (D.C. No. 5:19-CV-03267-JWL)

Kurtis K. Wiard, Assistant Solicitor General (Derek Schmidt, Attorney General and Kristafer R. Ailslieger, Deputy Solicitor General, with him on the briefs), Office of Attorney General, Topeka, Kansas, for Respondent-Appellant/Cross-Appellee.

Ruth Anne French Hodson of Sharp Law, LLP, Prairie Village, Kansas, for Petitioner-Appellee/Cross-Appellant.

Norman R. Mueller of Haddon, Morgan and Foreman, P.C., Denver, Colorado and Tyler J. Emerson and Kari S. Schmidt of Conlee, Schmidt & Emerson, L.L.P., Wichita, Kansas, filed an amicus curiae brief for National Association of Criminal Defense Lawyers.

Before **HOLMES**, Chief Judge, **KELLY**, and **MATHESON**, Circuit Judges.

HOLMES, Chief Judge.

Timothy Sumpter was convicted of aggravated kidnapping, attempted rape, and aggravated sexual battery, arising from his 2011 sexual assault of J.B. in Wichita, Kansas. The controlling sentence was for aggravated kidnapping, a conviction which added over 15 years to Mr. Sumpter's sentence.

After proceeding through the Kansas courts, Mr. Sumpter filed a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, claiming that his convictions were obtained in violation of his constitutional rights. The district court granted in part Mr. Sumpter's petition for relief. Specifically, the district court vacated Mr. Sumpter's aggravated kidnapping conviction but denied his remaining claims. Furthermore, the district court denied Mr. Sumpter's request for a certificate of appealability ("COA") with respect to his unsuccessful claims.

The State of Kansas now appeals from the partial grant of habeas relief; Mr. Sumpter seeks to appeal from the partial denial. We **reverse** the district court's grant of habeas relief, concluding—under the deference prescribed in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—that the Kansas Court of Appeals ("KCOA") was reasonable in determining that any ineffective assistance of counsel was not prejudicial because the evidence was sufficient to support the aggravated kidnapping conviction. Furthermore, even assuming, *arguendo*, that the KCOA's

decision was not entitled to AEDPA deference, we conclude—under de novo review—that the KCOA's decision should be upheld. As such, we **remand the case** with instructions to enter judgment for the State of Kansas. Additionally, having concluded that Mr. Sumpter is required to obtain a COA for the claims comprising his cross-appeal, we **deny** Mr. Sumpter a COA; accordingly, we **dismiss** his cross-appeal for lack of jurisdiction.

I

We limit our recitation of the facts to those found by the KCOA. *See Sumpter v. State* (*Sumpter I*), No. 117,732, 2019 WL 257974, at *3 (Kan. Ct. App. Jan. 18, 2019) (unpublished); *see also Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) ("[I]n reviewing a state court decision under § 2254(d)(1), we must 'limit[ ]' our inquiry 'to the record that was before the state court that adjudicated the claim on the merits.'" (second alteration in original) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011))); *Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) ("[S]tate-court findings of fact are entitled to great deference . . . . 'The presumption of correctness also applies to factual findings made by a state court of review based on the trial record.'" (quoting *Morgan v. Hardy*, 662 F.3d 790, 797–98 (7th Cir. 2011))).

Around 1:00 a.m. on January 11, 2011, Mr. Sumpter accosted J.B., a young woman, as she walked to her car in the Old Town entertainment district in Wichita, Kansas. When they arrived at J.B.'s car, Mr. Sumpter forced his way in, grabbed J.B., and attempted to sexually assault her. Mr. Sumpter had his knee across J.B.'s throat as he tried to touch her vagina. She briefly lost consciousness. When she

regained consciousness, Mr. Sumpter was masturbating and forced J.B. to touch his penis.

During the attack, Mr. Sumpter took J.B.'s car keys from her as she attempted to fight him off and threw them out the window. Part way through the attack, J.B. was able to force Mr. Sumpter out of the car and lock the doors. Mr. Sumpter then retrieved the keys and displayed them to J.B. in an effort to get her to open the door. J.B. relented, and Mr. Sumpter forced his way back into the car and resumed his assault.

Eventually, another car pulled up and Mr. Sumpter went to speak with the driver. In the meantime, J.B. found her keys and drove away.

The State charged Mr. Sumpter with aggravated kidnapping, attempted rape, and aggravated sexual battery. When Mr. Sumpter was charged, Kansas law defined kidnapping as "the taking or *confining* of any person, accomplished *by force*, threat or deception, with the intent to hold such person . . . *to facilitate* . . . the commission of any crime." K.S.A. § 21-3420 (repealed 2011) (emphases added). Aggravated kidnapping "is kidnapping . . . when bodily harm is inflicted upon the person kidnapped." K.S.A. § 21-3421 (repealed 2011).

In *State v. Buggs*, the Kansas Supreme Court construed the "facilitate" element as the "key word" to avoid "convert[ing] every robbery and every rape into the more serious offense of kidnapping." 547 P.2d 720, 726, 730–31 (Kan. 1976). The *Buggs* framework requires the State to show confinement by force that: (1) "Must not be slight, inconsequential and merely incidental to the other crime"; (2) "Must not be of

the kind inherent in the nature of the other crime"; and (3) "Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Id.* at 731.

In March 2012, the Sedgwick County District Court conducted a consolidated jury trial.[1] Mr. Sumpter's trial counsel did not offer any testimony about Mr. Sumpter's withholding of the keys as a means of confining J.B. in her vehicle. Nor did counsel cross-examine J.B. about that issue. Trial counsel did move, however, for a judgment of acquittal at the end of the State's case. Yet counsel did not mention the *Buggs* standard or any specific evidentiary deficiency related to the facilitation element of the aggravated kidnapping charge.

The jury found Mr. Sumpter guilty of all counts. Although trial counsel moved for a judgment of acquittal after the verdict, counsel again did not base the motion on the *Buggs* standard. For the aggravated kidnapping charge, the state district court sentenced Mr. Sumpter to 186 months of imprisonment. In total, the court sentenced Mr. Sumpter to 351 months of imprisonment. On direct appeal, appellate counsel for Mr. Sumpter did not challenge the sufficiency of the evidence as to the aggravated kidnapping conviction. The Kansas Court of Appeals affirmed

[1] Over the course of seven months, Mr. Sumpter sexually assaulted three other women in Sedgwick County, in addition to J.B. Given the similar nature of these attacks, the state district court consolidated the cases relating to these assaults for a single trial.

Mr. Sumpter's convictions and sentence, and the Kansas Supreme Court denied review. *See State v. Sumpter*, 313 P.3d 105, 2013 WL 6164520 (Kan. Ct. App. Nov. 22, 2013) (unpublished).

Mr. Sumpter filed a petition for a Writ of Habeas Corpus in state court pursuant to K.S.A. § 60-1507. Mr. Sumpter argued that his "Trial Counsel Provided Ineffective Assistance by Failing to Challenge the Insufficiency of the State's Aggravated Kidnapping Charges." Jt. App., Vol. III, at 349 (Am. Pet. for Writ of Habeas Corpus & *In Forma Pauperis* Aff., filed July 21, 2016). Additionally, Mr. Sumpter claimed that his constitutional rights were violated because of "Ineffective Assistance of Appellate Counsel in . . . Failing to Argue the Sufficiency of the Kidnapping Charges related to J.B." *Id.* at 357. Specifically, Mr. Sumpter argued that his trial and appellate counsel were ineffective because they did not argue that his confinement of J.B. in her car was "inherent in committing the underlying attempted rape" and had no significance independent of the attempted rape itself. *Id.* at 352.

The Sedgwick County District Court denied Mr. Sumpter's claims. The court reasoned that, as a matter of law, "[c]onfining a victim in a car; physically restraining her from leaving that car; and physically prohibiting her from yelling for help is not inherent in the nature of rape or attempted rape." *Id.* at 464 (Mem. Order Den. Pet. for Writ of Habeas Corpus, filed May 2, 2017). Therefore, the court concluded that "[t]he outcome of the trial would not have changed, even if trial counsel would have raised the issue at any time before or during the trial. Because the prejudice prong is

not met, there is no reason for this [state trial] court to consider the reasonableness prong of the [*Strickland*] test." *Id.* at 465.

Mr. Sumpter appealed to the KCOA. He argued, among other things, that his "trial counsel was ineffective because [counsel] did not understand the elements of the aggravated kidnapping count and, as a result, failed to challenge the sufficiency of the State's evidence at every phase." Jt. App., Vol. IV, at 563 (Petitioner-Appellant Timothy Sumpter's Br. to the KCOA, filed Aug. 25, 2017). Furthermore, Mr. Sumpter claimed that his "appellate counsel provided ineffective assistance by failing to raise sufficiency of the evidence on the aggravated kidnapping count." *Id.* at 579.

In January 2019, the KCOA issued an opinion denying each of Mr. Sumpter's claims. *Sumpter I*, 2019 WL 257974. At the outset of its opinion, the KCOA plainly stated its holding:

> We find [Mr.] Sumpter has failed to show a constitutional injury depriving him of a fundamentally fair adjudication of the charges against him, *meaning he has not persuaded us that absent the errors he alleges there is a reasonable probability the outcome would have been different*.

Id. at *1 (emphasis added).

The KCOA then laid out the *Strickland* standard:

> To prevail . . ., a convicted defendant must show both that his or her legal representation fell below the objective standard of reasonable competence guaranteed by the right to counsel in the Sixth Amendment to the United States Constitution and that absent the substandard lawyering there probably would have been a different outcome in the criminal case. *Strickland v. Washington*, 466 U.S. 668,

> 687–88, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) . . . . A *reasonable probability of a different outcome* "undermine[s] confidence" in the result and marks the criminal proceeding as fundamentally unfair. *See Strickland*, 466 U.S. at 694. The movant, then, must prove both constitutionally inadequate representation and sufficient prejudice attributable to that representation to materially question the resulting convictions.

Id. (alteration in original) (emphasis added). With this standard in mind, the KCOA evaluated and ultimately rejected Mr. Sumpter's *Strickland* claim that his trial counsel was ineffective for failing to challenge the sufficiency of the evidence of the aggravated kidnapping conviction:

> For the aggravated kidnapping charge, the State had to prove [Mr.] Sumpter "confin[ed]" J.B. by force "to facilitate" his intent to rape her and she suffered bodily harm as a result . . . .
>
> . . . .
>
> Here, [Mr.] Sumpter confined J.B. in the midst of the criminal episode when she forced him out of her car and he retrieved her keys that he had earlier thrown out the window. At that point, J.B. was unable to leave. If she tried to get out of the car, [Mr.] Sumpter could easily seize her. And she couldn't drive the car away, thereby escaping, without the keys. [Mr.] Sumpter had, thus, effectively trapped J.B. in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her. [Mr.] Sumpter then used the keys as part of a ploy to get J.B. to unlock the car to get them back. When she did, he forced his way in and resumed his assault of her. The confinement was clear, deliberate, and more than instantaneous. To support a kidnapping or aggravated kidnapping conviction, the confinement need not be extended. No particular amount of time is required; the fact of confinement is sufficient. *Buggs*, 219 Kan. at 214; *State v. Ellie*, No. 110,454, 2015 WL 2342137, at *6 (Kan. App. 2015) (unpublished opinion).

> The standoff between [Mr.] Sumpter and J.B. and, thus, the confinement cannot be characterized as simply incidental to or inherent in the sexual assault. [Mr.] Sumpter held J.B. hostage in a specific place and sought to gain access to that place to commit a crime against her. But that situation could have been the prelude to all sorts of crimes and was not unique to rape or even sex offenses. Having gotten into the car, [Mr.] Sumpter could have robbed or severely beaten J.B. The point is [Mr.] Sumpter trapped J.B. in a small, closed place of limited safety and induced J.B. to compromise that safety in an effort to escape. Her effort permitted [Mr.] Sumpter entry to the car making the commission of the crime that followed "substantially easier" than if he had to physically break in to the car. The circumstances fit within the *Buggs* test for a confinement sufficiently distinct from the underlying crime to be successfully prosecuted as an aggravated kidnapping given J.B.'s undisputed injuries . . . .
>
> *Because the trial evidence was sufficient for the jury's verdict,* [*Mr.*] *Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction either in the district court leading up to and during the trial or on direct appeal in this court.* He has failed to show a basis for relief under K.S.A. 60-1507.

Id. at *3–5 (second alteration in original) (emphasis added). The KCOA then dismissed the remainder of Mr. Sumpter's claims. *Id.* at *5–15. Mr. Sumpter appealed to the Kansas Supreme Court. However, the Kansas Supreme Court denied Mr. Sumpter's request for review.

After exhausting his state options, Mr. Sumpter requested federal habeas relief, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Kansas. On September 10, 2020, the district court entered a memorandum and order vacating Mr. Sumpter's aggravated kidnapping conviction but denying Mr. Sumpter's

remaining claims. *See Sumpter v. Kansas* (*Sumpter II*), 485 F. Supp. 3d 1286 (D. Kan. 2020). In reaching its conclusion, the district court did not apply AEDPA deference to the KCOA's decision. Specifically, the court stated:

> The KCOA concluded that [Mr. Sumpter] confined J.B. after he had been kicked out of the car by retrieving her keys and thus trapping her in the car (she could not drive away, and he could seize her if she attempted to get out). *See Sumpter* [*I*], 2019 WL 257974, at *4. The KCOA further concluded that such confinement was independent of the attempted rape for purposes of *Buggs*. *See id.* at *5. The KCOA reached that conclusion in deciding that the evidence was sufficient to support a kidnapping conviction and that [Mr. Sumpter] therefore could not establish the necessary prejudice under *Strickland*. *See id.* at *3. The KCOA applied the wrong standard, however – the issue is not whether the evidence was legally sufficient; the issue is whether there is a reasonable probability of a different outcome. Thus, the state court's ruling deviated from the controlling federal standard and *was contrary to clearly established federal law*. *See Milton v. Miller*, 744 F.3d 660, 670 (10th Cir. 2014). The result is that this Court does not defer to the KCOA's resolution of this claim, and instead reviews the claim *de novo*. *See id.* at 671.

Id. at 1296 (emphasis added).

Exercising de novo review, the district court found that the "KCOA did not address . . . or explain how [Mr. Sumpter's] conduct outside the car constituted confinement by force." *Id.* As such, the court then conducted an extensive evaluation of Kansas kidnapping law, reasoning as follows:

> *Cabral* [i.e., *State v. Cabral*, 619 P.2d 1163 (Kan. 1980)] is the most apt precedent by which to consider the application of *Buggs* to [Mr. Sumpter's] conduct in J.B.'s car. [Mr. Sumpter's] conduct in restraining J.B. occurred while fighting with her in his attempt to commit sexual assault, and the Kansas Supreme Court made clear in *Cabral* that

such conduct is merely incidental to the assault. The state trial court cited [Mr. Sumpter's] conduct in grabbing J.B.'s hand when she reached for the door handle; but as the supreme court recognized, a perpetrator must confine the victim somewhat – and obviously prevent her from leaving – to commit the crime of rape. [Mr. Sumpter] did not take J.B. to another location to avoid detection or otherwise to facilitate the rape; in the parlance of the *Cabral* court, he simply proceeded to assault J.B. once he was alone with her in the car.

Some Kansas courts, in distinguishing *Cabral*, have noted that the victim in *Cabral* had consensually ridden around with the defendant for a period of time preceding the assault. Indeed, J.B. did not voluntarily spend the evening with [Mr. Sumpter] prior to the assault in this case. The point of the *Cabral* court in citing that fact, however, was that the defendant had not taken or confined the victim until immediately prior to and as part of the assault. Moreover, in each of those other cases in which *Cabral* was distinguished, there was some conduct by the defendant that took the case beyond the "ordinary" rape in a single confined place in a relatively short time frame – for instance, the defendant had taken the victim or used restraints or moved the victim to a different place to facilitate the assault. *See, e.g.*, *State v. Halloway*, 256 Kan. 449, 452–53, 886 P.2d 831 (1994) (defendant did not rape the victim in the car, but dragged her into woods away from the highway to lessen the risk of detection); *State v. Blackburn*, 251 Kan. 787, 794, 840 P.2d 497 (1992) (defendant lessened the risk of detection by driving the victim to other locations); *State v. Zamora*, 247 Kan. 684, 696, 803 P.2d 568 (1990) (conduct went beyond that of *Cabral*; defendant's tying and gagging the victim and his lying in front of the door to the residence to prevent escape was not merely incidental to and inherent in an "ordinary" rape); *State v. Howard*, 243 Kan. 699, 702, 763 P.2d 607 (1988) (defendant restrained the victim in a house for hours and refused to let her leave when she tried to flee after the assault); *State v. Coberly*, 233 Kan. 100, 105, 661 P.2d 383 (1983) (victim rode with the defendant for a prolonged period because of deception); *State v. Montes*, 28 Kan. App. 2d 768, 772, 21 P.3d 592 (2001) (defendant drove the victim

> to another location to facilitate the assault), *rev. denied* (Kan. June 12, 2001, and July 11, 2001).
>
> Again, in the present case, the alleged confinement took place within the car, at a single location, during the attempted assault. The State has not addressed the conduct inside the car, and thus the State has not cited any Kansas case in which such conduct solely within a vehicle has been found sufficient to support a kidnapping conviction. *Cabral* is thus the most apt case here.

Id. at 1297–98.

The district court then conducted an independent factual investigation and determined that Mr. Sumpter's conduct did not constitute confinement by force:

> One might argue (although the State made no such argument here) that [Mr. Sumpter] confined J.B. when he forcibly took her car keys while in the car, thereby hindering her ability to flee. Such conduct would not necessarily be required as part of the assault. *The testimony at trial, however, does not support such a theory of confinement*. J.B. testified that [Mr. Sumpter] made reference to the attached mace and took the keys to prevent J.B. from using that mace. She also testified that she did not know how the keys ended up outside the car. [Mr. Sumpter] testified that he ripped the mace off the keys and discarded it, and that he grabbed the keys away so that J.B. could no longer hit him with the keys in her hand. He further testified that he did not know whether he threw the keys out of the car. Thus, there was no certain evidence (only [Mr. Sumpter]'s speculation that he might have done so) that [Mr. Sumpter] threw the keys out of the car (as opposed to finding the keys outside where they fell when [Mr. Sumpter] was kicked out), and there was no evidence at all that he took the keys to prevent J.B. from driving away. Thus, a reasonable jury that followed the testimony would not likely find that [Mr. Sumpter] confined J.B. by taking her keys and throwing them outside the car.

Id. at 1298–99 (emphasis added).

Based on its interpretation of Kansas law and its factual findings, the district court ultimately found in favor of Mr. Sumpter, holding:

> The Court thus concludes, based on the Kansas precedent, that if confronted with the issue the Kansas Supreme Court would rule that [Mr. Sumpter's] conduct inside the car (after he forced his way inside) did not constitute a separate crime of kidnapping under the *Buggs* standard. As discussed above, [Mr. Sumpter] also had a strong defense based on his conduct outside the car.
>
> Accordingly, [Mr. Sumpter] could have raised a defense to the kidnaping charge as submitted to the jury (confinement only, by force only) with a great likelihood of success based on the kidnapping statute as interpreted in *Buggs* and *Cabral*. Based on the strength of that defense, there is little doubt that counsel's failure to raise that defense, based on settled caselaw, before or during or after trial, was objectively unreasonable.
>
> . . . . The strength of this defense under Kansas law creates a probability of a different outcome sufficient to undermine confidence in the kidnapping conviction. [Mr. Sumpter] is therefore entitled to relief.

Id. at 1299.

The district court then summarily denied Mr. Sumpter's remaining claims. *See id.* at 1300–07. Furthermore, the court denied Mr. Sumpter's request for a certificate of appealability with respect to his remaining claims, including:

1. Mr. Sumpter was denied his rights under the Sixth Amendment because the jury venire did not include any African Americans;

2. Appellate counsel's performance was constitutionally deficient in failing to argue instances of prosecutorial misconduct; and

3. Trial counsel's performance was constitutionally deficient in obtaining continuances of the trial date without Mr. Sumpter's consent, thereby forfeiting Mr. Sumpter's speedy trial rights.

Id. at 1308.

The State of Kansas now appeals from the district court's grant of habeas relief. First, the State argues that the KCOA reasonably applied *Strickland v. Washington*—in particular, that case's prejudice standard—thereby entitling the KCOA's decision to AEDPA deference. Under AEDPA deference, the State contends the KCOA's decision must be affirmed. The State further contends that, even under de novo review, the KCOA's decision should be affirmed. On cross-appeal, Mr. Sumpter seeks to appeal from the district court's partial denial of habeas relief. Specifically, Mr. Sumpter asserts that he may not need a certificate of appealability for his cross-appeal of his remaining claims. Alternatively, Mr. Sumpter requests that we grant a certificate of appealability as to his remaining claims.

II

"[H]abeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials. Instead, it is designed to guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring) (citation omitted). Accordingly, "[t]he [AEDPA] circumscribes our review of claims adjudicated on the merits in state court proceedings." *Littlejohn*, 704 F.3d at 824; *see also Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) ("Section 2254(d) [i.e., a central provision of AEDPA] reflects the view that habeas corpus is a 'guard against extreme

malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." (quoting *Jackson*, 443 U.S. at 332 n.5)).

"Under AEDPA, a petitioner is entitled to federal habeas relief on a claim only if he can establish that the state court's adjudication of the claim on the merits (1) 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law'; or (2) 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Littlejohn*, 704 F.3d at 824 (quoting 28 U.S.C. § 2254(d)(1), (2)). Under the AEDPA standard, "'state-court decisions [should] be given the benefit of the doubt' and '[r]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" *Washington v. Roberts*, 846 F.3d 1283, 1293 (10th Cir. 2017) (alterations in original) (quoting *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam)).

"Under § 2254(d)(1), the threshold question is whether there exists clearly established federal law." *Hooks v. Workman* (*Victor Hooks II*), 689 F.3d 1148, 1163 (10th Cir. 2012) (citing *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008)). "'Clearly established Federal law' refers to the Supreme Court's holdings, not its dicta." *Wood v. Carpenter*, 907 F.3d 1279, 1289 (10th Cir. 2018) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

If there exists clearly established federal law, a state-court decision is "contrary to" it "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme

Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state court decision involves an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006) (alteration in original) (quoting *Williams*, 529 U.S. at 413). "Critically, an '*unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Wood*, 907 F.3d at 1289 (quoting *Williams*, 529 U.S. at 410). "[E]ven a clearly erroneous application of federal law is not objectively unreasonable." *Id.* (alteration in original) (quoting *Maynard v. Boone*, 468 F.3d 665, 670 (10th Cir. 2006)). "Rather, a state court's application of federal law is only unreasonable if '*all* fairminded jurists would agree the state court decision was incorrect.'" *Id.* (emphasis added) (quoting *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014)).

"We review the district court's legal analysis of the state court decision de novo." *Welch v. Workman*, 639 F.3d 980, 991 (10th Cir. 2011) (quoting *Bland*, 459 F.3d at 1009). "Furthermore, in reviewing a state court decision under § 2254(d)(1), we must 'limit[ ]' our inquiry 'to the record that was before the state court that adjudicated the claim on the merits.'" *Littlejohn*, 704 F.3d at 825 (alteration in original) (quoting *Pinholster*, 563 U.S. at 181). "Factual findings of the state court are presumed correct unless the applicant rebuts that presumption by 'clear and convincing evidence.'" *Id.* (quoting 28 U.S.C. § 2254(e)(1)).

Finally, § 2254 limits habeas relief to "violation[s] of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, "federal habeas corpus relief does not lie for errors of state law," and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) (alteration omitted) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)); *accord Hawes v. Pacheco*, 7 F.4th 1252, 1264 (10th Cir. 2021). As such, "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam).

III

The State of Kansas raises two issues on appeal. First, it argues that the KCOA's decision was not contrary to, nor an unreasonable application of the Supreme Court's decision in *Strickland v. Washington*. As such, the State contends the KCOA's decision is due AEDPA deference and must be affirmed. Second, the State claims that even under de novo review, the KCOA's decision should be affirmed. It contends in this regard that the district court erred by failing to apply the statutory presumption of correctness to the KCOA's factual findings and substituting its own interpretation of state law for that of the KCOA. Generally speaking, we agree with the State; consequently, the district court's grant of habeas relief cannot stand.

More specifically, we agree with the State that the KCOA's decision was neither contrary to, nor an unreasonable application of, clearly established federal

law. And, when AEDPA deference is appropriately applied to the KCOA's decision, we conclude that the KCOA was reasonable in determining that any ineffective assistance of counsel was not prejudicial because the evidence was sufficient to support the aggravated kidnapping conviction. Moreover, even assuming, *arguendo*, that the KCOA's decision was not entitled to AEDPA deference, we conclude that the KCOA's decision should be upheld under de novo review. Quite apart from AEDPA—the KCOA's factual findings and interpretation of state law were entitled to deference in the habeas context, and the district court wrongly denied that deference.

A

In this appeal, the clearly established federal law comes from *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner "must show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.'" *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 687–88). "These two prongs may be addressed in any order, and failure to satisfy either is 'dispositive.'" *Littlejohn*, 704 F.3d at 859 (quoting *Byrd*, 645 F.3d at 1168). "[R]easonableness" is measured "under prevailing professional norms." *Strickland*, 466 U.S. at 688. Prejudice "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Specifically, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Williams*, 529 U.S. at 391 (quoting *Strickland*, 466 U.S. at 694).

"The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." *Strickland*, 466 U.S. at 695. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*

1

The State first contends that the overall substance of the KCOA's analysis reflects that it understood and decided Mr. Sumpter's ineffective assistance claim under the proper *Strickland* framework. *See* Aplt.'s Opening Br. at 35. Thus, the State concludes that the KCOA's decision was not "contrary to" clearly established federal law and that the district court erred in ruling to the contrary. Mr. Sumpter responds that the KCOA "announced and applied a sufficiency standard that was contrary to federal law." Aplee.'s Resp. Br. at 29. Specifically, Mr. Sumpter argues that the KCOA misstated the *Strickland* prejudice standard as a sufficiency of the evidence standard. *Id.* Consistent with Mr. Sumpter's argument, the district court found that "[t]he KCOA applied the wrong standard[:] . . . the issue is not whether the evidence was legally sufficient; the issue is whether there is a reasonable probability of a different outcome." *Sumpter II*, 485 F. Supp. 3d at 1296. Therefore, the district court concluded "the state court's ruling deviated from the controlling

federal standard and was contrary to clearly established federal law." *Id.* We conclude that the State has the better of this argument—specifically, that the district court erred in concluding that the KCOA's decision was contrary to clearly established federal law of the U.S. Supreme Court, that is, *Strickland*.

"A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," but "a run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 405–06. More specifically, as the Supreme Court has stated, "a state-court decision on a prisoner's ineffective-assistance claim [that] correctly identifies *Strickland* as the controlling legal authority and [ ] appl[ies] that framework . . . . would be in accord with [the Supreme Court's] decision in *Strickland*[,] . . . even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself." *Id.* at 406. Therefore, when determining whether a state court's decision was "contrary to" clearly established law, we simply determine whether the state court correctly identified *Strickland* as the controlling legal authority and applied that framework.

Here, the KCOA clearly identified *Strickland* as the controlling authority and applied that framework—specifically, *Strickland*'s prejudice standard. At the very outset of the opinion, in providing an overview of its holding, the KCOA plainly invoked the substance of the *Strickland* prejudice standard:

> We find [Mr.] Sumpter has failed to show a constitutional injury depriving him of a fundamentally fair adjudication of the charges against him, *meaning he has not persuaded us that absent the errors he alleges there is a reasonable probability the outcome would have been different*.

Sumpter I, 2019 WL 257974, at *1 (emphasis added). Shortly thereafter, the KCOA correctly identified and detailed the *Strickland* standard:

> To prevail . . ., a convicted defendant must show both that his or her legal representation fell below the objective standard of reasonable competence guaranteed by the right to counsel in the Sixth Amendment to the United States Constitution and that absent the substandard lawyering there probably would have been a different outcome in the criminal case. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014); *see Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3, 4, 694 P.2d 468 (1985) (adopting and stating *Strickland* test for ineffective assistance). A reasonable probability of a different outcome "undermine[s] confidence" in the result and marks the criminal proceeding as fundamentally unfair. *See Strickland*, 466 U.S. at 694. The movant, then, must prove both constitutionally inadequate representation and sufficient prejudice attributable to that representation to materially question the resulting convictions.

Id. (alteration in original).

The KCOA then correctly stated the petitioner's burden: "Regardless of the inadequacy of legal representation, a [habeas] motion fails if the movant cannot establish substantial prejudice." *Id.* at *2; *see Pinholster*, 563 U.S. at 189 ("A reasonable probability . . . . requires a 'substantial,' not just 'conceivable,' likelihood of a different result." (quoting *Richter*, 562 U.S. at 112)). The KCOA also correctly determined that it "properly may deny a motion that falters on the prejudice

component of the *Strickland* test without assessing the sufficiency of the representation," which is exactly what it did here. *Sumpter I*, 2019 WL 257974, at *2 (citing *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")). Therefore, in deciding Mr. Sumpter's ineffective assistance claim, the KCOA correctly stated, and demonstrated a clear understanding of, the *Strickland* standard. And, contrary to the district court's conclusion here, the KCOA applied the *Strickland* prejudice standard—instead of abandoning it for a sufficiency of the evidence test.

In this regard, "the KCOA's proper articulation of the prejudice standard in other parts of its opinion confirms that it was not relying on an impermissible [sufficiency of the evidence] standard." *Frost*, 749 F.3d at 1227. As noted, the KCOA correctly stated the *Strickland* standard at the outset of its opinion—including the standard's test for prejudice. *Sumpter I*, 2019 WL 257974, at *1. Later in the opinion, when considering Mr. Sumpter's ineffective assistance claim regarding his attorneys' handling of the trial court's consolidation of his several criminal cases, the KCOA further demonstrated an awareness of how *Strickland*'s prejudice standard worked:

> The question posed here, however, is whether [Mr.] Sumpter *reasonably could have expected a different outcome* had the district court denied the State's request to consolidate and ordered a separate trial for each incident. If so, then, [Mr.] Sumpter has demonstrated the sort of prejudice required under *Strickland*.

Id. at *8 (emphasis added). The KCOA ultimately concluded that "[Mr.] Sumpter cannot point to actual legal prejudice *consistent with the Strickland test* flowing from the consolidated trial as compared to separate trials." *Id.* at *10 (emphasis added).

Taken together, "the overall substance of the [KCOA's] analysis, as well as the result it reached, reflects that the court understood and decided the ineffective-assistance issue under the proper *Strickland* framework." *Grant v. Royal*, 886 F.3d 874, 906 (10th Cir. 2018). Therefore, we agree with the State that the KCOA's decision was not "contrary to" clearly established federal law, and the district court erred in concluding otherwise.

Further, as we discuss below, we are unable to uphold the district court's determination that AEDPA deference was inappropriate on the ground that the KCOA's decision reflected an unreasonable application of *Strickland*. We conclude that—contrary to the district court's concern—the KCOA did not act unreasonably in considering, as part of its ineffective assistance analysis, whether there was sufficient evidence of the aggravated kidnapping offense.

2

The State argues that the KCOA reasonably applied clearly established federal law by determining that Mr. Sumpter was not prejudiced within the meaning of *Strickland* by his counsel's failures to challenge the sufficiency of the evidence supporting his aggravated kidnapping conviction because such a challenge would have been meritless—*viz.*, the evidence was sufficient to support his aggravated kidnapping conviction. Specifically, the State contends that the KCOA analyzed the

sufficiency of the evidence in order to answer the prejudice question that *Strickland* defines—that is, whether there was a reasonable probability of a different outcome had Mr. Sumpter's counsel raised such a sufficiency challenge. *See* Aplt.'s Opening Br. at 23.

Mr. Sumpter responds that the KCOA's decision evinced an unreasonable application of clearly established law, as its conclusion on prejudice was "explicitly linked to a sufficiency determination." Aplee.'s Resp. Br. at 29. Mr. Sumpter claims that the KCOA's use of a sufficiency analysis ignored "the Supreme Court's exhortation that the 'reasonable probability' determination requires the court to weigh all of the evidence before the jury and assess whether the verdict is only 'weakly supported' by the evidence." *Id.* at 28. Yet, as Mr. Sumpter reasons, "Kansas courts have made clear that in a sufficiency determination, appellate courts only view the evidence in the light most favorable to the State and 'do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.'" *Id.* (quoting *State v. Brown*, 387 P.3d 835, 848 (Kan. 2017)). Thus, Mr. Sumpter contends that evaluating *Strickland* prejudice through the application of the sufficiency of the evidence standard has the effect of forcing petitioners to satisfy a heightened, outcome-determinative test, which is inconsistent with *Strickland*'s "reasonability probability" standard. Accordingly, Mr. Sumpter argues that the KCOA's approach is "not merely wrong, but 'objectively unreasonable' under

AEDPA." *Id.* (quoting *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015)). We disagree.

In assessing the State's claim, we must be cognizant of our standard of review. Under § 2254(d)(1), a federal court must limit its review to determining "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101. In other words, it bears keeping in mind that "[f]or purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Id.* (quoting *Williams*, 529 U.S. at 410); *accord Frost*, 749 F.3d at 1223. Under this deferential standard, the KCOA's determination that Mr. Sumpter's *Strickland* claim lacks merit has the effect of "preclud[ing] federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

We conclude the KCOA reasonably applied *Strickland*. In his Opening Brief to the KCOA, Mr. Sumpter argued his trial and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence to support his aggravated kidnapping conviction.[2] *See* Jt. App., Vol. IV, at 563, 579. Accordingly, the KCOA

[2] On appeal, Mr. Sumpter argues that the KCOA mischaracterized his *Strickland* claim as solely stemming from his trial counsel's failure to challenge the sufficiency of the evidence to support his aggravated kidnapping conviction. *See* Aplee.'s Resp. Br. at 21. Instead, he claims that he has consistently argued that his trial counsel was ineffective for failing to "investigate, understand, develop, and deploy a *Buggs*-defense to his aggravated kidnapping claim" at various stages of the case. *Id.* However, in his Opening Brief submitted to the Kansas Court of Appeals, Mr. Sumpter clearly framed the issue in a way that centered on counsel's failure to

quite reasonably analyzed whether Mr. Sumpter suffered prejudice under *Strickland* from counsel's failure to raise such a challenge by inquiring as to whether such a sufficiency challenge would have been meritorious. Stated otherwise, the KCOA reasonably analyzed the question of prejudice under *Strickland* by assessing whether, but for counsel's failure to challenge the sufficiency of the evidence, there is a reasonable probability that the result of the proceeding would have been different. That is, if the sufficiency of evidence challenge was determined to lack merit, as the KCOA ultimately posited here, it could not be said that there is a reasonable

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raise the sufficiency of the evidence issue. He stated the following: "[Mr.] Sumpter's trial counsel was ineffective because she did not understand the elements of the aggravated kidnapping count and, *as a result, failed to challenge the sufficiency of the State's evidence* at every phase." Jt. App., Vol. IV, at 563 (emphasis added). Though this language complains of counsel's lack of understanding of the law of aggravated kidnapping, it pinpoints counsel's failure to actually lodge a challenge to the sufficiency of the evidence as the *action* resulting in allegedly ineffective assistance. Similarly, in his petition for a Writ of Habeas Corpus to the Sedgwick County District Court, Mr. Sumpter argued that his "Trial Counsel Provided Ineffective Assistance by *Failing to Challenge the Insufficiency of the State's Aggravated Kidnapping Charges*." Jt. App., Vol. III, at 349 (emphasis added). Therefore, neither his state petition for Writ of Habeas Corpus nor his argument as presented to the KCOA supports his more expansive framing here of his ineffective assistance grievances with his aggravated kidnapping conviction. Furthermore, the district court did not find that the KCOA erred in characterizing Mr. Sumpter's *Strickland* claim as centered on the failure to challenge the sufficiency of the evidence. Instead, the district court, like the KCOA, confined its analysis to determining whether Mr. Sumpter's trial counsel was ineffective for failing to challenge the sufficiency of the evidence for Mr. Sumpter's aggravated kidnapping conviction. In sum, we cannot conclude that, as to his aggravated kidnapping conviction, Mr. Sumpter fairly presented any non-sufficiency ineffective assistance claims before the state courts; that is, he failed to exhaust any such claims.

probability that the result would have been different if Mr. Sumpter's counsel advanced such a challenge.

The KCOA's approach is consistent with our own understanding of what the *Strickland* prejudice analysis entails. Specifically, we have recognized that "[w]hen, as here, the basis for the ineffective assistance claim is the failure to raise an issue, we must look to the merits of the omitted issue." *United States v. Orange*, 447 F.3d 792, 797 (10th Cir. 2006); *see Jones v. Gibson*, 206 F.3d 946, 959 (10th Cir. 2000) ("When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue, we look to the merits of the omitted issue." (quoting *Hooks v. Ward* (*Victor Hooks I*), 184 F.3d 1206, 1221 (10th Cir. 1999))). "If the omitted issue is without merit, then counsel's failure to raise it is not prejudicial, and thus is not ineffective assistance." *Orange*, 447 F.3d at 797; *see Jones*, 206 F.3d at 959 ("If the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." (quoting *Victor Hooks I*, 184 F.3d at 1221)).

Indeed, in the context of *Strickland* and under analogous circumstances, we have assessed the merits of a sufficiency of the evidence challenge in determining whether the state court acted unreasonably in determining that the petitioner was not entitled to relief based on his counsel's failure to present a sufficiency challenge. *See Upchurch v. Bruce*, 333 F.3d 1158, 1165 (10th Cir. 2003). In *Upchurch*, we considered whether petitioner's appellate counsel was constitutionally deficient for failing to challenge the sufficiency of the evidence for petitioner's kidnapping

conviction. *See id.* at 1164. In evaluating petitioner's *Strickland* claim, we stated that "[i]n order to evaluate [petitioner's] counsel's performance under *Strickland*, 'we look to the merits of the omitted issue.'" *Id.* at 1164–65 (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)). Thus, as with the KCOA here, we evaluated the merits of the sufficiency of the evidence claim under Kansas's law of kidnapping to determine whether there was "insufficient evidence for a rational jury to convict [petitioner]." *Id.* at 1164–66.[3]

Following this approach, under "AEDPA's deferential standard of review, we [held] that it was not unreasonable for the KCOA to conclude that [petitioner] received effective assistance of appellate counsel." *Id.* at 1167. In other words, we looked to the merits of the sufficiency of the evidence challenge in determining whether the KCOA was unreasonable in concluding that counsel acted reasonably in omitting it. *See id.* The KCOA precisely followed this mode of analysis here as it related to the question of prejudice under *Strickland*. And *Upchurch* strongly suggests that the KCOA acted reasonably in doing so.

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[3] Although *Upchurch* concerned the performance prong of the *Strickland* test, the standard for evaluating counsel's "failure to raise a claim" is the same under either prong. *Compare Orange*, 447 F.3d at 797 ("When, as here, the basis for the ineffective assistance claim is the failure to raise an issue, we must look to the merits of the omitted issue. If the omitted issue is without merit, then counsel's failure to raise it is not prejudicial, and thus is not ineffective assistance." (citation omitted)), *with Upchurch*, 333 F.3d at 1163 ("In order to evaluate [petitioner's] counsel's performance, 'we look to the merits of the omitted issue.'" (quoting *Cargle*, 317 F.3d at 1202)). Therefore, we believe our approach in *Upchurch* is—to say the least—instructive here.

More specifically, in assessing the merits of the sufficiency of the evidence claim here, the KCOA looked to the Kansas standard for assessing sufficiency of the evidence.[4] *See Sumpter I*, 2019 WL 257974, at *3 ("To assess sufficiency we review the evidence in a light most favorable to the State as the prevailing party and ask whether reasonable jurors could return a guilty verdict based on that evidence." (citing *State v. Butler*, 416 P.3d 116, 128 (Kan. 2018))). The KCOA then extensively reviewed Kansas kidnapping law and the underlying facts of Mr. Sumpter's attack. *See id.* In particular, the KCOA found that Mr. Sumpter confined J.B. in the car when he "retrieved her keys that he had earlier thrown out the window" because she was unable to leave without them, rendering her "effectively trapped . . . in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her." *Id.* at *4. The court then applied these facts to Kansas kidnapping law and found that "[t]he circumstances fit within the *Buggs* test for a confinement

[4] The Kansas sufficiency of the evidence standard substantially mirrors the federal one. *Compare Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis omitted)), *with State v. Butler*, 416 P.3d 116, 128 (Kan. 2018) ("[T]he standard of review is whether, after reviewing all the evidence in a light most favorable to the State, the appellate court is convinced a rational fact-finder could have found the defendant guilty beyond a reasonable doubt."). As discussed *supra*, we previously had occasion to apply the state standard in a habeas case—coincidentally the Kansas standard—in assessing the sufficiency of the evidence in the ineffective assistance context. *See Upchurch*, 333 F.3d at 1165 ("In evaluating the sufficiency of the evidence in a criminal case, the Kansas courts determine 'whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.'" (quoting *State v. Jamison*, 7 P.3d 1204, 1211 (Kan. 2000))).

sufficiently distinct from the underlying crime to be successfully prosecuted as an aggravated kidnapping given J.B.'s undisputed injuries." *Id.* at *5. Accordingly, the KCOA determined that Mr. Sumpter's sufficiency of the evidence claim was without merit.

With this conclusion in mind, the KCOA held that "[b]ecause the trial evidence was sufficient for the jury's verdict, [Mr.] Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction." *Id.* In other words, because a challenge to the sufficiency of the evidence would have failed, there is no reasonable probability of a different outcome had Mr. Sumpter's counsel raised such a challenge. In our view, the KCOA's approach constituted an entirely reasonable application of *Strickland*—in particular, its prejudice standard. And nothing about the KCOA's application of *Strickland* gave the district court a proper basis to strip away AEDPA deference.

To be sure, at the conclusion of its *Strickland* analysis of Mr. Sumpter's claim based on counsel's failure to present a sufficiency of the evidence challenge, the KCOA did not explicitly restate that there was no "reasonable probability of a different outcome." However, such "overemphasis on the language of a state court's rationale would lead to a grading papers approach that is outmoded in the post-AEDPA era." *Roberts*, 846 F.3d at 1293 (alteration omitted) (quoting *Ferguson v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 1315, 1337 (11th Cir. 2013)). We have "eschew[ed] the role of strict English teacher, finely dissecting every sentence of a state court's ruling to ensure all is in good order." *Royal*, 886 F.3d at 905–06. As

such, we are unwilling to conclude that the KCOA's decision constituted an unreasonable application of the clearly established law of *Strickland* (or was contrary to that law) simply because it failed to parrot once again the well-established *Strickland* prejudice standard.

Moreover, we reject Mr. Sumpter's contention that the use of a sufficiency analysis might have resulted in the improper skewing of the KCOA's factual findings in favor of the State. This contention is predicated on the truism that, under the sufficiency of the evidence standard, the facts are construed in the light most favorable to the State. *See, e.g.*, *Butler*, 416 P.3d at 128; *Jackson*, 443 U.S. at 319. Even putting aside that our precedent—construing *Strickland*'s commands—clearly seems to support the KCOA's reliance on the sufficiency of the evidence standard, Mr. Sumpter can gain no ground from this contention based on the specific circumstances here.

Even if there were some possibility of such a skewing of the factfinding process—a question upon which we do not opine—Mr. Sumpter would be positioned poorly to claim prejudice from it because of his litigation decisions in this appeal. First, Mr. Sumpter has not meaningfully shown that the KCOA's factfinding was erroneous, much less demonstrated that it was erroneous by clear and convincing evidence as required under 28 U.S.C. § 2254(e)(1). Perhaps equally as important, Mr. Sumpter expressly conceded certain facts that were key, material pillars for the KCOA's sufficiency of the evidence analysis and its legal conclusion that any sufficiency of the evidence challenge would have lacked merit. Specifically, Mr.

Sumpter conceded two key facts materially bearing on the KCOA's legal determination that Mr. Sumpter confined J.B. in the car in a manner supporting a kidnapping charge under *Buggs*: (1) "The keys ended up outside of the car" and (2) "Mr. Sumpter stood outside of the car with the keys." Oral Argument at 24:30–49. And that legal determination of confinement led the KCOA to conclude that Mr. Sumpter's counsel could not have mounted a meritorious challenge to the sufficiency of the evidence—*viz.*, that determination led the court to reach the ultimate conclusion that Mr. Sumpter could not establish prejudice under *Strickland*.

Accordingly, even if the KCOA's use of a sufficiency of the evidence approach had the effect—to some degree—of skewing the KCOA's factfinding, Mr. Sumpter would be hard pressed here to claim that he was harmed by this effect. That is because Mr. Sumpter has not meaningfully challenged the KCOA's factual findings and, indeed, has expressly conceded the accuracy of key findings upon which the KCOA rested its legal confinement determination and, by logical extension, its prejudice determination under *Strickland*.

In sum, we conclude that the KCOA's decision reasonably applied *Strickland*—most notably, its prejudice standard—and its decision regarding Mr. Sumpter's ineffective assistance claim was entitled to AEDPA deference, which the district court here wrongly denied it. Under that deference, we discern no ground to disturb the KCOA's overarching conclusion that Mr. Sumpter did not carry his burden to establish ineffective assistance under *Strickland*. Put another way, the KCOA's determination that Mr. Sumpter's *Strickland* claim lacks merit has the effect

of "preclud[ing] federal habeas relief[,] . . . as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough*, 541 U.S. at 664).

B

However, even assuming, *arguendo*, that the KCOA's decision was not entitled to AEDPA deference, we still would conclude under de novo review that the KCOA's decision should be upheld.

The State contends that the KCOA "correctly determined that under state law, the facts established [Mr.] Sumpter confined J.B." Aplt.'s Opening Br. at 38. As the State reasons, in overruling the KCOA's decision, the district court inappropriately substituted its own factual determinations and interpretations of state law for that of the KCOA. Mr. Sumpter, on the other hand, claims that the district court did not err in its treatment of state law. Specifically, Mr. Sumpter contends that the State has presented no cases "indicat[ing] that a federal district court cannot evaluate state law in a *de novo* prejudice review to determine the strength of the defense at issue and its likelihood of success." Aplee.'s Resp. Br. at 41. As such, Mr. Sumpter claims that the district court "evaluated 'the strength of [the *Buggs*] defense under Kansas law' and concluded that there was 'a significant likelihood that a jury, if properly instructed on the law under *Buggs* and *Cabral*, would have found that [Mr. Sumpter] did not confine (not merely take) J.B. by force.'" *Id*.

We begin by noting that "[e]ven when reviewing a habeas claim de novo rather than under § 2254(d), state-court factfinding still receives the benefit of doubt under

§ 2254(e)(1): that is, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence.'" *Fontenot v. Crow*, 4 F.4th 982, 1061 (10th Cir. 2021) (second alteration in original) (quoting *Victor Hooks II*, 689 F.3d at 1164). "The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." *Al-Yousif*, 779 F.3d at 1181 (quoting *Morgan*, 662 F.3d at 797–98).

Here, the KCOA made two key findings of fact, which it relied upon in conducting its confinement analysis: (1) Mr. Sumpter "retrieved [J.B.'s] keys that he had earlier thrown out the window," and (2) Mr. Sumpter "displayed the keys in an effort to get J.B. to open the door." *Sumpter I*, 2019 WL 257974, at *3–4. Mr. Sumpter has not meaningfully challenged these findings of fact—much less rebutted them by clear and convincing evidence as he would be obliged to do in challenging them pursuant to § 2254(e)(1).[5] Therefore, we must presume the KCOA's factual findings are correct.[6]

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[5] Indeed, as we noted *supra*, Mr. Sumpter has conceded two significant facts, which were critical to the KCOA's confinement analysis. Specifically, Mr. Sumpter conceded that (1) "the keys ended up outside of the car," and (2) "Mr. Sumpter stood outside of the car with the keys." Oral Argument at 24:30–49.

[6] The district court found that "there was no certain evidence (only [Mr. Sumpter's] speculation that he might have done so) that [Mr. Sumpter] threw the keys out of the car." *Sumpter II*, 485 F. Supp. 3d at 1299. However, the district court inappropriately disregarded the KCOA's finding to the contrary: "During the attack, [Mr.] Sumpter took J.B.'s car keys from her as she attempted to fight him off and threw them out the window." *Sumpter I*, 2019 WL 257974, at *3. As required by § 2254(e)(1), we defer to the KCOA's findings of fact unless a petitioner rebuts those findings by clear and convincing evidence.

Based on its factual findings, the KCOA made a legal determination that the requirements of kidnapping were satisfied under Kansas law. Specifically, the KCOA concluded:

> For the aggravated kidnapping charge, the State had to prove [Mr.] Sumpter "confin[ed]" J.B. by force "to facilitate" his intent to rape her and she suffered bodily harm as a result . . . .
>
> . . . .
>
> Here, [Mr.] Sumpter confined J.B. in the midst of the criminal episode when she forced him out of her car and he retrieved her keys that he had earlier thrown out the window. At that point, J.B. was unable to leave. If she tried to get out of the car, [Mr.] Sumpter could easily seize her. And she couldn't drive the car away, thereby escaping, without the keys. [Mr.] Sumpter had, thus, effectively trapped J.B. in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her. [Mr.] Sumpter then used the keys as part of a ploy to get J.B. to unlock the car to get them back. When she did, he forced his way in and resumed his assault of her. The confinement was clear, deliberate, and more than instantaneous. To support a kidnapping or aggravated kidnapping conviction, the confinement need not be extended. No particular amount of time is required; the fact of confinement is sufficient. *Buggs*, 219 Kan. at 214; *State v. Ellie*, No. 110,454, 2015 WL 2342137, at *6 (Kan. App. 2015) (unpublished opinion).
>
> The standoff between [Mr.] Sumpter and J.B. and, thus, the confinement cannot be characterized as simply incidental to or inherent in the sexual assault. [Mr.] Sumpter held J.B. hostage in a specific place and sought to gain access to that place to commit a crime against her. But that situation could have been the prelude to all sorts of crimes and was not unique to rape or even sex offenses. Having gotten into the car, [Mr.] Sumpter could have robbed or severely beaten J.B. The point is [Mr.] Sumpter trapped J.B. in a small, closed place of limited safety and induced J.B. to

> compromise that safety in an effort to escape. Her effort permitted [Mr.] Sumpter entry to the car making the commission of the crime that followed "substantially easier" than if he had to physically break in to the car. *The circumstances fit within the Buggs test for a confinement sufficiently distinct from the underlying crime to be successfully prosecuted as an aggravated kidnapping given J.B.'s undisputed injuries*.

Id. at *3–5 (second alteration in original) (emphasis added).

We are not at liberty to second-guess the KCOA's reading of Kansas law in reaching this result—in particular, the KCOA's interpretation of the import of *Buggs* for these facts.[7] *See Wilson*, 562 U.S. at 5 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (alteration in original) (quoting *Estelle*, 502 U.S. at 67–68)); *see also Hawes*, 7 F.4th at 1264 ("[T]he Supreme Court has 'repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.'" (quoting *Bradshaw*, 546 U.S. at 76)). As such, we find the district court's re-assessment of Kansas kidnapping law here to be inappropriate.

Even if the district court believed *State v. Cabral* to be "the most apt precedent by which to consider the application of *Buggs* to [Mr. Sumpter's] conduct in J.B.'s

[7] Even if this were not so, it would be particularly hazardous to second-guess a Kansas court's application of *Buggs* because, as the KCOA described it, *Buggs* "effectively laid out a totality-of-the-circumstances standard that, unlike a bright-line rule, creates a fuzzy border where close cases turn on seemingly minor differences." *Sumpter I*, 2019 WL 257974, at *4. Therefore, *Buggs* allows for a wide range of permissible outcomes.

car," it was not permitted to substitute its own independent assessment of Kansas law for that of the KCOA. *Sumpter II*, 485 F. Supp. 3d at 1297. Yet that is exactly what the district court did here. The court engaged in a lengthy discussion regarding its belief that the KCOA erred in failing to apply *Cabral*, and concluded that, "[t]his Court does not agree with the state court . . . that such conduct is independent of and not incidental to [Mr. Sumpter's] sexual assault of J.B." *Id.* at 1296. Indeed, the district court disregarded the KCOA's interpretation of state law and expressly purported to predict how the Kansas Supreme Court "would rule"—that the Kansas Supreme Court would determine that "[Mr. Sumpter's] conduct . . . did not constitute a separate crime of kidnapping under the *Buggs* standard." *Id.* at 1299.

However, U.S. Supreme Court precedent leaves no room for such analysis—*viz.*, analysis under which habeas courts presume to know better than state courts how to interpret their own state's law. *See Wilson*, 562 U.S. at 5 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (alteration in original) (quoting *Estelle*, 502 U.S. at 67–68)); *Estelle*, 502 U.S. at 67–68 ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). The KCOA clearly held that the "circumstances fit within the *Buggs* test for a confinement sufficiently distinct from the underlying crime to be successfully prosecuted as an aggravated

kidnapping." *Sumpter I*, 2019 WL 257974, at *5. The district court was required to defer to this determination, and so are we.

Therefore, applying § 2254(e)(1)'s presumption of correctness to the KCOA's factual determinations and deferring to the KCOA's interpretation of Kansas law—even under de novo review—we conclude that there is no basis to disturb the KCOA's determination that Mr. Sumpter confined J.B. by force to facilitate his intent to rape her and that she suffered bodily harm as a result. Consequently, there is no ground to disturb the KCOA's conclusion that there was sufficient evidence to support Mr. Sumpter's aggravated kidnapping conviction and that any challenge on the basis of the sufficiency of the evidence would have lacked merit. Given this, the KCOA likewise correctly concluded that there was no reasonable probability of a different outcome had Mr. Sumpter's trial or appellate counsel raised a sufficiency of the evidence challenge to the aggravated kidnapping conviction and that, therefore, Mr. Sumpter was not prejudiced under *Strickland* by his counsel's failure to present such a challenge. Accordingly, even under de novo review, Mr. Sumpter cannot show ineffective assistance and his claim of this stripe was properly rejected by the KCOA.

IV

A

Mr. Sumpter posits that he was not required to obtain a certificate of appealability for his claims comprising his cross-appeal. *See* Aplee.'s Resp. Br. at

48.[8] Specifically, he argues "that a COA is only in play when a prisoner 'take[s]' 'an appeal.'" *Id.* (alteration in original) (quoting 28 U.S.C. § 2253(c)(1)). Furthermore, he claims that the Supreme Court has expressed skepticism of "the utility of the COA requirement in [a cross-appeal] because [a COA] is intended to fill a gate-keeping function." *Id.* In a cross-appeal, because the "State has properly noticed an appeal of the grant of habeas relief . . . 'there are no remaining gates to be guarded.'" *Id.* (quoting *Jennings v. Stephens*, 574 U.S. 271, 282 (2015)).

[8] Though the language of the COA statute—28 U.S.C. § 2253(c)—could reasonably be read as requiring both prisoners and state parties to secure COAs to appeal from final judgments in § 2254 proceedings, it is well-settled that the COA requirement is not applicable to states (nor the federal government in § 2255 proceedings). *See* FED. R. APP. P. 22(b)(3) ("A certificate of appealability is not required when a state or its representative or the United States or its representative appeals."); *id.* advisory committee's note to 1967 adoption (noting, as to an earlier version of the rule discussing the pre-AEDPA, analogous requirement of a certificate of probable cause that "[a]lthough 28 U.S.C. § 2253 appears to require a certificate of probable cause even when an appeal is taken by a state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ"); *United States v. Pearce*, 146 F.3d 771, 774 (10th Cir. 1998) ("We hold that the United States has the right to appeal a final order in a proceeding under § 2255 and need not obtain a certificate of appealability. Thus we have jurisdiction, and hence deny defendant's motion to dismiss the government's appeal."); *see also* 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4[b] (2021) ("Sections 2253(a) and 2253(c)(1) seem to say that a certificate of appealability is needed in all section 2254 and 2255 appeals, apparently including ones by the state or federal government as well as by the prisoner, but Fed. R. App. P. 22(b) as amended by AEDPA in 1996 and thereafter revised by the Supreme Court in 1998 and 2009 exempts the 'state or its representative' and 'the United States or its representative' from the need to obtain a COA in order to appeal."). Therefore, the only question here is whether a prisoner, like Mr. Sumpter—when filing a cross-appeal to a state's appeal, which does not require a COA—is subject to the COA requirement.

28 U.S.C. § 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." The following subsection, § 2253(c)(2), further provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." Although the COA "performs an important gate-keeping function," the Supreme Court has noted that "[i]t is unclear whether [the COA] requirement applies to a habeas petitioner seeking to cross-appeal in a case that is already before a court of appeals." *Jennings*, 574 U.S. at 282.

The Third Circuit answered this question in the affirmative—*viz.*, it held that prisoners filing a cross-appeal are required to secure a COA for their claims. *See Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 474 (3d Cir. 2017). Because a COA requires an applicant to show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further,'" the court concluded, "[w]e perceive no reason to set aside this obligation merely because the petitioner's claims happen to arrive by way of cross-appeal." *Id.* (omission in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court explained that "in this context too [a COA] can serve its intended purpose of 'screen[ing] out issues unworthy of judicial time and attention and ensur[ing] that frivolous claims are not assigned to merits panels,' a 'gatekeeping function' that is satisfied '[o]nce a judge has made the determination that a COA is warranted and

resources are deployed in briefing and argument.'" *Id.* (second, third, and fourth alterations in original) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012)).

The Third Circuit is not alone: a majority of the circuit courts that have ruled on the issue have reached a similar conclusion. *See, e.g.*, Brian R. Means, FEDERAL HABEAS MANUAL § 12:73, Westlaw (database updated May 2022) ("Even if the prisoner obtains a writ in the district court, a majority of courts have concluded that he must obtain a COA in order to proceed on a cross-appeal."). For example, prior to the Supreme Court's *Jennings* decision (cited *supra*)—which indicated that whether prisoners needed COAs for their cross-appeal claims was an open issue—the Second Circuit similarly opined, saying "we conclude that a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003). Further, the Ninth Circuit agreed with the Second Circuit and explained, "[a]llowing a successful habeas petitioner to expand the scope of habeas review by adding claims other than those expressly held to be meritorious would thwart AEDPA's goal of limiting habeas review to those claims where 'the petitioner makes a substantial showing of the denial of a constitutional right.'" *Rios v. Garcia*, 390 F.3d 1082, 1087 (9th Cir. 2004) (quoting *Grotto*, 316 F.3d at 209). On the other hand, the Seventh Circuit has determined that a COA is not required for claims arising from a prisoner's cross-appeal. Specifically, the Seventh Circuit reasoned that "once a case is properly

before the court of appeals . . . there are no remaining gates to be guarded." *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002).

Amongst the circuits that have ruled on the COA issue, the Seventh Circuit appears to be the sole outlier, and we believe that its reasoning is at odds with the principles underlying the habeas regime. The gates of AEDPA are designed to bar the doors of appellate courts to frivolous or otherwise woefully inadequate prisoner claims by requiring those claims to clear the hurdle of a COA; this statutory objective is not materially altered simply because the claim arrives clothed in a cross-appeal. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("By enacting AEDPA . . . Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course"). By not requiring prisoner litigants to make a "substantial showing of the denial of a constitutional right" for their claims that have not already secured relief, we would be hindering AEDPA's goal of preventing habeas litigants from needlessly taxing courts' judicial resources and time. *See Banister v. Davis*, ---U.S.----, 140 S. Ct. 1698, 1707 (2020) ("AEDPA aimed to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality.").

Therefore, we join the majority of circuits that have ruled on the issue in concluding that the COA requirement applies to claims that habeas petitioners present via cross-appeal. Accordingly, Mr. Sumpter needs a COA for his remaining claims.

B

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, "a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. "AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner's request for COA." *Pacheco v. El Habti*, 48 F.4th 1179, 1192 (10th Cir. 2022) (quoting *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004)). Therefore, "[a]t the COA stage . . . we only ask whether the [d]istrict [c]ourt's application of AEDPA deference . . . to a claim was debatable amongst jurists of reason." *Dockins*, 374 F.3d at 938 n.1 (second omission in original) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)).

1

Mr. Sumpter first seeks a COA for his claim that he was denied his rights under the Sixth Amendment because the jury venire did not include any African Americans. *See* Aplee.'s Resp. Br. at 49. The district court concluded that the KCOA correctly identified the governing law—*Berghuis v. Smith*, 559 U.S. 314 (2010)—and reasonably applied it to Mr. Sumpter's claim. *Sumpter II*, 485 F. Supp. 3d at 1305–06. We do not find the district court's application of AEDPA deference to the KCOA's decision to be debatable amongst jurists of reason.

First, Mr. Sumpter agrees that the governing law was *Berghuis*, which the district court correctly determined that the KCOA identified and applied. *See* Aplee.'s Resp. Br. at 49–50; *Sumpter II*, 485 F. Supp. 3d at 1305. Thus, the district court's conclusion that the KCOA's decision was not "contrary to" clearly established federal law is not reasonably debatable. Further, the district court concluded that the KCOA reasonably applied *Berghuis*, when it determined "that [Mr. Sumpter] had not presented any evidence that African-Americans were routinely or systematically underrepresented on jury venires in that county." *Sumpter II*, 485 F. Supp. 3d at 1306. Operating under the deferential AEDPA standard, we do not believe that the district court's assessment of the reasonableness of the KCOA's application of *Berghuis* is open to debate by reasonable jurists. Accordingly, we **deny a COA** as to this claim.

2

Next, Mr. Sumpter seeks a COA for his claim that his appellate counsel was constitutionally deficient in failing to argue instances of prosecutorial misconduct. *See* Aplee.'s Resp. Br. at 53–60. The district court denied Mr. Sumpter's request, finding that the KCOA clearly demonstrated that such an appeal would have failed under Kansas law. *See Sumpter II*, 485 F. Supp. 3d at 1302. Therefore, the district court concluded that Mr. Sumpter could not establish *Strickland* prejudice. *See id.* Mr. Sumpter has not demonstrated that reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong.

First, Mr. Sumpter claims that appellate counsel should have argued that the prosecutor misstated the intent element for attempted rape by equating it with a mere intent to have sex with the victim. Specifically, in his closing argument, the prosecutor stated:

> And he told you what his intent was with [J.B.]. [Mr. Sumpter] minimizes it and says well, I didn't go into that car with the intent to have sex with her. But clearly he told you on the stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her—or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do.

Jt. App., Vol. VIII, at 1653–54.

The district court noted that the "KCOA concluded that this 'slip' did not constitute misconduct, as the prosecutor merely 'misspoke, realized as much, and immediately offered a revised statement of the law to the jurors.'" *Sumpter II*, 485 F. Supp. 3d at 1302. Moreover, the district court noted that earlier in the prosecutor's closing argument, the prosecutor had correctly stated the law as:

> I have to prove that he intended to commit the crime of rape. I don't have to prove rape occurred. I have to prove that he intended to commit it.

Id. at 1302–03; Jt. App., Vol. VIII, at 1624. Taken together, the district court concluded that Mr. Sumpter "ha[d] not shown that an appeal based on such a claim of prosecutorial misconduct would have succeeded." *Sumpter II*, 485 F. Supp. 3d at 1303. In particular, as the district court analyzed the matter, "[t]he KCOA

reasonably concluded that the misstatement at issue did not constitute misconduct, and [Mr. Sumpter] ha[d] not shown that the KCOA . . . would have found misconduct to such a degree to require reversal of [Mr. Sumpter's] conviction for attempted rape of J.B." *Id.* Accordingly, the district court's refusal to grant a COA as to Mr. Sumpter's claim that his counsel was ineffective for failing to challenge this ostensible prosecutorial misconduct is not subject to debate by reasonable jurists.

Mr. Sumpter also claims that the prosecutor inaccurately described his pro se pretrial motion as including an admission that he committed lesser-included offenses. *See* Aplee.'s Resp. Br. at 58–60. The district court noted that the KCOA did find that the prosecutor misrepresented the nature of Mr. Sumpter's motion. *See Sumpter II*, 485 F. Supp. 3d at 1303. Nevertheless, the district court stated that "the KCOA, applying standards set forth by the Kansas Supreme Court for claims of prosecutorial misconduct, concluded that the prosecutor's misrepresentation had not been flagrant or born of ill will, and that it was not so significant to have had a material effect on the verdicts." *Id.* In light of the KCOA's conclusion, the district court effectively determined that the KCOA acted reasonably in rejecting on the basis of lack of prejudice a claim of ineffective assistance of appellate counsel stemming from counsel's failure to challenge the prosecutor's lesser-included-offense misrepresentation. We do not believe that reasonable jurists would debate this determination.

For the foregoing reasons, we **deny a COA** to Mr. Sumpter to pursue his claim that appellate counsel was constitutionally deficient in failing to argue instances of prosecutorial misconduct.

3

Finally, Mr. Sumpter seeks a COA for his claim that his trial counsel's performance was constitutionally deficient because trial counsel repeatedly sought continuances without Mr. Sumpter's consent, thereby forfeiting Mr. Sumpter's speedy trial rights. *See* Aplee.'s Resp. Br. at 60–61. In rejecting Mr. Sumpter's claims, the district court first noted that the basis of Mr. Sumpter's claim arose under the Kansas Speedy Trial Act. *See Sumpter II*, 485 F. Supp. 3d at 1304. Therefore, it was bound by the KCOA's interpretation of the statute. *See id.*; *see also Bradshaw*, 546 U.S. at 76.

The KCOA, relying on Kansas Supreme Court precedent, rejected Mr. Sumpter's *Strickland* claim, as it found that the Kansas speedy trial statute did not require reversal of his convictions. *See Sumpter I*, 2019 WL 257974, at *13. Specifically, the KCOA held that because Mr. Sumpter's counsel requested the continuances, that delay would not have been charged against the prescribed speedy trial period (i.e., the running of the speedy trial clock would have been tolled)—even if the continuances were later deemed improper because Mr. Sumpter had not been consulted. *See id.* As such, there could not have been any prejudice to Mr. Sumpter within the meaning of *Strickland* from counsel's failure to request that Mr. Sumpter's convictions be set aside on the basis that Mr. Sumpter was not consulted regarding

the continuances. *Id.* Giving deference to the KCOA's interpretation of state law, the district court found no reason to conclude that the KCOA unreasonably applied *Strickland* in denying Mr. Sumpter's claim on the ground of lack of prejudice. We conclude that reasonable jurists would not find the district court's assessment of Mr. Sumpter's constitutional claim to be debatable or wrong.

Mr. Sumpter further attacks the KCOA's limitations decision by arguing that the state court failed to address his argument that his trial counsel violated a duty of loyalty to him.[9] *See* Aplee.'s Resp. Br. at 60–61. Mr. Sumpter claims that trial counsel was acting pursuant to a conflict of interest because if counsel had raised the issue after-the-fact, counsel would have been required to admit her mistake in seeking the continuances without Mr. Sumpter's consent. *See id.* at 60. As such, Mr. Sumpter argues that prejudice may be presumed under *Strickland*. *See id.* at 60–61. However, the district court noted that *Strickland* does not establish a per se rule of prejudice for conflicts of interest. *See Sumpter II*, 485 F. Supp. 3d at 1304–05. Instead, "[p]rejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest

[9] The district court noted that "it is not clear that [Mr. Sumpter] satisfied his exhaustion requirement by presenting this [duty of loyalty] argument fully to the state courts." *Sumpter II*, 485 F. Supp. 3d at 1305 n.6. That would mean that, to the extent that the KCOA failed to consider the argument, the fault lies with Mr. Sumpter. Nevertheless, given that the district court found no merit in the argument, even if the argument was not exhausted, the court was free to deny it on the merits. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

adversely affected his lawyer's performance." *Id.* (alteration in original) (quoting *Strickland*, 466 U.S. at 692). And, having discerned that Mr. Sumpter failed to show both that trial counsel was actively representing conflicting interests and that those alleged conflicts actually affected trial counsel's performance, the district court concluded that Mr. Sumpter had not established that any KCOA decision to deny this claim was at odds with *Strickland*. We cannot say reasonable jurists would conclude that the district court's determination on this point was debatable or wrong.

Therefore, we **deny a COA** to Mr. Sumpter on his claim stemming from an alleged violation of Mr. Sumpter's speedy trial rights.[10]

V

For these reasons, we **REVERSE** the district court's judgment granting habeas relief to Mr. Sumpter and **REMAND THE CASE** with instructions for the court to enter judgment for the State of Kansas. Furthermore, we **DENY** Mr. Sumpter a COA to pursue the claims asserted in his cross-appeal and, accordingly, **DISMISS** his cross-appeal for lack of jurisdiction.[11]

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[10] Given that Mr. Sumpter has failed to present a "reasoned, nonfrivolous argument on the law and facts in support of the issues raised on [cross-appeal]," *Caravalho v. Pugh*, 177 F.3d 1177, 1177 (10th Cir. 1999), we **deny** his renewed motion to proceed *in forma pauperis*.

[11] We also **deny** Mr. Sumpter's Motion for Leave to File a Sur-Reply. The State filed its Third Brief on Cross-Appeal on June 9, 2021. Under Federal Rule of Appellate Procedure 28.1(f)(4), Mr. Sumpter had twenty-one days to file a reply brief, but he failed to do so. Mr. Sumpter cannot now seek to undo his error by filing an untimely sur-reply.

FILED
United States Court of Appeals
Tenth Circuit

December 28, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TIMOTHY SUMPTER,

Petitioner - Appellee/
Cross-Appellant,

v.

STATE OF KANSAS,

Respondent - Appellant/
Cross-Appellee.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,

Amicus Curiae.

Nos. 20-3186 and 20-3206
(D.C. No. 5:19-CV-03267-JWL)
(D. Kan.)

JUDGMENT

Before **HOLMES**, Chief Judge, **KELLY**, and **MATHESON**, Circuit Judges.

This case originated in the District of Kansas and was argued by counsel.

For Appeal No. 20-3186, the judgment of that court is reversed. The case is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.

For Appeal No. 20-3206, the case is dismissed for lack of jurisdiction.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TIMOTHY SUMPTER, Petitioner,	)	
v.	)	Case No. 19-3267-JWL
STATE OF KANSAS, Respondent.	)	

MEMORANDUM AND ORDER

This matter comes before the Court[1] on Timothy Sumpter's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is **granted in part and denied in part**. The petition is granted with respect to petitioner's aggravated kidnapping conviction, which is hereby vacated. The petition is otherwise denied. In addition, petitioner's motion for discovery and an evidentiary hearing (Doc. # 23) is **denied**, and the State's motion to strike petitioner's notice of supplemental authority (Doc. # 25) is **denied**.

I. Background

Petitioner was charged in the District Court of Sedgwick County, Kansas, with various offenses in three separate cases arising out of his alleged attacks on four women:

[1] This case was reassigned to the undersigned judge on June 19, 2020.

11-CR-1187 (involving alleged victim A.E.); 11-CR-1290 (A.C. and A.P.); and 11-CR-1638 (J.B.). The district court granted the State's motion to consolidate the cases for trial. In 2012, a jury convicted petitioner of the following offenses: one count of aggravated kidnapping, in violation of K.S.A. § 21-3421 (J.B.); one count of attempted rape, in violation of K.S.A. § 21-3301 (J.B.); two counts of aggravated sexual battery, in violation of K.S.A. §21-3518(a)(1) (A.E. and J.B.); two counts of sexual battery, in violation of 21-3517(a) (A.C. and A.P.); and one count of criminal restraint, in violation of K.S.A. § 21-3424(a) (A.E.). The district court sentenced petitioner to 351 months of incarceration. The Kansas Court of Appeals (KCOA) upheld petitioner's convictions and sentence, and the Kansas Supreme Court denied review. *See State v. Sumpter*, 2013 WL 6164520 (Kan. Ct. App. Nov. 22, 2013) (unpub. op.) (per curiam), *rev. denied* (Kan. Jan. 15, 2015).

On May 2, 2017, the state district court denied petitioner's petition for post-conviction relief pursuant to K.S.A. § 60-1507. On January 18, 2019, the KCOA affirmed that decision, and again the Kansas Supreme Court denied review. *See Sumpter v. State*, 2019 WL 257974 (Kan. Ct. App. Jan. 18, 2019) (unpub. op.), *rev. denied* (Kan. Dec. 16, 2019). On December 30, 2019, petitioner filed the instant petition under Section 2254. The parties have briefed petitioner's claims, and the petition is now ripe for ruling.

II. Governing Standards

Section 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides for consideration of a prisoner's writ of habeas corpus on the ground that "he is in custody in violation of the Constitution or laws or treaties of the United

States." *See* 28 U.S.C. § 2254(a). The petitioner must exhaust state court remedies. *See id.* § 2254(b), (c). Relief shall not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See id.* § 2254(d). The standard is very strict, as explained by the Tenth Circuit:

> The KCOA [Kansas Court of Appeals] rejected this clam on the merits. Our review is therefore governed by the AEDPA, which erects a formidable barrier to federal habeas relief and requires federal courts to give significant deference to state court decisions on the merits.
>
> . . .
>
> Clearly established law is determined by the United States Supreme Court, and refers to the Court's holdings, as opposed to the dicta. A state court decision is "contrary to" the Supreme Court's clearly established precedent if the state court applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts.
>
> A state court decision is an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule – like the one adopted in *Strickland* – the more leeway state courts have in reaching outcomes in case-by-case determinations. An *unreasonable* application of federal law is therefore different from an *incorrect* application of federal law.
>
> We may issue the writ only when the petitioner shows there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents. Thus, even a strong case for

> relief does not mean the state court's contrary conclusion was unreasonable. If this standard is difficult to meet – and it is – that is because it was meant to be. Indeed, AEDPA stops just short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. Accordingly, we will not likely conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy.

See Frost v. Pryor, 749 F.3d 1212, 1222-24 (10th Cir. 2014) (internal quotations and citations and footnote omitted).

III. Motion for an Evidentiary Hearing and Discovery

By separate motion, petitioner requests an evidentiary hearing on his claims. Specifically, petitioner requests a hearing to address the issues of whether counsel's performance was deficient and whether African-Americans were systematically underrepresented on jury venires in Sedgwick County District Court at the time of his trial. The Court denies this request.

First, a hearing concerning counsel's performance would not be helpful to the resolution of petitioner's ineffective assistance claims, as those claims may be decided on the record before the Court. With respect to the claim concerning the aggravated kidnapping conviction, on which the Court has granted relief, the Court is able to determine that counsel's performance was deficient based on the state court record. *See infra* Part IV.A. Petitioner's other ineffective assistance claims have been denied based on a lack of prejudice, and thus no factual determinations concerning counsel's performance are required. *See infra* Part IV.B, C, D, E.

Second, the Court denies the request for hearing by which petitioner seeks to develop evidence to support his jury venire claim. Section 2254 provides that state court factual determinations are presumed to be correct, and that if a petitioner has failed to develop the factual basis for a claim in the state courts, the federal court shall not hold an evidentiary hearing unless the petitioner shows (a) that the claim relies on a new rule of constitutional law or on a factual predicate that could not have been discovered previously with due diligence; and (b) the facts show by clear and convincing evidence that the petitioner would not have been convicted but for constitutional error. *See* 28 U.S.C. § 2254(e). Petitioner argues that he acted with due diligence by requesting an evidentiary hearing in the state courts.

It is true that if a state court has made factual findings without considering the petitioner's evidence, then a federal court should not necessarily defer to those findings, and a federal court hearing may be warranted. *See Wilson v. Sirmons*, 536 F.3d 1064, 1079 (10th Cir. 2008). In this case, however, as discussed below, the state courts did not make a factual finding; rather, those courts ruled that petitioner had failed to present evidence to support his claim that African-Americans were systematically excluded or underrepresented in the county's jury venires. *See infra* Part IV.E.

"[A]n evidentiary hearing is not a fishing expedition. Instead, its function is to resolve disputed facts." *See Banks v. Workman*, 692 F.3d 1133, 1144 n.4 (10th Cir. 2012); *see also Anderson v. Attorney Gen'l of Kan.*, 425 F.3d 853, 860 (10th Cir. 2005) ("[t]he purpose of an evidentiary hearing is to resolve conflicting evidence;" court did not abuse its discretion in denying an evidentiary hearing when petitioner did not cite evidence

supporting his claim). A federal district court is not required to conduct an evidentiary hearing on a claim if the petitioner has not presented available evidence. *See Cannon v. Mullin*, 383 F.3d 1152, 1177 (10th Cir. 2004). "District courts are not required to hold evidentiary hearings in collateral attacks without a firm idea of what the testimony will encompass and how it will support a movant's claim." *See United States v. Cervini*, 379 F.3d 987, 994 (10th Cir. 2004).

Although petitioner requests a hearing to support his claim, he has not proffered any evidence to be presented at such a hearing, and thus there are no disputed facts to be resolved at such a hearing. Nor did petitioner identify any such evidence in requesting a hearing in the state courts. Petitioner is not entitled to an evidentiary hearing in order to conduct a fishing expedition for favorable evidence. Accordingly, a hearing is not warranted in this case.

In the same motion, petitioner requests leave to conduct discovery, again with respect to his ineffective assistance claims and his jury venire claim. A habeas petitioner is not entitled to discovery as a matter of course. *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Under the applicable rule, a party shall be entitled to discovery if the judge grants leave in the exercise of his or her discretion and for good cause shown. *See id.* (citing Rule 6(a), Rules Governing § 2254 Cases). Good cause may exist where specific allegations provide a reason to believe that the petitioner may be able to demonstrate entitlement to relief. *See id.* at 908-09. Mere speculation is unlikely to provide good cause for a discovery request on collateral review. *See Strickler v. Greene*, 527 U.S. 263, 286 (1999).

The Court concludes in its discretion that petitioner has not established good cause for discovery in this case. Again, additional evidence concerning the performance of trial and appellate counsel would not affect this Court's rulings, as the Court has denied the ineffective assistance claims based on a lack of prejudice. With respect to the jury venire issue, petitioner has not identified specific evidence to support his claim that he expects to obtain through discovery, and the Court will not authorize a fishing expedition based on mere speculation. Accordingly, the Court denies the request for discovery.

IV. Analysis of Petitioner's Claims

A. Kidnapping Conviction

Petitioner first claims that he received ineffective assistance of trial and appellate counsel with respect to their defense of the charge of the aggravated kidnapping of J.B. in violation of K.S.A. § 21-3421. "To establish ineffective assistance of counsel, [a] [d]efendant must show 'that counsel's representation fell below an objective standard of reasonableness' and that he was prejudiced by the deficient performance." *United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984)). The test for establishing prejudice is as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

See Strickland, 466 U.S. at 694. The defendant does *not* need to show that counsel's deficient performance more likely than not altered the outcome. *See id.* at 693.

Petitioner argues that he should not have been convicted of aggravated kidnapping because any confinement of the victim by force was not independent of the intended crime of attempted rape under the standard set forth by the Kansas Supreme Court in *State v. Buggs*, 219 Kan. 203 (1976). Petitioner argues – and the record reveals – that trial counsel failed to assert that defense at any stage, including at the preliminary hearing, in examining the witnesses, in arguing for a directed verdict, in proposing and arguing jury instructions, and in closing argument. Nor did appellate counsel raise this issue on direct appeal. To determine whether counsel were deficient in failing to raise this issue and whether petitioner suffered prejudice from that failure, the Court must examine the merits of petitioner's argument under Kansas kidnapping law.

At trial, J.B. testified to the following facts: Petitioner approached J.B. as she walked to her car from a bar in Wichita. When she was halfway into her car, petitioner forced his way inside with her, punched her, and closed the door. A physical fight ensued, during which petitioner punched J.B. multiple times, he choked her with his knee on her throat as she lay on the floor of the passenger side, and he grabbed her hand and ripped it down when she attempted to reach for the door handle. J.B. blacked out, and when she came to, she found petitioner masturbating while still choking her with his knee. When petitioner placed her hand on his penis, she pretended to go along, but then punched petitioner and managed to kick him out of the car and lock the doors. Petitioner ended up with J.B.'s car keys, however, and he dangled them in front of the window for her to see. Petitioner had ripped the keys out of J.B.'s hand at the beginning of the fight, which, based on his statements at the time, she believed he had done because he did not want J.B. to use

the mace attached to the keychain. J.B. did not know whether petitioner had thrown the keys out of the car at any point or how the keys ended up outside. J.B. opened the door slightly to accept petitioner's offer of the keys, but petitioner forced his way into the car again, and the fight resumed, during which time petitioner rubbed his crotch against J.B.'s rear. Again J.B. managed to kick petitioner out of the car, and she was able to escape when other persons approached the car.

In his testimony, petitioner described J.B. as the aggressor, and he stated that he was pulled into the car when J.B. grabbed his shirt. He claimed that he slapped J.B. but did not punch her. He stated that he did intend to have sex with her, after she came on to him. He testified that he pulled the mace off the keychain and threw it out of the car, and that he choked J.B. to take her keys from her hand because she was hitting him with the keys. He did not recall if he threw the keys out of the car. He admitted that he did commit a sexual battery against J.B.

Under K.S.A. § 21-3421, aggravated kidnapping is a kidnapping in which bodily harm is inflicted upon the person kidnapped. *See id.* Kidnapping is defined as follows:

> Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person:
>
> (a) For ransom, or as a shield or hostage;
>
> (b) to facilitate flight or the commission of any crime;
>
> (c) to inflict bodily injury or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.

See id. § 21-3420.

In petitioner's case, this charge was submitted to the jury only as a confining by force with the intent to facilitate the commission of the crime of rape. Thus, the charge was not submitted to the jury, and the jury was not instructed, on a theory that would also include a "taking" under the statute. The Kansas Supreme Court has indicated that "taking" and "confining" describe different conduct for purposes of this statute. *See State v. Holloman*, 240 Kan. 589, 594 (1987). At the hearing in the trial court on petitioner's post-conviction petition, the State argued that there was sufficient evidence under the kidnapping statute based on petitioner's taking J.B. into the car and his confining her in the care by his use of force and threats while fighting with her inside the car and by his use of deception while outside the car with her keys. The State then conceded, however, that because the "taking" element was not submitted the jury, the court could disregard the argument based on taking J.B. into the car, and the court agreed that the State had abandoned any such argument based on a taking. Similarly, only the element of force was submitted to the jury; thus, the State may not justify the conviction by reference to deception or threats, and the State has made no such argument to this Court.

Petitioner's position is based on the Kansas Supreme Court's interpretation of the kidnapping statute in *Buggs*. The court interpreted the "facilitation" requirement of Section 21-3420(b) as follows:

> To be kidnapping, therefore, the taking need not be necessary to the accomplishment of the underlying crime, but it must be aimed at making it at least "easier".
>
> Further, to facilitate in our minds means something more than just to make more convenient. We think that a taking or confining, in order to be said to "facilitate" a crime, must have some significant bearing on making

> the commission of the crime "easier" as, for example, by lessening the risk of detection.
>
> . . . We agree with [other courts whose cases were discussed previously in the opinion] that a kidnapping statute is not reasonably intended to cover movements and confinements which are slight and "merely incidental" to the commission of an underlying lesser crime. Thus the "standstill" robbery and the ordinary rape require as a necessary incident some "confinement" of the victim – they are nevertheless not kidnappings solely for that reason. In the light of our statute, however, we cannot agree that merely because a taking "facilitates" another crime it must necessarily be "merely incidental" to the other crime. Whether a taking substantially "facilitates" another crime or whether it is "merely incidental" are two different things. The same taking cannot be both.

See Buggs, 219 Kan. at 215. The court announced its holding as follows:

> We therefore hold that if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

See id. at 216. The court provided the following non-exhaustive list of examples:

> For example: A standstill robbery on the street is not a kidnapping; the forced removal of the victim to a dark alley for robbery is. The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is not a kidnapping; the removal from a public place to a place of seclusion is. The forced direction of a store clerk to cross the store to open a cash register is not a kidnapping; locking him in a cooler to facilitate escape is.

See id.

Petitioner argues that any confinement of J.B. by force did not satisfy the requirement of *Buggs* that the confinement be independent of, and not incidental to and inherent in, his attempted rape of J.B. With the State having abandoned a theory of kidnapping based on petitioner's taking J.B. into the car, petitioner could have confined J.B. under *Buggs* in two ways during the encounter: while fighting with J.B. inside the car; and while holding J.B.'s keys outside the car.

The Court first addresses petitioner's conduct outside the car, as the KCOA relied solely on that conduct in denying petitioner post-conviction relief. The KCOA concluded that petitioner confined J.B. after he had been kicked out of the car by retrieving her keys and thus trapping her in the car (she could not drive away, and he could seize her if she attempted to get out). *See Sumpter*, 2019 WL 257974, at *4. The KCOA further concluded that such confinement was independent of the attempted rape for purposes of *Buggs*. *See id.* at *5. The KCOA reached that conclusion in deciding that the evidence was sufficient to support a kidnapping conviction and that petitioner therefore could not establish the necessary prejudice under *Strickland*. *See id.* at *3. The KCOA applied the wrong standard, however – the issue is not whether the evidence was legally sufficient; the issue is whether there is a reasonable probability of a different outcome. Thus, the state court's ruling deviated from the controlling federal standard and was contrary to clearly established federal law. *See Milton v. Miller*, 744 F.3d 660, 670 (10th Cir. 2014). The result is that this Court does not defer to the KCOA's resolution of this claim, and instead reviews the claim *de novo*. *See id.* at 671.

The Court agrees with the KCOA that petitioner's conduct outside the car was independent of the sexual assault of J.B. Petitioner does not argue otherwise. Petitioner argued to the KCOA, however, and argues to this Court, that any confinement from outside the car could not support the conviction because any such confinement was not *by force*. The KCOA did not address this argument or explain how petitioner's conduct outside the car constituted confinement by force (as opposed to by deception or threat, which theories were not submitted to the jury). In its brief to this Court, the State has merely relied on the KCOA's opinion, and thus the State has failed to identify any Kansas authority to suggest that petitioner could have confined J.B. by force in this manner from outside the car. Nor has the Court located any such authority. *Cf. State v. Ransom*, 239 Kan. 594, 601 (1986) (chase did not constitute kidnapping; "[a]ny kidnapping must have occurred after the defendant made actual contact with the victim"). Considering only petitioner's conduct outside the car (as the KCOA did), if counsel had raised and argued this issue, petitioner would have had a strong defense to the kidnapping charge.

Although in proceedings in this Court the State has not relied on any conduct by petitioner inside the car, the trial court, in denying post-conviction relief, relied on petitioner's conduct both inside and outside the car. The court cited petitioner's conduct in pushing her into the car and forcing his way inside, striking her and holding her down, choking her and preventing her from yelling, grabbing her hand when she reached for the door, and taking her keys. This Court does not agree with the state court, however, that such conduct is independent of and not incidental to petitioner's sexual assault of J.B.

As noted above, the State abandoned any argument based on petitioner's taking J.B. by pushing her into the car, as no theory of kidnapping by taking was submitted to the jury. The remaining conduct by petitioner inside the car to restrain J.B. occurred entirely during his physical fights with J.B. as he attempted to hold her down in order to commit the sexual assault. As noted above, in *Buggs* the Kansas Supreme Court stated that the "standstill robbery" and the "ordinary rape" necessarily require some confinement, but that such confinement does not by itself support a kidnapping offense. *See Buggs*, 219 Kan. at 215. The supreme court applied that distinction in *State v. Cabral*, 228 Kan. 741 (1980), in which the court reversed a kidnapping conviction. In *Cabral*, the victim rode in the defendant's car for a period by consent, and then the defendant turned into a park, locked the door, proceeded behind a tree, and forcibly raped the victim. *See id.* at 743-44. Applying the *Buggs* standard, the court reasoned as follows:

> We have concluded that, under all the factual circumstances presented in the record, a separate and independent crime of kidnapping was not established. Here the defendant and his victim had been together all evening, driving around Hutchinson and stopping at various places by mutual consent. After leaving the first park and on the way to the dormitory where the victim resided, the defendant simply turned into the second park, locked the door, and proceeded to rape his victim. *When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape.*

See id. at 744-45 (emphasis added).

Cabral is the most apt precedent by which to consider the application of *Buggs* to petitioner's conduct in J.B.'s car. Petitioner's conduct in restraining J.B. occurred while fighting with her in his attempt to commit sexual assault, and the Kansas Supreme Court

made clear in *Cabral* that such conduct is merely incidental to the assault. The state trial court cited petitioner's conduct in grabbing J.B.'s hand when she reached for the door handle; but as the supreme court recognized, a perpetrator must confine the victim somewhat – and obviously prevent her from leaving – to commit the crime of rape. Petitioner did not take J.B. to another location to avoid detection or otherwise to facilitate the rape; in the parlance of the *Cabral* court, he simply proceeded to assault J.B. once he was alone with her in the car.

Some Kansas courts, in distinguishing *Cabral*, have noted that the victim in *Cabral* had consensually ridden around with the defendant for a period of time preceding the assault. Indeed, J.B. did not voluntarily spend the evening with petitioner prior to the assault in this case. The point of the *Cabral* court in citing that fact, however, was that the defendant had not taken or confined the victim until immediately prior to and as part of the assault. Moreover, in each of those other cases in which *Cabral* was distinguished, there was some conduct by the defendant that took the case beyond the "ordinary" rape in a single confined place in a relatively short time frame – for instance, the defendant had taken the victim or used restraints or moved the victim to a different place to facilitate the assault. *See, e.g.*, *State v. Halloway*, 256 Kan. 449, 452-53 (1994) (defendant did not rape the victim in the car, but dragged her into woods away from the highway to lessen the risk of detection); *State v. Blackburn*, 251 Kan. 787, 794 (1992) (defendant lessened the risk of detection by driving the victim to other locations); *State v. Zamora*, 247 Kan. 684, 696 (1990) (conduct went beyond that of *Cabral*; defendant's tying and gagging the victim and his lying in front of the door to the residence to prevent escape was not merely incidental

to and inherent in an "ordinary" rape); *State v. Howard*, 243 Kan. 699, 702 (1988) (defendant restrained the victim in a house for hours and refused to let her leave when she tried to flee after the assault); *State v. Coberly*, 233 Kan. 100, 105 (1983) (victim rode with the defendant for a prolonged period because of deception); *State v. Montes*, 28 Kan. App. 2d 768, 772 (2001) (defendant drove the victim to another location to facilitate the assault), *rev. denied* (Kan. June 12, 2001, and July 11, 2001).

Again, in the present case, the alleged confinement took place within the car, at a single location, during the attempted assault. The State has not addressed the conduct inside the car, and thus the State has not cited any Kansas case in which such conduct solely within a vehicle has been found sufficient to support a kidnapping conviction. *Cabral* is thus the most apt case here.

This conclusion is further supported by the KCOA's opinion in *State v. Burden*, 30 Kan. App. 2d 690 (2002), *rev'd*, 275 Kan. 934 (2003). In *Burden*, the defendant had beaten and raped the victim in the bathroom of a residence, chased her when she fled toward the back door, and caught her and dragged her back to a bedroom, where he continued to beat and threaten her. *See id.* at 700. The KCOA held that under the *Buggs* standard, such conduct was "part and parcel of the beating rather than a crime apart from it," and that the defendant's movement of the victim "only enabled him to continue what he had started and was incidental to it." *See id.* at 700-01. The Kansas Supreme Court reversed, but only based on its holding that the *Buggs* standard for "facilitation" did not apply to a kidnapping conviction under K.S.A. § 21-3420(c) (taking or confining with intent to inflict injury or

terrorize); thus it did not find fault with the KCOA's conclusion that the conduct at issue would not satisfy the *Buggs* standard. *See Burden*, 275 Kan. 934.

Mere days ago, the KCOA again applied the *Buggs* standard to reverse a kidnapping conviction in *State v. Olsman*, __ P.3d __, 2020 WL 5265521 (Kan. Ct. App. Sept. 4, 2020). The court held that the forceful confinement of the victim in that case was incidental and inherent to the force used to commit the attempted rape of the victim, as he "committed the attempted rape by physically overpowering [the victim] and continuing to physically control her movements, in spite of her efforts to resist the attack," until she was able to leave. *See id.* at *5. The court also stated:

> Rape through force necessarily and inherently requires confinement of the victim to a particular place where the rape occurs. After all, if the victim were allowed to leave, there would be no rape.

See id. at *7.

The *Buggs* standard applies to petitioner's conviction under Section 21-3420(b), and as in *Cabral* and *Burden* and *Olsman*, the confining conduct at issue (in J.B.'s car) – including efforts to prevent J.B. from leaving – was part and parcel of the intended assault.

One might argue (although the State made no such argument here) that petitioner confined J.B. when he forcibly took her car keys while in the car, thereby hindering her ability to flee. Such conduct would not necessarily be required as part of the assault. The testimony at trial, however, does not support such a theory of confinement. J.B. testified that petitioner made reference to the attached mace and took the keys to prevent J.B. from using that mace. She also testified that she did not know how the keys ended up outside the car. Petitioner testified that he ripped the mace off the keys and discarded it, and that

he grabbed the keys away so that J.B. could no longer hit him with the keys in her hand. He further testified that he did not know whether he threw the keys out of the car. Thus, there was no certain evidence (only petitioner's speculation that he might have done so) that petitioner threw the keys out of the car (as opposed to finding the keys outside where they fell when petitioner was kicked out), and there was no evidence at all that he took the keys to prevent J.B. from driving away. Thus, a reasonable jury that followed the testimony would not likely find that petitioner confined J.B. by taking her keys and throwing them outside the car.

The Court thus concludes, based on the Kansas precedent, that if confronted with the issue the Kansas Supreme Court would rule that petitioner's conduct inside the car (after he forced his way inside) did not constitute a separate crime of kidnapping under the *Buggs* standard. As discussed above, petitioner also had a strong defense based on his conduct outside the car.

Accordingly, petitioner could have raised a defense to the kidnaping charge as submitted to the jury (confinement only, by force only) with a great likelihood of success based on the kidnapping statute as interpreted in *Buggs* and *Cabral*. Based on the strength of that defense, there is little doubt that counsel's failure to raise that defense, based on settled caselaw, before or during or after trial, was objectively unreasonable. *Buggs* is the seminal and oft-cited standard for the key facilitation element of the offense, and in light of the facts here, the Court can divine no possible strategic reason for failing to hold the State to that standard in its proof. That failure to appreciate and assert this defense was especially inexcusable considering that this conviction proved the most serious for

purposes of petitioner's sentencing. Thus, the Court concludes that counsel's performance in this regard was constitutionally deficient.

The Court further concludes that petitioner has established the requisite prejudice here.[2] Under existing Kansas precedent, there is a significant likelihood that the Kansas Supreme Court would have ruled as a matter of law in petitioner's favor on this issue; and there is also a significant likelihood that a jury, if properly instructed on the law under *Buggs* and *Cabral*, would have found that petitioner did not confine (not merely take) J.B. by force (not by threat or deception), based on the charge submitted to it. The strength of this defense under Kansas law creates a probability of a different outcome sufficient to undermine confidence in the kidnapping conviction. Petitioner is therefore entitled to relief.

The Court takes this opportunity to stress that by this ruling it does not mean to take away from the seriousness of petitioner's sexual assault of J.B., whose testimony about petitioner's horrific conduct the jury credited. Petitioner was convicted of the attempted rape and aggravated sexual battery of J.B., and he was sentenced for those crimes. Nevertheless, Kansas law does not permit his additional conviction of the crime of kidnapping through confinement based on the force used to commit the assault, and when his counsel failed to assert that defense, petitioner was denied his constitutional right to the effective assistance of counsel. The Court therefore must order that petitioner's conviction

[2] The Court does not agree with petitioner that he was completely denied counsel or that counsel entirely failed to subject the State's case to meaningful adversarial testing, such that prejudice may be presumed under *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984).

and sentence for aggravated kidnapping be vacated. Petitioner is entitled to a new trial on that charge, and the instant petition is granted to that extent.

B. *Consolidation of Cases*

In the case involving two alleged victims, the trial court denied petitioner's motion to sever the charges into separate cases, one for each victim. The trial court also granted the State's motion to consolidate the three cases (involving four alleged victims) for trial. On direct appeal, the KCOA rejected petitioner's challenge to the consolidation, holding that the alleged crimes were of the same or similar character as required for consolidation under K.S.A. § 22-3203 and that the trial court therefore did not abuse its discretion in consolidating the cases. *See Sumpter*, 2013 WL 6164520, at *3-6.

Petitioner now claims that his appellate counsel's performance was constitutionally deficient because she failed to challenge the denial of the motion for severance and thus failed to argue that the trial court violated its continuing duty to sever all four sets of charges to prevent prejudice to petitioner. *See, e.g.*, *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008) (citing *State v. Shaffer*, 229 Kan. 310, 312 (1981)), *rev. denied* (Kan. July 3, 2008). The state district court and the KCOA denied this claim of ineffective assistance of counsel. *See Sumpter*, 2019 WL 257974, at *5-10. Although petitioner challenged only appellate counsel's performance, the KCOA treated the claim as one involving both trial and appellate counsel. *See id.* at *5. After a thorough analysis, the KCOA concluded that petitioner could not demonstrate undue prejudice from consolidation, primarily because in separate trials evidence of the other alleged incidents would have been admissible and would likely have been introduced and admitted. *See id.*

at *5, 8-10. The KCOA also noted that in separate trials petitioner would have in fact been *disadvantaged* because in the consolidated trial jurors were instructed not to consider evidence involving one incident in deciding charges based on another incident, while in separate trial jurors would essentially have been free to consider evidence of all of the incidents for any purpose. *See id.* at *10. The KCOA further concluded that the verdicts did not reveal any obvious prejudice, as the mixed verdicts (involving an acquittal and conviction on lesser included offenses) indicated that the jury did not act in a blanket fashion but considered each charge involving each victim separately. *See id.* at *8. Finally, the KCOA rejected petitioner's argument that in separate trials he could have chosen to testify in some and remain silent in others, as based on a faulty premise that other incidents would not be in evidence in separate trials; the implication is that if multiple incidents were at issue in a separate trial, petitioner would have had to testify to address any incident, just as he did in the consolidated trial. *See id.* at *10.

In pursuing this claim in this Court, petitioner repeats the same arguments rejected by the KCOA concerning whether he suffered undue prejudice from consolidation and a denial of severance. He argues that appellate counsel, in challenging the propriety of consolidation on direct appeal, unreasonably failed to make the separate argument that consolidation resulted in undue prejudice. With respect to *Strickland*'s second prong, petitioner argues that such an appeal would have been successful, and that the KCOA applied the *Strickland* standard unreasonably in failing to address that precise question.

It is true that the KCOA's opinion is not clear with respect to its application of *Strickland*'s second prong. The KCOA chose to "pass" on reviewing counsel's strategic

considerations in arguing the consolidation issue, and thus it skipped to the second prong relating to prejudice. *See id.* at *7. It stated that the second prong required it to explore whether the outcome might have been different with separate trials. *See id.* As noted, it concluded that separate trials would not have been materially different because evidence of other incidents likely would have been admitted even in separate trials. *See id.* at *7-10.

The Tenth Circuit has made clear that in evaluating a claim of ineffective assistance of appellate counsel in a Section 2254 proceeding, under clearly established law the requirement of prejudice under *Strickland*'s second prong "means the defendant must show a reasonable probability that, but for his counsel's unreasonable failure to raise a particular nonfrivolous issue, he would have prevailed on his appeal." *See Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (internal quotations omitted) (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). Thus, the issue is whether petitioner probably would have prevailed on appeal if counsel had raised this issue concerning prejudice from consolidation. In focusing on whether separate trials would have been different instead of on whether the appeal would have succeeded, the KCOA appears not to have applied the correct standard under *Strickland*'s prejudice prong.[3] Accordingly, the Court reviews petitioner's ineffective-assistance claim *de novo*. *See id.* at 671.

[3] This seeming misapplication may have resulted from the KCOA's consideration of the claim as involving both trial and appellate counsel, as prejudice from trial counsel's failure to argue the issue properly would depend on the likely outcome in the trial court. In his initial and reply briefs to the KCOA, petitioner clearly claimed ineffective assistance by appellate counsel; thus, the source of the KCOA's confusion is unclear.

The Court concludes, however, that petitioner has failed to show that a prejudice-from-consolidation argument would likely have succeeded on direct appeal. Petitioner notes that on direct appeal one judge issued a concurring opinion, stating that he concurred with respect to the consolidation issue "based on how the parties framed and argued the issue on appeal." *See Sumpter*, 2013 WL 6164520, at *12 (Atcheson, J., concurring). That same judge authored the KCOA's post-conviction opinion, however, and that opinion includes the following footnote:

> As a member of the panel deciding the direct appeal, I wrote a short concurrence that deliberately bordered on the delphic but hinted at reservations about consolidation. I was troubled by the possibility of undue prejudice to [petitioner] in a single trial of all four incidents. But the appellate lawyer did not brief that issue and at oral argument indicated she hadn't really considered it. So I confined my review to what the parties presented. The issue has been fully briefed in this proceeding. Based on that argument and the broad legislative mandate in [Kansas Rule 455(d)], I am persuaded [petitioner] did not face legally impermissible prejudice in the consolidated trial.

See Sumpter, 2019 WL 257974, at *7 n.3 (Atcheson, J.) (citations omitted). Moreover, the KCOA stated plainly its conclusion that petitioner "cannot demonstrate undue prejudice in his consolidated trial." *See id.* at *5. Thus, given this holding of the KCOA – ruled by a panel including two of the judges on the panel hearing petitioner's direct appeal – it is not likely that petitioner would have prevailed on direct appeal if counsel had argued prejudice from consolidation. Accordingly, the Court concludes that petitioner has failed to satisfy *Strickland*'s prejudice prong, and it therefore denies this claim.

C. Prosecutorial Misconduct

On direct appeal, the KCOA rejected petitioner's argument based on misconduct by the prosecutor in commenting on petitioner's credibility in the State's closing argument. *See Sumpter*, 2013 WL 6164520, at *8-11. Petitioner now claims that his appellate counsel rendered constitutionally deficient performance in failing to argue two other instances of prosecutorial misconduct.[4]

Again, because the claim is that appellate counsel failed to raise the issue, the prejudice inquiry focuses on whether there is a reasonable probability that such an appeal would have succeeded. *See Milton*, 744 F.3d at 669. Again, the KCOA did not explicitly apply that standard. The KCOA made clear in its opinion, however, that such an appeal by petitioner under Kansas law would not have succeeded. Thus, petitioner cannot establish the necessary prejudice here.

First, petitioner claims that appellate counsel should have argued that the prosecutor committed misconduct by misstating the intent element for attempted rape as an intent to have sex as opposed to an intent to commit rape. In his closing argument, the prosecutor stated as follows:

> And he told you what his intent was with [J.B.]. He minimizes it and says well, I didn't go into that car with the intent to have sex with her. But

[4] In asserting this claim in this Court, petitioner has argued that these instances of misconduct violated his right to due process and that both trial and appellate counsel should have raised these issues. In his petition to the state district court and in his briefs to the KCOA, however, he claimed only that appellate counsel rendered ineffective assistance with respect to the instances of prosecutorial misconduct, and the district court and the KCOA addressed only that narrow basis in denying the claim. *See Sumpter*, 2019 WL 257974, at *10. Petitioner did not argue to the state courts ineffective assistance by trial counsel or a due process violation with respect to prosecutorial misconduct. Thus, petitioner failed to exhaust with respect to any such claim, and this Court has confined its consideration to a claim of ineffective assistance by appellate counsel.

> clearly he told you on the stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her – or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do.

Petitioner takes issue with the prosecutor's statement that he had to prove that petitioner confined the woman "with the intent to commit sex." The KCOA concluded that this "slip" did not constitute misconduct, as the prosecutor merely "misspoke, realized as much, and immediately offered a revised statement of the law to the jurors." *See Sumpter*, 2019 WL 257974, at *13. The Court agrees with that description of what occurred.

The Court disagrees with petitioner's statement that the prosecutor repeated his misstatement of the law. When the prosecutor argued in that excerpt that petitioner intended to have sex, he was addressing the defense that petitioner did not intend to have sex with J.B. when he entered the car; he did not thereby suggest that he need not prove an intent to have *illegal* sex. Moreover, the prosecutor had previously argued in closing that petitioner's intent was to have sex with J.B. "with or without her consent" and that petitioner then acted without her consent. Immediately after that argument, the prosecutor stated the law properly, as follows:

> I have to prove that he intended to commit the crime of rape. I don't have to prove rape occurred. I have to prove that he intended to commit it.

Thus, the prosecutor's argument was generally consistent and correct concerning the intent element. He misstated the element a single time, and then immediately corrected himself by stating the element correctly. Indeed, his statement that he had to show an intent to

"commit sex" – instead of a mere intent to "have" sex – demonstrates that he really meant to state the element correctly, as "commit" suggests an improper act.

Petitioner also argues that the effect of the prosecutor's misstatement was exacerbated by the fact that his own counsel stated that the State had to prove an intent to have sexual intercourse. Of course, a misstatement by his own counsel would not mean that the prosecutor committed misconduct in making a similar mistake. Moreover, petitioner's counsel did not misstate the intent element. She was merely suggesting that the State could not prove that he intended to have sex with J.B., which would provide a defense to the charge that he intended unconsensual sex. Immediately before that statement, petitioner's counsel stated that the State had to prove an intent to rape the accuser. There is no basis to conclude that the prosecutor was somehow trying to exploit confusion sown by defense counsel.

Finally, petitioner is incorrect in arguing that the Court failed to correct the prosecutor's misstatement. The jury instruction setting forth the elements for the charge of the attempted rape of J.B. stated properly that the State had to prove an intent by petitioner to commit the crime of rape, defined as sex without consent.

Accordingly, petitioner has not shown that an appeal based on such a claim of prosecutorial misconduct would have succeeded. The KCOA reasonably concluded that the misstatement at issue did not constitute misconduct, and petitioner has not shown that the KCOA, despite its post-conviction opinion to the contrary, would have found misconduct to such a degree to require reversal of petitioner's conviction for attempted rape of J.B. The Court therefore denies this claim of ineffective assistance of counsel.

Second, petitioner argues that appellate counsel's performance was deficient because he failed to assert that the prosecutor committed misconduct in closing argument by mischaracterizing a pro se motion by petitioner as including an admission that petitioner committed lesser-included offenses. As the KCOA noted, in the motion petitioner stated that he and his trial counsel had concluded that the conduct to which witnesses testified at the preliminary hearing amounted only to lesser-included offenses; thus, petitioner had not actually admitted to committing those offenses. Nevertheless, the KCOA, applying standards set forth by the Kansas Supreme Court for claims of prosecutorial misconduct, concluded that the prosecutor's misrepresentation had not been flagrant or born of ill will, and that it was not so significant to have had a material effect on the verdicts. *See id.* at *12. With respect to the latter point, the KCOA noted that petitioner had admitted in his testimony to conduct "likely amounting" to minor crimes against the accusers. *See id.*

In light of that conclusion by the KCOA in post-conviction proceedings, the Court concludes that petitioner has not shown that he probably would have prevailed on appeal if appellate counsel had pursued this instance of prosecutorial misconduct. Petitioner has now had a full opportunity to argue to the KCOA that such misconduct warrants reversal under the applicable Kansas standards, and the KCOA rejected that argument. Based on its own review of the entirety of the prosecutor's closing and the evidence against petitioner, this Court is not persuaded that this mischaracterization by the prosecutor was so excessive and prejudicial to create a reasonable probability that the KCOA (or the

Kansas Supreme Court) would have ruled differently on direct appeal.[5] Accordingly, the Court denies this part of the claim as well.

D. Continuances

Petitioner claims that his trial counsel rendered ineffective assistance, in violation of the Sixth Amendment, in obtaining continuances of his trial date without his consent, causing him to forfeit his statutory speedy trial rights. The KCOA, relying on precedent from the Kansas Supreme Court, rejected this claim, holding that the Kansas speedy trial statute did not require reversal of the convictions. *See Sumpter*, 2019 WL 257974, at *13. The speedy trial statute was amended while petitioner's case was on direct appeal, and the amendment applied to petitioner's case; and under that amendment, as interpreted by the Kansas Supreme Court, because defendant's counsel requested the continuances, that time would not be charged against the speedy trial period, even if the continuances were later deemed improper because petitioner had not been consulted. *See id.* (citing *State v. Dupree*, 304 Kan. 43 (2016)). The Court is bound by the Kansas courts' interpretation of the state's speedy trial statute. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Thus, in the absence of a violation, trial and appellate counsel were not ineffective in failing to request that the convictions be set aside on that basis.

[5] The Court does not agree with petitioner that the prosecutor repeated the improper statement multiple times. The prosecutor referred to the pro se motion only one time. On the other cited occasions, the prosecutor argued that petitioner had admitted to lesser-included offenses, but that argument could properly have been based on defendant's own testimony. In addition, in cross-examining petitioner about the pro se motion, the prosecutor accurately quoted the relevant statement about the lesser-included defenses, and the jurors were instructed that they were to consider as evidence the testimony and not statements by counsel.

The KCOA essentially held that trial and appellate counsel were not ineffective for failing to raise this issue after the fact (at trial or after). The KCOA did not address whether trial counsel's performance was deficient at the time the continuances were requested without petitioner's consent. Petitioner has not pursued such an argument in asserting this claim, however, and thus petitioner has not shown that counsel acted unreasonably in seeking additional time to prepare for trial.

Petitioner responds to the decision of the KCOA by arguing that that court failed to address his argument that trial counsel violated a duty of loyalty to him. Petitioner argues that counsel was eventually acting under a conflict of interest because if she had raised the issue after-the-fact, she would have had to admit her mistake in seeking the continuances without petitioner's consent. Petitioner argues that such a conflict of interest means that prejudice may be presumed under the Supreme Court's opinion in *Strickland*. In that case, however, the Supreme Court stopped short of creating a per se rule of prejudice for conflicts of interest; rather, the Court held that "[p]rejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *See Strickland*, 466 U.S. at 692 (internal quotations omitted) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)).

Petitioner has not addressed this standard from *Strickland* for the presumption of prejudice.[6] Thus petitioner has not shown that a speculative desire to avoid admitting an

[6] Petitioner did not allege a breach of counsel's duty of loyalty in his petition to the state district court. Nor did petitioner cite *Strickland* or argue that prejudice may be presumed in pursuing this claim in his briefs to the KCOA. Thus it is not clear that Continued…

error meets the requirement that counsel was "actively representing conflicting interests." Nor has petitioner shown how the alleged conflict actually affected trial counsel's performance. Indeed, the KCOA has held that trial counsel could not successfully have argued a violation of the state speedy trial statute. In sum, petitioner has not established that the KCOA unreasonably applied *Strickland* in denying this claim, and the Court therefore also denies this claim for relief.

E. Jury Venire

Petitioner claims that he was denied his rights under the Sixth Amendment because the panel from which his jury was selected did not include any African-Americans and was therefore underrepresentative. In denying this claim, the state district court ruled that the issue should have been raised on direct appeal and that no exceptional circumstances excused that failure. The KCOA treated this claim as one of ineffective assistance of trial and appellate counsel, based on counsel's failure to pursue the issue at trial or on direct appeal. *See Sumpter*, 2019 WL 257974, at *14. The KCOA denied the claim, based on petitioner's failure to show that African-Americans were routinely underrepresented in jury pools in that county. *See id.*

As a preliminary matter, it remains unclear whether petitioner is attempting to claim ineffective assistance of counsel with respect to this claim. Petitioner did *not* make such a claim in his district court post-conviction petition or in his initial brief on appeal to the KCOA. Indeed, petitioner noted in those briefs that trial counsel objected to the panel's

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petitioner satisfied his exhaustion requirement by presenting this argument fully to the state courts.

lack of African-Americans and moved for a mistrial on that basis. In his reply brief on appeal, petitioner stated that trial counsel did not raise this issue sufficiently and that appellate counsel ignored the issue. In his petition to this Court, petitioner claims that trial and appellate counsel were ineffective with respect to this issue, and he makes the same claim in his claim summary in his initial brief to this Court; but in his argument on this issue and in his reply brief, he has not mentioned counsel or the *Strickland* standard.

Ultimately, the Court need not decide the precise basis for this claim. The KCOA denied the claim because petitioner failed to make the required showing of underrepresentation, and such a failure would doom either a Sixth Amendment claim or a claim of ineffective assistance (because of a lack of prejudice) with respect to the issue. The Court therefore addresses the merits of the Sixth Amendment claim.

The parties agree that the governing standard may be found in the Supreme Court's opinion in *Berghuis v. Smith*, 559 U.S. 314 (2010), which standard the KCOA applied. As the Supreme Court stated in that case, "[t]he Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community." *See id.* at 319 (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975)). To establish a prima facie violation of the Sixth Amendment's fair-cross-section requirement, a criminal defendant "must prove that (1) a group qualifying as distinctive (2) is not fairly and reasonably represented in jury venires, and (3) systematic exclusion in the jury selection process accounts for the underrepresentation." *See id.* at 327 (internal quotations omitted) (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

Petitioner bases this claim on the fact that his jury venire lacked any African-Americans while that group makes up 9.3 percent of the county's population. The KCOA noted, however, that petitioner had not presented any evidence that African-Americans were routinely or systematically underrepresented on jury venires in that county. In support of the present petition, petitioner has not identified any evidence overlooked by the KCOA. Petitioner continues to rely on the fact that his own venire was underrepresentative and on speculation concerning possible causes of underrepresentation in venires in that county.[7] That is not enough, as petitioner did not show in the state courts – and has still not shown – that African-Americans were *routinely* or *systematically* underrepresented in venires in that county. Thus, petitioner has not shown that the KCOA misapplied the *Berghuis* standard for this type of claim or unreasonably applied any facts.

Petitioner argues that the KCOA had no basis for its statement that "[t]he absence of African-Americans from the particular jury panel called for his case is nothing more than a statistical anomaly so far as the record evidence demonstrates." It is clear, however, that the KCOA based that conclusion on petitioner's lack of evidence that such underrepresentation was systematic and not an aberration (an "anomaly"). The KCOA based its decision on a lack of evidence to meet the applicable standard, and there is no basis to overturn that decision.

[7] By notice of supplemental authority, petitioner has submitted a survey and an article concerning the issue of low jury pay, which petitioner cites as one such possible cause. Those materials are not helpful, as they do not contain any evidence that African-Americans were systematically underrepresented in the county. Although the submission is not helpful, the Court does not believe that it was improper, and the Court therefore denies the State's motion to strike the notice of supplemental authority.

F. *Lifetime Registration and Supervision*

Petitioner claims that the conditions of his sentence that require (a) his registration as a sexual offender and (b) lifetime supervision are unconstitutional, specifically violating due process, equal protection, and the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioner concedes that the Kansas Supreme Court has previously rejected such an argument, but, citing a single law review article in support, he contends that those decisions were based on the faulty assumption that sexual offenders are more likely to re-offend. The KCOA denied this claim, noting that the Kansas Supreme Court has rejected the argument and that petitioner had failed to explain how his lifetime supervision violates the Equal Protection Clause.[8]

The Court denies this claim. Petitioner has not shown how the KCOA's rejection of this claim is contrary to or constitutes an unreasonable application of settled precedent of the United States Supreme Court. Indeed, petitioner has not cited any federal law in support of this claim or otherwise addressed the applicable frameworks for the constitutional provisions he invokes. Nor has he shown or even suggested that the KCOA misapplied any facts in rejecting this claim on a legal basis. Accordingly, petitioner has not shown that he is entitled to relief on this basis under Section 2254.

G. *Application of* Apprendi

[8] The State argues that this claim was defaulted by petitioner's failure to raise these issues on his direct appeal. The KCOA did not reject this claim on the basis of such a default, however, but instead addressed the merits of the claim. This Court therefore does likewise.

In his last claim, petitioner argues that the trial court's use of his criminal history in sentencing him violated the constitutional requirement, recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact that increases a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt. *See id.* at 490. The KCOA followed precedent from the Kansas Supreme Court in rejecting this claim both on direct appeal and in post-conviction proceedings. *See Sumpter*, 2013 WL 6164520, at *11; *Sumpter*, 2019 WL 257974, at *15. Petitioner argues that the opinions by the Kansas Supreme Court on which the KCOA relied were wrongly decided.

The Court denies this claim. Petitioner has not cited any federal law other than *Apprendi*, and he has not explained how that opinion applies in this case. In fact, in deciding *Apprendi*, the Supreme Court held that its rule applied to facts "[o]ther than the fact of a prior conviction." *See Apprendi*, 530 U.S. at 490. Only last year the Supreme Court confirmed that the fact of a prior conviction remains an exception to the general rule of *Apprendi*. *See United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019). Thus, petitioner has not shown that the KCOA's rejection of this claim is contrary to or an unreasonable application of settled law of the Supreme Court.

In addition, in his summary, one-paragraph argument on this issue, petitioner appears to argue that the trial court also violated *Apprendi* by its use of "aggravating factors" to sentence him. Petitioner has not identified those factors or explained *Apprendi*'s application to such factors under Kansas law, and thus petitioner has not established his entitlement to relief on this basis. Moreover, on direct appeal petitioner argued that the trial court improperly imposed a sentence at the upper end of the applicable sentencing

range under Kansas law, instead of at the range's midpoint. The Kansas Supreme Court, however, has interpreted the relevant Kansas sentencing statutes as giving a trial court discretion to sentence anywhere within the sentencing range, without the need to find additional facts; thus, an upper-range sentence does not exceed the statutory maximum, and the *Apprendi* rule is not implicated. *See State v. Johnson*, 286 Kan. 824, 840-52 (2008). This Court is bound by the Kansas Supreme Court's interpretation of Kansas law. *See Bradshaw*, 546 U.S. at 76. Accordingly, under Kansas law, a sentence within the guideline range does not exceed the statutory maximum, and the imposition of such a sentence without additional jury findings does not violate *Apprendi*. The Court denies this claim in its entirety.

V. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases states that the Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[9] To satisfy this standard, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282

[9] [1]The denial of a Section 2254 petition is not appealable unless a circuit justice or a circuit or district judge issues a certificate of appealability. *See* Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

(2004)). Because it is clear that defendant is not entitled to relief on the claims denied herein, the Court denies a certificate of appealability in this case with respect to those claims.

IT IS THEREFORE ORDERED BY THE COURT THAT the petition for relief pursuant to 28 U.S.C. § 2254 is **granted in part and denied in part**. The petition is granted with respect to petitioner's aggravated kidnapping conviction, which is hereby vacated. The petition is otherwise denied.

IT IS FURTHER ORDERED BY THE COURT THAT petitioner's motion for discovery and an evidentiary hearing (Doc. # 23) is **denied**.

IT IS FURTHER ORDERED THAT the State's motion to strike petitioner's notice of supplemental authority (Doc. # 25) is **denied**.

IT IS SO ORDERED.

Dated this 10th day of September, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

NOT DESIGNATED FOR PUBLICATION

No. 117,732

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TIMOTHY SUMPTER,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed January 18, 2019. Affirmed.

Kelly H. Foos, *Katie Gates Calderon* and *Ruth Anne French-Hodson*, of Shook, Hardy & Bacon L.L.P., of Kansas City, Missouri, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., ATCHESON, J., and LORI BOLTON FLEMING, District Judge, assigned.

ATCHESON, J.: In 2012, a Sedgwick County District Court jury convicted Timothy Sumpter of seven crimes arising from four incidents in which he sexually assaulted different women. The State charged Sumpter in three cases that were consolidated for trial. The jury found Sumpter not guilty of one felony, and some of the convictions were for less serious crimes than the State had charged. After this court affirmed the verdicts and sentences on direct appeal, Sumpter, with the aid of new lawyers, filed a habeas

corpus motion contending he received constitutionally deficient legal representation and asking that the convictions be reversed. See *State v. Sumpter*, No. 108,364, 2013 WL 6164520 (Kan. App. 2013) (unpublished opinion). The district court held a nonevidentiary hearing on the motion with the prosecutor and Sumpter's new lawyers and later issued a detailed written ruling denying Sumpter any relief. Sumpter has appealed that ruling. We find Sumpter has failed to show a constitutional injury depriving him of a fundamentally fair adjudication of the charges against him, meaning he has not persuaded us that absent the errors he alleges there is a reasonable probability the outcome would have been different. We, therefore, affirm the district court.

Given the issues Sumpter has raised, we dispense with an extended opening narrative of the trial evidence and procedural history in favor of focused recitations tied to the particular points. The parties know the record well. The four incidents resulting in charges against Sumpter occurred between September 2010 and April 2011, so the criminal code in effect then applies.[1] We turn to the general legal principles governing habeas corpus motions under K.S.A. 60-1507 and then consider the issues Sumpter has raised.

[1]The Legislature approved a recodification of the Kansas Criminal Code in 2010. The new code didn't go into effect until July 1, 2011.

Guiding Legal Principles

To prevail on a 60-1507 motion, a convicted defendant must show both that his or her legal representation fell below the objective standard of reasonable competence guaranteed by the right to counsel in the Sixth Amendment to the United States Constitution and that absent the substandard lawyering there probably would have been a different outcome in the criminal case. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014); see *Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3, 4, 694 P.2d 468

(1985) (adopting and stating *Strickland* test for ineffective assistance). A reasonable probability of a different outcome "undermine[s] confidence" in the result and marks the criminal proceeding as fundamentally unfair. See *Strickland*, 466 U.S. at 694. The movant, then, must prove both constitutionally inadequate representation and sufficient prejudice attributable to that representation to materially question the resulting convictions.

As the United States Supreme Court and the Kansas Supreme Court have stressed, review of the representation should be deferential and hindsight criticism tempered lest the evaluation of a lawyer's performance be unduly colored by lack of success notwithstanding demonstrable competence. See *Strickland*, 466 U.S. at 689-90; *Holmes v. State*, 292 Kan. 271, 275, 252 P.3d 573 (2011). Rarely should a lawyer's representation be considered substandard when he or she investigates the client's circumstances and then makes a deliberate strategic choice among arguably suitable options. *Strickland*, 466 U.S. at 690-91. Whether a lawyer had made reasoned strategic decisions bears on the competence component of the *Strickland* test.

Regardless of the inadequacy of legal representation, a 60-1507 motion fails if the movant cannot establish substantial prejudice. And the district court properly may deny a motion that falters on the prejudice component of the *Strickland* test without assessing the sufficiency of the representation. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); see *Edgar v. State*, 294 Kan. 828, 843-44, 283 P.3d 152 (2012); *Oliver v. State*, No. 106,532, 2013 WL 2395273, at *5 (Kan. App. 2013) (unpublished opinion). In other words, even assuming a criminal defendant's legal representation fell below the Sixth Amendment standard, he or she is not entitled to habeas corpus relief if the result would have been no different with competent counsel.

Sumpter has challenged the constitutional adequacy of both his trial lawyer and the lawyer who handled the direct appeal. The *Strickland* test also guides review of an appellate lawyer's representation of a defendant in a criminal case. See *Miller v. State*, 298 Kan. 921, 929-30, 318 P.3d 155 (2014) (applying *Strickland* test to performance of lawyer handling direct appeal).

A district court has three procedural options in considering a 60-1507 motion. The district court may summarily deny the motion if the claims in the motion and the record in the underlying criminal case conclusively show the movant is entitled to no relief. Or the district court may conduct a preliminary hearing with lawyers for the State and the movant to determine if a full evidentiary hearing is warranted. Finally, the district court may hold a full evidentiary hearing. See *Sola-Morales*, 300 Kan. at 881. Absent an evidentiary hearing, the district court must credit the factual allegations in the 60-1507 motion unless they are categorically rebutted in the record of the criminal case. Where, as here, the district court limits a preliminary hearing to the argument of counsel before denying the motion, we exercise unlimited review of the ruling on appeal. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014); *Sola-Morales*, 300 Kan. at 881. The district court has received no new evidence, and we can review the motion and the underlying record equally well.

With those principles in mind, we take up the points Sumpter has presented on appeal from the district court's denial of his 60-1507 motion.

Aggravated Kidnapping Conviction

Sumpter contends the State failed to produce sufficient evidence to support the jury's verdict for the aggravated kidnapping of J.B.—the most serious charge on which he was convicted. Sumpter faults his trial lawyer for misunderstanding the fit between the elements of aggravated kidnapping and the evidence against him and fumbling the issue

in the district court. He also faults the lawyer handling the appeal for not raising sufficiency of the evidence at all.

Because the district court did not hold an evidentiary hearing, we have no insight into what strategic decisions those lawyers may have made in assessing potential lines of attack on that charge at the trial level and on the resulting conviction on appeal. As a practical matter, evidence about those professional judgments commonly must be developed in an evidentiary hearing on the 60-1507 motion at which the lawyer produces his or her work file and testifies about why he or she handled the criminal case in a particular manner. See *State v. Hargrove*, 48 Kan. App. 2d 522, 552, 293 P.3d 787 (2013); *Johnson v. State*, No. 109,169, 2014 WL 1362929, at *5 (Kan. App. 2014) (unpublished opinion); *Oliver*, 2013 WL 2395273, at *5.[2]

[2]In criminal cases, defense lawyers typically need not explain why they represented their clients as they did. If a defendant requests a new trial based on the ineffectiveness of his or her trial lawyer or asserts ineffectiveness as a point on direct appeal, the district court may—on its own or at the direction of an appellate court—hold what's called a *Van Cleave* hearing to explore the claim. See *State v. Van Cleave*, 239 Kan. 117, Syl. ¶ 2, 716 P.2d 580 (1986). A *Van Cleave* hearing functionally replicates an evidentiary hearing on a 60-1507 motion, except that it is held as part of the direct criminal case rather than in a collateral proceeding. A district court could rely on the evidentiary record from a *Van Cleave* hearing to summarily deny a 60-1507 motion questioning purported strategic decisions of the trial lawyer. Usually, however, ineffectiveness claims will be deferred to 60-1507 proceedings, since they become moot if a defendant raises some other issue in the direct criminal case requiring a new trial. So the record in most criminal cases lacks evidence about the defense lawyer's reasons for representing the defendant as he or she did. This is such a case.

In rare situations, a reviewing court can say that a lawyer's action or inaction could not have been the product of any reasoned strategic decision because the effect is so patently detrimental to the client. See *Hargrove*, 48 Kan. App. 2d at 551 ("No sound strategy could warrant a defendant assuming a heavier burden of proof than required under the law in establishing a defense . . . . [an] error incontestably devoid of strategic

worth."). Sumpter suggests the record here establishes that sort of error with respect to his conviction for aggravated kidnapping.

But the quality of the lawyers' representation becomes irrelevant if Sumpter cannot also show prejudice. If the trial evidence legally supports the jury's verdict and, thus, the conviction, his argument founders on that part of the *Strickland* test. We engage that analysis and conclude the State presented sufficient evidence to prove the aggravated kidnapping charge. To assess sufficiency we review the evidence in a light most favorable to the State as the prevailing party and ask whether reasonable jurors could return a guilty verdict based on that evidence. *State v. Butler*, 307 Kan. 831, 844-45, 416 P.3d 116 (2018); *State v. McBroom*, 299 Kan. 731, 754, 325 P.3d 1174 (2014). Sumpter does not contend his trial lawyer should have presented more or different evidence on the charge.

In January 2011, Sumpter accosted J.B., a young woman, about 1 a.m. as she walked to her car in a parking lot in Old Town, an entertainment district in downtown Wichita. When they got to J.B.'s car, he forced his way in, grabbed J.B., and attempted to sexually assault her. Sumpter had his knee across J.B.'s throat as he tried to touch her vagina. She briefly lost consciousness. When she regained her senses, Sumpter was masturbating. He forced J.B. to touch his penis. During the attack, Sumpter took J.B.'s car keys from her as she attempted to fight him off and threw them out the window.

Part way through the attack, J.B. was able to force Sumpter out of the car and to lock the doors. Sumpter then retrieved the keys and displayed the keys in an effort to get J.B. to open the door. She did. Sumpter forced his way back in and resumed his assault. Another car fortuitously pulled up. Sumpter got out of J.B.'s car. He spoke briefly to the driver of the other car. J.B. drove away; she immediately contacted the police. Police investigators later identified and interviewed the driver of the other car. The driver described Sumpter jumping out of the car with his belt unbuckled as J.B. shouted, "He

tried to rape me." As J.B. drove off, Sumpter told the man, "She's lying . . . . That's my girl."

J.B. acknowledged she had been drinking that night. There were minor variations in the accounts of the incident she gave police investigators, testified to at a preliminary hearing, and then described for the jurors during the trial.

The State charged Sumpter with aggravated kidnapping, attempted rape, and aggravated sexual battery. The jury convicted him of all three crimes.

For the aggravated kidnapping charge, the State had to prove Sumpter "confin[ed]" J.B. by force "to facilitate" his intent to rape her and she suffered bodily harm as a result. See K.S.A. 21-3420; K.S.A. 21-3421. Under the former code, the relevant elements of kidnapping were: The "taking or confining of a person . . . by force . . . with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 21-3420. The infliction of "bodily harm" on the victim elevated the crime to aggravated kidnapping. K.S.A. 21-3421. For purposes of the 60-1507 motion, Sumpter doesn't dispute the evidence of the attempted rape or that J.B. was injured. He focuses on the element of confinement.

In *State v. Buggs*, 219 Kan. 203, 215, 547 P.2d 720 (1976), the Kansas Supreme Court held that kidnapping requires movement or confinement of the victim that is more than "slight and 'merely incidental' to the commission of an underlying . . . crime." The movement or confinement constituting facilitation required for kidnapping entails some greater intrusion upon the victim's freedom than does the underlying crime and has some discernible independence from the conduct necessary to carry out that crime. 219 Kan. at 216. The court identified several criteria differentiating movement or confinement sufficient to support a kidnapping conviction from that legally considered no more than an intrinsic part of another crime. The movement or confinement:

"(a) Must not be slight, inconsequential and merely incidental to the other crime;

"(b) Must not be of the kind inherent in the nature of the other crime; and

"(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. at 216.

The court characterized the considerations as illustrative rather than exhaustive and pointed out they "may be subject to some qualification when actual cases arise." 219 Kan. at 216. Kansas courts continue to use the *Buggs* standards to assess evidence in kidnapping and aggravated kidnapping cases bearing on the element of movement or confinement. See *State v. Curreri*, 42 Kan. App. 2d 460, 462-65, 213 P.3d 1084 (2009); *State v. Brown*, No. 115,613, 2017 WL 5015486, at *2-5 (Kan. App. 2017) (unpublished opinion); *State v. Harris*, No. 113,879, 2017 WL 1035343, at *8-9 (Kan. App. 2017) (unpublished opinion); PIK Crim. 4th 54.210, Comment. The *Buggs* court offered three paired hypothetical examples—two involving robberies and one involving rape—to illustrate what would and would not support a kidnapping charge. They described movement of the victims or movement coupled with confinement and aren't especially apt here.

The principle recognized in *Buggs* theoretically avoids kidnapping convictions for limited movement or confinement of a victim integral to the commission of another crime. It may be thought of as a particularized application of the rule prohibiting multiplicitous convictions for conduct amounting to a single crime. See *State v. Weber*, 297 Kan. 805, 808, 304 P.3d 1262 (2013) (convictions multiplicitous when State prosecutes single crime as two or more offenses exposing defendant to pyramiding punishments for one wrong); *State v. McKessor*, 246 Kan. 1, 10-11, 785 P.2d 1332 (1990) (recognizing *Buggs* standards directed at multiplicity problem). The *Buggs* court

effectively laid out a totality-of-the-circumstances standard that, unlike a bright-line rule, creates a fuzzy border where close cases turn on seemingly minor differences. It also diminishes any given case as precedent for a somewhat similar, though not entirely analogous, set of circumstances.

Here, Sumpter confined J.B. in the midst of the criminal episode when she forced him out of her car and he retrieved her keys that he had earlier thrown out the window. At that point, J.B. was unable to leave. If she tried to get out of the car, Sumpter could easily seize her. And she couldn't drive the car away, thereby escaping, without the keys. Sumpter had, thus, effectively trapped J.B. in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her. Sumpter then used the keys as part of a ploy to get J.B. to unlock the car to get them back. When she did, he forced his way in and resumed his assault of her. The confinement was clear, deliberate, and more than instantaneous. To support a kidnapping or aggravated kidnapping conviction, the confinement need not be extended. No particular amount of time is required; the fact of confinement is sufficient. *Buggs*, 219 Kan. at 214; *State v. Ellie*, No. 110,454, 2015 WL 2342137, at *6 (Kan. App. 2015) (unpublished opinion).

The standoff between Sumpter and J.B. and, thus, the confinement cannot be characterized as simply incidental to or inherent in the sexual assault. Sumpter held J.B. hostage in a specific place and sought to gain access to that place to commit a crime against her. But that situation could have been the prelude to all sorts of crimes and was not unique to rape or even sex offenses. Having gotten into the car, Sumpter could have robbed or severely beaten J.B. The point is Sumpter trapped J.B. in a small, closed place of limited safety and induced J.B. to compromise that safety in an effort to escape. Her effort permitted Sumpter entry to the car making the commission of the crime that followed "substantially easier" than if he had to physically break in to the car. The circumstances fit within the *Buggs* test for a confinement sufficiently distinct from the

underlying crime to be successfully prosecuted as an aggravated kidnapping given J.B.'s undisputed injuries.

The specific facts here tend to set this conviction apart from more common confinement scenarios found to be kidnapping. See, e.g., *State v. Weigel*, 228 Kan. 194, Syl. ¶ 4, 612 P.2d 636 (1980) (robber herds bank employees into vault and attempts to lock it); *State v. Dunn*, 223 Kan. 545, 547, 575 P.2d 530 (1978) (three inmates at state prison hold two employees hostage in office for five hours while demanding "a car and free passage" from facility in exchange for their release). But it is no less a kidnapping because it is unusual. By the same token, however, these circumstances do not lend themselves to any sweeping conclusion or rule about confinement as an element of kidnapping. Because the trial evidence was sufficient for the jury's verdict, Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction either in the district court leading up to and during the trial or on direct appeal in this court. He has failed to show a basis for relief under K.S.A. 60-1507.

Consolidation of Cases for Trial

Sumpter contends the lawyers representing him in the district court and on appeal failed to properly contest the consolidation of three cases comprising four separate incidents for a single trial. He says the unfair prejudice to him of having the jurors hear about the four sexually based assaults substantially outweighed any judicial efficiency in trying the cases together. And, he says, his lawyers provided constitutionally substandard representation in fumbling the issue.

Given the exceedingly broad rules governing the admissibility of sexual misconduct as other crimes evidence, Sumpter cannot demonstrate undue prejudice in his consolidated trial. As we explain, had he been tried separately in each case or for each incident, the other incidents would have been admissible under K.S.A. 2011 Supp. 60-

455(c) to show his propensity or proclivity to engage in sexually aggressive and unlawful conduct. In the consolidated case, however, the jurors were instructed they could consider only the evidence admitted as to a particular charge in determining Sumpter's guilt or innocence of that charge—theoretically preventing them from relying on the multitude of incidents to bolster the State's evidence of each incident. See PIK Crim. 4th 68.060. Ultimately, Sumpter was better off in a consolidated trial than in sequential trials of each case in which the other incidents would have been admitted as propensity evidence. Neither outcome, however, could be described as advantageous to Sumpter.

We outline briefly the three separate cases the State filed against Sumpter. The State charged the attack on J.B. in one case. We have already laid out those charges and a summary of the attack. When the police questioned Sumpter months later, he initially said he didn't know J.B. but admitted to being in Old Town at the same time when a woman attacked him and he defended himself. Sumpter agreed with the detectives that he might be the person shown in an indistinct surveillance video of J.B.'s car and what happened there.

At trial, Sumpter offered a confusing story about J.B. spitting on him and then pulling him into the car and coming on to him sexually. He admitted touching J.B.'s buttocks and masturbating but denied trying to touch her pubic area.

In a second case, the State charged Sumpter based on two distinct incidents:

• In September 2010, Sumpter met A.C., a 23-year-old woman, at a party, and they arranged to get together sometime later at a fast food restaurant. From the restaurant, Sumpter drove them to a nature trail where they walked and talked for a while. Sumpter then pulled A.C. to the ground, grabbed her buttocks, and masturbated. A.C. convinced him to stop and left the area. Shortly afterward, Sumpter texted A.C. to explain that a

nurse told him he had a bad reaction to a prescription medication. A.C. reported the assault to the police the next day.

When detectives questioned him months later, Sumpter denied knowing A.C. or having any contact with her. Investigators obtained copies of the text messages between Sumpter and A.C., and those communications were admitted as evidence in the trial. During his testimony, Sumpter told the jurors he had gone to the nature trail with A.C. and had touched her in a sexual manner. He suggested the encounter had been consensual. The jury found Sumpter not guilty of attempted rape and found him guilty of misdemeanor sexual battery as a lesser included offense of aggravated sexual battery, a felony.

• In February 2011, Sumpter called A.P., a 24-year-old woman, who he knew from her employment at a supermarket where Sumpter regularly shopped. As a store employee, A.P. occasionally cashed checks for Sumpter. According to A.P., Sumpter telephoned her in the middle of the night and asked to meet her ostensibly because he was distraught over the death of a close friend. She declined, saying she had to be at work early in the morning. When A.P. arrived at the supermarket, Sumpter was already there. He tried and failed to coax her into leaving with him so they could talk about his friend; he then followed her into the store. In one of the aisles, Sumpter hugged A.P. and fondled her buttocks. She protested, and he left. A.P. reported the incident to the police that day.

Sumpter later told detectives he knew A.P. because she cashed checks for him at the store. He denied grabbing or hugging A.P. At trial, Sumpter admitted he hugged A.P. and touched her buttocks. The jury convicted Sumpter of misdemeanor sexual battery as a lesser included offense of a charge of aggravated sexual battery.

In the third case, the State charged Sumpter with the April 2011 kidnapping and sexual assault of A.E., a 19-year-old woman. A.E. said she and Sumpter separately turned

up at a loosely organized gathering at a friend of a friend's house. They became separated from the other partygoers, and Sumpter exposed himself and began to masturbate. A.E. said when she got angry and tried to leave, Sumpter began crying about his dead father—the trial evidence showed Sumpter's father had died years earlier. A.E. testified that she felt sorry for Sumpter. They left the house and drove around in Sumpter's SUV. Sumpter began talking about killing himself, so A.E. tried to get away. Sumpter grabbed her and they physically fought.

As a private security guard pulled up to the SUV, Sumpter told A.E. he would take her back to the party. But after the security guard left, Sumpter drove down a dirt road, stopped the vehicle, and attacked her. A.E. said Sumpter put his hands down her pants and grabbed her buttocks as she fought back. A Sedgwick County sheriff's deputy drove up to the SUV and got out to investigate what was going on. By then, it was about 2:30 a.m. A.E. described what had happened. Sumpter offered that he and A.E. actually had been in a relationship for over a year. The deputy arrested Sumpter.

At trial, Sumpter admitted trying to have sex with A.E. while they were in the SUV. He denied masturbating in front of her at the party and trying to grab her buttocks. The State had charged Sumpter with aggravated sexual battery and kidnapping. The jury convicted him of aggravated sexual battery and of criminal restraint, a misdemeanor, as a lesser offense of kidnapping.

The State filed a motion to consolidate the three cases (and, thus, the four incidents) for trial to a single jury. Sumpter opposed the motion and requested the incidents involving A.C. and A.P. be severed for separate trials. The district court ordered consolidation. In his direct appeal, Sumpter challenged the order, arguing the incidents were not sufficiently similar to be joined for trial under K.S.A. 22-3203. He did not argue that consolidation was unduly prejudicial. On direct appeal, this court found

consolidation satisfied the statutory requirements and affirmed the district court's ruling on that basis. *Sumpter*, 2013 WL 6164520, at *3-6.[3]

[3]As a member of the panel deciding the direct appeal, I wrote a short concurrence that deliberately bordered on the delphic but hinted at reservations about consolidation. *Sumpter*, 2013 WL 6164520, at *12. I was troubled by the possibility of undue prejudice to Sumpter in a single trial of all four incidents. But the appellate lawyer did not brief that issue and at oral argument indicated she hadn't really considered it. So I confined my review to what the parties presented. See *State v. Bell*, 258 Kan. 123, 126-27, 899 P.2d 1000 (1995) (as general rule, court should not consider issue parties have neither raised nor briefed). The issue has been fully briefed in this proceeding. Based on that argument and the broad legislative mandate in K.S.A. 2011 Supp. 60-455(d), I am persuaded Sumpter did not face legally impermissible prejudice in the consolidated trial.

In his 60-1507 motion, Sumpter constitutionalizes the consolidation issue by arguing that his lawyers in the criminal case failed to competently present undue prejudice as a compelling ground against a single trial. Without an evidentiary hearing, we pass on reviewing what strategic considerations, if any, shaped the lawyers' approaches to consolidation and turn to the second aspect of the *Strickland* test to explore whether the outcome might have been different if Sumpter had received a separate trial on each incident. We, therefore, have to unspool what likely would have happened if Sumpter had successfully opposed the State's motion to consolidate and compare that with how the actual trial played out.

As we have explained, in the trial, the district court instructed the jurors that they should separately consider the evidence on each count or charge and that they should be "uninfluenced" in deciding Sumpter's guilt on that count or charge by the evidence bearing on the other charged crimes. See PIK Crim. 4th 68.060. Based on the instruction, the jurors should have considered each incident separate from the other three. Appellate courts presume that jurors follow the instructions they are given. *State v. Mattox*, 305 Kan. 1015, 1027, 390 P.3d 514 (2017). In a backward looking evaluation, a criminal defendant must point to something in the record suggesting otherwise to make any legal headway. See *State v. Kleypas*, 305 Kan. 224, 279, 382 P.3d 373 (2016). Nothing

indicates the jurors deviated from that directive in their deliberations. The Kansas Supreme Court has endorsed an instruction like PIK Crim. 4th 68.080 as an effective tool for directing jurors on how to consider evidence during their deliberations in cases involving distinct criminal episodes. See *State v. Cruz*, 297 Kan. 1048, 1057-58, 307 P.3d 199 (2013).

During the pretrial proceedings on consolidation, Sumpter's lawyer argued that jurors would be hard pressed to compartmentalize the evidence on each of the four incidents and to disregard the fairly intuitive implication that the sheer number of separate allegations tended to reinforce the validity of each one. The recognized dangers in admitting other crimes evidence include portraying the defendant as a chronic lawbreaker deserving of punishment for that reason alone or supporting the defendant's guilt through a pattern of alleged wrongdoing even though the evidence of any one instance may be weak. See *State v. Gunby*, 282 Kan. 39, 48-49, 144 P.3d 647 (2006). The same danger lurks in a single trial of consolidated criminal episodes, notwithstanding a contrary jury instruction. Despite those genuine concerns, Sumpter has failed to show that any of those dangers were realized in his trial.

The jurors returned a decidedly mixed set of verdicts. They found Sumpter not guilty of one especially serious felony, convicted him of lesser offenses on three charges, and convicted him as charged of four crimes. We hesitate to read too much into those decisions. They do not, however, indicate a jury in the throes of an irrational passion or prejudice to convict regardless of the evidence. And the Kansas Supreme Court has recognized split verdicts may be viewed as consistent with a jury following the admonition of an instruction based on PIK Crim. 4th 68.060. See C*ruz*, 297 Kan. at 1058. In short, the outcome in Sumpter's trial was not obviously infected with unfair prejudice because the jury considered all four incidents. This court so noted in considering Sumpter's direct appeal. *Sumpter*, 2013 WL 6164520, at *6.

The question posed here, however, is whether Sumpter reasonably could have expected a different outcome had the district court denied the State's request to consolidate and ordered a separate trial for each incident. If so, then, Sumpter has demonstrated the sort of prejudice required under *Strickland.*

Absent consolidation, the State presumably would have sought to introduce at one trial the circumstances of the other three episodes as relevant evidence of other crimes or wrongs under K.S.A. 2011 Supp. 60-455(d), to prove Sumpter's propensity to engage in sexual misconduct and that he acted on that propensity. See *State v. Smith*, 299 Kan. 962, 970, 327 P.3d 441 (2014). In pertinent part, K.S.A. 2017 Supp. 60-455(d) states:

> "(d) Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense . . . evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

Propensity entails a disposition or proclivity to engage in the defined activity. Accordingly, to be admitted as propensity evidence under K.S.A. 2017 Supp. 60-455(d), an instance of conduct need only be sufficiently similar to the charged crime to display a common sexually based disposition or proclivity. Without belaboring the factual circumstances, each incident shows a proclivity on Sumpter's part consistent with the other incidents. So the evidence would fall within the broad rule of admissibility in K.S.A. 2017 Supp. 60-455(d). For purposes of our analysis, we assume the evidence would not be admissible under the more restrictive requirements of K.S.A. 2017 Supp. 60-455(b).

Even when a district court finds evidence satisfies the general test for admissibility in K.S.A. 2017 Supp. 60-455(d), it must then determine that the probative value outweighs any undue prejudice to the defendant before allowing the jury to hear the evidence. *State v. Bowen*, 299 Kan. 339, Syl. ¶ 7, 323 P.3d 853 (2014) (recognizing 60-

455[d] requires balancing of probativeness and undue prejudice); *State v. Huddleston*, 298 Kan. 941, 961-62, 318 P.3d 140 (2014) (noting K.S.A. 60-445, cited in 60-455[d], permits balancing probativeness against undue prejudice to exclude unfairly prejudicial evidence). The Kansas Supreme Court has recognized an array of factors that should be assessed in making the determination as to sexually based propensity evidence:

> "'1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely it is such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct. [Citations omitted].' *United States v. Benally*, 500 F.3d 1085, 1090-91 (10th Cir. 2007)." *Bowen*, 299 Kan. at 350.

In each of Sumpter's hypothetical separate trials, the key consideration in admitting the other incidents would be the proof of their factual circumstances and whether the jurors would be required to spend inordinate time and effort in evaluating disputed evidence about them, effectively creating mini-trials.

We believe a district court likely would have admitted the incidents and that decision would have fallen within its wide judicial discretion. *State v. Wilson*, 295 Kan. 605, Syl. ¶ 1, 289 P.3d 1082 (2012) (district court's weighing of probative value against undue prejudice reviewed for abuse of judicial discretion). By evaluating the accounts of each of the incidents and Sumpter's out-of-court statements about them, we can reach reliable conclusions about their admissibility under 60-455(d). Sumpter's trial testimony doesn't really factor into that assessment, since admissibility typically would be based on the State's pretrial request. See K.S.A. 2017 Supp. 60-455(e) (State must disclose evidence at least 10 days before trial). Identity is not a compelling issue in any of the incidents. A.C. and J.B. each spent considerable time with her attacker. A.C. produced

inculpatory text messages from Sumpter consistent with her account. Sumpter admitted to police that he was in Old Town when J.B. was assaulted and conceded he might be depicted in the surveillance video. And Sumpter was arrested with A.E. in his SUV. Identity isn't an issue with A.P., either. If the incident happened, A.P. wouldn't have been mistaken about who assaulted her. It happened in the aisle of the supermarket where she worked. By his own admission, Sumpter knew A.P. casually because he had interacted with her as a regular customer at the store.

Likewise, Sumpter's out-of-court statements bolster the argument for admissibility. As we mentioned, Sumpter's denial that he even knew A.C. was undercut by his contemporaneous text messages with her. Those messages not only confirmed they knew each other but that Sumpter had done something untoward for which he was apologizing. The contradiction creates strong circumstantial evidence of a guilty mind and, thus, culpability of conduct roughly consistent with A.C.'s account. See *United States v. Holbert*, 578 F.2d 128, 129 (5th Cir. 1978) ("long line of authority . . . recognizes that false exculpatory statements may be used not only to impeach, but also as substantive evidence tending to prove guilt"); *United States v. Lepore*, No. 1:15-cr-00367-WSD, 2016 WL 4975237, at *2 (N.D. Ga. 2016) (unpublished opinion) ("False exculpatory statements may be used as evidence of consciousness of guilt."). There was similar, if less compelling, evidence as to J.B. Sumpter told the driver who pulled up near J.B.'s car that J.B. was his girlfriend—a patent falsehood. Months later, Sumpter gave an evolving version of his conduct that began with an admission he was in Old Town about the time J.B. was attacked but didn't know her. He then offered a claim that some woman assaulted him for no apparent reason, and finally he allowed that he might be the man in the surveillance video. That sort of shifting narrative, especially coupled with the driver's account of Sumpter's explanation during the incident, also points to a guilty mind. The episode incident involving A.E., where a sheriff's deputy caught Sumpter with her in his SUV on a secluded road in the middle of the night, prompted a similarly disputed

representation—that he and A.E. were in a long-standing relationship. That didn't square with what the deputy observed or A.E. said.

So the implausibility and inconsistency of Sumpter's statements and explanations of each of those incidents would support a conclusion favoring the victim's overall account portraying a sexually motivated assault. The evidence was considerably stronger than an uncorroborated accusation and a corresponding unimpeached denial. In turn, a district court could find those incidents admissible as 60-455(d) evidence of propensity. To be sure, each trial would have been longer because of the propensity evidence. But that would not be a compelling reason to exclude the evidence, especially since the additional time likely would have been a couple of days. In the actual trial, the jurors heard about four days of testimony.

The possible exception to admissibility under 60-455(d) is the incident with A.P. Basically, A.P. said Sumpter hugged and groped her without consent, and he denied doing anything of the kind to her. No circumstantial evidence associated with their interaction lent any particular credibility to either version. So the admissibility of the episode with A.P. as other crimes evidence in a trial of any of the other incidents might be questionable. But the other three incidents would have been admissible in a trial of the episode in which A.P. was the victim. And the incident with A.P. reflects the least persuasive propensity evidence, since it entailed a brief, though wholly unwelcome and disquieting, sexual touching in a public place and lacked the violent physical aggression of the other incidents.

In short, Sumpter would have had to confront largely the same evidence, except perhaps for the incident involving A.P., in separate trials of the charges arising from the attacks involving A.C., J.B., and A.E. Given the sweeping rule of admissibility in K.S.A. 2017 Supp. 60-455(d), a district court need not give the jurors a limiting instruction confining their consideration of the propensity evidence to a narrow purpose or point.

State v. Prine, 297 Kan. 460, Syl. ¶ 4, 303 P.3d 662 (2013). The jurors in those hypothetical separate trials would have been free to consider the other crimes evidence for virtually any ground bearing on Sumpter's guilt of the charged crimes against the particular victim. The district court would not have given an instruction comparable to PIK Crim. 4th 68.060 confining the jurors' consideration of the evidence on a particular charge to the facts pertaining directly to that charge. As a result, Sumpter would have been materially disadvantaged in separate trials compared to the consolidated trial he received.

Sumpter, of course, says the reverse is true and submits he might well have chosen not to testify in at least some of the separate trials but effectively had to testify in the consolidated trial and, thus, to speak to all of the allegations against him in front of the jurors. Sumpter's argument, however, rests on the premise that in each separate trial none of the other incidents would have been admitted as evidence. But, as we have explained, the premise is faulty. Sumpter cannot point to actual legal prejudice consistent with the *Strickland* test flowing from the consolidated trial as compared to separate trials.

Overlooked Instances of Prosecutorial Error

In his 60-1507 motion, Sumpter contends the lawyer handling the direct appeal failed to brief instances of prosecutorial error during the trial and the failure amounted to constitutionally deficient representation. The lawyer did argue on appeal that the prosecutor made several improper remarks in closing argument impermissibly painting Sumpter as a liar and, thus, engaged in misconduct warranting a new trial. On direct appeal, this court found those portions of the closing argument to be fair comment based on the evidence and free of any error. *Sumpter*, 2013 WL 6164520, at *11.

We mention that the Supreme Court revamped the standards for assessing claims of prosecutorial error after Sumpter's trial and direct appeal. See *State v. Sherman*, 305

Kan. 88, 108-09, 378 P.3d 1060 (2016). We suppose, however, that the standards in effect at the time of Sumpter's trial and appeal should govern our review of this collateral challenge to his convictions. The Kansas Supreme Court declined to apply *Sherman* in cases that were fully briefed on direct appeal when it was decided. See *State v. Netherland*, 305 Kan. 167, 180-81, 379 P.3d 1117 (2016). And the issue here is the constitutional adequacy of Sumpter's legal representation when the earlier standards for prosecutorial error governed; so it follows the quality of the representation should be measured against the law as it was then. See *Baker v. State*, 20 Kan. App. 2d 807, Syl. ¶ 3, 894 P.2d 221 (1995) (criminal defense lawyer typically not considered constitutionally ineffective for failing to foresee distant or unusual change in law); *Mayo v. Henderson*, 13 F.3d 528, 533-34 (2d Cir. 1994) (under *Strickland* test, "[c]ounsel is not required to forecast changes in the governing law"). The choice, however, is not especially significant. Under either the pre-*Sherman* standards or *Sherman* itself, the focus for our purposes rests on sufficiently substantial prejudice to Sumpter to compromise his right to a fair trial.

Before *Sherman*, the Kansas courts use a well-recognized, two-step test for measuring the impropriety of closing arguments in criminal cases:

> "'First, the appellate court must decide whether the comments fall outside the wide latitude afforded a prosecutor in discussing the evidence and the law. Second, if the prosecutor has exceeded those bounds, the appellate court must determine whether the improper comments constitute plain error; that is, whether the statements prejudiced the jury to the extent the defendant was denied a fair trial. *State v. McReynolds*, 288 Kan. 318, 323, 202 P.3d 658 (2009) (outlining mode of analysis); see *State v. King*, 288 Kan. 333, 351, 204 P.3d 585 (2009) (noting considerable range permitted advocates, including prosecutor, in arguing their causes in jury summations).'" *State v. Franco*, 49 Kan. App. 2d 924, 938, 319 P.3d 551 (2014) (quoting *State v. Schreiner*, 46 Kan. App. 2d 778, 793-94, 264 P.3d 1033 [2011], *rev. denied* 296 Kan. 1135 [2013]).

If the argument falls outside what is proper, the courts then look at three factors to assess the degree of prejudice:

> "'(1) whether the misconduct was gross and flagrant; (2) whether the misconduct showed ill will on the prosecutor's part; and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. Moreover, the third factor may not override the first two factors unless the harmless error tests of both K.S.A. 60-261 [refusal to grant new trial is inconsistent with substantial justice] and *Chapman v. California*, 386 U.S. 18, [22-24,] 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) [conclusion beyond a reasonable doubt that the error . . . changed the result of the trial], have been met.' [Citations omitted.]" *State v. McReynolds,* 288 Kan. 318, 323, 202 P.3d 658 (2009).

We apply that test here with the observation that the first part used to assess error in a closing argument was carried over in *Sherman*, while the second part for assessing prejudice now looks exclusively at the impact of any erroneous argument on the fairness of the trial without considering prosecutorial ill-will or the flagrancy of the impropriety—misconduct that may be more directly and effectively remedied in other ways.

Sumpter contends that in closing argument to the jurors, the prosecutor mischaracterized the content of the security video depicting part of the episode with J.B. The contention is unavailing. First, although the security video was played for the jurors during the trial and admitted as an exhibit, it is not part of the record on appeal. We cannot compare the video to the prosecutor's description and cannot really assess any purported error. See *State v. Kidd*, 293 Kan. 591, 601, 265 P.3d 1165 (2011) (party claiming error has obligation to provide sufficient record for appellate review); *Harman v. State*, No. 108,478, 2013 WL 3792407, at *1 (Kan. App.) (unpublished opinion) ("When there are blanks in that record, appellate courts do not fill them in by making assumptions favoring the party claiming error in the district court."). On its face, the prosecutor's comment about the video was proper. The prosecutor invited the jurors to

review the video during their deliberations. He described part of what was shown (and what the jurors had already seen during the trial) and explained how it conflicted with Sumpter's testimony. But he expressed no personal opinion about the veracity of the video or Sumpter's account. Given what's in front of us, we find no prosecutorial error.

Sumpter next contends the prosecutor inaccurately described a pro se pretrial motion he filed for a bond reduction. By way of background, the prosecutor used the motion as a statement against interest to cross-examine Sumpter during the trial. In closing argument, the prosecutor said the motion was consistent with Sumpter's testimony that included admissions to facts supporting lesser included offenses while denying facts that would support the more serious charges. A pro se pleading or statements a criminal defendant personally makes in court in the course of self-representation typically are treated as admissions. See *State v. Burks*, 134 Kan. 607, 608-09, 7 P.2d 36 (1932); *United States v. Thetford*, 806 F.3d 442, 447 (8th Cir. 2015).

The prosecutor did appear to misrepresent the motion. In the motion, Sumpter seems to argue that he and his lawyer concluded he could be found guilty only of misdemeanors based on the testimony presented at the preliminary hearing and, therefore, should receive a bond reduction. In the motion, Sumpter neither admitted to committing misdemeanors nor conceded the accuracy of the preliminary hearing evidence. He simply argued the State's strongest evidence would prove only misdemeanors. So to the extent the prosecutor's closing argument to the jury characterized the pretrial motion as some admission of guilt, it amounted to error. But nothing suggested the prosecutor acted out of ill-will, and the error wasn't flagrant in the sense the prosecutor built a theme of the closing argument around the motion. See *State v. Judd*, No. 112,606, 2016 WL 2942294, at *8-9 (Kan. App. 2016) (unpublished opinion) (under pre-*Sherman* standard, prosecutor committed reversible error in closing argument by repeatedly misstating basic point of law as singular theme in arguing to jury for conviction on thin circumstantial evidence). Moreover, the error didn't somehow shift the tide of the case, especially in light of

Sumpter's trial testimony. On the witness stand, Sumpter did admit to conduct likely amounting to comparatively minor crimes against A.C., J.B., and possibly A.E.

The failure of Sumpter's trial and appellate lawyers to raise this point in the direct criminal case could not have resulted in material prejudice under the *Strickland* test. The prosecutor's misstatement about the pretrial motion was not of the magnitude to call into question the jury's verdicts. So the error cannot warrant relief in a collateral challenge to those verdicts under K.S.A. 60-1507.

For his final challenge to the prosecutor's closing argument, Sumpter says the prosecutor misled the jurors about what the State had to prove to convict him of the attempted rape of J.B. In describing the elements of the attempted crime, the prosecutor told the jurors Sumpter had to intend to commit rape when he confined J.B. So, the prosecutor explained, the State did not have to show that Sumpter actually had sex with J.B.—only that he intended to. That's a misstatement of law, since an intent to have consensual sex would not be rape. Without an objection, the prosecutor seemed to realize the problem, corrected himself, and told the jurors the crime required an intent to commit rape. Arguably, though, the correction wasn't a model of clarity.[4]

[4]This is what the prosecutor said:

> "And he [Sumpter] told you what his intent was with [J.B.] He minimizes it and says well, I didn't go into that car with the intent to have sex with her. But clearly he told you on the stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her—or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do."

We see no prosecutorial error. The prosecutor misspoke, realized as much, and immediately offered a revised statement of the law to the jurors. Those kinds of slips are an unavoidable part of the unscripted presentation that is trial practice. The record shows nothing more. See *State v. Jones*, 47 Kan. App. 2d 512, 535, 276 P.3d 804 (2012)

(Atcheson, J., concurring) (deliberate line of questions lacking factual basis "was not a slip of the tongue or a single, poorly phrased question that could be excused as the occasional byproduct of the unscripted give-and-take of trial practice"); *State v. Alexander*, No. 114,729, 2016 WL 5344569, at *5-6 (Kan. App. 2016) (unpublished opinion), *rev. denied* 306 Kan. 1320 (2017). Sumpter cannot lay a foundation for relief here. Even if the prosecutor's comment were ambiguous or erroneous, the relevant jury instruction accurately set forth the elements, including the intent to commit rape, and tracked with what appeared to be the prosecutor's revision. Given the brevity of the prosecutor's comment and the clarity of the jury instruction, Sumpter could not have been materially prejudiced.

Other Challenges Raised in Sumpter's 60-1507 Motion

Sumpter has raised several additional issues in his 60-1507 motion that fail to warrant relief or further consideration in an evidentiary hearing. Either the record establishes no factual basis to find for Sumpter or settled law forecloses his claims.

• Sumpter contends his statutory right to a speedy trial was violated because he was not present to object to continuances his lawyer requested and received from the district court. At the time, the State had to bring a defendant in custody to trial within 90 days, as provided in K.S.A. 22-3402. Delays attributable to a defendant, such as continuances to prepare for trial, did not count against the 90-day period. But district courts could not grant continuances to defense lawyers if their clients objected. *State v. Hines*, 269 Kan. 698, 703-04, 7 P.3d 1237 (2000). The Kansas Supreme Court has recognized that if a defendant is not present when his or her lawyer requests a continuance (and, thus, cannot object), any resulting delay should be counted in the statutory speedy trial period. *State v. Brownlee*, 302 Kan. 491, 507-08, 354 P.3d 525 (2015).

Premised on that rule, Sumpter says because he wasn't present when his lawyer requested and received the continuances, his trial was delayed more than 90 days in violation of K.S.A. 22-3402. We assume the calculation to be accurate for purposes of resolving the issue. Neither Sumpter's trial lawyer nor his appellate lawyer asserted a statutory speedy trial violation. Sumpter contends the omission compromised his Sixth Amendment right to adequate legal representation. The remedy for a statutory speedy trial violation requires any conviction be set aside and the underlying charges be dismissed with prejudice. K.S.A. 22-3402(1). The failure to assert a valid violation would fall below the standard of care and could not be justified as a strategic culling of potential issues. Prejudice to the defendant in overlooking or discarding a speedy trial violation would be manifest.

But Sumpter's claim fails because the Legislature amended K.S.A. 22-3402 while his case was on direct appeal to eliminate a speedy trial violation based on the circumstances he now argues. As amended, K.S.A. 2017 Supp. 22-3402 states in relevant part:

> "If a delay is initially attributed to the defendant, but is subsequently charged to the state for any reason, such delay shall not be considered against the state . . . and shall not be used as a ground for dismissing a case or for reversing a conviction unless not considering such delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to such delay." K.S.A. 2017 Supp. 22-3402(g).

That section of the statute precludes counting a continuance originally assessed to a criminal defendant against the State (and, thus, against the speedy trial time) if a court later concludes the time was erroneously charged to the defendant in the first place. The limitation would be applicable here if we assume the continuances should not have been assessed to Sumpter because he had not authorized or otherwise agreed to them. The Kansas Supreme Court has held the amendment of K.S.A. 22-3402 adding subsection (g)

to be procedural and, thus, applicable to any case on direct appeal when it became effective. *State v. Dupree*, 304 Kan. 43, Syl. ¶ 5, 371 P.3d 862 (2016). The court denied relief to the defendant in *Dupree* in circumstances legally comparable to those Sumpter now presents. 304 Kan. at 57. Sumpter cannot demonstrate a violation of his speedy trial rights under K.S.A. 22-3402. His lawyers, therefore, could not have inadequately represented him by failing to allege a purported violation.

• Sumpter contends his lawyers in the criminal case inadequately represented him by failing to challenge the panel of potential jurors summoned at the start of the trial because the group included no African-Americans. Sumpter is African-American. A criminal defendant has a Sixth Amendment right to a jury composed of persons both called for jury duty and then selected to serve in a manner free of racial discrimination, thus reflecting a fair cross-section of the community. *Berghuis v. Smith*, 559 U.S. 314, 319, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010); *Duren v. Missouri*, 439 U.S. 357, 359, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979) (recognizing right as incorporated through the Due Process Clause of the Fourteenth Amendment and, thus, applicable to state criminal proceedings). Sumpter did not challenge the composition of the panel of potential jurors at trial or on direct appeal. Ordinarily, a defendant cannot litigate points in a 60-1507 motion that could have been raised on direct appeal. To do so, a defendant must show extraordinary circumstances. Those circumstances may include the constitutional inadequacy of his lawyers in the criminal case. As with the other issues, we have no idea why Sumpter's trial and appellate lawyers did not pursue this claim.

To advance an underrepresentation claim, Sumpter must present evidence that African-Americans appear in venires or panels from which juries are selected in numbers disproportionately below their percentage in the community generally and the reason lies in their "systematic exclusion . . . in the jury-selection process." See 439 U.S. at 364. In support of his 60-1507 motion, Sumpter has offered nothing to show that African-Americans are routinely underrepresented in jury pools in Sedgwick County. His claim

sinks on that failure. The absence of African-Americans from the particular jury panel called for his case is nothing more than a statistical anomaly so far as the record evidence demonstrates. An aberration in one panel does not and cannot advance an underrepresentation claim that turns on the systemic exclusion of a recognized group, such as African-Americans, from jury service.

• As part of his sentence, Sumpter will be required to register as a sex offender when he gets out of prison and to report as directed under the Kansas Offender Registration Act, K.S.A. 2017 Supp. 22-4901 et seq. He challenges registration as cruel and unusual punishment violating the Eighth Amendment to the United States Constitution. He also submits a jury must make the specific findings requiring registration consistent with constitutional due process protections. As Sumpter concedes, the Kansas Supreme Court has rejected the arguments that KORA entails punishment subject to the Eighth Amendment or violates due process requirements for jury findings. See *State v. Huey*, 306 Kan. 1005, 1009-10, 399 P.3d 211 (2017), *cert. denied* 138 S. Ct. 2673 (2018) (KORA provisions not considered punishment under Eighth Amendment; in turn, no due process requirement jury find facts supporting registration).

• Sumpter similarly contends lifetime postrelease supervision imposed on him as part of his sentence amounts to constitutionally cruel and unusual punishment. Under this condition, Sumpter will have to report to a parole officer after his release from prison and will be subject to restrictions on his travel, searches of his residence, and other limitations on his liberty. Those limitations are different from (and in addition to) the reporting requirements under KORA.

Again, Sumpter acknowledges the Kansas Supreme Court has turned aside constitutional challenges to lifetime postrelease supervision for comparable convicted sex offenders. See *State v. Williams*, 298 Kan. 1075, 1089-90, 319 P.3d 528 (2014) (lifetime postrelease supervision not cruel and unusual punishment); *State v. Mossman*, 294 Kan.

901, 921, 930, 281 P.3d 153 (2012). Sumpter also suggests the requirement violates the Equal Protection Clause of the Fourteenth Amendment, but he neither clearly articulates the disadvantaged class to which he purportedly belongs nor explains why such a classification would be constitutionally impermissible. Our court has rejected equal protections attacks on lifetime postrelease supervision. *State v. Dies*, No. 103,817, 2011 WL 3891844, at *4-5 (Kan. App. 2011) (unpublished opinion) (holding that lifetime postrelease supervision for adult sex offenders does not violate equal protection).

• As he did on direct appeal, Sumpter contends the district court improperly considered his criminal history in determining his sentence. He argues that the district court's use of his past convictions in determining an appropriate sentence impairs his constitutional rights because the fact of those convictions was not proved beyond a reasonable doubt to the jury. He relies on the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to support that proposition. We denied relief on this issue on direct appeal. *Sumpter*, 2013 WL 6164520, at *11. We do so again now.

The Kansas Supreme Court has consistently rejected that argument and has found the State's current sentencing regimen conforms to the Sixth and Fourteenth Amendments with respect to the use of a defendant's past convictions in determining a presumptive statutory punishment. *State v. Fischer*, 288 Kan. 470, Syl. ¶ 4, 203 P.3d 1269 (2009); *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002). We, therefore, decline Sumpter's invitation to rule otherwise, especially in light of the court's continuing affirmation of *Ivory*. *State v. Pribble*, 304 Kan. 824, 838-39, 375 P.3d 966 (2016); *State v. Hall*, 298 Kan. 978, 991, 319 P.3d 506 (2014).

Conclusion

We have endeavored to meticulously review the numerous points Sumpter has raised on appeal from the denial of his motion for relief under K.S.A. 60-1507. In doing so, we have examined the underlying criminal prosecution, including the trial evidence and the briefing in the direct appeal. We find the district court properly denied the motion. Given the issues and the record, the district court did not need to hold an evidentiary hearing.

Affirmed.

ELECTRONICALLY FILED
2017 May 02 PM 2:22
CLERK OF THE SEDGWICK COUNTY DISTRICT COURT
CASE NUMBER: 2016-CV-000161-HC

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

TIMOTHY SUMPTER, Petitioner	)	
v.	)	Case No. 16CV161
STATE OF KANSAS, Respondent	)	

MEMORANDUM ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS

Now on this 2nd day of May, 2017, the above captioned matter comes before the Court on the petitioner's Petition for Writ of Habeas Corpus. Petitioner, Timothy Sumpter, appears by and through counsel Katie Gates Calderon and Ruth Anne French-Hodson. The State of Kansas appears by and through A.D.A. Robin Sommer.

WHEREUPON, the court, upon review of the pleadings filed by the parties, review of the records, and otherwise being duly advised in the premises, denies petitioner's Petition for Writ of Habeas Corpus and makes the following findings.

Procedural History and Relevant Facts

1. Petitioner's petition originates from his Sedgwick County criminal cases, 11CR1187, 11CR1290, and 11CR1638, charging various sex crimes against four women, A.S.E., A.C.C., A.R.P. and J.B., in four incidents. Trial counsel Alice Osburn represented petitioner. The court consolidated the three cases prior to trial. A jury found petitioner guilty of various crimes as charged and lesser offenses as

instructed by the court. Petitioner was sentenced to a controlling term of 351 months incarceration (315 months in prison consecutive to 36 months in the county jail). Petitioner subsequently filed a direct appeal and was represented by appellate counsel Heather Cessna. The Court of Appeals denied relief and affirmed the convictions, vacating only the no contact order. Petitioner timely filed the current petition.

2. The court refers to and hereby adopts the Procedural History and Summary of Relevant Facts as accurately stated in the State's Response to Amended Petition for Writ of Habeas Corpus (pp. 1-12); and as summarized in *State v. Sumpter*, No. 108,364, 2013 WL 6164520, 313 P.3d 105 (Kan. App. 2013) (unpublished opinion), *rev. denied* January 15, 2015. The court further adopts the appellate history as accurately summarized in the State's Response to Amended Petition for Writ of Habeas Corpus (pp. 12-17), and as stated in the above referenced opinion.

3. For the below stated reasons, this court denies the Petition for Writ of Habeas Corpus without holding an evidentiary hearing, which will not provide evidence affecting the ultimate validity of petitioner's claims.

K.S.A. 60-1507

4. In *Moncla v. State*, 285 Kan. 826, Syl. ¶ 1, 176 P.3d 954 (2008), the Supreme Court noted that a district court is not required to hold an evidentiary hearing if it can be conclusively determined that relief is not warranted:

> An evidentiary hearing on a K.S.A. 60-1507 motion is not required if the motion together with the files and records of the case conclusively show that the movant is not entitled to relief. The burden is on the movant to allege facts sufficient to warrant a

> hearing. If no substantial issues of fact are presented by the motion, the district court is not required to conduct an evidentiary hearing.

5. To meet the required burden, a petitioner must do more than raise conclusory contentions:

> [T]he movant must make more than conclusory contentions and must state an evidentiary basis in support of the claims or an evidentiary basis must appear in the record. [Citation omitted.] However, in stating the evidentiary basis, the K.S.A. 60–1507 motion must merely 'set forth a factual background, names of witnesses or other sources of evidence to demonstrate that petitioner is entitled to relief.' [Citation omitted.]

Swenson v. State, 284 Kan. 931, 938, 169 P.3d 298 (2007); see also *Burns v. State*, 215 Kan. 497, 500, 524 P.2d 737 (1974) (a movant's unsupported claims are never enough for relief pursuant to K.S.A. 60-1507). This threshold requirement prevents fishing expeditions into allegations that cannot be substantiated and is consistent with long-standing precedent.

6. If a movant alleges facts that are not in the original record, an evidentiary hearing is not required if the court determines there is no legal basis for relief, even assuming the truth of the factual allegations. *Trotter v. State*, 288 Kan. 112, 137, 200 P.3d 1236 (2009).

7. Kansas law also provides that a movant cannot raise a mere trial error in a K.S.A. 60-1507 motion, but may raise an error affecting constitutional rights if there are exceptional circumstances:

> [A] proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may

> be raised even though the error could have been raised on direct appeal, provided there are exceptional circumstances excusing the failure to appeal.

See Supreme Court Rule 183(c)(3); see also *Trotter v. State*, 288 Kan. at 127 (discussing exceptional circumstances for failing to raise an issue at trial or on direct appeal). The burden of showing exceptional circumstances lies with the movant. *Holt v. State*, 290 Kan. 491, 495, 232 P.3d 848 (2010).

8. The Supreme Court states the following regarding the two-part test applicable to a claim of ineffective assistance of counsel:

> To prevail on a claim of ineffective assistance of counsel a criminal defendant must establish that (1) counsel's representation fell below an objective standard of reasonableness, considering all the circumstances and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been more favorable to the defendant. In considering the first element, the defendant's counsel enjoys a strong presumption that his or her conduct falls within the wide range of reasonable professional conduct. Further, courts are highly deferential in scrutinizing counsel's conduct and counsel's decisions on matters of reasonable strategy, and make every effort to eliminate the distorting effects of hindsight.

Moncla v. State, 285 Kan. 826, Syl. ¶ 3.

9. A movant bears the burden of establishing ineffective assistance of counsel to the extent necessary to overcome the presumption of regularity of a conviction and the presumption of reasonable assistance of counsel. *Hogan v. State*, 30 Kan. App. 2d 151, 38 P.3d 746 (2002). "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

counsel's perspective at the time." *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Moreover, the adequacy of an attorney's representation must be judged by the totality of the representation, not "by fragmentary segments analyzed in isolated cells." *Schoonover v. State*, 2 Kan. App. 2d 481, Syl. ¶ 4, 582 P.2d 292 (1978).

10. The Supreme Court has further recognized, "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of alleged deficiencies." *Edgar v. State*, 294 Kan. 828, Syl. ¶ 4, 283 P.3d 152 (2012). The United States Supreme Court holds the same view:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

11. This court may take judicial notice of the content of district court files. *In the Interest of A.S.*, 12 Kan. App. 2d 594, 598, 752 P.2d 705 (1998) (K.S.A. 60-409(b)(4) allows a court to take judicial notice of its case file, including journal

entries contained therein). Therefore, this court takes judicial notice of the district court files and case history in the current and underlying case.

Analysis and Ruling

12. **Petitioner's First Claim [Claim I(A) – pp. 4-10 of petition]. Petitioner claims trial counsel was ineffective because she did not understand and argue the elements of aggravated kidnapping in relation to the incident with J.B.**

- Petitioner's claim of ineffective assistance of trial counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

- The issue of sufficiency of the aggravated kidnapping count is a matter of law. This court has the ability to review the facts in the record and make a legal determination regarding the sufficiency of the evidence without an evidentiary hearing.

- Petitioner claims Ms. Osburn should have objected to the aggravated kidnapping count at preliminary hearing, as well as at various stages of the trial, including cross examination of the victim, motion for judgment of acquittal, and closing argument.

- Kidnapping as defined by K.S.A. 21-3420(b) is "taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." Aggravated Kidnapping is "when bodily harm is inflicted upon the person kidnapped." See K.S.A. 21-3421.

- The Court in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), set out the necessary elements to establish kidnapping done to take or confine a person to facilitate the commission of another crime (in the present case, Attempted Rape). "We therefore hold that if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement: (a) Must not be slight, inconsequential and merely incidental to the other crime; (b) Must not be of the kind inherent in the nature of the other crime; and (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Id.* at 216.

- The evidence is that petitioner approached J.B. as she walked to her car after leaving a bar in the Old Town area of downtown Wichita. As J.B. was getting into her car, petitioner pushed her into the car and forced his way into J.B.'s car. J.B. struggled with and resisted petitioner by kicking and punching him in an effort to keep from coming into the car; to get petitioner out of the car once he was in; and to open the door to call for help or get out of the car. While in J.B.'s car, petitioner resisted J.B.s efforts to remove him from the car by holding her down and punching her in the face. Petitioner additionally prevented J.B. from opening her door by grabbing her hand and ripping it down and punching her in the face. Petitioner's physical force against J.B. was accompanied and further enhanced by verbal threats, taunts and profanity against J.B. *(Transcript of Jury Trial – Vol. III, March 14, 2012, pp. 38-52).*

- Petitioner's confinement of J.B. was not slight, inconsequential or merely incidental to the attempted rape. Petitioner's actions go beyond attempting to rape J.B. By using physical force, accompanied by verbal threats, taunts and intimidating profanity to enhance his objective, petitioner confined J.B. to her car, not allowing her to get out of the car or to drive away. By punching J.B. (at one point five times directly in her face); pushing his knee up against her throat (restricting her air way); and preventing J.B. from opening the passenger door; petitioner furthers the confinement by eliminating the possibility of third party aid responding to cries for help *(Transcript of Jury Trial – Vol. III, March 14, 2012, pp. 42-44).* After J.B. successfully pushed petitioner out of the car, petitioner further confined J.B. to the car (and to the parking lot) by taking her car keys which prohibited J.B. from safely exiting her car, or from driving off and leaving the parking lot *(Transcript of Jury Trial – Vol. III, March 14, 2012, pp. 47-50).* These acts are significant to the confinement of J.B. and are not merely incidental to the attempted rape.

- Confining a victim in a car; physically restraining her from leaving that car; and physically prohibiting her from yelling for help is not inherent in the nature of rape or attempted rape. Petitioner could have attempted to rape J.B. at any point after he first contacted J.B. and before entering her car. But petitioner decided to wait to attempt the rape until J.B. was confined in the car with him.

- Confining J.B. to her car made the attempted rape substantially easier to commit and substantially lessoned the risk that the attack would be detected by others. Again, petitioner could have attempted to rape J.B. outside of her car. But the close confines of the car helped conceal the rape by making it harder for others to see and hear.

- Petitioner highlights the rule stated in *State v. Cabral*, 228 Kan. 741, 619 P.2d 1163 (1980), where the Court held: "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." 228 Kan. at 744-45. However, the facts in this case are distinguishable from *Cabral* and more akin to those in *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983); *State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985) and *State v. Blackburn*, 251 Kan. 787, 840 P.2d 497 (1992). Unlike in *Cabral*, at no time did J.B. request, initiate or consent to any contact with petitioner. At no point was J.B. a willing companion of petitioner, or sufficiently acquiesce to petitioner's presence with her. In *Cabral*, the defendant and victim had spent the evening together at a bar and later with two other friends driving around in defendant's car. As the Court stated, "the defendant and victim had been together all evening, driving around Hutchinson and stopping at various places by mutual consent." 228 Kan. at 744. However, like the defendants in *Lile* and *Blackburn*, petitioner confined J.B. by forcing her to remain in her car against her will. Furthermore, J.B. was forced to remain in the parking lot (and not drive away) against her will. Petitioner physically prevented J.B. not only from leaving her car, but also from leaving the parking lot in her car.

- This court finds there is sufficient evidence to support the aggravated kidnapping conviction. Therefore, petitioner is not prejudiced. The outcome of the trial would not have changed, even if trial counsel would have raised the issue at any time before or during the trial. Because the prejudice prong is not met, there is no reason for this court to consider the reasonableness prong of the test.

- Petitioner's claim counsel was ineffective at the preliminary hearing fails for similar reasons. "As a general principle, after an accused has gone to trial and has been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is considered harmless unless it appears that the error caused prejudice at trial. *State v. Butler*, 257 Kan. 1043, 1062, 897

P.2d 1007 (1995)." *State v. Jones*, 290 Kan. 373, 381, 228 P.3d 394, 401 (2010).

13. **Petitioner's Second Claim [Claim I(B) – p. 10]. Petitioner claims his speedy trial rights were violated by trial counsel's continuations without his consent.**

- Petitioner's claim of ineffective assistance of trial counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed on the court record and on Kansas law.

- K.S.A. 2015 Supp. 22-3402(g) bars reversal of petitioner's convictions:

> If a delay is initially attributed to the defendant, but is subsequently charged to the state for any reason, such delay shall not be considered against the state under subsections (a), (b) or (c) and shall not be used as a ground for dismissing a case or for reversing a conviction unless not considering such delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to such delay.

Therefore, the time that was initially attributable to petitioner cannot now be counted toward the State's time for speedy trial purposes, regardless of whether petitioner failed to authorize the continuances. Additionally, there is no claim concerning a violation of the constitutional right to a speedy trial or prosecutorial misconduct.

- Petitioner has failed in proving that either prong of the test for ineffective assistance of trial counsel has been met.

14. **Petitioner's Third Claim [Claim II(A) – pp. 11-16]. Petitioner claims appellate counsel was ineffective for not claiming the trial court abused its discretion in denying the motion to sever because of manifest injustice and prejudice.**

- Petitioner's claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

- Trial counsel objected to and argued against the consolidation of the three cases, and to sever the counts as to the two victims in case number

11CR1290 – specifically requesting four separate trials. Trial counsel argued that consolidating the trials would unfairly prejudice petitioner; that the jury would have difficulty separating the counts; that the multiple counts verdict instruction would be insufficient; and that petitioner's right to testify would conflict with his right to remain silent. *(Transcript of Pretrial Motions, March 8, 2012, pp. 11-18).* In the direct appeal, the Court of Appeals denied relief on the issue of consolidating the three cases for trial, specifically finding the district court properly consolidated the cases for trial. The Court of Appeals found the jury demonstrated its ability to follow the court's multiple counts instruction by acquitting petitioner on a count and finding him guilty on multiple lesser included counts. *State v. Sumpter,* pp. 6-10.

- The jury was instructed that each crime charged was a separate and distinct offense, and that the jury was to decide each charge separately. The jury validated the presumption that a jury complies with the court's instructions. See *State v. Gaither*, 283 Kan. 671, 156 P.3d 602 (2007). As to victim A.S.E., in Count 1, the jury found petitioner guilty of the lesser included offense (of Kidnapping) – Criminal Restraint; and in Count 2, guilty as charged – Aggravated Sexual Battery. As to victim A.C.C., in Count 1, the jury found petitioner not guilty; and in Count 2, guilty of the lesser included offense (of Aggravated Sexual Battery) – Sexual Battery. As to victim A.R.P, the jury found petitioner guilty of the lesser included offense (of Aggravated Sexual Battery) – Sexual Battery. As to victim J.B., the jury found petitioner guilty as charged in Count 1 – Aggravated Kidnapping; Count 2 – Attempt to Commit Rape; and Count 3 – Aggravated Sexual Battery. Contrast this result with that in *State v. Coburn*, 38 Kan. App. 2d 1036, 1057, 176 P.3d 203 (2008) where the Court concluded:

> Because the jury found Coburn guilty on all offenses charged, we are unable to say with any certainty that the jury carefully considered each charge separately on the evidence and law applicable to that charge. See *State v. Walker,* 244 Kan. 275, 280, 768 P.2d 290 (1989) (When a jury acquits a defendant on one or more of the offenses charged, this is an indication that the jury carefully considered each charge separately on the evidence and the law applicable to that charge.). As a result, we do not believe that a jury instruction consisting of two sentences could cure the prejudice caused by the joinder in this case.

State v. Coburn, 38 Kan. App. 2d at 1057. Again, in this case, the jury's verdict belies the petitioner's claim that he was prejudiced by the consolidation of the cases. This finding additionally applies to the petitioner's claim of being forced to choose between his Fifth and Sixth Amendment rights to testify or not. There was no prejudice.

- The petitioner has failed in proving that either prong of the test for ineffective assistance of appellate counsel has been met.

15. **Petitioner's Fourth Claim [Claim II(B) – p. 16]. Petitioner claims appellate counsel was ineffective for not raising the sufficiency of the kidnapping count.**

    - Petitioner's claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

    - Neither trial nor appellate counsel was ineffective for failing to raise the issue. Neither prong of the test has been met. There has been no showing of prejudice. See the court's findings and ruling in paragraph #12 above.

16. **Petitioner's Fifth Claim [Claim II(C) – pp. 17-19]. Petitioner claims appellate counsel did not identify key instances of prejudicial prosecutorial misconduct.**

    - Petitioner's claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

    - On direct appeal, the Court of Appeals denied relief on the issue of prosecutorial misconduct during closing argument. The Court cites the use of petitioner's letter in closing argument, as well as other challenges to the prosecutor's comments and found that they "fell within the wide latitude afforded to prosecutors, and the prosecutor did not commit misconduct during closing argument." *State v. Sumpter,* pp. 14-18.

    - Petitioner's current claims of prosecutorial misconduct are similar in nature to those raised on appeal. As with those previously raised, the prosecutor's comments were made in context of the evidence presented and fall within the wide latitude afforded to prosecutors. The prosecutor did not commit misconduct.

- The petitioner has failed in proving that either prong of the test for ineffective assistance of appellate counsel has been met.

17. **Petitioner's Sixth Claim [Claim III(A) – pp. 20-22]. Petitioner claims the lack of African-Americans on the jury venire denied him of a fair trial and due process.**

    - This is a claim of mere trial error that could have been raised on direct appeal and is not properly brought in a K.S.A. 60-1507 motion. It is denied without an evidentiary hearing based on the court record and on Kansas law. There are no exceptional circumstances that excuse the failure to raise the issue on appeal.

18. **Petitioner's Seventh Claim [Claim III(B) – pp. 22-23]. Petitioner claims the offender registry and lifetime post-release supervision sentencing requirements are unconstitutional.**

    - This is a claim of mere trial error that could have been raised on direct appeal and is not properly brought in a K.S.A. 60-1507 motion. It is denied without an evidentiary hearing based on the court record and on Kansas law. There are no exceptional circumstances that excuse the failure to raise the issue on appeal.

19. **Petitioner's Eighth Claim [Claim III(C) – p. 24]. Petitioner claims the trial court imposed an enhanced sentence without requiring the State to prove the factors to a jury beyond a reasonable doubt.**

    - This claim is denied without an evidentiary hearing based on the court record and on Kansas law.

    - In the direct appeal, the Court of Appeals denied relief on the imposition of the enhanced sentence pursuant to case law.

    - Res judicata bars relief on this issue as it has already been settled by the appellate court.

The court denies petitioner's Petition for Writ of Habeas Corpus.

IT IS SO ORDERED.

Judge Jeffrey L. Syrios

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of May, 2017, a true and correct copy of the above and foregoing order was served upon all interested parties properly addressed, as follows:

Robin Sommer
(via e-mail)

and

Katie Gates Calderon
Ruth Anne French-Hodson
(via e-mail)

Katie Harris, Administrative Assistant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TIMOTHY SUMPTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 19-3267-SAC
	)	
STATE OF KANSAS,	)	
	)	
Defendant.	)	

AMENDED MEMORANDUM IN SUPPORT OF TIMOTHY SUMPTER'S PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

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Timothy Sumpter respectfully seeks habeas corpus relief from this Court, and submits this amended memorandum in support of his petition.

NATURE OF THE MATTER

This petition raises issues of tremendous public importance. "Habeas corpus . . . actions are of fundamental importance . . . in our constitutional scheme because they directly protect our most valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (internal quotation omitted). Enshrined in the United States Constitution is the notion that the criminal justice system only works to ensure fair and trusted decisions when those facing criminal sanctions receive effective defense counsel to put the prosecution's case to the "crucible of meaningful adversarial testing." *U.S. v. Cronic*, 466 U.S. 648, 656 (1984). But at every critical stage of his case, from pre-trial proceedings to trial to appeal, Sumpter was denied the right to an effective attorney to meaningfully test the State's case.

The Court of Appeals ignored multiple controlling precedents of the U.S. Supreme Court in order to affirm the denial of Sumpter's petition for habeas corpus. These errors occurred in seven areas:

First, Sumpter's trial counsel failed to either understand or deploy the leading Kansas kidnapping jurisprudence as evidenced by:

(1) her failure to challenge the charges against him at every stage from the pre-trial hearing to trial motions based on the Kansas kidnapping jurisprudence;

(2) her misstatement of the law during jury instructions and failure to challenge the prosecutor's misstatements of the law;

(3) her failure to focus examinations (both cross and direct) on the critical element;

(4) her failure to ask for a clarification of the jury instructions as suggested by the Kansas Court of Appeals for this type of case.

Second, Sumpter's appellate counsel similarly failed to understand or deploy the leading Kansas kidnapping jurisprudence as evidenced by her failure to raise a sufficiency challenge to his kidnapping conviction.

Third, Sumpter's appellate counsel failed to challenge the denial of Sumpter's severance motion and the trial court's continuing duty to sever which prevented him from raising the prejudice from the consolidation of cases.

Fourth, Sumpter was denied his right to due process under the Fifth and Fourteenth Amendments through repeated egregious instances of prosecutorial misconduct. These instances of misconduct went unchallenged by both trial and appellate counsel.

Fifth, due to trial counsel's ineffectiveness in violation of her duty of loyalty, Sumpter's case was continued without his consent and he was forced to forfeit his right to a speedy trial.

Sixth, Sumpter's trial and appellate counsel failed to challenge the venire as not representative of the jury pool and this denied Sumpter his right to a fair trial.

Seventh, Sumpter's sentencing was conducted in an unconstitutional manner and imposed unconstitutional requirements.

These constitutional violations are contrary to established constitutional law that was ignored by the Kansas Court of Appeals. As such this Court should apply *de novo* review and grant habeas relief under 28 U.S.C. § 2254. *See Phillips v. Workman*, 604 F.3d 1202, 1213 (10th Cir. 2010).

STATEMENT OF FACTS

I. PRELIMINARY HEARING

On April 19, 2011, the State filed three different complaints involving four alleged incidents all purportedly involving Petitioner-Appellant Timothy Sumpter. One of these

complaints charged Sumpter with attempted rape and aggravated kidnapping of an individual, J.B.

While there was no formal consolidation of the cases until trial, the preliminary hearing on all three cases occurred on August 25, 2011.

For purposes of this petition, the testimony of J.B. in support of the aggravated kidnapping and attempted rape charges are particularly important. At Sumpter's preliminary hearing, J.B testified about the incident underlying the charges, all of which took place in a Wichita parking lot. J.B. testified that after a night in Old Town Wichita, she voluntarily walked to her car in the parking lot before and after Sumpter approached her and began talking with her. (Prelim. Hearing Tr. 4-7.) J.B. testified that she continued to walk to her car even though she did not want Sumpter to know which one it was because she thought it was nice for him to accompany her. (Prelim. Hearing Tr. 6.) She stated that when she got to the car: "I got to my car, and I got my key. . . . I was just gonna leave. So, you know, he grabbed me, pushed me up against the car . . . [and] I got away from him, walked around my car to my driver's side . . . . and got into my car, and that's when he came to my driver's door, forced his way into my vehicle, and we began [] fighting . . . [and] [h]e forced my hand upon his genital area." (Prelim. Hearing Tr. 7:9-9:1.) J.B. testified that they immediately started fighting when he pushed into the car with her and exposed himself. (*Id.* at 8.) J.B. testified that at one point while fighting she pulled out her keys with her mace on them to use on Sumpter but Sumpter grabbed the keys and mace and threw them out of the vehicle to avoid being maced. (*Id.* at 20.) The fighting did not end until another vehicle pulled up. (*Id.* at 8-10.) At that point, J.B. testified that Sumpter got out of the car and J.B. drove off. (*Id.* at 10-11.)

Importantly, during their short interaction, J.B. did not testify that Sumpter moved her from the Old Town parking lot. By J.B.'s testimony, to the extent Sumpter confined her, it was incidental to the sexual assault. The facts giving rise to the charges for both attempted rape and aggravated kidnapping were inextricable. Yet Sumpter's trial counsel never objected to the sufficiency of the State's evidence to support the aggravated kidnapping count at the preliminary hearing on any grounds including the standard articulated in *State v. Buggs*. (Prelim. Hearing Tr. 7:9-9:1; Trial Tr. (vol. 3) 38:2-39:21.) She did not ask for the charge to be dismissed nor did she request a bill of particulars to determine what act the State was relying on for the count.

Prior to the preliminary hearing, Sumpter was advised by his trial counsel to waive his arraignment to begin his speedy trial date. Sumpter's trial date was originally set for October 17, 2011, but trial did not begin until March 12, 2012. While there were three continuances recorded as taken by the defendant, Sumpter was not aware of, did not consent to, and did not desire any of these continuances. After receiving no contact from his attorney for close to two months and after multiple continuances, Sumpter requested a bond modification *pro se* because his attorney was not available to do so for him. (Def.'s Mot. for Bond Modification (Feb. 22, 2012).) The letter references his attorney's assessment that the information presented—while still not proven—at most sets out liability for misdemeanor offenses. (*Id.* at ¶ 7 (stating that "his counsel and him have come to the conclusion that the testimonies at preliminary hearing are not equivilant [sic] to the definitions of the charges, but those of missdameanors [sic], thus showing the defendant should not be looking at charges of such high severity").) Sumpter is emphatic in the letter that when the matters are tried he would be found innocent. (*Id.* at ¶ 5.)

II. TRIAL

A. Pretrial Motions and Voir Dire

Just prior to trial, the State moved for consolidation of the three cases for trial to a single jury. (Minute Order, Case No. 11CR01290; State Mot. Consolidate.) Ms. Osburn, Mr. Sumpter's trial counsel, did not file a written opposition to the State's motion for consolidation but did file a separate motion to sever, arguing that the charges were not so similar to warrant proper joinder under K.S.A. 22-3202. (Def.'s Mot. Severance.) During the hearing on the motions, Sumpter's trial counsel informed the Court that Sumpter desired to testify about two of the cases but wished to present a different defense in the third case. (Pre-trial Motions Hearing Tr. 13-15.) The trial court granted the motion for consolidation and denied the motion to sever.

At the voir dire, four potential jurors stated to the entire panel that they would have a hard time providing Sumpter with his constitutionally-mandated presumption of innocence given that there were four victims. (Trial Tr. (vol. 1) 220, 316.) During the State's questioning of the panel, one juror stated outright that she did not believe Sumpter was innocent because there were four victims:

> MR. EDWARDS: I want everybody to give him a fair trial, that's what the constitution affords and that's what we're here to do. Can you be one of those 13 people, 12 people who can sit here and give him a fair trial? In other words, presume him to be innocent right now?
>
> NO. 21: Well, he was arrested and it's not just one woman's word.
>
> MR. EDWARDS: I understand. But you've heard me say it's four women, right?
>
> NO. 21: (Juror nodding head up and down.) . . .
>
> MR. EDWARDS: As he sits there today can you look at him and say that he's an innocent man?

NO. 21: No.

(Trial Tr. (vol. 1) 132:5-16, 133:6-9.) Similarly, another potential juror was unsure whether the number of victims would always be at the back of her mind during the case:

> NO. 13: I don't know how actually you would phrase the question, but I'm sitting here thinking, when we heard what he was accused of, if it would have been one victim I would have immediately felt well, it was going to be her word against his word. Now that know that there's four alleged victims, I can't help but think there must be something to it, that there's not one, but there's four accusing him. . . .
>
> MR. EDWARDS: And the question then becomes can you give him a fair trial, whether it's four victims, one or a thousand?
>
> NO. 13: I think so.
>
> MR. EDWARDS: Okay.
>
> NO. 13: But I'm just, in the back of my mind, as soon as I heard that there was four, just I don't know, affected me, made me wonder. . . .
>
> MS. OSBURN: One thing you said before we broke and I want to talk about this with everyone is the fact that, you know, if there was one woman maybe, but we've got four, so I get a sense because you heard four different women are going to testify, that that has had an impact on your ability to presume Mr. Sumpter innocent today.
>
> NO. 13: Somewhat.

(Trial Tr. (vol. 1) 215:25-216:9, 217:11-19, 263:17-25.) During the questioning by Sumpter's trial attorney, another potential juror noted that while he had not heard the facts, his mind threw red flags when he heard there were four victims:

> MS. OSBURN: Are you able to presume Mr. Sumpter innocent?
>
> NO. 14: Well, I -- at this point yes, but I will -- I agree with my neighbor here [Prospective Juror 13] that when I first heard four, bingo, my mind automatically kind of said, you know, what's going on here, but you know, I haven't heard the facts.
>
> MS. OSBURN: Right.
>
> NO. 14: And you know, I'm waiting to hear them.

MS. OSBURN: Waiting to hear them, okay.

NO. 14: But you know, that's all I can say on that, it did raise a red flag when I heard that there were more than one persons.

(Trial Tr. (vol. 1) 268:16-269:7.) Finally, one of the jurors who was eventually selected for the jury indicated that because she had heard four different women are going to testify that it would impact her ability to presume Sumpter innocent. (Trial Tr. (vol. 1) 263:17-264:5.) Even though she later testified that she could apply the law and weigh the evidence, she again stated that "when I raised my hand when I said about the four, that's just an automatic thought, well, if there's four women, you know." (*Id.* at 294:1-4.)

After the prosecutor's questioning of the panel, Sumpter's trial attorney moved for the Court to reconsider the consolidation of the cases and to sever for trial based on the prejudice being vocalized by the potential jurors. (Trial Tr. (vol. 1) 220-221, 316-319.) The Court denied the motion and noted that a limiting instruction was the appropriate manner for handling a consolidated case. (Trial Tr. (vol. 1) 318-319.)

At Sumpter's jury trial, there were no African-Americans in his venire even though African-Americans make up approximately 9.3% of the county's population. (Trial Tr. (vol. 1) 220-21.) Sumpter's trial attorney moved for a mistrial because of the absence of any African-Americans and the nature of the case with four white female victims and one black male defendant. But she did not request that the panel be dismissed. The Court denied the mistrial motion and objection to the jury panel. (Trial Tr. (vol. 1) 220:20-221:4; 319:15-320:5.) The Court denied the motion because of the county's "systemic," random process had resulted in the venire having several other minorities—at least two individuals of Hispanic ancestry and persons of European descent. (Trial Tr. (vol. 1) 319:24-320:5.)

B. Trial Evidence related to the Aggravated Kidnapping Court for Victim J.B.

At trial, as at the preliminary hearing, J.B. testified that she had voluntarily walked to her car even when she was wary of Sumpter. (Trial Tr. (vol. 3) 21-25.) Indeed, when she got to the parking lot, she testified that she was "blocking [Sumpter] out, wasn't paying attention to anything he said, because I really didn't care, I just was walking to my car, getting my stuff." (*Id.* at 25:10-13.) J.B. also testified about what happened outside the vehicle and as Sumpter entered the vehicle with her. This testimony changed from the account given at the preliminary hearing. At trial, she now testified that she had not fully gotten into her car when Sumpter pushed his way in:

> Q: All right. Jessica, let's talk about what happened when you got to your car. Tell us what you recall.
>
> A: I got to my car and [after Sumpter refused to leave] . . . I got my key, walked behind my car and started walking towards my driver's door, and I thought he was still on the other side of the car, you know, and he [] was like, at least let me get the door for ya. And I was just like, whatever, put my key in the door, placed one foot into my car and . . . [h]e tried to force his way into my car. And so I had one leg in the car and . . . he gripped my door with his left hand and tried to shove his way into my car. And he pushed me and was like forcing me into the car.

(Trial Tr. (vol. 3) 38:1-40:1.)

Again J.B. testified about the fighting that occurred between the two in the vehicle. J.B. testified that after the initial punch and push from Sumpter, she started kicking him in the face and stomach to keep him out of the car. (Trial Tr. (vol. 3) 40-41.) As Sumpter got further into her car, J.B. testified that she began to punch him, which caused him to use his knee against her throat to hold her down. (*Id.* at 41-42.) After temporarily gaining control of her with his knee, J.B. testified that Sumpter then started to touch her sexually. (*Id.* at 42.) During his advances, J.B. testified that she continued to try and fight him by

punching and pushing him. (*Id.* at 42-45.) At some point during the fight, J.B. tried to use the mace on her key ring on him but Sumpter grabbed the keys from her to prevent her from macing him. (*Id.* at 47.)

J.B. testified that at one point she was able to use her self-defense training to trick Sumpter and kick him out of the vehicle. (Trial Tr. (vol. 3) 46-47.) She decided to stay in the car at that point because she felt safer there and thought that they would just fight in the parking lot if she got out. (*Id.* at 48-49.) But after realizing that her keys were outside of the car, J.B. testified that she asked Sumpter to drop the keys through a crack in the door. (*Id.* at 50.) Instead, Sumpter tried to force his way back in to put his body against her. (*Id.* at 50-51.) Again, J.B. fought back and was able to kick him out again and flag down an approaching vehicle. (*Id.* at 51-52.) As Sumpter was distracted by the approaching vehicle, J.B. testified that she was able to find her keys and drive away. (*Id.* at 52.)

While the prosecutor used a grainy and choppy surveillance video of the Old Town parking lot to guide J.B. through some events of the night, the trial testimony just covered J.B.'s explanation of the events depicted in the video until Sumpter and J.B. reach the car. (Trial Tr. (vol. 3) 28:11-32:6.) The prosecutor never elicited testimony from J.B. on what was being shown in the section of the video after the two reach the car. (*Id.*)

Sumpter's trial counsel failed to clarify during J.B.'s cross-examination what happened at or in the vehicle that would amount to confinement beyond what was inherent or incidental to the commission of the attempted rape, which the State was required to prove under *Buggs*. (Trial Tr. (vol. 3) 57-70.) Instead, Sumpter's trial counsel's cross-examination focused almost entirely on discounting the attempted rape allegations and J.B.'s changing story on whether penetration or attempted penetration occurred. *Id.* Nor

did trial counsel cross-examine J.B about what happened while she got into the vehicle with either her contradictory preliminary hearing testimony or the surveillance video of the incident.

Sumpter also took the stand to give his version of the events. Sumpter's testimony and the defense presented by counsel rested largely on his testimony that the women consented to the actions or that he lacked any requisite intent for the crimes alleged. (Trial Tr. (vol. 4) 72-146.) Trial counsel did not counsel or prepare Sumpter to testify about any defense to the facilitation element of the aggravated kidnapping count.

C. Motion for Judgment of Acquittal

Trial counsel did move for a judgment of acquittal at the end of the State's case but she made no mention of the *Buggs*-test or any specific evidentiary deficiency related to the facilitation element in the State's case. (Trial Tr. (vol. 4) 59:2-23.) Contrary to J.B.'s testimony that she had voluntarily gotten into her car, the prosecutor stated in his opposition to Sumpter's directed verdict motion that the aggravated kidnapping count with respect to J.B. was based on a "confinement" and that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (Trial Tr. (vol. 4) 64:5-8.) Sumpter's trial counsel did not challenge misstatements of the evidence by the prosecutor on the facilitation element or base her directed verdict or motion for retrial on the *Buggs* standard.

D. Jury Instructions

The State submitted the following counts to the jury: (1) Case No. 11CR1187 (A.S.E.): aggravated sexual battery including the lesser included offense of sexual battery, and kidnapping including the lesser included offense of criminal restraint; (2) Case No. 11CR1290: attempted rape (A.C.C.), aggravated sexual battery including the lesser

included offense of sexual battery (A.C.C.), and aggravated sexual battery including the lesser included offense of sexual battery (A.R.P.); (3) Case No. 11CR1638 (J.B.): aggravated kidnapping including the lesser included offenses of kidnapping and criminal restraint, attempted rape, aggravated sexual battery including the lesser included offense of sexual battery. (Jury Instructions (March 19, 2012).)

Of relevance to Sumpter's habeas petition are two instructions:

- On the aggravated kidnapping count related to the incident with J.B., the jury was only instructed on one theory, confinement by force, so the State had to prove beyond a reasonable doubt that "Timothy Sumpter **confined** JB **by force**." The jury was also instructed that the confinement had to be "done with the intent to hold such person to facilitate the commission of the crime of Rape." (Jury Instruction 19; Trial Tr. (vol. 5) 53:6-7.)
- On the attempted rape counts, the jury was instructed that they had to find beyond a reasonable doubt that Sumpter committed an overt act toward the commission of the crime of Rape "with the intent to commit the crime of Rape." Rape was defined, in part, for the jury as an "act of sexual intercourse . . . committed without the consent of [the victim] under circumstances when she was overcome by force or fear." (Jury Instructions 11 and 23; Trial Tr. (vol. 5) 47-48, 56.)

Sumpter's trial counsel made no request for a clarification of the facilitation element to state that any confinement sufficient to support an aggravated kidnapping count must meet the standard expressed by the Kansas Supreme Court in *Buggs*.

E. Closing Statements

1. *Argument related to Aggravated Kidnapping Count for Incident involving J.B.*

At closing argument, the prosecutor relied on an act not in evidence and not supported by the testimony of J.B. to support his argument for an aggravated kidnapping conviction. Rather than rely on J.B.'s testimony, the prosecutor provided his opinion for the jury of what they should find occurred in a grainy and choppy surveillance video of the incident with J.B. when the two were at the car: "Watch that video and there's a time when

you will see him as she gets out of the car and he is following along, grabbing her and pulling her back into that car." (Trial Tr. (vol. 5) 106:18-22.) But the prosecutor never elicited testimony from J.B. on what was being shown in this section of the video. (Trial Tr. (vol. 3) 28:11-32:6.)

Sumpter's trial counsel failed to challenge the prosecutor's unfounded assertions based on events not in evidence or point to the contradictory testimony from J.B. On the aggravated kidnapping count, Sumpter's trial counsel only stated that Sumpter denied "ever confin[ing J.B.] in the car." (Trial Tr. (vol. 5) 92:19-20.) But trial counsel did not explain to the jury what the State must prove to satisfy the facilitation element. She also made no argument to demonstrate that the evidence elicited at trial did not show confinement beyond what is inherent or incidental to the underlying crime. Indeed, Sumpter's trial counsel seems to have accepted that holding J.B. during the alleged attempted rape was sufficient because she simply argued that the bruising that happened as "part of the confinement" could not be used to also support the "bodily harm" proof. (*Id.* at 92:24-93:10.)

Additionally, both trial counsel and the prosecutor incorrectly relayed the intent element of the aggravated kidnapping count to the jury. They both stated that all the State needed to prove for intent on the *aggravated kidnapping* count was that Sumpter intended to rape J.B. (Trial Tr. (vol. 5) 76:2-6, 85:7-8, 88:13-21, 93:12-14 (The prosecutor states that all he has to prove is "confined [J.B] by force" and that "he intended to commit the crime of rape." Trial counsel states "the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her.").)

2. *Argument related to Attempted Rape Count for Incident involving J.B.*

During the closing argument, the prosecutor also misstated the requirements for attempted rape. While explaining the charges involving J.B., the prosecutor stated "clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her -- or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do." (Trial Tr. (vol. 5) 106:2-9.) He illustrated the point by referencing Sumpter's testimony that he wanted to have sex with J.B. when she came on to him and touched his penis. (*Id.* at 105:22-106:9.) Indeed, J.B. had also testified that she had tricked Sumpter into thinking she wanted to have sex with him in order to get him out of her car. (Trial Tr. (vol. 3) 45-46.) But the State had to do more than prove that Sumpter intended to have sex with J.B. at some point during their interaction; they had to prove that he intended to have sex with J.B. *without her consent*.

The prosecutor's misleading guidance to the jurors on what the State had to show to meet the burdens outlined in the jury instructions went unchallenged. Rather, Sumpter's trial attorney actually compounded the error by stating the incorrect burden in her closing argument. She told the jury:

> [T]he state has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her. Again, it's not what she thought was gonna happen, it's what was in Mr. Sumpter's mind when he was in the car with her. Were his intentions to have sexual intercourse with her? That's what they have to prove. If they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping.

(Trial Tr. (vol. 5) 93:12-21.)

3. *The Prosecutor Commingled the Evidence from the Four Victims*

In his closing statement, the prosecutor commingled facts on multiple occasions. Notably, the prosecutor took evidence from individual cases and argued to the jury that it was a common theme in all of the cases. For example, the State had elicited evidence that Sumpter had made false statements to police in one of the cases, 11-cr-1290, related to the incidents with A.C.C. and A.R.P. But the prosecutor generally averred that for all of the cases the jury should consider Sumpter's credibility: "Consider all of those mistruths, consider his entire lack of credibility." (Trial Tr. (vol. 5) 108:8-10.) He went on to admonish the jury not to believe Sumpter in any of the cases because of his lack of credibility—even though that evidence was limited to one case. (*See generally* Trial Tr. (vol. 5) 78:10-80:5, 102:11-12, 103:12-13, 107:1-2, 107:23-108:10.)

Similarly, the prosecutor stated, "You're going to hear this common theme in all of these, he talks about a sadness, he talks about something that's going on in his life that he's using to manipulate each of these women to try and get them to feel bad for him, to get them into an isolated place." (Trial Tr. (vol. 5) 66:1-6.) But there was no evidence that in two of the four incidents—with J.B. and A.C.C.—Sumpter had talked about sadness in his life.

The prosecutor also lumped the cases together and asked the jury to infer a pattern of behavior—even though the State never had to go through the process of showing that the evidence was admissible beyond an individual case and for propensity purposes under K.S.A. 60-455. During closing, the prosecutor repeatedly tried to bolster the evidence in individual cases by referring to patterns from other cases. For example:

- "[Y]ou saw her [A.C.C.] and you saw each of these women and you remember what they looked like and you'll start seeing the pattern that emerges with this defendant." (Trial Tr. (vol. 5) 69:14-17.)
- "Again, with Amber Claasen, she's isolated, his demeanor changed, he changed from being fine to going a little bit different, a lot different, in fact. Much like he did with Avonlea, his demeanor changed." (Trial Tr. (vol. 5) 72:19-23.)
- "He puts her [A.R.P.] to go into a further isolated place, where it turns out there were no video cameras. But he is again isolating these women, trying to get them alone, so he can commit his crimes against them." (Trial Tr. (vol. 5) 74:19-24.)

The prosecutor also mischaracterized the *pro se* bond modification motion (which the prosecutor called a "letter") in his closing. The prosecutor stated that "he wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense." (Trial Tr. (vol. 5) 80:15-18.) The prosecutor went on to use this motion to tell the jury that Sumpter admitted to all of the lesser included crimes even though his testimony could only be interpreted to admissions on *some* of the lesser included crimes. (Trial Tr. (vol. 5) 64:12-14 ("So what the defendant's here asking you to do is find him guilty of the lesser included crimes."); *id.* at 80:14-18 (arguing that "[Sumpter] wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense [sic]"); *id.* at 80:5-11 ("[H]e comes in here to court . . . and he is telling you . . . all I did were the lesser included offenses."); *id.* at 101:1-5 ("But they so want you

to just move past the greaters and get down to those lesser and just find him guilty of those because that's easy, he's admitted those, why don't we just do that and go home.").)

F. Verdict and Sentencing

The jury returned a guilty verdict as follows: (1) Case No. 11CR1187: aggravated sexual battery and misdemeanor criminal restraint; (2) Case No. 11CR1290: misdemeanor sexual battery (victim A.C.C.) and misdemeanor sexual battery (victim A.R.P.); (3) Case No. 11CR1638: aggravated kidnapping, attempted rape, aggravated sexual battery. (Verdict (Mar. 19, 2012).) After the verdict, trial counsel did move for judgment of acquittal in J.B.'s case but she did not mention the issues with the kidnapping conviction based on the Buggs standard. (Def.'s Mot. J. of Acquittal (Apr. 2, 2012).)

Appellant-Petitioner Timothy Sumpter was sentenced to 351 months (36 months in jail consecutive to the prison sentence). (Tr. of Post-trial Mot. and Sentencing Proceedings, 33-36.) Sumpter's sentence included a requirement that he register on the offender registry for his lifetime, K.S.A. 22-4906(d), and be subject to a lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G). (*Id.*) The District Court sentenced Sumpter to an enhanced sentence based upon his prior criminal history and aggravating factors. The State was not required to prove the existence of these sentencing enhancement factors beyond a reasonable doubt.

III. APPEAL

Sumpter timely appealed his convictions. Sumpter's appellate counsel argued that the trial court erred in granting the motion for consolidation under K.S.A. 22-3202(1); but appellate counsel did not challenge the denial of Sumpter's motion for severance or the district court's continuing duty to sever. The Court of Appeals upheld the trial court's decision on consolidation but one judge only concurred: "As to the consolidation of the

charges for trial, I concur in the result based on how the parties framed and argued the issue on appeal." *State v. Sumpter*, 313 P.3d 105 (Table) (Kan. App. 2013). Additionally, appellate counsel made no objection to the sufficiency of the aggravated kidnapping conviction based on the standard articulated in *Buggs*, 219 Kan. 203 (1976).

Finally, his appellate counsel argued that the prosecutor's statements about credibility amounted to prosecutorial misconduct. (Appellant's Br., at 19-24.) But appellate counsel did not challenge the prosecutor's unfounded argument about a surveillance video, the prosecutor's statements about a pro se bond modification request, or misstatements about Sumpter's testimony and the elements of attempted rape.

IV. STATE HABEAS REVIEW

Sumpter timely filed a *habeas* petition under K.S.A. 60-1507. The Court heard arguments on the petition during a status conference but denied counsel's request to have Sumpter attend the status conference. (Register of Actions, 6.) At the status conference, the State conceded that it must withdraw its theories of sufficient evidence for the aggravated kidnapping conviction that were not supported by the actual charge on which the jury was instructed. (12/21/16 Tr. of Habeas Corpus/60-1507 Hrg., 56-58.) The Court denied Sumpter's petition and request for an evidentiary hearing on May 2, 2017.

The Kansas Court of Appeals upheld the denial on all grounds on January 18, 2019. *Sumpter v. State*, No. 117,732, 2019 WL 257974 (Kan. Ct. App. Jan. 18, 2019). The Kansas Supreme Court denied Sumpter's petition for review in his post-convictions proceedings on December 26, 2019.

STANDARD OF REVIEW

A defendant is entitled to federal habeas corpus relief if (1) the state court decision was "contrary to, or an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), a state court decision is contrary to clearly established federal law "if the state court applies a rule different from the governing law set for in [U.S. Supreme Court] cases." *Premo v. Moore*, 562 U.S. 115, 128 (2011) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision involves an unreasonable application of clearly established federal law "if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08, 411 (2000).

While it is true that AEDPA mandates a degree of deference to the state courts, such "deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." *Williams*, 529 U.S. at 389.

ARGUMENT

I. SUMPTER IS ENTITLED TO RELIEF BECAUSE THE KANSAS COURT OF APPEALS MISAPPLIED *STRICKLAND* ON SUMPTER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

The State failed to present any evidence at the preliminary hearing or trial to show that Sumpter committed a confinement by force to facilitate the commission of the underlying crime that went beyond confinement inherent in the nature of the underlying crime, attempted rape, as required by Kansas law for a kidnapping conviction. Indeed, the State has now abandoned the kidnapping act that it relied on at trial to support the jury's verdict (and neither the district court nor the Court of Appeals relied on the act identified

at trial to support their denial of Sumpter's petition). But Sumpter's trial counsel did not challenge that act prior to trial nor through examination of the witness nor in closing argument nor in post-trial motions. As the trial record demonstrates, trial counsel failed to understand what the State had to show to meet its burden on the aggravated kidnapping count. Such performance violated trial counsel's duty to investigate, counsel Sumpter on his defenses, and subject the State's case to meaningful adversarial testing.

This failure was not only deficient but highly prejudicial. The attempts by the Kansas Court of Appeals to *post-hoc* rationalize the jury's verdict on an act not presented to the jury (standing outside J.B.'s car after she kicked him out) is not only inadequate as a matter of law but raises serious questions that sufficiently undermine the confidence in the outcome of Sumpter's trial on this count that demand retrial. This new "act" was never tested through the adversarial process. There was no decision on whether the evidence at the preliminary hearing would have been sufficient to have Sumpter bound over on this act. Trial counsel was never able to test these theories through cross or direct examination of witnesses. Nor was she able to investigate any additional factual background on this new act. Nor did the case law exist at the time to support upholding the convictions on post-trial motions because the previous case law would have counseled that the evidence elicited at trial was insufficient. Because trial counsel failed to subject the State's kidnapping count to meaningful adversarial testing at all stages—and, indeed, could not have on this new act—here the evidence procured during the unfair adversarial process is "presumptively unreliable" and should not have been relied on by the Kansas Court of Appeals. *U.S. v. Cronic*, 466 U.S. 648, 659 (1984).

Moreover, while the Kansas Court of Appeals recognized that the facts here make this case different "from more common confinement scenarios found to be kidnapping" by the Kansas Supreme Court, *Sumpter*, 2019 WL 257974, at *5, it failed to reckon with U.S. Supreme Court precedent that counsels that a verdict "weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). In so doing, the Kansas Court of Appeals did not heed the warning that its "task is not to determine a defendant's guilt or innocence but to determine, with all due deference to the jury and the trial process itself, whether a defendant was deprived of a fair trial." *Fisher v. Gibson*, 282 F.3d 1283, 1310 (10th Cir. 2002).

A. Standard

A defendant's Sixth Amendment right to counsel is violated when (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Under *Strickland*'s first prong, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" in light of all circumstances. *Id.* at 688. A defendant may prove that his "counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (citing *Strickland*, 466 U.S. at 699). To prove this, a defendant "must identify the acts or omissions of [his] counsel . . . ." *Strickland*, 466 U.S. at 689.

Under *Strickland*, it is clearly established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. In *Hinton*, the Supreme Court explained further that an attorney's "ignorance of a point of law that is fundamental to his

case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Under the second prong, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability "undermines confidence in the outcome." *Id.* Although a reviewing court must defer to an attorney's performance, *Strickland*'s standard should not be interpreted to become an "insurmountable obstacle to meritorious claims." *Id.* at 689, 704 (Brennan, J., concurring and dissenting in part).

B. Trial Counsel was Constitutionally Deficient Under *Strickland* and *Hinton* for Failing to Research and Investigate Sumpter's Most Serious Charge.

Here, the record reveals that trial counsel did not meet her constitutional duty to perform basic investigations or research on the State's aggravated kidnapping charge because the record is completely devoid of *any* reference to the leading Kansas kidnapping case, *Buggs*, or any argument under the *Buggs* standard. As the Court of Appeals noted, aggravated kidnapping was "the most serious charge on which [Sumpter] was convicted." *Sumpter*, 2019 WL 257974, at *2. Yet nowhere during Sumpter's proceedings or direct appeal did either trial or appellate counsel address the fact that under *Buggs* and its progeny, Kansas law places additional burdens on the State when the defendant is charged with kidnapping done to "facilitate the commission of another crime." *Buggs*, 547 P.2d at 731.

1. *Kansas kidnapping law and the charged act*

Sumpter was charged with aggravated kidnapping under the theory that he confined J.B. by force. Under Kansas law, the State had the burden to show that the confinement

by force that amounted to kidnapping went beyond the force inherent in or incidental to the underlying crime, attempted rape. Under the operative Kansas statute at the time of the incident, kidnapping is "the taking or ***confining*** of any person, accomplished ***by force***, threat or deception, with the intent to hold such person . . . to facilitate . . . the commission of any crime . . . ." K.S.A. 21-3420 (emphasis added).[1] Aggravated kidnapping "is kidnapping . . . when bodily harm is inflicted upon the person kidnapped." K.S.A. 21-3421. As the Kansas Supreme Court has explained, the confinement alleged to facilitate the commission of the underlying crime must meet three separate, essential elements: it (1) "[m]ust not be slight, inconsequential and merely incidental to the other crime"; (2) "[m]ust not be of the kind inherent in the nature of the other crime"; and (3) "[m]ust have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Buggs*, 219 Kan. at 216.

The Kansas Supreme Court has been especially critical of kidnapping charges where, as here, the confinement amounts to forcible, violent rape in a vehicle. "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." *State v. Cabral*, 228 Kan. 741, 744-45 (1980); *cf. Buggs*, 219 Kan. at 215 (stating that "the ordinary rape require[s] as a necessary incident some 'confinement' of the victim-they are nevertheless not kidnappings solely for that reason").

[1] The jury was only instructed on confinement "by force . . . to facilitate the commission of the crime of Rape." (Jury Instruction 19.)

In cases where kidnapping convictions on a confinement by force theory have been upheld the victim has been restrained in a manner beyond the assailant's superior strength, such as through tying up or handcuffing the victim. *See State v. Mitchell*, 784 P.2d 365, 1989 Kan. LEXIS, 199, at *15-16 (Kan. 1989) (holding that the confinement of tying the victim to a bedpost and binding her hands and feet had independent significance because it made it impossible for the victim to resist the assault, greatly inhibited her ability to attempt to identify her attacker or pursue him as he left); *State v. Zamora*, 247 Kan. 684, 696 (1990) (holding that the confinement met the *Buggs* standard because the defendant gagged the victim with a rope, tied her hands behind her head, and tied one leg to the bed before he raped her three times and then he further confined her by tying her to him, unplugging the phone, blocking the door from approximately 1:30 a.m. until approximately 8:30 a.m.); *State v. Richmond*, 250 Kan. 375, 378 (1992) (holding that tying up the victim during and after the commission of a rape and using a pillow to blindfold her was a confinement that was not incidental to the underlying crime); *State v. Little*, 26 Kan. App. 2d 713, 718-19 (1999) (finding confinement where the defendant bound the victims to facilitate the crime of robbery); *cf. State v. Hays*, 256 Kan. 48, 63 (1994) (holding that the kidnapping conviction was not supported by the evidence because holding the victim down with a crowbar while committing the underlying crime had no significance independent of the robbery).

Given Kansas kidnapping law at the time of trial, Sumpter had a strong defense to the kidnapping charge based on the *Buggs* standard.

2. *Trial Counsel's Failure to Investigate, Counsel, or Deploy the* Buggs *Standard at Any Stage was Deficient (Not Strategic)*

Because the facts supporting Sumpter's kidnapping charge were (as the Court of Appeals acknowledged) not "common," the *Buggs* standard was crucial to Sumpter's defense on his most serious charge. *Sumpter*, 2019 WL 257974, at *2, *5. But the record reveals that trial counsel was ignorant of the *Buggs* standard:

- **Preliminary Hearing:** Trial counsel failed to assert that the State lacked evidence to show that Sumpter's confinement of J.B. was independently significant from the attempted rape and not "merely incidental."

- **During Trial:** Trial counsel failed to elicit additional details from J.B. about which actions would have supported confinement beyond that which was incidental to the attempted rape.

- **Directed Verdict:** Trial counsel failed to argue in her motion for a directed verdict that the State did not meet its burden to show confinement sufficient to support its aggravated kidnapping charge.

- **Closing Argument:** Trial counsel affirmatively misstated the law, asserting that all the State needed to prove for intent on the *aggravated kidnapping* count was that Sumpter intended to rape J.B, rather than the additional requirements outlined in *Buggs*.

- **Post-Trial:** Trial counsel failed to argue that the State did not meet its burden to show confinement sufficient to support its aggravated kidnapping charge in her motion for aquittal.

The Court of Appeals declined to decide whether trial counsel's performance was deficient but only held that Sumpter was not prejudiced by his counsel's performance. *Sumpter*, 2019 WL 257974, at *3. Indeed, in the State's responses during post-conviction proceedings, it seems to acknowledge that it never identified—at any stage of the trial—an act that it relied on to meet the "confinement by force" element on the aggravated kidnapping count. It provides no citation to the record to where the State notified the Court, Sumpter, or the jury what act it relied on to meet this element.

Despite the lack of citation by the district court and State at the habeas stage, the State did, on one occasion, identify the act it was relying on in its opposition to Sumpter's directed verdict motion. But this act was not a confinement by force act and was unsupported by the evidence. Unsurprisingly, the State and district court have now abandoned this theory. On the motion to directed verdict, the State argued that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (Trial Tr. (vol. 4) 64:5-8.) But as the State and district court have now acknowledged, that act was insufficient because it could only be evidence of a "takings" theory of kidnapping—a theory on which the jury was not instructed. (12/21/16 Tr. of Habeas Corpus/60-1507 Hrg., *compare* 38-39 (arguing that it was a taking for Sumpter to "tak[e] JB from outside the car to inside the car so he can control her and he can rape her"), and 55-58 (the State offering to withdraw any argument on takings if the jury was not instructed on this act and the Court confirming that the State had abandoned those arguments).)

Trial counsel should have made an argument based on *Buggs* at the preliminary hearing, on a motion for directed verdict, and on a motion for judgment notwithstanding the verdict given the paucity of evidence provided to support the charge at the preliminary hearing and at trial. Indeed, as noted, the State has now abandoned the only act identified during trial to support the conviction as insufficient under the jury instructions and *Buggs*. There is no excuse to not similarly holding the State responsible for proving the elements during the pretrial and trial proceedings.

3. *The Record Demonstrates Deficiency even without an Evidentiary Hearing.*

Despite the fact that the record was devoid of any argument or mention of the State's burden of proof under *Buggs* at *any* point during Sumpter's proceedings, the Court of Appeals concluded that it had "no insight into what strategic decisions [the] lawyers may have made" regarding Sumpter's aggravated kidnapping charge. *Sumpter*, 2019 WL 257974, at *2. But no explanation can justify this deficiency.

Even though the State never identified for the Court or jury an act of ***confinement by force***, trial counsel never objected to the aggravated kidnapping count based on the incident with J.B. on the grounds that the evidence did not support the legal definition of the count. Because trial counsel did not have a proper understanding of what the State had to show at trial on the aggravated kidnapping count, she missed crucial opportunities to challenge the State's claims and testimonial evidence. And Sumpter's trial counsel never challenged the sufficiency of the State's evidence on these grounds at any stage including at the preliminary hearing.

At trial, Sumpter's trial counsel made several decisions to not challenge the State's claims or witness testimony that make no strategic sense if counsel had actually understood the importance of the facilitation element of the aggravated kidnapping count. First, Sumpter's trial counsel failed to challenge the prosecutor's misstatement of the evidence on what affirmative act was being used to support the count during arguments on the Sumpter's motion for directed verdict at the end of the State's case in chief. As noted previously, the prosecutor stated that the aggravated kidnapping count with respect to J.B. was based on a "confinement" and that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (Trial Tr. (vol.

4) 64:5-8.) But J.B. had instead testified at both the preliminary hearing and at trial that she had voluntarily gotten into her car and that Sumpter had pushed his way into the vehicle with her to accomplish the underlying crime—attempted rape.[2]

Second, J.B. changed her testimony about what happened as Sumpter entered the vehicle with her, in the vehicle, and outside the vehicle from the preliminary hearing to trial. But trial counsel did nothing during her cross-examination to clarify what happened at or in the vehicle that would amount to confinement beyond what was inherent or incidental to the commission of the attempted rape. Rather trial counsel's cross-examination focused almost entirely on discounting the attempted rape allegations and J.B.'s changing story on whether penetration or attempted penetration occurred. (Trial Tr. (vol. 3) 57-70.)

During the charge conference, trial counsel also failed to request an explanatory instruction on the facilitation element. The Kansas Court of Appeals has recognized that a jury instruction explaining the *Buggs*-standard is advisable "where the question of whether the restraint or movement facilitated the crime is at issue," as it was in this case. *State v. Little*, 26 Kan. App. 2d 713, 718-19 (1999) (acknowledging that the pattern instruction for kidnapping is vague and confusing on the facilitation language and noting that an instruction explaining the *Buggs* holding "would be advisable in any situation where the question of whether the restraint or movement facilitated the crime is at issue").

[2] Moreover, the State has no acknowledged that this testimony cannot support a guilty verdict on the count the jury was instructed on: confinement by force. (12/21/16 Tr. of Habeas Corpus/60-1507 Hrg., *compare* 38-39 (arguing that it was a taking for Sumpter to "tak[e] JB from outside the car to inside the car so he can control her and he can rape her"), and 55-58 (the State offering to withdraw any argument on takings if the jury was not instructed on this act and the Court confirming that the State had abandoned those arguments).)

Trial counsel's misunderstanding of the law was confirmed at closing. On the aggravated kidnapping count, trial counsel only stated that Sumpter denied "ever confin[ing J.B.] in the car." (Trial Tr. (vol. 5) 92:19-20.) But Sumpter's trial counsel did not explain to the jury what the State must prove to satisfy the facilitation element and for that reason she never argued that the evidence elicited at trial showed no confinement that would meet the *Buggs* standard. Indeed, Sumpter's trial counsel seems to have accepted that holding J.B. during the alleged attempted rape was sufficient because she simply argued that the bruising that happened as "part of the confinement" could not be used to also support the "bodily harm" proof. (*Id.* at 92:24-93:10.)

Additionally, both trial counsel and the prosecutor incorrectly relayed the intent element of the aggravated kidnapping count to the jury. They both stated that all the State needed to prove for intent on the *aggravated kidnapping* count was that Sumpter intended to rape J.B. (Trial Tr. (vol. 5) 76:2-6 (The prosecutor states that all he has to prove is "confined [J.B] by force" and that "he intended to commit the crime of rape.") and 93:12-14 (Sumpter's trial counsel states "the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her.").) But the State actually had to prove that any confinement done by Sumpter was more than incidental *and* was done with the intent of facilitating—and not just committing—the underlying crime. By inappropriately conflating the intent element of the underlying crime—attempted rape—with the intent element of the separate kidnapping count, Sumpter's trial counsel once again demonstrated a lack of understanding of the facilitation element and what was required of the State beyond simply showing the type of confinement and intent inherent in the underlying crime. Trial counsel's arguments and explanations at closing belie any

argument that these were strategic choices, rather than a misunderstanding of the law. Admittedly, trial counsel did move for a directed verdict at the end of the State's case and for acquittal during the post-trial proceedings but she made no mention of the *Buggs*-test or any specific evidentiary deficiency related to the facilitation element in the State's case. (Trial Tr. (vol. 4) 59:2-23; Post-trial Tr. 3:5-18.)

This failure to challenge misstatements of testimony and changing witness testimony on the aggravated kidnapping count—the charge that carried the largest maximum sentence—only made sense if trial counsel did not realize what was required of the State under *Buggs*.

It was not strategic for Sumpter's counsel to not demand to know what act the State had relied on to meet the "confinement by force" element. Neither was it strategic to not argue the sufficiency of the State's evidence on confinement by force sufficient to meet the separate kidnapping requirements. Rather, as the record demonstrates, trial counsel did not understand the facilitation requirement under *Buggs*, and, as such, failed at every stage to highlight and move against the insufficiency of the State's evidence. This failure to understand the law and associated burden of proof is objectively deficient as far as assistance of counsel.

The Supreme Court has explained: "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. In making its determination, the court must "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* Here, where trial counsel failed to subject Sumpter's most serious

charge to meaningful adversarial testing under the established State law, there can be no argument that counsels' decision was the result of reasoned trial strategy. Indeed, neither the Kansas Court of Appeals, nor the State in its briefing, has offered any possible strategy that might have explained counsels' failure. *Buggs* is not a new or obscure case in Kansas jurisprudence, but represents Kansas's position on aggravated kidnapping since 1976. A record devoid of any reference to the State's heightened burden of proof under *Buggs* thus compels the conclusion that trial and appellate counsel were ignorant on a point of law that was fundamental to Sumpter's case. *See Hinton*, 571 U.S. at 274 (finding ineffective assistance of counsel where counsel failed to make "even the cursory investigation" into a statute important to the defense case); *Kimmelman*, 477 U.S. at 385 (counsel's failure a timely motion, when based on mistake of law amounts to constitutionally deficient assistance); *Williams*, 529 U.S. at 395–96 (failure to conduct investigation because of lawyer's mistake of law was constitutionally ineffective). No "deference" should be accorded to trial counsel's decision not to investigate or deploy a *Buggs* argument because there was "*no advantage* in the decision to bypass the [] defense." *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987).

The Court of Appeals therefore misapplied clearly established federal law when it concluded that it could not determine whether counsels' performance was constitutionally deficient.[3]

[3] There is no strategic explanation for counsels' failure to make any argument on this fundamental point of law. However, at minimum, the Kansas Court of Appeals should have remanded the case for an evidentiary hearing.

C. The Kansas Court of Appeals Used the Wrong Legal Standard to Evaluate Whether Sumpter was "Prejudiced" by Counsel's Failure.

The Kansas Court of Appeals applied the wrong legal standard when it determined that Sumpter failed to meet his burden on the second prong of *Strickland*'s test. In *Strickland*, the Supreme Court explained that "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." *Strickland*, 466 U.S. at 695. When determining prejudice, *Strickland* instructs courts to ask "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

But the Kansas Court of Appeals did not apply Strickland's "reasonable probability" standard in evaluating whether counsels' constitutionally deficient performance prejudiced Sumpter. Instead, the Court of Appeals analyzed Sumpter's claim under the "sufficiency of the evidence" standard, asking whether there was *sufficient evidence* to sustain the jury's verdict. *See Sumpter*, 2019 WL 257974, at *3 (citing portions of two state cases discussing the sufficiency of the evidence, not effectiveness of counsel), *5 (concluding that Sumpter was not prejudiced because "the trial evidence was sufficient for the jury's verdict"). Indeed, the Court of Appeals did not cite any cases on how to determine whether a defendant is prejudiced by counsel that did not investigate the law prior to trial. Instead, the Court of Appeals cited two Kansas cases that cited how sufficiency of the evidence is ascertained on direct appeal. *Sumpter*, 2019 WL 257974, at *3 (citing portions of two state cases discussing the sufficiency of the evidence, not effectiveness of counsel). Sufficiency of the evidence is a different standard. *Compare Boltz v. Mullin*, 415 F.3d 1215, 1232 (10th Cir. 2005) (sufficiency of the evidence requires "appellate courts to determine, after reviewing the evidence presented at trial in the light

most favorable to the government, whether any rational trier of fact could have found the aggravating circumstance existed beyond a reasonable doubt") *with Strickland*, 466 U.S. at 695 (determining prejudice requires courts to ask "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

Sufficient evidence on a count does not eliminate the possibility that the defendant was prejudiced by errors. *See U.S. v. Whitehead*, 176 F.3d 1030, 1040 (8th Cir. 1999). As the Supreme Court has explained, a "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 at 694. As the Tenth Circuit has recognized in assessing prejudice, the task of a court reviewing a habeas petition is not "to determine a defendant's guilt or innocence but to determine, with all due deference to the jury and the trial process itself, whether a defendant was deprived of a fair trial." *Fisher*, 282 F.3d at 1310; *accord Kimmelman*, 477 U.S. at 380 ("We have never intimated that the right to counsel is conditioned upon actual innocence."). "To show his attorney's deficient performance prejudiced him, however, [petitioner] need not show that he could not have been convicted. Instead, he need only undermine our confidence in the trial's outcome." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993).

Indeed, the Kansas Court of Appeals ignored Supreme Court precedent holding that defense counsel's failure to understand the law is not only deficient but *per se* prejudicial because such a failure affects every strategic choice that counsel makes at trial. *Cronic*, 466 U.S. at 659 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice [is]

required because the petitioner had been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.") (internal citation and quotations omitted); *Kimmelman*, 477 U.S. at 385 (holding that trial counsel had provided deficient assistance where counsel's justifications "for his omission betray a startling ignorance of the law-or a weak attempt to shift blame for inadequate preparation" and because such lack of investigation calls into question the "reliability of the adversarial testing process").

"Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. Here, the Kansas Court of Appeals specifically recognized that "[t]he specific facts here tend to set this conviction apart from more common confinement scenarios found to be kidnapping." *Sumpter*, 2019 WL 257974, at *5. In other words, the Kansas Court of Appeals recognized that Sumpter's was not a case of overwhelming record support for his aggravated kidnapping conviction, making it more likely that the result of Sumpter's proceedings on the aggravated kidnapping charge would have been different but for counsels' failure to raise *Buggs* at any point during Sumpter's proceedings. Had competent trial counsel raised *Buggs* during pre-trial proceedings, developed a record under the *Buggs* standard during trial, or explained Kansas kidnapping law under *Buggs* to the jury through closing arguments or jury instructions, there is a reasonable probability that the jury might have returned a different result on Sumpter's kidnapping charge. *See Williams*, 529 U.S. at 398–99 (finding a "reasonable probability that the result of the sentencing proceeding would have been different if competent counsel

had presented and explained the significance of all the available evidence") (internal quotation marks and citation omitted).

In most habeas petitions, the question relates to a particular piece of evidence or witness and there is not a general question about the validity of the other evidence. So the question becomes a counterfactual: if trial counsel had successfully suppressed this piece of evidence or if this witness had been called, would the court still have confidence in the verdict? But here the counterfactuals are never-ending, intertwined, call into question all other evidence elicited or omitted, and often dispositive: what if trial counsel had successfully challenged the State's proffered evidence based on the *Buggs*-standard at the preliminary hearing, or on the motion for directed verdict, or on the motion for acquittal? How would trial counsel's strategy have changed if she had forced the prosecutor to identify the act he was relying on for confinement by force prior to the end of the State's evidence? How would trial counsel's strategy at the preliminary hearing and at trial—including her handling of the cross-examination of J.B. and the direct examination of Sumpter—have changed if she realized that the confinement by force could not be confinement that was incidental, inherent, or had no independent significance? How would have trial counsel's proposed jury instructions changed?[4] Or her closing arguments? Or her challenges of prosecutorial statements? These are not simple counterfactuals and require the Court to question every aspect of the trial from the preliminary hearing to post-trial motions. Moreover, because of the deficiencies of the newly-found acts—even on a

[4] *Little*, 994 P.2d at 720 (acknowledging that the pattern instruction for kidnapping is vague and confusing on the facilitation language and noting that an instruction explaining the *Buggs* holding "would be advisable in any situation where the question of whether the restraint or movement facilitated the crime is at issue").

record with no adversarial testing or argument—this Court should not have confidence in the outcome of the trial on this count.

D. Not Only was the Conviction Weakly Supported, the Court of Appeals Erred in Determining There was Sufficient Evidence.

Even on the deficient record, the act of kidnapping the Court of Appeals identified does not set out an act of confinement by force—the charge submitted to the jury—sufficient to meet the *Buggs* standard. The Court of Appeals found that:

> Sumpter confined J.B. ***in the midst*** of the criminal episode when ***she forced him*** out of her car and he retrieved her keys that he had earlier thrown out of the window. At that point, J.B. was unable to leave. If she tried to get out of the car, Sumpter could easily have seized her. And she couldn't drive the car away, thereby escaping, without the keys. Sumpter had, thus, effectively trapped J.B. in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her. Sumpter then used the keys as part of ***a ploy*** to get J.B. to unlock the car to get them back. When she did, he forced his way in and resumed his assault of her.

Sumpter, 2019 WL 257974, at *4 (emphasis added). When considering all of J.B.'s actual testimony, it is apparent that this brief interlude in the fight between J.B. and Sumpter cannot meet the definition of confinement by force. Therefore, even if the weight of the evidence is considered on this new act not presented to the jury, Sumpter was prejudiced for three reasons.

First, Sumpter used ***no force*** when he was outside of the vehicle.[5] As the Kansas Supreme Court has recognized, confinement by force has always required some sort of binding or physical restraint. *Zamora*, 247 Kan. at 696; *Richmond*, 250 Kan. at 378; *Hays*, 256 Kan. at 63. Here Sumpter did not physically hold the doors closed to prevent J.B. from leaving, he did not lock the doors, nor did he bind J.B. or the doors with some sort of

[5] While the Court of Appeals describes Sumpter using "a ploy" and "induc[ing]" J.B. to open the door with the keys, *Sumpter*, 2019 WL 257974, at *4, the State did not instruct the jury on confinement by deception. (Trial Tr. (vol. 5) 53.)

restraint or device to keep her from escaping or to facilitate his escape. Without such evidence of ***force***, there is no evidence to support the jury's verdict. This is especially true given that Sumpter was convicted of ***aggravated*** kidnapping, which also required the State show that the confinement by force "inflicted" "bodily harm." (Trial Tr. (vol. 5) 53.) No such bodily harm was inflicted while Sumpter momentarily stood outside J.B.'s vehicle.

Second, J.B. was ***not confined by Sumpter***; rather, ***she*** forced him out of the car and stayed in the car by her own choice. (Trial Tr. (vol. 3) 46-47, 49.) As J.B. testified, she stayed in her vehicle after she had pushed Sumpter out because she calculated that it was safer in her vehicle. (Trial Tr. (vol. 3) 48-49 ("I was like, if I get out of the car we're gonna fight in the parking lot, if I stay in my car at least I know I'm safe and I'm away from him.").) A victim's voluntary choices, even if done out of fear, cannot amount to confinement of any kind, let alone confinement by force—the charge at issue here—under Kansas law. *State v. Holt*, 223 Kan. 34, 41-43 (1977) (voluntary choice to enter a vehicle without evidence of force or deception could not support the submission of an aggravated kidnapping count to the jury); *State v. Miller*, 2004 WL 1191017 at *3 (Kan. Ct. App. 2004) (a kidnapping does not occur when any confinement was the result of voluntary actions by the defendant); *State v. Quintero*, 183 P.3d 860, 2008 WL 2186070, at *5 (Kan. Ct. App. 2008) (rejecting the State's suggestion that a taking "may be accomplished by instilling fear in the victim" and noting that the statute "requires a taking or confining by force, threat or deception—not fear").

Third, any confinement lasted minutes—at most—and thus cannot meet the *Buggs* requirement that any confinement be more than "slight, inconsequential and merely

incidental." 219 Kan. at 216.[6] While the Court of Appeals is correct to note that the Kansas Supreme Court has never put an exact time requirement on confinement, it has required that the confinement not be "slight, inconsequential and merely incidental." *Buggs*, 219 Kan. at 216. In past cases, this Court has only found sufficient confinement when a victim was held for at least an hour. *Zamora*, 247 Kan. at 696 (seven-hour confinement); *State v. Coberly*, 233 Kan. 100, 105 (1983) (victim held in the defendant's truck for four hours); *Richmond*, 250 Kan. at 378 (moving and tying victim for around an hour).

As applied, the Kansas Court of Appeals' interpretation of the kidnapping statute provides no guidance as to what constitutes confinement or force sufficient to distinguish kidnapping as a separate, distinct, and substantial crime worthy of the substantial sentences that accompany felony kidnapping. As the Kansas Court of Appeals admits, its interpretation "creates a fuzzy border where close cases turn on seemingly minor differences." *Sumpter*, 2019 WL 257974, at *4. Such an interpretation of the statute is also unconstitutional as it would allow prosecutors to charge any momentary pause in an incident—even if forced by a victim—as a "confinement." And the Kansas Court of Appeals did not even attempt to describe what it believes constitutes sufficient "force" here under the kidnapping statute. Without "explicit standards," the kidnapping statute as applied will "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Commentators have already recognized "numerous instances of abusive prosecution under

[6] Additionally, any "confinement" did not have independent significance under *Buggs*. The time J.B. sat in her car and decided what to do actually increased—not lessened—"the risk of detection" as J.B.'s vehicle was in a public parking lot at the time of bar closings and within minutes of Sumpter re-entering the vehicle another vehicle pulled up to see what was happening—allowing J.B. to tell them and escape.

expansive kidnapping statutes" and that kidnapping should be limited "to cases of substantial isolation of the victim from [her] normal environment." John L. Diamond, *Kidnapping: The Modern Definition*, 12 Am. J. Crim. Law 1, 28 (1985) (quoting Model Penal Code art. 212.1 comment 221-22).[7] In attempting to find "sufficient" evidence to support a conviction, the Kansas Court of Appeals had to interpret the kidnapping statute in such a manner that as applied it would create a due process violation.

II. APPELLATE COUNSEL ALSO WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE ON THE KIDNAPPING CONVICTION.

Appellate counsel was also ineffective in failing to challenge the sufficiency of the aggravated kidnapping count. As discussed above, the State did not produce any evidence of a confinement by force that went beyond what was necessary for the commission of the underlying crime. Indeed, when presented with Kansas kidnapping law and the jury instructions during post-conviction proceedings, the State abandoned the only act presented at trial during the state habeas proceedings.

Under *Strickland*, appellate counsel's failure to investigate or deploy this ground for reversal was not reasonable given the lack of evidence of any confinement outside of that inherent in the nature of the crime against J.B. As the Supreme Court has recognized, appellate counsel is ineffective if she "unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins,* 528 U.S. 259, 285 (2000).

The kidnapping conviction was Sumpter's controlling sentence and counsel's failure to investigate or deploy this argument based on clearly established Kansas

[7] *Accord* Melanie Prince, *Two Crimes for the Price of One: The Problem with Kidnapping Statutes in Tennessee and Beyond*, 76 TENN. L. REV. 789 (2009) ("These ambiguous standards, coupled with the poor application of the statutory requirements, allow prosecutors and courts to fit the facts of a given crime into their own preferences when assessing the validity of a kidnapping charge.").

kidnapping law was not only unreasonable, there is a reasonable probability that Sumpter's appellate challenge would have prevailed. *Milton v. Miller*, 744 F.3d 660, 673 (10th Cir. 2014). Additionally, the kidnapping challenge was a stronger meritorious claim than many of the challenges raised by appellate counsel. *Smith*, 528 U.S. at 288 (noting evaluation of whether "particular nonfrivolous issue was clearly stronger than issues that counsel did present"). For example, established Kansas precedent barred three of the arguments: voluntariness of a confession recorded without notice and no indications of coercion, use of grid box in violation of *Apprendi*, and use of previous convictions without presenting to jury in violation of *Apprendi*. *State v. Sumpter*, No. 12-108364-A, 313 P.3d 105 (Table), at *6-7, 11-12 (Kan. Ct. App. Nov. 22, 2013). Moreover, appellate counsel had the ability to present additional arguments in the merits brief as she did not use all of the allowed pages for the brief. Appellant's Br., *State v. Sumpter*, No. 12-108364-A (Feb. 5, 2013).

Again, the Kansas Court of Appeals misapplied controlling federal precedent by only evaluating whether there was sufficient evidence on the record to support Sumpter's kidnapping conviction. The Constitution only requires the court to consider "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695; *Milton*, 744 F.3d at 673 (applying same standard to ineffective assistance of appellate counsel). The only additional question that the Supreme Court has suggested in cases of ineffective assistance of appellate counsel is whether the omitted argument is more meritorious than the arguments actually presented. *Smith*, 528 U.S. at 288. But the Kansas Court of Appeals only considered whether the evidence at trial was sufficient to support the jury's verdict and avoided the appropriate *Strickland* inquiry. *Sumpter*, 2019 WL 257974, at *5.

III. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE DISTRICT COURT'S ERROR ON THE MOTION TO SEVER

Appellate counsel's failure to properly challenge the severance of the charges by the State was also unduly prejudicial and constituted deficient representation. Here, the consolidation of the charges against Sumpter was clearly prejudicial and undermined the confidence of the outcome in his trial because the jury would not have otherwise improperly considered and relied upon the testimony of other victims in coming to their verdicts for the other three counts, and vice versa.

Sumpter's appellate counsel was ineffective because her failure to properly present the joinder/severance issue prevented her from presenting the prejudice to Sumpter that occurred from the consolidation of the charges in the three cases against him. Appellate counsel only argued that the district court had erred in joining under K.S.A. § 22-3202(1) on the State's motion for consolidation but did not argue that the trial court erred in denying Sumpter's motion for severance or from raising the issue *sua sponte* when prejudice was apparent. Appellate counsel's failure to correctly argue the consolidation claim was highlighted by the concurring judge in the direct appeal as he noted, "As to the consolidation of the charges for trial, I concur in the result based on how the parties framed and argued the issue on appeal." *Sumpter*, 313 P.3d 105 (Table), at *12. But, again, the Kansas Court of Appeals did not consider whether this challenge was more meritorious than the chosen strategy. Additionally, the Kansas Court of Appeals incorrectly decided that Sumpter was not prejudiced because it believed the full victims' testimonies would have been admitted in each of the separate trials.

A. By choosing to focus on the motion for consolidation and not severance, appellate counsel ignored a means of challenging the joinder that would have allowed the Kansas Court of Appeals to consider the prejudice to Sumpter and not just the similarity of the cases.

Appellate counsel's failure to challenge the denial of the motion to sever prevented Sumpter from successfully raising the prejudice that occurred when all three cases were tried together. The consolidation argument presented by appellate counsel only allowed the Court of Appeals to consider whether the trial court had abused its discretion when it found that the cases were of the same or similar character. By failing to argue severance, appellate counsel could not present to the Court of Appeals the "continuing duty of the trial court to grant a motion for severance to prevent prejudice and manifest injustice." *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008). Because of appellate counsel's error, the Court of Appeals could not consider any prejudice that the consolidation created as part of its analysis *Sumpter*, 313 P.3d at *3-6 (confining its analysis to whether the crimes were of the same or similar character). As the concurring opinion noted, this choice by appellate counsel had consequences: "As to the consolidation of the charges for trial, I concur in the result ***based on how the parties framed and argued the issue on appeal***." *Sumpter*, 313 P.3d at *12.

It was unreasonable for appellate counsel to leave out the severance argument. Even if this Court assumes that joinder was proper, as the trial and appellate courts found, the next step is to determine whether a severance should have been granted (either by motion or *sua sponte*). *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008) ("Nevertheless, for argument sake, assuming that one of the joinder requirements under K.S.A. 22–3202(1) was established, the trial court was under a continuing duty to grant a motion for severance to prevent prejudice and manifest injustice to the defendant.")

(internal quotation omitted). In reviewing a severance decision, the reviewing court considers whether "severance should have been ordered to prevent prejudice and manifest injustice to the defendant." *State v. Shaffer*, 229 Kan. 310, 312 (1981).

In order to ensure a fair trial, severance should occur when a defendant has shown there would be actual prejudice. *State v. Davis*, 277 Kan. 231, 239, 83 P.3d 182 (2004). A defendant can be prejudiced from the consolidation of cases for multiple reasons:

> (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964). "Prejudice may result from a possibility that the jury might use evidence of one crime to infer guilt on the other or that the jury might cumulate the evidence to find guilt on all crimes when it would not have found guilt if the crimes were considered separately." *Closs v. Leapley*, 18 F.3d 574, 578 (8th Cir.1994). If the jury would otherwise be unable to compartmentalize the evidence to each separate count, severance should be granted. *Bear Stops v. United States*, 204 F. Supp. 2d 1209, 1213 (D.S.D. 2002), *aff'd*, 339 F.3d 777 (8th Cir. 2003).

Due to appellate counsel's error in framing the problems with consolidation, the Kansas Court of Appeals was not permitted on direct appeal to consider the multiple forms of prejudice that occurred due to consolidation. Sumpter faced prejudice throughout the trial due to the trial court's decision not to sever the cases and its refusal to reconsider that decision as the prejudice became apparent. The prejudice started immediately just through the optics of having an African-American man accused of various sexual crimes against

four white women being considered by an all-white jury. At the voir dire, four potential jurors stated to the group that they would have a hard time considering Sumpter's claims given that there were four victims. (Trial Tr. (vol. 1), 132:5-16, 133:6-9, 194:1-4, 215:25-216:9, 217:11-19, 263:17-264:5, 268:16-269:7.) These candid remarks from potential jurors demonstrate how the multiple cases are seen as evidence that Sumpter had a propensity to commit a crime—an impermissible type of evidence under K.S.A. 60-455.

The consolidation of the cases also forced Sumpter to choose between his Fifth Amendment right to avoid self-incrimination and his Sixth and Fourteenth Amendment right to testify on his own behalf. Sumpter desired to testify about two of the cases (involving A.S.E., A.C.C., and A.R.P.) but wished to present a different defense in the case involving J.B. Sumpter believed that he had credibility over A.S.E. and wished to testify in 11-cr-1187 to bolster questions about her credibility and to explain why he had restrained her while driving. Sumpter also believed he needed to testify in 11-cr-1290 which involved A.C.C. and A.R.P. to bolster his credibility because that was the only case that involved the false statements to police. In deciding to testify to regain credibility vis-à-vis victims A.S.E., A.C.C., and A.R.P., Sumpter opened himself up to incredibly prejudicial lines of questioning in the case involving J.B. This very risk of prejudice is recognized as one of the factors to consider in deciding whether to sever consolidated cases. *State v. Howell*, 223 Kan. 282, 284, 573 P.2d 1003, 1004-05 (1977) ("Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence.") (quoting *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964)).

The joinder of the cases allowed the State to commingle evidence and use broad rhetoric to overcome weaknesses in all of the cases. In his closing statement, the prosecutor commingled facts to try and bolster the State's case and damage Sumpter's credibility in all of the cases. But as mentioned above, the credibility questions related to the false statements to police only called into question Sumpter's credibility in one of the cases, 11-cr-1290. That did not stop the prosecutor from generally averring that the jury should consider Sumpter's credibility in general: "Consider all of those mistruths, consider his entire lack of credibility." (Trial Tr. (vol. 5) 108:8-10, *see also* 78:10-80:5, 102:11-12, 103:12-13, 107:1-2, 107:23-108:10.)

The prosecutor further commingled evidence to prejudicial effect on other important points in the closing. Notably, the prosecutor stated that certain themes occurred in all cases even though the evidence did not support such statements. For example, the prosecutor stated, "You're going to hear this common theme in all of these, he talks about a sadness, he talks about something that's going on in his life that he's using to manipulate each of these women to try and get them to feel bad for him, to get them into an isolated place." (Trial Tr. (vol. 5) 66:1-6.) But, in fact, there was no evidence that in two of the four incidents—those involving J.B. and A.C.C.—that Sumpter had talked about sadness in his life.

Additionally, the prosecutor frequently attempted to bolster individual victim's testimony about the events by asking the jury to consider the other cases and improperly infer that the victim's version was more believable because of the evidence in the other cases:

- "[Y]ou saw her [A.C.C.] and you saw each of these women and you remember what they looked like and you'll start seeing the pattern that emerges with this defendant." (Trial Tr. (vol. 5) 69:14-17.)
- "Again, with Amber Claasen, she's isolated, his demeanor changed, he changed from being fine to going a little bit different, a lot different, in fact. Much like he did with Avonlea, his demeanor changed." (Trial Tr. (vol. 5) 72:19-23.)
- "He puts her [A.R.P.] to go into a further isolated place, where it turns out there were no video cameras. But he is again isolating these women, trying to get them alone, so he can commit his crimes against them." (Trial Tr. (vol. 5) 74:19-24.)

Given the State's willingness to conflate the cases, intermingle evidence, and urge conclusions based on propensity, the State never took its role in carefully separating the cases seriously. All of the circumstances demonstrate "a legitimate concern that the jury was unable to consider each charge separately on the evidence and law applicable to it." *Coburn*, 38 Kan. App. 2d at 1057.

In light of the demonstrable evidence of prejudice from trial, it was unreasonable for Sumpter's appellate counsel to argue improper joinder while ignoring the error on the related motions for severance. That failure likely made a difference in the outcome of the appeal. One justice explicitly called out the problem with how Sumpter's appellate counsel presented the consolidation argument. And the severance argument was the only way for Sumpter's appellate counsel to highlight the prejudicial nature of the proceedings.

B. The Kansas Court of Appeals Applied the Wrong Legal Standard when Assessing Ineffectiveness of Appellate Counsel.

First, the Kansas Court of Appeals unreasonably applied clearly established federal law. Even though the court "correctly identifie[d] the governing legal rule," it "unreasonably" applied *Strickland* "to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407–08, 411. The Kansas Court of Appeals recognized the "dangers in admitting other crimes evidence include portraying the defendant as a chronic lawbreaker deserving of punishment for that reason alone or supporting the defendant's guilt through a patent of alleged wrongdoing even though the evidence of any one instance may be weak." *Sumpter*, 2019 WL 257974, at *5 (citing *State v. Gunby*, 282 Kan. 39, 48-49 (Kan. 2006)). The Kansas Court of Appeals appeared to recognize that Sumpter faced this very prejudice at the combined trial, but it justified that prejudice by finding that this same prejudice would have existed at individual trials. However, the Kansas Court of Appeals unreasonably considered the prejudice from individual trials, and ignored additional types of prejudice—beyond just the prejudice of multiple victims testifying together—in assessing the *Strickland* standard.

Most importantly, there was no evidence on the record that the State would simply proffer the same testimony at individual trials—nor did the State ever make this argument. And the trial court never indicated (either at trial or in the habeas proceeding) that it would admit such victim testimony in full as propensity evidence. The admission of previous crimes evidence may be allowed under 60-455(d), but trial courts still weigh whether to admit such testimony and in what form under the factors laid out by this Court in *State v. Bowen*, 299 Kan. 339, 350-51 (2014). Here, there were many factors that weighed against the relevance or necessity of the full trial testimony of additional victims. For example,

there was no question of identity at trial in any of the cases. There were no allegations that the crimes were part of a connected incident. Moreover, while the Court of Appeals recognized the testimony of A.P. likely would be inadmissible at the other individual trials, it apparently gives no weight to this obvious improvement for Sumpter, who would have faced not four, but three, victims' testimony at these trials. *Sumpter*, 2019 WL 257974, at *10.

The Court of Appeals also ignored the availability of less prejudicial evidence of the previous crimes than full victim testimony, a required consideration under *Bowen*. 299 Kan. at 350. After one trial, the less prejudicial and time-consuming means to admit propensity evidence would have been a stipulation of the previous conviction or admission of the journal entry. *Bowen*, 299 Kan. at 350-51; *U.S. v. Sturm*, 673 F.3d 1274, 1285 (10th Cir. 2012) (noting government proposal to reduce prejudice by using a stipulation rather than admitting direct evidence of prior crime) (cited in *State v. Prine*, 297 Kan. 460, 478 (2013)). Sumpter and the State could have also come to a stipulation or admission to avoid mini-trials on uncharged crimes. Evidence of uncharged previous crimes requires an evidentiary hearing to determine whether the incident met the preponderance of the evidence standard, and then potentially a mini-trial on the incident if the trial court allowed the victim to testify. *U.S. v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (cited in *Prine*, 297 Kan. at 478). Not only would full victim testimony likely contribute "to an improperly-based jury verdict," such mini-trials would "distract the jury" and would be time consuming. *Bowen*, 299 Kan. 350. Accordingly, it is unlikely the evidence would have been admitted in the form imagined by the Court of Appeals.

Importantly, Sumpter would have retained his right to testify in some but not all cases as it would be unnecessary to fully counter victim testimony. Finally, individual trials would have prevented the prosecutor from conflating the cases and improperly intermingling and confusing the evidence of the four cases in his closing—prejudice that the Court of Appeals completely ignored in its opinion.

Because the failure to sever was unduly prejudicial, Sumpter's counsel was constitutionally deficient for failing to challenge the issue on appeal. Sumpter's appellate counsel argued that the consolidation was in error (under KSA 22-3203), however, she failed to properly challenge the court's error on the severance motion (under K.S.A. 22-3204). The distinction is important because it precluded her from presenting and arguing the manifest injustice and prejudice caused by the joinder, instead of arguing the merits of whether the cases were substantially similar. Had appellate counsel raised the severance issue on direct appeal, the Court would have reviewed "whether severance should have been ordered to prevent prejudice and manifest injustice to the defendant." *Shaffer,* 624 P.2d at 443.

IV. SUMPTER WAS DENIED A FAIR TRIAL DUE TO EGREGIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT AND HIS COUNSELS' FAILURE TO CHALLENGE THE MISCONDUCT

The Kansas Court of Appeals misapplied *Strickland* to Sumpter's claim that his counsel was constitutionally deficient because they failed to raise some of the most egregious examples of repeated prosecutorial misconduct. In order to determine if his representation on appeal was constitutionally deficient, the Kansas Court of Appeals needed to thoughtfully examine the merits of the omitted issue. *Banks v. Reynolds,* 54 F.3d 1508, 1515 (10th Cir. 1995) (concluding that "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though

counsel may have presented strong but unsuccessful claims on appeal") (citation omitted). Instead, the Kansas Court of Appeals dismissed the prosecutor's errors as a "part of trial practice" based upon an unreasonable determination of the facts in light of the evidence presented and an unreasonable application of clearly established federal law. But these incidences of prosecutorial misconduct were egregious, not harmless, and should have been raised by appellate counsel.

The Kansas Court of Appeals recognized two errors made during the prosecutor's closing: (1) the prosecutor, Mr. Edwards, incorrectly categorized the mens rea of attempted rape by claiming the State only had to show Sumpter "intended to have sex" with the victim; and (2) the prosecutor improperly characterized Sumpter's *pro se* pretrial motion as an admission of guilt. *Sumpter*, 2019 WL 257974, at *12-13. These errors amounted to prosecutorial misconduct, which should have been challenged by counsel, and which denied Sumpter a fair trial and appeal.

A. Standard

On federal habeas review under *Strickland*, both Kansas and federal law on prosecutorial misconduct is important and relevant. To determine whether counsels' failures to raise an argument was deficient and prejudicial, this court should consider both federal and Kansas law that would have controlled a challenge to prosecutorial misconduct. And, to determine whether the Kansas Court of Appeals misapplied or ignored controlling established precedent, this court should look to *Strickland* and its application by federal courts in this context.

To determine whether a prosecutor's argument during closing amounts to prosecutorial misconduct, Kansas courts:

(1) Whether the misconduct was gross and flagrant;

> (2) whether the misconduct showed ill will on the prosecutor's part; and
>
> (3) whether the evidence was of such direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. Moreover, the third factor may not override the first two factors unless the harmless error tests of both K.S.A. 60-261 [refusal to grant a new trial is inconsistent with substantial justice] and *Chapman v. California*, 386 U.S. 18, [22-24,] 17 L. Ed.2d 705, 87 S. Ct. 824 (1967) [conclusion beyond a reasonable doubt that the error…changed the result of the trial], have been met.

State v. McReynolds, 288 Kan. 318, 323 (Kan. 2009); *see also State v. Ortega*, 300 Kan. 761, 782 (Kan. 2014). Emphasizing and repeating improper points on closing that are determinative of a defendant's requisite intent constitute prosecutorial misconduct under Kansas law. *Ortega*, 300 Kan. at 782. In *Ortega*, the State charged defendant Ortega with attempted aggravated interference with parental custody and disorderly conduct, and Ortega asserted the defense of ignorance or mistake, arguing that she could not have the requisite intent for the crime because she did not know that she could not contact her child or take her out of school. *Id.* at 780. In closing, the prosecutor told the jury twice that it should disregard witness testimony on whether Ortega was on notice of a custody hearing because it was irrelevant. *Id.* at 780.

The Supreme Court of Kansas determined that the prosecutor's misstatements constituted prosecutorial misconduct, reasoning that the prosecutor's statements were gross and flagrant, motivated by ill-will, and prejudicial, which denied Ortega a fair trial. *Id.* First, the court noted that if a prosecutor's misstatement are repeated, or if they are violations of a well-established rule, or a rule designed to protect a constitutional right, the prosecutor's misconduct is gross and flagrant. *Id.* at 782. The court found that the prosecutor's statements impacted the jury's determination of Ortega's requisite intent and impended Ortega's constitutional right to present her defense. *Id.* Next, the court found

the two misstatements to demonstrate the prosecutor's ill-will as reflected through "deliberate and repeated misconduct." *Id.* (citation omitted). Specifically, the court was concerned with the prosecutor's emphasis that the jury should not consider Ortega's notice of her custody hearing in determining her guilt, stating "[e]ncouraging the jury to remember an improper statement of law suggests deliberate misconduct aimed at undermining the defense." *Id.* Lastly, the court ruled that the statements were prejudicial because they went to the heart of Ortega's defense, in conjunction with the trial court's failure to instruct the jury on the law. *Id.*

As federal courts—including the Supreme Court—have recognized:

> Misrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.' For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. This is particularly true when a prosecutor misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty.

Washington v. Hofbauer, 228 F.3d 689, 700 (6th Cir. 2000) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974), citing *Berger v. United States*, 295 U.S. 78, 84 (1935)). Additionally, misrepresentations of the law also amount to prosecutorial misconduct that can require habeas relief under Section 2254. *Hooks v. Workman*, 606 F.3d 715, 744 (10th Cir. 2010) (noting that the prosecutor's statements on the jury's role in sentencing was "wholly inconsistent with [state] law"). "The prosecutor has a duty not to misrepresent the law and not to misstate the jury's role." *Hung Thanh Le v. Mullin*, 311 F.3d 1002, 1022 (10th Cir. 2002).

The benchmark question for habeas relief in the misconduct realm is whether "a prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Douglas v. Workman*, 560 F.3d 1156, 1177 (10th Cir.

2009) (quoting *Donnelly*, 416 U.S. at 643). In assessing whether the misstatements amounted to a due process violation, the Supreme Court and the Tenth Circuit weigh several factors at issue here: whether (1) "the prosecutor's argument . . . manipulate[d] or misstate[d] the evidence," (2) "it impacte[d] other specific rights of the accused such as the right to counsel or the right to remain silent," (3) "the objectionable content was invited by or responsive to the opening summation of the defense," and (4) "[t]he weight of the evidence against petitioner was heavy." *Douglas*, 560 F.3d at 1177 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986)).

B. Prosecutorial Misconduct from Incorrectly Relaying State's Burden on Intent Element of Attempted Rape

First, the Kansas Court of Appeals recognized that the prosecutor made misstatements of the law to the jury multiple times regarding the State's burden of proof on the intent element. Nonetheless, the court incorrectly concluded that the misstatements did not rise to the level of prosecutorial misconduct based on a factual error. *Sumpter*, 2019 WL 257974, at *12-13. The Kansas Court of Appeals incorrectly applied *Strickland* to the facts of this error as it ignored the fact that this was not a mere slip of the tongue and was never corrected by the prosecutor, Sumpter's trial counsel, or the Court.

Kansas law governing attempted rape required the State to prove that Sumpter committed some act in furtherance of, and with the intent to, commit rape, *i.e.*, engage in sexual intercourse without her consent. *State v. Martinez*, 290 Kan. 992, 236 P.3d 418, (Kan. 2010); K.S.A. 21-5503. The prosecutor, however, argued to the jury that he only needed to prove that Sumpter had sex with the victim. He stated:

> But clearly [Sumpter] told you on the stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly [Sumpter] intended to have sex. I don't have to prove rape occurred. I have to prove he took her—or I'm sorry, he confined her with the intent to commit sex, commit rape

> against her. Clearly that was his intent, he told you even yesterday that's what he intended to do.

(Trial Tr. (vol. 5) 107.) The record reflects that the prosecutor repeatedly stated that Mr. Sumpter's intent to have sex with the victims was the threshold basis of proof he needed to convict Sumpter of attempted rape. Though the prosecutor states—"I have to prove he took her—or I'm sorry, he confined her with the intent to commit sex, commit rape against her"—his subsequent sentence eliminates again emphasizes this misstatement. (Trial Tr. (vol. 5) 107.) Contrary to the Court of Appeals opinion, an examination of the transcript reveals that the prosecutor did not "correct" himself; instead, his statement actually repeats the erroneous statement of law by making an intent to rape the victim synonymous with an intent to have sex with the victim

The prosecutor then repeatedly told the jury that he had met that element with Mr. Sumpter's testimony about wanting to have sex with J.B.:

- "And he told you what his intent was with Jessica. He minimizes it and says well, I didn't go into the car with the intent to have sex with her. But clearly he told you on the stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly he intended to have sex." (Trial Tr. (vol. 5) 105:22-106:3.)
- "Clearly that was his intent, he told you even yesterday that's what he intended to do," again refers to Mr. Sumpter's intent to have sex with the victim. (Trial Tr. (vol. 5) 106:7-9.)

But this evidence does not support the actual instruction—only the deliberately lessened burden set out by the prosecutor.

In contrast, not once during the trial did the jury hear Sumpter testify that he intended to rape anyone. (*See,* Trial Tr. (vol. 4) 72–147, at 126 ("I definitely know I didn't try to rape anyone); at 86-87 ("Q: [was] it your intent to touch her in a sexual way by overcoming her with force or fear? A: No").) The jury did, however, repeatedly hear that Sumpter intended to have sex with the women. (*See, e.g.*, Trial Tr. (vol. 4) 88 ("Q: you guys had made arrangements to hook up? A: Yes, ma'am"); 139 (Q: "your testimony is that she then became amorous towards you, wanted to engage in sexual relations with you, right? A: After we was in the car, yes"); 139 ("Well, she came onto me and made it feel like she—it made it feel like we was both agreeing upon it…"); 139 ("Q: So while you were in the car you did have an intention to have sexual intercourse with Jessica right? A: After, after she came onto me, yeah").) Thus, the prosecutor again mischaracterized the State's burden of proof as an intent to have sex, rather than an intent to rape, as required by statute, when he referred to Sumpter's testimony that he intended to have sex with the women. Further, the only way to mitigate the prosecutor's statements would have been to give a jury instruction on the correct standard of law, however, the jury instructions provided by the court did not define the intent element of attempted rape, therefore, the jury was left with the prosecutor's incorrect characterization.

But the State had to do more than prove that Sumpter intended to have sex with J.B. at some point during their interaction; they had to prove that he intended to have sex with J.B. *without her consent*. The prosecutor's deliberately misleading guidance to the jurors on what the State had to show to meet the burdens outlined in the jury instructions went unchallenged and provided the jury with a lessened burden for the State to meet—a burden that conveniently aligned with the testimony given by Sumpter. Not only was the

prosecution's interpretation of the intent element on attempted rape unchallenged by Sumpter's appellate attorney, but Sumpter's trial attorney actually compounded the injury by repeating the incorrect burden in her closing argument. She told the jury:

> [T]he state has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her. Again, it's not what she thought was gonna happen, it's what was in Mr. Sumpter's mind when he was in the car with her. Were his intentions to have sexual intercourse with her? That's what they have to prove. If they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping.

(Trial Tr. (vol. 5) 93:12-21.) This additional legal mistake by trial counsel further emphasizes the prejudice Sumpter faced. As the Kansas Supreme Court has held, misstatement of the law by the prosecutor can amount to prosecutorial misconduct. *State v. McCullough*, 293 Kan. 970, 988-89 (2012); *State v. Phillips*, 295 Kan. 929, 945 (2012). Emphasizing and repeating improper points on closing that are determinative of a defendant's requisite intent constitute prosecutorial misconduct under Kansas law. *Ortega*, 300 Kan. at 782.

Similar to *Ortega*, nothing in Sumpter's trial clearly suggested that the State needed to show an intent to rape to convict Sumpter. On multiple occasions in closing, as discussed above, the prosecutor stated that he only needed to show an attempt to have sex, even referencing Sumpter's testimony regarding his intent to have sex with the women. This repetition demonstrated that the prosecutor was "[e]ncouraging the jury to remember an improper statement of law." *Ortega*, 300 Kan. at 782. The repeated reference paired with how the prosecutor then selected testimony of an intent to have sex shows that this was deliberate and amounted to ill-will. *Id.* As in *Ortega*, it is not clear that the jury applied the correct legal standard in assessing whether Sumpter had the requisite intent to commit the crime. Moreover, such false statements of law—especially uncorrected—also violated

the prosecutor's professional responsibility of candor toward the tribunal. Kan. R. P.R. 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

This prosecutorial misconduct amounted to reversible error that should have been challenged at the trial court and raised on appeal because the State cannot convict a defendant if it fails to show that the defendant had the required mental state when committing the crime. Accordingly, Sumpter's attorneys were constitutionally ineffective for failing to challenge this misconduct. And, the Kansas Court of Appeals unreasonably applied the *Strickland* prejudice test by ignoring the repeated misstatement and mischaracterizing the repeated misstatements of the prosecutor. *Hooks*, 606 F.3d at 744 (holding that prosecutorial misconduct of repeated misstatements of the law, uncorrected by jury instructions demands 2254 relief).

C. Prosecutor's Misconduct of Repeated Theme of Sumpter's Purported Admission of Guilt

Second, Sumpter's attorneys were constitutionally deficient because she failed to challenge the prosecutor's mischaracterization of his pre-trial motion as an admission of guilt. In his pretrial motion, Sumpter argued that his bond should be reduced because he may only be found guilty of misdemeanors based on the testimony at the preliminary hearing. *Sumpter*, 2019 WL 257974, at *12. As noted by Kansas Court of Appeals, Sumpter "neither admitted to committing misdemeanors nor conceded the accuracy of the preliminary hearing evidence." *Id.* Nonetheless, the prosecutor characterized the motion as an admission of guilt. *Id.* The State's characterization follows:

> And I ask you, do you believe him when he said that I didn't know they were lesser included crimes until today? When back in February, the

> evidence is, he wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense?

(Trial Tr. (vol. 5) 81.) The Kansas Court of Appeals found that Mr. Edwards mischaracterized the motion, which amounted to error, but stated that nothing suggested that this was a part of the prosecutor's theme or "shift[ed] the tide" in the case. *Sumpter*, 2019 WL 257974, at *12. The Court of Appeals erred because the prosecutor raised this issue at least five times during his closing argument. (Trial Tr. (vol. 5) 64:12-14 ("So what the defendant's here asking you to do is find him guilty of the lesser included crimes."); *id.* at 80:14-18 (arguing that "[Sumpter] wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense [sic]"); *id.* at 80:5-11 ("[H]e comes in here to court . . . and he is telling you . . . all I did were the lesser included offenses."); *id.* at 101:1-5 ("But they so want you to just move past the greaters and get down to those lesser and just find him guilty of those because that's easy, he's admitted those, why don't we just do that and go home.").) Indeed, this misrepresentation of the *pro se* pretrial motion was part of the prosecutor's final summation in his closing, his rebuttal argument, and his request for the jury to automatically find Sumpter guilty of all lesser-included crimes even though, as the Court of Appeals recognized, Sumpter disputed those lesser-included offenses as to at least three victims (J.B., A.E., and A.P.). (Trial Tr. (vol. 5) 64, 80-1, 101.) Such a repeated and emphasized theme based on prosecutorial error amounts to misconduct in Kansas that should have been challenged. *Ortega*, 300 Kan. at 782.

This was an unreasonable determination of the facts in light of the evidence presented, especially in light of the prosecutor's proceeding characterization of his burden of proof. As such, the Kansas Court of Appeals unreasonably applied the *Strickland* test

for prejudice. As noted earlier, a prosecutor's emphasis on improper points amounts to prosecutorial misconduct. *Ortega,* 300 Kan. at 782. This misrepresentation of facts never admitted into evidence is particularly prejudicial and likely had a profound impact on the fairness of Sumpter's trial. *Washington,* 228 F.3d at 700 (6th Cir. 2000) (citing *Donnelly*, 416 U.S. at 646; *Berger v,* 295 U.S. at 84). Counsels' failure to challenge this prosecutorial misconduct at trial and on appeal was deficient and denied Sumpter a fair trial.

D. The Kansas Court of Appeals Unreasonably Applied Controlling Law on Prosecutorial Misconduct and Ineffective Assistance

Sumpter's fundamental right to due process and a fair trial was compromised multiple times—when his own counsel mischaracterized the law to the jury, when the prosecutor mischaracterized the law and the facts to the jury, and when his counsel failed to challenge any instances of prosecutorial misconduct on appeal. *See Douglas*, 560 F.3d at 1177 (assessing whether "a prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'") (quoting *Donnelly*, 416 U.S. at 643). In assessing whether the misstatements amounted to a due process violation, the Supreme Court and the Tenth Circuit weigh several factors at issue here: whether (1) "the prosecutor's argument . . . manipulate[d] or misstate[d] the evidence," (2) "it impacte[d] other specific rights of the accused such as the right to counsel or the right to remain silent," (3) "the objectionable content was invited by or responsive to the opening summation of the defense," and (4) "[t]he weight of the evidence against petitioner was heavy." *Douglas*, 560 F.3d at 1177 (quoting *Darden v. Wainwright,* 477 U.S. 168, 181-82 (1986)). The multiple misstatements of law and fact made to the jury, in conjunction with the court's failure to correct these misstatements through a jury instruction, and counsel's failure to

bring these issues on appeal made the trial fundamentally unfair and eliminated any change of genuine adversarial testing of the State's case.

The Kansas Court of Appeals misapplied *Strickland* based upon unreasonable determination of the facts in light of the evidence presented and an unreasonable application of well-established federal law. It has long been established in federal jurisprudence that counsel's deficiencies in failure to address to official misconduct are violations of a defendant's federal constitutional right to due process. *Washington*, 228 F.3d at 703 ("The prosecution's tactics and challenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction, yet [trial counsel] sat silent. At the most pivotal moments, we conclude, his silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy."). Such misconduct is flagrant and demanding habeas relief when it is repeated multiple times, deliberately made as part of a theme, and done to bolster a victim's testimony. *Washington*, 228 F.3d at 709. Thus, federal law should have guided the court to find that Sumpter was denied a fair trial and his counsels' failure to challenge this miconduct constituted ineffective assistance of counsel.

Failure to bring reversible error on appeal falls below an objective standard of reasonableness. These instances of prosecutorial misconduct should have been challenged at trial and presented on appeal. These additional instances were stronger instances of prosecutorial misconduct than those that were actually argued. Moreover, these additional examples could have bolstered the cumulative effect of all of the combined prosecutorial misconduct. Therefore, counsel had available all information necessary to raise

prosecutorial misconduct and by failing to do so, her representation fell below an objective standard of reasonableness.

V. DUE TO TRIAL COUNSEL'S VIOLATION OF HER DUTY OF LOYALTY AND CONTINUATIONS WITHOUT CONSENT, SUMPTER'S STATUTORY RIGHT TO SPEEDY TRIAL WAS VIOLATED.

Sumpter was denied his statutory right to a speedy trial due to his trial counsel's actions and inactions. Under K.S.A. 22-3402(1), "[i]f any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged." All three of the cases were heard together for the preliminary hearing on August 25, 2011. Sumpter was advised by his trial counsel to waive his arraignment and that his speedy trial date would begin that day. Sumpter was then arraigned and his trial date was originally set for October 17, 2011. But instead Sumpter's trial occurred 100 days after his arraignment on March 12, 2012. While there were three continuances on the docket that were recorded as taken by the defendant, Sumpter was not aware of these continuances until after the occurred and did not consent to or desire any continuance. He was not present or able to consent to these continuances. It is not clear why the continuances were taken because no motions were filed and no record was taken on the continuance determination. From October 17, 2012, onward, Sumpter was essentially being held on consolidated charges and his speedy trial clock should have run 90-days from October 17.

Trial counsel's continuances amounted to ineffective assistance as they violated the duty of loyalty to her client and created a potential conflict given her duties to the court. "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid

conflicts of interest." *Strickland*, 466 U.S. at 688. While continuances attributable to a defendant do not normally count towards the State's time, Sumpter was not informed of the continuances and did not consent to them. As such, the continuances were not actually attributable to Sumpter. Trial counsel's performance amounts to a breach of the duty of loyalty to Sumpter because her actions were taken for her own interests and protecting his speedy trial rights would have meant admitting her error—a conflict of interest.

This ineffectiveness had implications for his right to a speedy trial and created a situation where Sumpter felt he needed to file a *pro se* bail motion with the Court because he had not heard from counsel. *Cf. Sola-Morales v. State*, 300 Kan. 875, 891-99 (2014) (holding that an evidentiary hearing was required where counsel had lied to defendant about continuances which resulted in the defendant filing a *pro se* motion). As is discussed in the prosecutorial misconduct section, that letter-motion was then used to prejudicial effect by the State at trial. Accordingly, trial counsel's continuations without his consent prevented him effectuating his speedy trial rights and created an impermissible conflict of interest.

The Kansas Court of Appeals unreasonably applied constitutional law on this claim as well. The court only analyzed whether counsel's continuances should be attributed to Sumpter under the current statute. *Sumpter*, 2019 WL 257974, at *13. In so doing, the court completely ignored Sumpter's argument that his counsel had violated her duty of loyalty to him. This failure meant that the Kansas Court of Appeals did not even consider the Supreme Court's admonition that a violation of the duty of loyalty is one of the deficiencies by counsel that is presumptively prejudicial. *Strickland*, 466 U.S. at 692. *De*

novo review is required by this Court because of the unreasonable application of established constitutional law under *Strickland* on this challenge as well.

VI. THE COMPOSITION OF THE JURY VENIRE DENIED SUMPTER HIS CONSTITUTIONAL RIGHTS.

The Kansas Court of Appeals failed to apply clearly established federal law when it concluded that Sumpter was not entitled to relief on his fair cross-section claim. See *Sumpter*, 2019 WL 257974, at *14. The Court of Appeals summarily concluded that Sumpter failed to present evidence that African-Americans appear in venires disproportionately below their percentage in the community generally due to systemic exclusion in the jury selecting process. But the Kansas Court of Appeals ignored the fact that Sumpter had been denied his ability to investigate or present the evidence supporting an unfair jury venire through the ineffective assistance of counsel. Indeed, during the post-conviction proceedings, Sumpter had repeatedly asked for opportunities to analyze this data to demonstrate prejudice.

The Supreme Court "has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). A defendant claiming a violation of the Sixth Amendment's fair cross-section requirement must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (citing *Duren v. Missouri*, 439 U.S. at 364).

In denying Sumpter's petition, the Court of Appeals failed to acknowledge that Sumpter requested discovery on venires in order to conduct a full statistical analysis. See Appellant's Br. at 46 n.6. And, Sumpter outlined the ways African Americans would be underrepresented in the venire given the demographics in Sedgwick County in both his petition and on appeal. African-Americans are a distinctive group for Sixth Amendment purposes. *Accord Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (noting that the Court had previously held that African-Americans were properly designated as a distinctive group). Unfortunately, African-Americans are under-represented in Sedgwick County venires. At Sumpter's jury trial, there were no African-Americans in his venire even though African-Americans make up approximately 9.3% of the county's population.[8] This underrepresentation is likely the result of systematic features in the jury selection process.[9] The manner in which jury notifications are sent, the excuses that are accepted, and the manner in which those reasons are verified all can systemically affect the racial composition of the jury. For example, if the court regularly excuses jurors that cannot find a babysitter, African-Americans, who are overrepresented as single parents in Sedgwick County, would be underrepresented in the venire. In addition, previous studies of similar methods (using voting records supplemented by drivers' licenses) have shown that the method can actually increase the underrepresentation of African-Americans.[10]

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[8] This does not include the individuals that stated that they were two or more races on the census. In Sedgwick County, 1.2% of individuals identified as white and African-American. *See* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0500000US20173.

[9] Sumpter requested that the Court provide information on the racial make-up of Sedgwick County venires in 2012 to allow for a full statistical analysis of this underrepresentation. Sumpter also requested an evidentiary hearing to set out the process by which the District Court of Sedgwick County selects venires, the underrepresentation of African-Americans in venires, and why this underrepresentation is systemic. *See Berghuis*, 559 U.S. at 322 (noting that the state appellate court ordered the trial court to conduct an evidentiary hearing on the fair-cross-section claim).

[10] Ted C. Newman, *Fair Cross-Sections and Good Intentions: Representation in Federal Juries*, 18 JUSTICE SYSTEM J. 211, 226 (1996) (noting that a study of the U.S. District Court for the Northern District of Illinois

These allegations, coupled with a complete absence of African-American venire members in a county with an almost 10% African-American population, created a substantial claim that required at least an evidentiary hearing to evaluate the Sixth Amendment violation. Accordingly, the Kansas Court of Appeals unreasonably applied established constitutional law.

VII. SUMPTER'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING SENTENCING.

A. The Offender Registry and Lifetime Post-Release Supervision Sentencing Requirements are Unconstitutional.

Sumpter's sentence included a requirement that he register on the offender registry for his lifetime, K.S.A. § 22-4906(d), and be subject to a lifetime post-release supervision under K.S.A. § 22-3717(d)(1)(G). These requirements violate Sumpter's U.S. and Kansas constitutional rights to due process, equal protection of the law, and cruel and unusual punishment. Sumpter is aware that similar challenges to the Kansas Sex Offender Registration Act ("KSORA") and the lifetime post-release supervision have been previously rejected. *State v. Wilkinson*, 269 Kan. 603 (2000); *State v. Scott*, 265 Kan. 1 (1998); *State v. Snelling*, 266 Kan. 986 (1999); *State v. Mossman*, 294 Kan. 901 (2012); *State v. Cameron*, 294 Kan. 884 (2012) (same); *cf. Matter of Hay*, 263 Kan. 822, 833 (1998). But those cases relied on the mistaken assumption that a registry would benefit public safety due to the belief that sexual offenders were habitual offenders and posed greater risks of recidivism. *Wilkinson*, 269 Kan. at 609; *Scott*, 265 Kan. at 11. But the very justification for unparalleled treatment of a certain class of offenders is completely

found that supplementing voting records with drivers licenses information would actually increase the underrepresentation of African-Americans in the jury wheel and stating that based on this information the District decided not to change its jury plan).

disproven by the evidence.[11] Sumpter encourages this Court to hold unconstitutional the KSORA and the lifetime post-release supervision in light of the faulty assumptions on which it is based.

B. The Trial Court Violated Sumpter's Sixth and Fourteenth Amendment Rights under *Apprendi*.

The trial court sentenced Sumpter to an enhanced sentence based upon his prior criminal history and aggravating factors. Because the State was not required to prove the existence of these sentencing enhancement factors beyond a reasonable doubt, Sumpter's Sixth and Fourteenth Amendment Rights were violated. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Sumpter is aware that the Kansas Supreme Court has rejected this application of *Apprendi*, *see State v. Ivory*, 273 Kan. 44 (2002); *State v. Johnson*, 286 Kan. 824 (2008), but he contends that these cases were wrongly decided and warrant federal review.

2254(a) ARGUMENT AND REQUEST FOR RELIEF

Having shown that the Kansas Court of Appeals acted contrary to clearly established federal law and unreasonably applied clearly established federal law, Sumpter's claims survive the threshold review set out in § 2254(d)(1) and (2). The merits of his ineffective assistance of counsel, due process, and right to a representative jury claims must therefore be reviewed under § 2254(a) *de novo*, without any deference to the state courts' decision-making in order to determine whether a constitutional violation has occurred. *See Phillips v. Workman*, 604 F.3d 1202, 1213 (10th Cir. 2010).

[11] Dr. Mark Kielsgard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247, 256 (2014) ("Recidivism rates for sex offenders are universally lower than other criminal offenders.").

Sumpter hereby incorporates the arguments made above regarding the merits of his claims of ineffective assistance of counsel, due process, and right to a representative jury. On the basis of those arguments, Sumpter respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. Alternatively, Sumpter requests that this Court conduct an evidentiary hearing on both claims.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

On this 8th day of May, 2020, the undersigned hereby certifies that she electronically filed the foregoing with the Clerk of the Court by using CM/ECF which will send a notice of electronic filing to the following:

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Court: Supreme Court

Case Number: 117732

Case Title: TIMOTHY SUMPTER, APPELLANT,
V.
STATE OF KANSAS, APPELLEE.

Type: Corrected Petition For Review By Appellant, Timothy Sumpter

Considered by the Court and denied.

SO ORDERED.

for Lawton R. Nuss, Chief Justice

No. 17-117732-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

TIMOTHY SUMPTER,

Plaintiff-Appellant,

v.

STATE OF KANSAS,

Defendant-Appellee.

CORRECTED PETITION FOR REVIEW BY THE SUPREME COURT

Appeal from the District Court of Sedgwick County,
Eighteenth Judicial District
The Honorable Jeffrey L. Syrios, Judge,
District Court Case No. 2016-cv-000161-HC

Respectfully submitted:

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ATTORNEYS FOR TIMOTHY SUMPTER
PETITIONER

PRAYER FOR REVIEW

Timothy Sumpter respectfully requests that this Court review the unpublished opinion of the Court of Appeals affirming the District Court's decision to deny his petition for habeas corpus relief under Kansas Statute 60-1507. Upon review, Sumpter asks that this Court reverse the Court of Appeals and remand the case to the District Court with instructions to grant his petition or hold an evidentiary hearing.

This is one of the rare cases which implicates all four statutory reasons for review. K.S.A. 20-3018(b). The issues raised are of tremendous public importance. "Habeas corpus . . . actions are of fundamental importance . . . in our constitutional scheme because they directly protect our most valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (internal quotation omitted). Enshrined in both the federal and our Kansas constitution is the notion that the criminal justice system only works to ensure fair and trusted decisions when those facing criminal sanctions receive effective defense counsel to put the prosecution's case to the "crucible of meaningful adversarial testing." *U.S. v. Cronic*, 466 U.S. 648, 656 (1984). But at every critical stage of his case, from pre-trial proceedings to trial to appeal, Sumpter was denied the right to an effective attorney meaningfully testing the State's case.

The Court of Appeals ignored multiple controlling precedents of this Court in order to affirm the denial of Sumpter's petition for habeas corpus. These errors occurred in four areas related to the ineffective assistance of Sumpter's trial and appellate counsel: (1) failure to understand Kansas kidnapping jurisprudence; (2) failure to raise the egregious instances of prosecutorial misconduct; (3) failure to challenge the denial the severance motion and the trial court's continuing duty to sever; and (4) failure to challenge the venire as not representative of the jury pool.

I. Kidnapping

Most egregiously, the Court of Appeals erred by applying a sufficiency of evidence review to determine whether Sumpter was affected by his counsel's failure to understand Kansas kidnapping jurisprudence, including ignorance of the foundational opinion in *State v. Buggs*, 219 Kan. 203 (1976). The Court of Appeals ignored this Court's holding that defense counsel's failure to understand the law is not only deficient but *per se* prejudicial because such a failure affects every strategic choice that counsel makes at trial. *State v. Davis*, 277 Kan. 309, 329 (2004); *see also State v. Jones*, 290 Kan. 373, 381 (2010) (holding that even a guilty verdict at trial is insufficient to remedy trial counsel's failure to elicit evidence or raise legal issues that would have put him in a better posture at trial). Despite four pages of briefing on *Davis*, *Jones*, and similar holdings in the United States Supreme Court, the Court of Appeals did not mention or justify its decision to ignore this standard for prejudice, which must be applied when ignorance of the law is at issue.

Second, even though counsel failed to develop a record to present an argument under *Buggs*, the Court of Appeals acknowledged that the facts here make this case different "from more common confinement scenarios found to be kidnapping" by the Kansas Supreme Court. Court of Appeals (COA) Op. at 10. Not "common" is, here, a euphemism for unprecedented, as this Court has never found a "confinement by force" that involved no force, a voluntary choice by the victim, and—if any—an incidental confinement of, at most, minutes. *See State v. Weigel*, 228 Kan. 194, (1980) (COA Op. at 10) (kidnapping existed where defendant placed employees in bank vault and attempted to lock it in order to facilitate flight); *State v. Dunn*, 223 Kan. 545, 547 (1978) (COA Op. at 10) (holding hostages for five hours to facilitate an aggravated escape from prison constituted kidnapping); *State v. Zamora*, 247 Kan. 684, 696 (1990) (confinement met the *Buggs* standard because the defendant gagged the victim with a rope, tied her hands

behind her head, and tied one leg to the bed before he raped her three times and then he further confined her by tying her to him, unplugging the phone, blocking the door, and holding her for approximately seven hours); *State v. Richmond*, 250 Kan. 375, 378 (1992) (tying up the victim during and after the commission of a rape for approximately one hour and using a pillow to blindfold her was a confinement that was not incidental to the underlying crime); *State v. Hays*, 256 Kan. 48, 63 (1994) (holding the victim down with a crowbar while committing the underlying crime had no independent significance); *State v. Cabral*, 228 Kan. 741, 744-45 (1980) (reversing conviction because some confinement "is a necessary part of the force required" "[w]hen the rape occurs in an automobile").

Not only is the Court of Appeals' interpretation of "confinement by force" completely out of step with the opinions of this Court, it also stretches the statute to eliminate any distinction about what makes kidnapping a separate, distinct, and substantial crime. If allowed to stand, the kidnapping statute as interpreted by the Court of Appeals would be void for vagueness, as it would provide no guidance or check against prosecutorial abuse. *City of Wichita v. Wallace*, 246 Kan. 253, 258-59 (1990) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

II. Prosecutorial misconduct

The Court of Appeals recognized that two errors occurred during the prosecutor's closing but incorrectly decided that these errors did not rise to the level of misconduct: (1) improperly characterizing Sumpter's *pro se* pretrial motion as an admission of guilt; (2) incorrectly relaying the intent element of attempted rape by claiming the State only had to show Sumpter "intended to have sex" with the victim. COA Op. at 23-24. On the first, the Court of Appeals ignored that

this was one of the key themes in the prosecutor's closing. Such a repeated and emphasized theme based on prosecutorial error amounts to misconduct. *State v. Ortega*, 300 Kan. 761, 782 (2014) (holding that prosecutorial misconduct occurs when the prosecutor "emphasiz[es] an improper point [or] planned or calculated statements" and finding such misconduct where the prosecutor repeated the erroneous statement to the jury not once, but twice). On the second, the Court of Appeals incorrectly concluded that the prosecutor quickly corrected himself. But an examination of the transcript reveals that the prosecutor did not "correct" himself, and instead repeated the erroneous statement of law. COA Op. at 24, n.4; *see also* R. XIV, 106:2-9. This error, suggesting a lesser burden on the State, was not corrected by the jury instructions as the intent element of attempted rape was never defined. R. XIV, 56.

III. Joinder

The Court of Appeals noted the "recognized dangers in admitting other crimes evidence include portraying the defendant as a chronic lawbreaker deserving of punishment for that reason alone or supporting the defendant's guilt through a pattern of alleged wrongdoing even though the evidence of any one instance may be weak." COA Op. at 15 (citing *State v. Gunby*, 282 Kan. 39, 48-49 (2006)). But it went on to hold that Sumpter was not prejudiced by having all of the cases tried together because it found that the allegations of J.B., A.C., and A.E. were similar enough that these victims' testimony would be admitted at each other's trials. Yet the Court of Appeals seemed to recognize that A.P. would not be able to testify at the trial of the other three. This fact alone would have made individual trials better for Sumpter, and demonstrates the prejudice of his appellate counsel's failure to raise this issue.

Additionally, the Court of Appeals assumed that full victim testimony would be accepted at all of the individual trials rather than less prejudicial and time-consuming forms of evidence sanctioned by this Court like stipulations or admissions. *State v. Bowen*, 299 Kan. 339, 350-51

(2014) (approving of prior crime evidence when the trial court "allow[ed] the State to admit only a journal entry of conviction . . . and excluded witness and victim testimony, which it considered more prejudicial" and noted that "this evidence was not time consuming, as it was admitted at trial as a written stipulation given to the jury, rather than through testimony"). These options would have had the same probative value without the heightened prejudice or distracting and time-consuming presentation. Such stipulations or admissions would have also allowed Sumpter to choose whether to testify in any given case. Moreover, individual trials would have prevented the prosecutor from conflating the cases and improperly intermingling and confusing the evidence of the four cases—prejudice that the Court of Appeals completely ignored in its opinion. Appellant's Br. at 35-40.

IV. Jury venire

The American concept of a jury trial requires "a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975). Sumpter was denied a fair trial when his venire contained no African-Americans despite this demographic making up almost 10% of the Sedgwick County population. The Court of Appeals faulted Sumpter for not providing record evidence of whether this was a statistical anomaly. But without an evidentiary hearing, Sumpter had no opportunity to substantiate his allegations of systemic exclusion of African-Americans from the jury pool given his specific proof of demographic differences and the impact of those differences on jury make-up.

In sum, the Kansas Court of Appeals incorrectly evaluated the law and record evidence as to trial and appellate counsels' ineffectiveness, and the Supreme Court should exercise its supervisory authority and review this case to ensure consistent and fair jurisprudence in these important areas.

DATE OF DECISION: JANUARY 18, 2019.

STATEMENT OF ISSUES

I. Did the Court of Appeals err in finding no prejudice from counsel's ineffectiveness for failure to understand Kansas kidnapping law when it:

   a. Improperly applied a sufficiency of the evidence standard to evaluate prejudice from ineffective assistance of counsel for failure to know the law?

   b. Found "confinement by force" sufficient to meet the kidnapping standard when there was no force used and the confinement—if any—occurred for, at most, minutes?

   c. Applied the kidnapping statute in a way that makes it void for vagueness?

II. Did the Court of Appeals err in determining whether Sumpter was prejudiced by the joinder when:

   a. It erroneously found that the trial court would have admitted in full the testimony of the other victims at individual trials?

   b. It found that Sumpter presented no evidence of prejudice from the joinder despite Appellant providing over four pages of briefing on the prejudice resulting from the consolidated trial?

III. Did the Court of Appeals err in finding no prosecutorial misconduct when:

   a. The prosecutorial error identified by the Court of Appeals was repeated as a theme throughout the prosecutor's closing argument?

   b. The prosecutor repeatedly defined the intent element of rape incorrectly to mean "the intent to have sex," and there was no counter definition of this element existed in the jury instructions?

IV. Did the Court of Appeals err in finding that Sumpter offered nothing to show African-Americans are routinely underrepresented in Sedgwick County jury pools when no evidentiary hearing was provided on the issue and Sumpter provided substantiated allegations based on county demographic information?

STATEMENT OF RELEVANT FACTS

Sumpter set out a full set of relevant facts in his brief to the Court of Appeals. Appellant's Br. at 2-15. Rather than recite all of those facts here, Sumpter instead focuses on the incorrect and incomplete statements in the Court of Appeals opinion related to the aggravated kidnapping count. *See* Supreme Court Rule 8.03(a)(5)(d).

On appeal, the State did not argue that the short time when J.B. forced Sumpter out of the car amounted to confinement by force, so some of the facts selected by the Court of Appeals had never been argued before at either trial or the non-evidentiary habeas hearing. As the Court of Appeals notes, Sumpter ended up outside of J.B.'s vehicle in the middle of the incident, not through his choice or a plan to hold her there, but because, as J.B. testified, she got the upper hand in the fight and forced him out of the vehicle. R. XII, 46-47. And J.B.'s keys were outside of her car at that time not because of some planned confinement on Sumpter's behalf to facilitate the underlying crime, but because J.B. had attempted to use the mace on a key ring on Sumpter earlier, and he threw the keys outside the car to avoid getting maced during their fight. R. XII, 47. While the Court of Appeals found that Sumpter had "trapped J.B. in the enclosed space of the vehicle," J.B. testified that ***she*** was the one who forced Sumpter out and she "stay[ed] in [the] car" because she knew she was "safe" and "away from him." R. XII, 49. J.B. testified that she had her phone with her in her car and could have made a call, but she decided to try to get the keys back rather than call the police. *Id.* 47-48.

The Court of Appeals did not mention any evidence about the amount of time that Sumpter was outside the car while J.B. had locked herself inside the vehicle. COA Op. at 9. Because Sumpter's trial counsel did not understand the *Buggs* standard, or even understand this could be the act of confinement by force, trial counsel did not cross-examine J.B. on how long this part of the fight lasted or whether she even felt confined. R. XII, 57-70. But we do know that the ***entire*** incident lasted less than 8 to 10 minutes from the testimony of a third-party who witnessed both J.B. and Sumpter walking together to her car prior to the incident and then discovered the two of them again right before J.B. drove off. R. XII, 86. That testimony was confirmed by dispatch records from that witness. *Id.* 75-76, 86. J.B. also testified that after seeing Sumpter with her keys, she immediately asked for them back—even though she had her phone with her in the car—because she did not want to wait more than a minute or two for the police to arrive. *Id.* 47-48.

ARGUMENT FOR REVIEW

I. Kidnapping.

Sumpter's brief demonstrates his trial counsel's lack of understanding of the *Buggs* jurisprudence. Appellant's Br. at 16-22. As this Court and the U.S. Supreme Court have held, failure to understand the law is not only deficient but also *per se* prejudicial because such a failure affects every strategic choice on evidence and argument that counsel makes at trial and calls into question the "reliability of the adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986); *accord Davis*, 277 Kan. at 329; *see also Jones*, 290 Kan. at 381. "No specific showing of prejudice [is] required because the petitioner had been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Cronic*, 466 U.S. at 659 (internal citation omitted). But the Court of Appeals ignored the presumptive prejudice resulting from an

attorney's lack of preparation or understanding of the law. Rather, the Court of Appeals treated the prejudice prong as simply a sufficiency challenge, ignoring Sumpter's arguments on how trial counsel would have proceeded differently if she understood the well-developed *Buggs* jurisprudence. Appellant's Br. at 24-26. This error requires reversal.

Second, even on the deficient record, the act of kidnapping the Court of Appeals identified does not set out an act of confinement by force—the charge submitted to the jury—sufficient to meet the *Buggs* standard. The Court of Appeals found that:

> Sumpter confined C.B. ***in the midst*** of the criminal episode when ***she forced him*** out of her car and he retrieved her keys that he had earlier thrown out of the window. At that point, J.B. was unable to leave. If she tried to get out of the car, Sumpter could easily have seized her. And she couldn't drive the car away, thereby escaping, without the keys. Sumpter had, thus, effectively trapped J.B. in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her. Sumpter then used the keys as part of ***a ploy*** to get J.B. to unlock the car to get them back. When she did, he forced his way in and resumed his assault of her.

COA Op. at 9. When considering all of J.B.'s actual testimony, it is apparent that this brief interlude in the fight between J.B. and Sumpter cannot meet the definition of confinement by force. Therefore Sumpter was prejudiced for three reasons:

First, Sumpter used ***no force*** when he was outside of the vehicle.[1] As this Court has recognized, confinement by force has always required some sort of binding or physical restraint. *Zamora*, 247 Kan. at 696; *Richmond*, 250 Kan. at 378; *Hays*, 256 Kan. at 63. Here Sumpter did not physically hold the doors closed to prevent J.B. from leaving, he did not lock the doors, nor did he bind J.B. or the doors with some sort of restraint or device to keep her from escaping or to facilitate his escape. Without such evidence of ***force***, there is no evidence to support the jury's verdict. This is especially true given that Sumpter was convicted of ***aggravated*** kidnapping,

[1] While the Court of Appeals describes Sumpter using "a ploy" and "induc[ing]" J.B. to open the door with the keys, COA Op. at 9, the State did not charge Sumpter with confinement by deception. R. XIV, 53.

which also required the State show that the confinement by force "inflicted" "bodily harm." R. XIV, 53. No such bodily harm was inflicted while Sumpter momentarily stood outside J.B.'s vehicle.

Second, J.B. was ***not confined by Sumpter***; rather, ***she*** forced him out of the car and stayed in the car by her own choice. R. XII, 46-47, 49. A victim's voluntary choices, even if done out of fear, cannot amount to confinement of any kind, let alone confinement by force—the charge at issue here. *State v. Holt*, 223 Kan. 34, 41-43 (1977) (voluntary choice to enter a vehicle without evidence of force or deception could not support the submission of an aggravated kidnapping count to the jury); *State v. Miller*, 2004 WL 1191017 at *3 (Kan. Ct. App. 2004) (a kidnapping does not occur when any confinement was the result of voluntary actions by the defendant); *State v. Quintero*, 183 P.3d 860, 2008 WL 2186070, at *5 (Kan. Ct. App. 2008) (rejecting the State's suggestion that a taking "may be accomplished by instilling fear in the victim" and noting that the statute "requires a taking or confining by force, threat or deception—not fear").

Third, any confinement lasted minutes—at most—and thus cannot meet the *Buggs* requirement that any confinement be more than "slight, inconsequential and merely incidental." 219 Kan. at 216.[2] While the Court of Appeals is correct to note that this Court has never put an exact time requirement on confinement, it has required that the confinement not be "slight, inconsequential and merely incidental." *Buggs*, 219 Kan. at 216. In past cases, this Court has only found sufficient confinement when a victim was held for at least an hour. *Zamora*, 247 Kan. at 696 (seven-hour confinement); *State v. Coberly*, 233 Kan. 100, 105 (1983) (victim held

[2] Additionally, any "confinement" did not have independent significance under *Buggs*. *Id.* The time J.B. sat in her car and decided what to do actually increased—not lessened—"the risk of detection" as J.B.'s vehicle was in a public parking lot at the time of bar closings and within minutes of Sumpter re-entering the vehicle another vehicle pulled up to see what was happening—allowing J.B. to tell them and escape.

in the defendant's truck for four hours); *Richmond*, 250 Kan. at 378 (moving and tying victim for around an hour).

As applied, the Court of Appeals' interpretation of the kidnapping statute provides no guidance as to what constitutes confinement or force sufficient to distinguish kidnapping as a separate, distinct, and substantial crime worthy of the substantial sentences that accompany felony kidnapping. As the Court of Appeals admits, its interpretation "creates a fuzzy border where close cases turn on seemingly minor differences." COA Op. at 9. Left uncorrected, the Court of Appeals' interpretation would allow prosecutors to charge any momentary pause in an incident—even if forced by a victim—as a "confinement." And the Court of Appeals does not even attempt to describe what it believes constitutes sufficient "force" here under the kidnapping statute. Without "explicit standards," the kidnapping statute as applied will "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Wallace*, 246 Kan. at 258-59. Commentators have already recognized "numerous instances of abusive prosecution under expansive kidnapping statutes" and that kidnapping should be limited "to cases of substantial isolation of the victim from [her] normal environment." John L. Diamond, *Kidnapping: The Modern Definition*, 12 Am. J. Crim. Law 1, 28 (1985) (quoting Model Penal Code art. 212.1 comment 221-22).[3]

But the ever-shifting justification for Sumpter's aggravated kidnapping conviction was never challenged or probed by his trial or appellate counsel. Their failure to evaluate kidnapping jurisprudence and develop an appropriate strategy "undermine[s] confidence in the outcome" of

[3] *Accord* Melanie Prince, *Two Crimes for the Price of One: The Problem with Kidnapping Statutes in Tennessee and Beyond*, 76 TENN. L. REV. 789 (2009) ("These ambiguous standards, coupled with the poor application of the statutory requirements, allow prosecutors and courts to fit the facts of a given crime into their own preferences when assessing the validity of a kidnapping charge.").

Sumpter's conviction on this count. *Edgar v. State*, 294 Kan. 828, 837 (2012). Trial counsel did not even seek a dismissal of the count at the preliminary hearing despite even more flimsy testimony offered there. R. VII, 9-10. Trial counsel did not develop appropriate direct or cross examinations to highlight the weaknesses on this count—which carried the longest and controlling sentence. Nor did trial counsel request a clarifying jury instruction to the facilitation element of kidnapping, which has been suggested as "advisable" given that the pattern instruction is "vague and confusing." *State v. Little*, 26 Kan. App. 2d 713, 720 (1999). Counsel did not challenge the prosecutor's misstatements of the law and facts related to this count. Instead, trial counsel compounded the prosecutor's error by also incorrectly relaying the elements of aggravated kidnapping to the jury. And appellate counsel failed to correct these errors by presenting a sufficiency challenge. Such prejudicial ineffective assistance requires reversal of Sumpter's conviction or, at a minimum, an evidentiary hearing.

II. Prosecutorial misconduct.

The Court of Appeals concluded that prosecutorial error occurred when "the prosecutor's closing argument to the jury characterized the pretrial motions as some admission of guilt." COA Op. at 23. But the Court of Appeals held that this did not amount to misconduct because it found that the prosecutor had not "built a theme" around that erroneous characterization. The Court of Appeals erred because the prosecutor raised this issue at least five times during his closing argument. Appellant's Br. at 41-42. Indeed, this misrepresentation of the *pro se* pretrial motion was part of the prosecutor's final summation in his closing, his rebuttal argument, and his request for the jury to automatically find Sumpter guilty of all lesser-included crimes even though, as the Court of Appeals recognized, Sumpter disputed those lesser-included offenses as to at least three victims (J.B., A.E., and A.P.). R. XIV 64, 80-1, 101. Such a repeated and emphasized theme based on prosecutorial error amounts to misconduct. *Ortega*, 300 Kan. at

782.

The Court of Appeals also recognized that the prosecutor committed error when he misstated the law on the intent element of attempted rape by claiming he only had to show that Sumpter "intended to have sex" with the victim, and omitted "***without her consent***." COA Op. at 24. However, the Court of Appeals concluded that the prosecutor quickly corrected himself. But an examination of the transcript reveals that the prosecutor did not "correct" himself; instead, he repeated the erroneous statement of law by making an intent to rape the victim synonymous with an intent to have sex with the victim: "I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her—or I'm sorry, he confined her with the intent to commit sex, commit rape against her." COA Op. at 24, n.4; *see also* R. XIV, 106:2-9. The only correction made in the transcript is to correct the kidnapping element (an alleged confinement rather than an alleged taking). Sumpter's trial counsel repeated the error in her closing: "Were his intentions to have sexual intercourse with her? That's what they have to prove." R. XIV, 93:12-21. Such a misstatement allowed the prosecutor to improperly base his proof of intent to rape on Sumpter's own testimony that he wanted to have sex with J.B. after she started making sexual advances. *See* COA Op. at 24, n.4; R. XIV, 106:2-9 ("Clearly that was his intent, he told you even yesterday that's what he intended to do."). The jury instructions did not correct this error as they did not define the intent element of attempted rape. R. XIV, 56.

III. Joinder.

The Court of Appeals recognized that Sumpter faced prejudice at the combined trial, but justified that prejudice by finding that this same prejudice would have existed at individual trials. But the State never argued that it would simply proffer the same testimony at individual trials, and the trial court never indicated (either at trial or in the habeas proceeding) that it would admit such victim testimony in full as propensity evidence. The admission of previous crimes evidence

may be allowed under 60-455(d), but trial courts still weigh whether to admit such testimony and in what form under the factors laid out by this Court in *Bowen*, 299 Kan. at 350. Moreover, while the Court of Appeals recognized the testimony of A.P. would be inadmissible at the other individual trials, it apparently gives no weight to this obvious improvement for Sumpter, who would have faced not four, but three, victims' testimony at these trials. COA Op. at 19.

The Court of Appeals also ignored the availability of less prejudicial evidence of the previous crimes than full victim testimony, a required consideration under *Bowen*. 299 Kan. at 350. After one trial, the less prejudicial and time-consuming means to admit propensity evidence would have been a stipulation of the previous conviction or admission of the journal entry. *Bowen*, 299 Kan. at 350-51; *U.S. v. Sturm*, 673 F.3d 1274, 1285 (10th Cir. 2012) (noting government proposal to reduce prejudice by using a stipulation rather than admitting direct evidence of prior crime) (cited in *State v. Prine*, 297 Kan. 460, 478 (2013)). Sumpter and the State could have also come to a stipulation or admission to avoid mini-trials on uncharged crimes. Evidence of uncharged previous crimes requires an evidentiary hearing to determine whether the incident met the preponderance of the evidence standard, and then potentially a mini-trial on the incident if the trial court allowed the victim to testify. *U.S. v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (cited in *Prine*, 297 Kan. at 478). Not only would full victim testimony likely contribute "to an improperly-based jury verdict," such mini-trials would "distract the jury" and would be time consuming. *Bowen*, 299 Kan. 350. Accordingly, it is unlikely the evidence would have been admitted in the form imagined by the Court of Appeals.

Importantly, Sumpter would have retained his right to testify in some but not all cases as it would be unnecessary to fully counter victim testimony. Finally, individual trials would have prevented the prosecutor from conflating the cases and improperly intermingling and confusing

the evidence of the four cases in his closing—prejudice that the Court of Appeals completely ignored in its opinion. Appellant's Br. at 35-40.

IV. Jury venire.

The Court of Appeals concluded that the lack of any African-Americans in Sumpter's venire was a "statistical anomaly" because there was no "record evidence" from other panels. COA Op. at 28. But the Court of Appeals ignored the fact that Sumpter did not get an evidentiary hearing on this point to develop record evidence and had requested, as part of his petition, discovery on venires to conduct a full statistical analysis. Sumpter set out allegations of the systemic ways in which African-Americans would be underrepresented in the venire given the demographics of Sedgwick County. Appellant's Br. at 46. These allegations, coupled with a complete absence of African-American venire members in a county with an almost 10% African-American population, created a substantial claim that required an evidentiary hearing.

V. Remaining issues.

For the remaining issues raised on appeal, the reasons submitted in Sumpter's briefing demand reversal and were not appropriately addressed by the Court of Appeals.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR TIMOTHY SUMPTER

CERTIFICATE OF SERVICE

On this 3rd day of May 2019, the undersigned hereby certifies that service of the above and foregoing Corrected Petition for Review By the Supreme Court was made by e-mailing a full and complete copy of same to:

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The undersigned hereby certifies that service of the above and foregoing Corrected Petition for Review By the Supreme Court was made by mailing a full and complete copy of same to:

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Appendix

A1 January 18, 2019 Court of Appeals Memorandum Opinion

A2 State's Revised Opposition to 60-1507 Petition (Sedgwick District Court)

A3 Sumpter's Reply to Revised Opposition in support of Petition (Sedgwick District Court)

A4 Excerpts from Appellate Record, vol. VII (8/25/11 Preliminary Hearing Transcript)

A5 Excerpts from Appellate Record, vol. XII (3/14/12 Trial Transcript)

A6 Excerpts from Appellate Record, vol. XIV (3/16/12 Trial Transcript)

A7 Order Denying Petition for Writ of Habeas Corpus (Sedgwick District Court)

A1

NOT DESIGNATED FOR PUBLICATION

No. 117,732

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TIMOTHY SUMPTER,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed January 18, 2019. Affirmed.

Kelly H. Foos, *Katie Gates Calderon* and *Ruth Anne French-Hodson*, of Shook, Hardy & Bacon L.L.P., of Kansas City, Missouri, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., ATCHESON, J., and LORI BOLTON FLEMING, District Judge, assigned.

ATCHESON, J.: In 2012, a Sedgwick County District Court jury convicted Timothy Sumpter of seven crimes arising from four incidents in which he sexually assaulted different women. The State charged Sumpter in three cases that were consolidated for trial. The jury found Sumpter not guilty of one felony, and some of the convictions were for less serious crimes than the State had charged. After this court affirmed the verdicts and sentences on direct appeal, Sumpter, with the aid of new lawyers, filed a habeas

corpus motion contending he received constitutionally deficient legal representation and asking that the convictions be reversed. See *State v. Sumpter*, No. 108,364, 2013 WL 6164520 (Kan. App. 2013) (unpublished opinion). The district court held a nonevidentiary hearing on the motion with the prosecutor and Sumpter's new lawyers and later issued a detailed written ruling denying Sumpter any relief. Sumpter has appealed that ruling. We find Sumpter has failed to show a constitutional injury depriving him of a fundamentally fair adjudication of the charges against him, meaning he has not persuaded us that absent the errors he alleges there is a reasonable probability the outcome would have been different. We, therefore, affirm the district court.

Given the issues Sumpter has raised, we dispense with an extended opening narrative of the trial evidence and procedural history in favor of focused recitations tied to the particular points. The parties know the record well. The four incidents resulting in charges against Sumpter occurred between September 2010 and April 2011, so the criminal code in effect then applies.[1] We turn to the general legal principles governing habeas corpus motions under K.S.A. 60-1507 and then consider the issues Sumpter has raised.

[1]The Legislature approved a recodification of the Kansas Criminal Code in 2010. The new code didn't go into effect until July 1, 2011.

Guiding Legal Principles

To prevail on a 60-1507 motion, a convicted defendant must show both that his or her legal representation fell below the objective standard of reasonable competence guaranteed by the right to counsel in the Sixth Amendment to the United States Constitution and that absent the substandard lawyering there probably would have been a different outcome in the criminal case. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014); see *Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3, 4, 694 P.2d 468

(1985) (adopting and stating *Strickland* test for ineffective assistance). A reasonable probability of a different outcome "undermine[s] confidence" in the result and marks the criminal proceeding as fundamentally unfair. See *Strickland*, 466 U.S. at 694. The movant, then, must prove both constitutionally inadequate representation and sufficient prejudice attributable to that representation to materially question the resulting convictions.

As the United States Supreme Court and the Kansas Supreme Court have stressed, review of the representation should be deferential and hindsight criticism tempered lest the evaluation of a lawyer's performance be unduly colored by lack of success notwithstanding demonstrable competence. See *Strickland*, 466 U.S. at 689-90; *Holmes v. State*, 292 Kan. 271, 275, 252 P.3d 573 (2011). Rarely should a lawyer's representation be considered substandard when he or she investigates the client's circumstances and then makes a deliberate strategic choice among arguably suitable options. *Strickland*, 466 U.S. at 690-91. Whether a lawyer had made reasoned strategic decisions bears on the competence component of the *Strickland* test.

Regardless of the inadequacy of legal representation, a 60-1507 motion fails if the movant cannot establish substantial prejudice. And the district court properly may deny a motion that falters on the prejudice component of the *Strickland* test without assessing the sufficiency of the representation. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); see *Edgar v. State*, 294 Kan. 828, 843-44, 283 P.3d 152 (2012); *Oliver v. State*, No. 106,532, 2013 WL 2395273, at *5 (Kan. App. 2013) (unpublished opinion). In other words, even assuming a criminal defendant's legal representation fell below the Sixth Amendment standard, he or she is not entitled to habeas corpus relief if the result would have been no different with competent counsel.

Sumpter has challenged the constitutional adequacy of both his trial lawyer and the lawyer who handled the direct appeal. The *Strickland* test also guides review of an appellate lawyer's representation of a defendant in a criminal case. See *Miller v. State*, 298 Kan. 921, 929-30, 318 P.3d 155 (2014) (applying *Strickland* test to performance of lawyer handling direct appeal).

A district court has three procedural options in considering a 60-1507 motion. The district court may summarily deny the motion if the claims in the motion and the record in the underlying criminal case conclusively show the movant is entitled to no relief. Or the district court may conduct a preliminary hearing with lawyers for the State and the movant to determine if a full evidentiary hearing is warranted. Finally, the district court may hold a full evidentiary hearing. See *Sola-Morales*, 300 Kan. at 881. Absent an evidentiary hearing, the district court must credit the factual allegations in the 60-1507 motion unless they are categorically rebutted in the record of the criminal case. Where, as here, the district court limits a preliminary hearing to the argument of counsel before denying the motion, we exercise unlimited review of the ruling on appeal. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014); *Sola-Morales*, 300 Kan. at 881. The district court has received no new evidence, and we can review the motion and the underlying record equally well.

With those principles in mind, we take up the points Sumpter has presented on appeal from the district court's denial of his 60-1507 motion.

Aggravated Kidnapping Conviction

Sumpter contends the State failed to produce sufficient evidence to support the jury's verdict for the aggravated kidnapping of J.B.—the most serious charge on which he was convicted. Sumpter faults his trial lawyer for misunderstanding the fit between the elements of aggravated kidnapping and the evidence against him and fumbling the issue

in the district court. He also faults the lawyer handling the appeal for not raising sufficiency of the evidence at all.

Because the district court did not hold an evidentiary hearing, we have no insight into what strategic decisions those lawyers may have made in assessing potential lines of attack on that charge at the trial level and on the resulting conviction on appeal. As a practical matter, evidence about those professional judgments commonly must be developed in an evidentiary hearing on the 60-1507 motion at which the lawyer produces his or her work file and testifies about why he or she handled the criminal case in a particular manner. See *State v. Hargrove*, 48 Kan. App. 2d 522, 552, 293 P.3d 787 (2013); *Johnson v. State*, No. 109,169, 2014 WL 1362929, at *5 (Kan. App. 2014) (unpublished opinion); *Oliver*, 2013 WL 2395273, at *5.[2]

[2]In criminal cases, defense lawyers typically need not explain why they represented their clients as they did. If a defendant requests a new trial based on the ineffectiveness of his or her trial lawyer or asserts ineffectiveness as a point on direct appeal, the district court may—on its own or at the direction of an appellate court—hold what's called a *Van Cleave* hearing to explore the claim. See *State v. Van Cleave*, 239 Kan. 117, Syl. ¶ 2, 716 P.2d 580 (1986). A *Van Cleave* hearing functionally replicates an evidentiary hearing on a 60-1507 motion, except that it is held as part of the direct criminal case rather than in a collateral proceeding. A district court could rely on the evidentiary record from a *Van Cleave* hearing to summarily deny a 60-1507 motion questioning purported strategic decisions of the trial lawyer. Usually, however, ineffectiveness claims will be deferred to 60-1507 proceedings, since they become moot if a defendant raises some other issue in the direct criminal case requiring a new trial. So the record in most criminal cases lacks evidence about the defense lawyer's reasons for representing the defendant as he or she did. This is such a case.

In rare situations, a reviewing court can say that a lawyer's action or inaction could not have been the product of any reasoned strategic decision because the effect is so patently detrimental to the client. See *Hargrove*, 48 Kan. App. 2d at 551 ("No sound strategy could warrant a defendant assuming a heavier burden of proof than required under the law in establishing a defense . . . . [an] error incontestably devoid of strategic

worth."). Sumpter suggests the record here establishes that sort of error with respect to his conviction for aggravated kidnapping.

But the quality of the lawyers' representation becomes irrelevant if Sumpter cannot also show prejudice. If the trial evidence legally supports the jury's verdict and, thus, the conviction, his argument founders on that part of the *Strickland* test. We engage that analysis and conclude the State presented sufficient evidence to prove the aggravated kidnapping charge. To assess sufficiency we review the evidence in a light most favorable to the State as the prevailing party and ask whether reasonable jurors could return a guilty verdict based on that evidence. *State v. Butler*, 307 Kan. 831, 844-45, 416 P.3d 116 (2018); *State v. McBroom*, 299 Kan. 731, 754, 325 P.3d 1174 (2014). Sumpter does not contend his trial lawyer should have presented more or different evidence on the charge.

In January 2011, Sumpter accosted J.B., a young woman, about 1 a.m. as she walked to her car in a parking lot in Old Town, an entertainment district in downtown Wichita. When they got to J.B.'s car, he forced his way in, grabbed J.B., and attempted to sexually assault her. Sumpter had his knee across J.B.'s throat as he tried to touch her vagina. She briefly lost consciousness. When she regained her senses, Sumpter was masturbating. He forced J.B. to touch his penis. During the attack, Sumpter took J.B.'s car keys from her as she attempted to fight him off and threw them out the window.

Part way through the attack, J.B. was able to force Sumpter out of the car and to lock the doors. Sumpter then retrieved the keys and displayed the keys in an effort to get J.B. to open the door. She did. Sumpter forced his way back in and resumed his assault. Another car fortuitously pulled up. Sumpter got out of J.B.'s car. He spoke briefly to the driver of the other car. J.B. drove away; she immediately contacted the police. Police investigators later identified and interviewed the driver of the other car. The driver described Sumpter jumping out of the car with his belt unbuckled as J.B. shouted, "He

tried to rape me." As J.B. drove off, Sumpter told the man, "She's lying . . . . That's my girl."

J.B. acknowledged she had been drinking that night. There were minor variations in the accounts of the incident she gave police investigators, testified to at a preliminary hearing, and then described for the jurors during the trial.

The State charged Sumpter with aggravated kidnapping, attempted rape, and aggravated sexual battery. The jury convicted him of all three crimes.

For the aggravated kidnapping charge, the State had to prove Sumpter "confin[ed]" J.B. by force "to facilitate" his intent to rape her and she suffered bodily harm as a result. See K.S.A. 21-3420; K.S.A. 21-3421. Under the former code, the relevant elements of kidnapping were: The "taking or confining of a person . . . by force . . . with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 21-3420. The infliction of "bodily harm" on the victim elevated the crime to aggravated kidnapping. K.S.A. 21-3421. For purposes of the 60-1507 motion, Sumpter doesn't dispute the evidence of the attempted rape or that J.B. was injured. He focuses on the element of confinement.

In *State v. Buggs*, 219 Kan. 203, 215, 547 P.2d 720 (1976), the Kansas Supreme Court held that kidnapping requires movement or confinement of the victim that is more than "slight and 'merely incidental' to the commission of an underlying . . . crime." The movement or confinement constituting facilitation required for kidnapping entails some greater intrusion upon the victim's freedom than does the underlying crime and has some discernible independence from the conduct necessary to carry out that crime. 219 Kan. at 216. The court identified several criteria differentiating movement or confinement sufficient to support a kidnapping conviction from that legally considered no more than an intrinsic part of another crime. The movement or confinement:

"(a) Must not be slight, inconsequential and merely incidental to the other crime;

"(b) Must not be of the kind inherent in the nature of the other crime; and

"(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. at 216.

The court characterized the considerations as illustrative rather than exhaustive and pointed out they "may be subject to some qualification when actual cases arise." 219 Kan. at 216. Kansas courts continue to use the *Buggs* standards to assess evidence in kidnapping and aggravated kidnapping cases bearing on the element of movement or confinement. See *State v. Curreri*, 42 Kan. App. 2d 460, 462-65, 213 P.3d 1084 (2009); *State v. Brown*, No. 115,613, 2017 WL 5015486, at *2-5 (Kan. App. 2017) (unpublished opinion); *State v. Harris*, No. 113,879, 2017 WL 1035343, at *8-9 (Kan. App. 2017) (unpublished opinion); PIK Crim. 4th 54.210, Comment. The *Buggs* court offered three paired hypothetical examples—two involving robberies and one involving rape—to illustrate what would and would not support a kidnapping charge. They described movement of the victims or movement coupled with confinement and aren't especially apt here.

The principle recognized in *Buggs* theoretically avoids kidnapping convictions for limited movement or confinement of a victim integral to the commission of another crime. It may be thought of as a particularized application of the rule prohibiting multiplicitous convictions for conduct amounting to a single crime. See *State v. Weber*, 297 Kan. 805, 808, 304 P.3d 1262 (2013) (convictions multiplicitous when State prosecutes single crime as two or more offenses exposing defendant to pyramiding punishments for one wrong); *State v. McKessor*, 246 Kan. 1, 10-11, 785 P.2d 1332 (1990) (recognizing *Buggs* standards directed at multiplicity problem). The *Buggs* court

effectively laid out a totality-of-the-circumstances standard that, unlike a bright-line rule, creates a fuzzy border where close cases turn on seemingly minor differences. It also diminishes any given case as precedent for a somewhat similar, though not entirely analogous, set of circumstances.

Here, Sumpter confined J.B. in the midst of the criminal episode when she forced him out of her car and he retrieved her keys that he had earlier thrown out the window. At that point, J.B. was unable to leave. If she tried to get out of the car, Sumpter could easily seize her. And she couldn't drive the car away, thereby escaping, without the keys. Sumpter had, thus, effectively trapped J.B. in the enclosed space of the vehicle—a circumstance he highlighted by displaying the keys to her. Sumpter then used the keys as part of a ploy to get J.B. to unlock the car to get them back. When she did, he forced his way in and resumed his assault of her. The confinement was clear, deliberate, and more than instantaneous. To support a kidnapping or aggravated kidnapping conviction, the confinement need not be extended. No particular amount of time is required; the fact of confinement is sufficient. *Buggs*, 219 Kan. at 214; *State v. Ellie*, No. 110,454, 2015 WL 2342137, at *6 (Kan. App. 2015) (unpublished opinion).

The standoff between Sumpter and J.B. and, thus, the confinement cannot be characterized as simply incidental to or inherent in the sexual assault. Sumpter held J.B. hostage in a specific place and sought to gain access to that place to commit a crime against her. But that situation could have been the prelude to all sorts of crimes and was not unique to rape or even sex offenses. Having gotten into the car, Sumpter could have robbed or severely beaten J.B. The point is Sumpter trapped J.B. in a small, closed place of limited safety and induced J.B. to compromise that safety in an effort to escape. Her effort permitted Sumpter entry to the car making the commission of the crime that followed "substantially easier" than if he had to physically break in to the car. The circumstances fit within the *Buggs* test for a confinement sufficiently distinct from the

underlying crime to be successfully prosecuted as an aggravated kidnapping given J.B.'s undisputed injuries.

The specific facts here tend to set this conviction apart from more common confinement scenarios found to be kidnapping. See, e.g., *State v. Weigel*, 228 Kan. 194, Syl. ¶ 4, 612 P.2d 636 (1980) (robber herds bank employees into vault and attempts to lock it); *State v. Dunn*, 223 Kan. 545, 547, 575 P.2d 530 (1978) (three inmates at state prison hold two employees hostage in office for five hours while demanding "a car and free passage" from facility in exchange for their release). But it is no less a kidnapping because it is unusual. By the same token, however, these circumstances do not lend themselves to any sweeping conclusion or rule about confinement as an element of kidnapping. Because the trial evidence was sufficient for the jury's verdict, Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction either in the district court leading up to and during the trial or on direct appeal in this court. He has failed to show a basis for relief under K.S.A. 60-1507.

Consolidation of Cases for Trial

Sumpter contends the lawyers representing him in the district court and on appeal failed to properly contest the consolidation of three cases comprising four separate incidents for a single trial. He says the unfair prejudice to him of having the jurors hear about the four sexually based assaults substantially outweighed any judicial efficiency in trying the cases together. And, he says, his lawyers provided constitutionally substandard representation in fumbling the issue.

Given the exceedingly broad rules governing the admissibility of sexual misconduct as other crimes evidence, Sumpter cannot demonstrate undue prejudice in his consolidated trial. As we explain, had he been tried separately in each case or for each incident, the other incidents would have been admissible under K.S.A. 2011 Supp. 60-

455(c) to show his propensity or proclivity to engage in sexually aggressive and unlawful conduct. In the consolidated case, however, the jurors were instructed they could consider only the evidence admitted as to a particular charge in determining Sumpter's guilt or innocence of that charge—theoretically preventing them from relying on the multitude of incidents to bolster the State's evidence of each incident. See PIK Crim. 4th 68.060. Ultimately, Sumpter was better off in a consolidated trial than in sequential trials of each case in which the other incidents would have been admitted as propensity evidence. Neither outcome, however, could be described as advantageous to Sumpter.

We outline briefly the three separate cases the State filed against Sumpter. The State charged the attack on J.B. in one case. We have already laid out those charges and a summary of the attack. When the police questioned Sumpter months later, he initially said he didn't know J.B. but admitted to being in Old Town at the same time when a woman attacked him and he defended himself. Sumpter agreed with the detectives that he might be the person shown in an indistinct surveillance video of J.B.'s car and what happened there.

At trial, Sumpter offered a confusing story about J.B. spitting on him and then pulling him into the car and coming on to him sexually. He admitted touching J.B.'s buttocks and masturbating but denied trying to touch her pubic area.

In a second case, the State charged Sumpter based on two distinct incidents:

• In September 2010, Sumpter met A.C., a 23-year-old woman, at a party, and they arranged to get together sometime later at a fast food restaurant. From the restaurant, Sumpter drove them to a nature trail where they walked and talked for a while. Sumpter then pulled A.C. to the ground, grabbed her buttocks, and masturbated. A.C. convinced him to stop and left the area. Shortly afterward, Sumpter texted A.C. to explain that a

nurse told him he had a bad reaction to a prescription medication. A.C. reported the assault to the police the next day.

When detectives questioned him months later, Sumpter denied knowing A.C. or having any contact with her. Investigators obtained copies of the text messages between Sumpter and A.C., and those communications were admitted as evidence in the trial. During his testimony, Sumpter told the jurors he had gone to the nature trail with A.C. and had touched her in a sexual manner. He suggested the encounter had been consensual. The jury found Sumpter not guilty of attempted rape and found him guilty of misdemeanor sexual battery as a lesser included offense of aggravated sexual battery, a felony.

• In February 2011, Sumpter called A.P., a 24-year-old woman, who he knew from her employment at a supermarket where Sumpter regularly shopped. As a store employee, A.P. occasionally cashed checks for Sumpter. According to A.P., Sumpter telephoned her in the middle of the night and asked to meet her ostensibly because he was distraught over the death of a close friend. She declined, saying she had to be at work early in the morning. When A.P. arrived at the supermarket, Sumpter was already there. He tried and failed to coax her into leaving with him so they could talk about his friend; he then followed her into the store. In one of the aisles, Sumpter hugged A.P. and fondled her buttocks. She protested, and he left. A.P. reported the incident to the police that day.

Sumpter later told detectives he knew A.P. because she cashed checks for him at the store. He denied grabbing or hugging A.P. At trial, Sumpter admitted he hugged A.P. and touched her buttocks. The jury convicted Sumpter of misdemeanor sexual battery as a lesser included offense of a charge of aggravated sexual battery.

In the third case, the State charged Sumpter with the April 2011 kidnapping and sexual assault of A.E., a 19-year-old woman. A.E. said she and Sumpter separately turned

up at a loosely organized gathering at a friend of a friend's house. They became separated from the other partygoers, and Sumpter exposed himself and began to masturbate. A.E. said when she got angry and tried to leave, Sumpter began crying about his dead father—the trial evidence showed Sumpter's father had died years earlier. A.E. testified that she felt sorry for Sumpter. They left the house and drove around in Sumpter's SUV. Sumpter began talking about killing himself, so A.E. tried to get away. Sumpter grabbed her and they physically fought.

As a private security guard pulled up to the SUV, Sumpter told A.E. he would take her back to the party. But after the security guard left, Sumpter drove down a dirt road, stopped the vehicle, and attacked her. A.E. said Sumpter put his hands down her pants and grabbed her buttocks as she fought back. A Sedgwick County sheriff's deputy drove up to the SUV and got out to investigate what was going on. By then, it was about 2:30 a.m. A.E. described what had happened. Sumpter offered that he and A.E. actually had been in a relationship for over a year. The deputy arrested Sumpter.

At trial, Sumpter admitted trying to have sex with A.E. while they were in the SUV. He denied masturbating in front of her at the party and trying to grab her buttocks. The State had charged Sumpter with aggravated sexual battery and kidnapping. The jury convicted him of aggravated sexual battery and of criminal restraint, a misdemeanor, as a lesser offense of kidnapping.

The State filed a motion to consolidate the three cases (and, thus, the four incidents) for trial to a single jury. Sumpter opposed the motion and requested the incidents involving A.C. and A.P. be severed for separate trials. The district court ordered consolidation. In his direct appeal, Sumpter challenged the order, arguing the incidents were not sufficiently similar to be joined for trial under K.S.A. 22-3203. He did not argue that consolidation was unduly prejudicial. On direct appeal, this court found

consolidation satisfied the statutory requirements and affirmed the district court's ruling on that basis. *Sumpter*, 2013 WL 6164520, at *3-6.[3]

[3]As a member of the panel deciding the direct appeal, I wrote a short concurrence that deliberately bordered on the delphic but hinted at reservations about consolidation. *Sumpter*, 2013 WL 6164520, at *12. I was troubled by the possibility of undue prejudice to Sumpter in a single trial of all four incidents. But the appellate lawyer did not brief that issue and at oral argument indicated she hadn't really considered it. So I confined my review to what the parties presented. See *State v. Bell*, 258 Kan. 123, 126-27, 899 P.2d 1000 (1995) (as general rule, court should not consider issue parties have neither raised nor briefed). The issue has been fully briefed in this proceeding. Based on that argument and the broad legislative mandate in K.S.A. 2011 Supp. 60-455(d), I am persuaded Sumpter did not face legally impermissible prejudice in the consolidated trial.

In his 60-1507 motion, Sumpter constitutionalizes the consolidation issue by arguing that his lawyers in the criminal case failed to competently present undue prejudice as a compelling ground against a single trial. Without an evidentiary hearing, we pass on reviewing what strategic considerations, if any, shaped the lawyers' approaches to consolidation and turn to the second aspect of the *Strickland* test to explore whether the outcome might have been different if Sumpter had received a separate trial on each incident. We, therefore, have to unspool what likely would have happened if Sumpter had successfully opposed the State's motion to consolidate and compare that with how the actual trial played out.

As we have explained, in the trial, the district court instructed the jurors that they should separately consider the evidence on each count or charge and that they should be "uninfluenced" in deciding Sumpter's guilt on that count or charge by the evidence bearing on the other charged crimes. See PIK Crim. 4th 68.060. Based on the instruction, the jurors should have considered each incident separate from the other three. Appellate courts presume that jurors follow the instructions they are given. *State v. Mattox*, 305 Kan. 1015, 1027, 390 P.3d 514 (2017). In a backward looking evaluation, a criminal defendant must point to something in the record suggesting otherwise to make any legal headway. See *State v. Kleypas*, 305 Kan. 224, 279, 382 P.3d 373 (2016). Nothing

indicates the jurors deviated from that directive in their deliberations. The Kansas Supreme Court has endorsed an instruction like PIK Crim. 4th 68.080 as an effective tool for directing jurors on how to consider evidence during their deliberations in cases involving distinct criminal episodes. See *State v. Cruz*, 297 Kan. 1048, 1057-58, 307 P.3d 199 (2013).

During the pretrial proceedings on consolidation, Sumpter's lawyer argued that jurors would be hard pressed to compartmentalize the evidence on each of the four incidents and to disregard the fairly intuitive implication that the sheer number of separate allegations tended to reinforce the validity of each one. The recognized dangers in admitting other crimes evidence include portraying the defendant as a chronic lawbreaker deserving of punishment for that reason alone or supporting the defendant's guilt through a pattern of alleged wrongdoing even though the evidence of any one instance may be weak. See *State v. Gunby*, 282 Kan. 39, 48-49, 144 P.3d 647 (2006). The same danger lurks in a single trial of consolidated criminal episodes, notwithstanding a contrary jury instruction. Despite those genuine concerns, Sumpter has failed to show that any of those dangers were realized in his trial.

The jurors returned a decidedly mixed set of verdicts. They found Sumpter not guilty of one especially serious felony, convicted him of lesser offenses on three charges, and convicted him as charged of four crimes. We hesitate to read too much into those decisions. They do not, however, indicate a jury in the throes of an irrational passion or prejudice to convict regardless of the evidence. And the Kansas Supreme Court has recognized split verdicts may be viewed as consistent with a jury following the admonition of an instruction based on PIK Crim. 4th 68.060. See C*ruz*, 297 Kan. at 1058. In short, the outcome in Sumpter's trial was not obviously infected with unfair prejudice because the jury considered all four incidents. This court so noted in considering Sumpter's direct appeal. *Sumpter*, 2013 WL 6164520, at *6.

The question posed here, however, is whether Sumpter reasonably could have expected a different outcome had the district court denied the State's request to consolidate and ordered a separate trial for each incident. If so, then, Sumpter has demonstrated the sort of prejudice required under *Strickland.*

Absent consolidation, the State presumably would have sought to introduce at one trial the circumstances of the other three episodes as relevant evidence of other crimes or wrongs under K.S.A. 2011 Supp. 60-455(d), to prove Sumpter's propensity to engage in sexual misconduct and that he acted on that propensity. See *State v. Smith*, 299 Kan. 962, 970, 327 P.3d 441 (2014). In pertinent part, K.S.A. 2017 Supp. 60-455(d) states:

> "(d) Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense . . . evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

Propensity entails a disposition or proclivity to engage in the defined activity. Accordingly, to be admitted as propensity evidence under K.S.A. 2017 Supp. 60-455(d), an instance of conduct need only be sufficiently similar to the charged crime to display a common sexually based disposition or proclivity. Without belaboring the factual circumstances, each incident shows a proclivity on Sumpter's part consistent with the other incidents. So the evidence would fall within the broad rule of admissibility in K.S.A. 2017 Supp. 60-455(d). For purposes of our analysis, we assume the evidence would not be admissible under the more restrictive requirements of K.S.A. 2017 Supp. 60-455(b).

Even when a district court finds evidence satisfies the general test for admissibility in K.S.A. 2017 Supp. 60-455(d), it must then determine that the probative value outweighs any undue prejudice to the defendant before allowing the jury to hear the evidence. *State v. Bowen*, 299 Kan. 339, Syl. ¶ 7, 323 P.3d 853 (2014) (recognizing 60-

455[d] requires balancing of probativeness and undue prejudice); *State v. Huddleston*, 298 Kan. 941, 961-62, 318 P.3d 140 (2014) (noting K.S.A. 60-445, cited in 60-455[d], permits balancing probativeness against undue prejudice to exclude unfairly prejudicial evidence). The Kansas Supreme Court has recognized an array of factors that should be assessed in making the determination as to sexually based propensity evidence:

> "'1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely it is such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct. [Citations omitted].' *United States v. Benally*, 500 F.3d 1085, 1090-91 (10th Cir. 2007)." *Bowen*, 299 Kan. at 350.

In each of Sumpter's hypothetical separate trials, the key consideration in admitting the other incidents would be the proof of their factual circumstances and whether the jurors would be required to spend inordinate time and effort in evaluating disputed evidence about them, effectively creating mini-trials.

We believe a district court likely would have admitted the incidents and that decision would have fallen within its wide judicial discretion. *State v. Wilson*, 295 Kan. 605, Syl. ¶ 1, 289 P.3d 1082 (2012) (district court's weighing of probative value against undue prejudice reviewed for abuse of judicial discretion). By evaluating the accounts of each of the incidents and Sumpter's out-of-court statements about them, we can reach reliable conclusions about their admissibility under 60-455(d). Sumpter's trial testimony doesn't really factor into that assessment, since admissibility typically would be based on the State's pretrial request. See K.S.A. 2017 Supp. 60-455(e) (State must disclose evidence at least 10 days before trial). Identity is not a compelling issue in any of the incidents. A.C. and J.B. each spent considerable time with her attacker. A.C. produced

inculpatory text messages from Sumpter consistent with her account. Sumpter admitted to police that he was in Old Town when J.B. was assaulted and conceded he might be depicted in the surveillance video. And Sumpter was arrested with A.E. in his SUV. Identity isn't an issue with A.P., either. If the incident happened, A.P. wouldn't have been mistaken about who assaulted her. It happened in the aisle of the supermarket where she worked. By his own admission, Sumpter knew A.P. casually because he had interacted with her as a regular customer at the store.

Likewise, Sumpter's out-of-court statements bolster the argument for admissibility. As we mentioned, Sumpter's denial that he even knew A.C. was undercut by his contemporaneous text messages with her. Those messages not only confirmed they knew each other but that Sumpter had done something untoward for which he was apologizing. The contradiction creates strong circumstantial evidence of a guilty mind and, thus, culpability of conduct roughly consistent with A.C.'s account. See *United States v. Holbert*, 578 F.2d 128, 129 (5th Cir. 1978) ("long line of authority . . . recognizes that false exculpatory statements may be used not only to impeach, but also as substantive evidence tending to prove guilt"); *United States v. Lepore*, No. 1:15-cr-00367-WSD, 2016 WL 4975237, at *2 (N.D. Ga. 2016) (unpublished opinion) ("False exculpatory statements may be used as evidence of consciousness of guilt."). There was similar, if less compelling, evidence as to J.B. Sumpter told the driver who pulled up near J.B.'s car that J.B. was his girlfriend—a patent falsehood. Months later, Sumpter gave an evolving version of his conduct that began with an admission he was in Old Town about the time J.B. was attacked but didn't know her. He then offered a claim that some woman assaulted him for no apparent reason, and finally he allowed that he might be the man in the surveillance video. That sort of shifting narrative, especially coupled with the driver's account of Sumpter's explanation during the incident, also points to a guilty mind. The episode incident involving A.E., where a sheriff's deputy caught Sumpter with her in his SUV on a secluded road in the middle of the night, prompted a similarly disputed

representation—that he and A.E. were in a long-standing relationship. That didn't square with what the deputy observed or A.E. said.

So the implausibility and inconsistency of Sumpter's statements and explanations of each of those incidents would support a conclusion favoring the victim's overall account portraying a sexually motivated assault. The evidence was considerably stronger than an uncorroborated accusation and a corresponding unimpeached denial. In turn, a district court could find those incidents admissible as 60-455(d) evidence of propensity. To be sure, each trial would have been longer because of the propensity evidence. But that would not be a compelling reason to exclude the evidence, especially since the additional time likely would have been a couple of days. In the actual trial, the jurors heard about four days of testimony.

The possible exception to admissibility under 60-455(d) is the incident with A.P. Basically, A.P. said Sumpter hugged and groped her without consent, and he denied doing anything of the kind to her. No circumstantial evidence associated with their interaction lent any particular credibility to either version. So the admissibility of the episode with A.P. as other crimes evidence in a trial of any of the other incidents might be questionable. But the other three incidents would have been admissible in a trial of the episode in which A.P. was the victim. And the incident with A.P. reflects the least persuasive propensity evidence, since it entailed a brief, though wholly unwelcome and disquieting, sexual touching in a public place and lacked the violent physical aggression of the other incidents.

In short, Sumpter would have had to confront largely the same evidence, except perhaps for the incident involving A.P., in separate trials of the charges arising from the attacks involving A.C., J.B., and A.E. Given the sweeping rule of admissibility in K.S.A. 2017 Supp. 60-455(d), a district court need not give the jurors a limiting instruction confining their consideration of the propensity evidence to a narrow purpose or point.

State v. Prine, 297 Kan. 460, Syl. ¶ 4, 303 P.3d 662 (2013). The jurors in those hypothetical separate trials would have been free to consider the other crimes evidence for virtually any ground bearing on Sumpter's guilt of the charged crimes against the particular victim. The district court would not have given an instruction comparable to PIK Crim. 4th 68.060 confining the jurors' consideration of the evidence on a particular charge to the facts pertaining directly to that charge. As a result, Sumpter would have been materially disadvantaged in separate trials compared to the consolidated trial he received.

Sumpter, of course, says the reverse is true and submits he might well have chosen not to testify in at least some of the separate trials but effectively had to testify in the consolidated trial and, thus, to speak to all of the allegations against him in front of the jurors. Sumpter's argument, however, rests on the premise that in each separate trial none of the other incidents would have been admitted as evidence. But, as we have explained, the premise is faulty. Sumpter cannot point to actual legal prejudice consistent with the *Strickland* test flowing from the consolidated trial as compared to separate trials.

Overlooked Instances of Prosecutorial Error

In his 60-1507 motion, Sumpter contends the lawyer handling the direct appeal failed to brief instances of prosecutorial error during the trial and the failure amounted to constitutionally deficient representation. The lawyer did argue on appeal that the prosecutor made several improper remarks in closing argument impermissibly painting Sumpter as a liar and, thus, engaged in misconduct warranting a new trial. On direct appeal, this court found those portions of the closing argument to be fair comment based on the evidence and free of any error. *Sumpter*, 2013 WL 6164520, at *11.

We mention that the Supreme Court revamped the standards for assessing claims of prosecutorial error after Sumpter's trial and direct appeal. See *State v. Sherman*, 305

Kan. 88, 108-09, 378 P.3d 1060 (2016). We suppose, however, that the standards in effect at the time of Sumpter's trial and appeal should govern our review of this collateral challenge to his convictions. The Kansas Supreme Court declined to apply *Sherman* in cases that were fully briefed on direct appeal when it was decided. See *State v. Netherland*, 305 Kan. 167, 180-81, 379 P.3d 1117 (2016). And the issue here is the constitutional adequacy of Sumpter's legal representation when the earlier standards for prosecutorial error governed; so it follows the quality of the representation should be measured against the law as it was then. See *Baker v. State*, 20 Kan. App. 2d 807, Syl. ¶ 3, 894 P.2d 221 (1995) (criminal defense lawyer typically not considered constitutionally ineffective for failing to foresee distant or unusual change in law); *Mayo v. Henderson*, 13 F.3d 528, 533-34 (2d Cir. 1994) (under *Strickland* test, "[c]ounsel is not required to forecast changes in the governing law"). The choice, however, is not especially significant. Under either the pre-*Sherman* standards or *Sherman* itself, the focus for our purposes rests on sufficiently substantial prejudice to Sumpter to compromise his right to a fair trial.

Before *Sherman*, the Kansas courts use a well-recognized, two-step test for measuring the impropriety of closing arguments in criminal cases:

> "'First, the appellate court must decide whether the comments fall outside the wide latitude afforded a prosecutor in discussing the evidence and the law. Second, if the prosecutor has exceeded those bounds, the appellate court must determine whether the improper comments constitute plain error; that is, whether the statements prejudiced the jury to the extent the defendant was denied a fair trial. *State v. McReynolds*, 288 Kan. 318, 323, 202 P.3d 658 (2009) (outlining mode of analysis); see *State v. King*, 288 Kan. 333, 351, 204 P.3d 585 (2009) (noting considerable range permitted advocates, including prosecutor, in arguing their causes in jury summations).'" *State v. Franco*, 49 Kan. App. 2d 924, 938, 319 P.3d 551 (2014) (quoting *State v. Schreiner*, 46 Kan. App. 2d 778, 793-94, 264 P.3d 1033 [2011], *rev. denied* 296 Kan. 1135 [2013]).

If the argument falls outside what is proper, the courts then look at three factors to assess the degree of prejudice:

> "'(1) whether the misconduct was gross and flagrant; (2) whether the misconduct showed ill will on the prosecutor's part; and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. Moreover, the third factor may not override the first two factors unless the harmless error tests of both K.S.A. 60-261 [refusal to grant new trial is inconsistent with substantial justice] and *Chapman v. California*, 386 U.S. 18, [22-24,] 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) [conclusion beyond a reasonable doubt that the error . . . changed the result of the trial], have been met.' [Citations omitted.]" *State v. McReynolds,* 288 Kan. 318, 323, 202 P.3d 658 (2009).

We apply that test here with the observation that the first part used to assess error in a closing argument was carried over in *Sherman*, while the second part for assessing prejudice now looks exclusively at the impact of any erroneous argument on the fairness of the trial without considering prosecutorial ill-will or the flagrancy of the impropriety—misconduct that may be more directly and effectively remedied in other ways.

Sumpter contends that in closing argument to the jurors, the prosecutor mischaracterized the content of the security video depicting part of the episode with J.B. The contention is unavailing. First, although the security video was played for the jurors during the trial and admitted as an exhibit, it is not part of the record on appeal. We cannot compare the video to the prosecutor's description and cannot really assess any purported error. See *State v. Kidd*, 293 Kan. 591, 601, 265 P.3d 1165 (2011) (party claiming error has obligation to provide sufficient record for appellate review); *Harman v. State*, No. 108,478, 2013 WL 3792407, at *1 (Kan. App.) (unpublished opinion) ("When there are blanks in that record, appellate courts do not fill them in by making assumptions favoring the party claiming error in the district court."). On its face, the prosecutor's comment about the video was proper. The prosecutor invited the jurors to

review the video during their deliberations. He described part of what was shown (and what the jurors had already seen during the trial) and explained how it conflicted with Sumpter's testimony. But he expressed no personal opinion about the veracity of the video or Sumpter's account. Given what's in front of us, we find no prosecutorial error.

Sumpter next contends the prosecutor inaccurately described a pro se pretrial motion he filed for a bond reduction. By way of background, the prosecutor used the motion as a statement against interest to cross-examine Sumpter during the trial. In closing argument, the prosecutor said the motion was consistent with Sumpter's testimony that included admissions to facts supporting lesser included offenses while denying facts that would support the more serious charges. A pro se pleading or statements a criminal defendant personally makes in court in the course of self-representation typically are treated as admissions. See *State v. Burks*, 134 Kan. 607, 608-09, 7 P.2d 36 (1932); *United States v. Thetford*, 806 F.3d 442, 447 (8th Cir. 2015).

The prosecutor did appear to misrepresent the motion. In the motion, Sumpter seems to argue that he and his lawyer concluded he could be found guilty only of misdemeanors based on the testimony presented at the preliminary hearing and, therefore, should receive a bond reduction. In the motion, Sumpter neither admitted to committing misdemeanors nor conceded the accuracy of the preliminary hearing evidence. He simply argued the State's strongest evidence would prove only misdemeanors. So to the extent the prosecutor's closing argument to the jury characterized the pretrial motion as some admission of guilt, it amounted to error. But nothing suggested the prosecutor acted out of ill-will, and the error wasn't flagrant in the sense the prosecutor built a theme of the closing argument around the motion. See *State v. Judd*, No. 112,606, 2016 WL 2942294, at *8-9 (Kan. App. 2016) (unpublished opinion) (under pre-*Sherman* standard, prosecutor committed reversible error in closing argument by repeatedly misstating basic point of law as singular theme in arguing to jury for conviction on thin circumstantial evidence). Moreover, the error didn't somehow shift the tide of the case, especially in light of

Sumpter's trial testimony. On the witness stand, Sumpter did admit to conduct likely amounting to comparatively minor crimes against A.C., J.B., and possibly A.E.

The failure of Sumpter's trial and appellate lawyers to raise this point in the direct criminal case could not have resulted in material prejudice under the *Strickland* test. The prosecutor's misstatement about the pretrial motion was not of the magnitude to call into question the jury's verdicts. So the error cannot warrant relief in a collateral challenge to those verdicts under K.S.A. 60-1507.

For his final challenge to the prosecutor's closing argument, Sumpter says the prosecutor misled the jurors about what the State had to prove to convict him of the attempted rape of J.B. In describing the elements of the attempted crime, the prosecutor told the jurors Sumpter had to intend to commit rape when he confined J.B. So, the prosecutor explained, the State did not have to show that Sumpter actually had sex with J.B.—only that he intended to. That's a misstatement of law, since an intent to have consensual sex would not be rape. Without an objection, the prosecutor seemed to realize the problem, corrected himself, and told the jurors the crime required an intent to commit rape. Arguably, though, the correction wasn't a model of clarity.[4]

[4]This is what the prosecutor said:

> "And he [Sumpter] told you what his intent was with [J.B.] He minimizes it and says well, I didn't go into that car with the intent to have sex with her. But clearly he told you on the stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her—or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do."

We see no prosecutorial error. The prosecutor misspoke, realized as much, and immediately offered a revised statement of the law to the jurors. Those kinds of slips are an unavoidable part of the unscripted presentation that is trial practice. The record shows nothing more. See *State v. Jones*, 47 Kan. App. 2d 512, 535, 276 P.3d 804 (2012)

(Atcheson, J., concurring) (deliberate line of questions lacking factual basis "was not a slip of the tongue or a single, poorly phrased question that could be excused as the occasional byproduct of the unscripted give-and-take of trial practice"); *State v. Alexander*, No. 114,729, 2016 WL 5344569, at *5-6 (Kan. App. 2016) (unpublished opinion), *rev. denied* 306 Kan. 1320 (2017). Sumpter cannot lay a foundation for relief here. Even if the prosecutor's comment were ambiguous or erroneous, the relevant jury instruction accurately set forth the elements, including the intent to commit rape, and tracked with what appeared to be the prosecutor's revision. Given the brevity of the prosecutor's comment and the clarity of the jury instruction, Sumpter could not have been materially prejudiced.

Other Challenges Raised in Sumpter's 60-1507 Motion

Sumpter has raised several additional issues in his 60-1507 motion that fail to warrant relief or further consideration in an evidentiary hearing. Either the record establishes no factual basis to find for Sumpter or settled law forecloses his claims.

• Sumpter contends his statutory right to a speedy trial was violated because he was not present to object to continuances his lawyer requested and received from the district court. At the time, the State had to bring a defendant in custody to trial within 90 days, as provided in K.S.A. 22-3402. Delays attributable to a defendant, such as continuances to prepare for trial, did not count against the 90-day period. But district courts could not grant continuances to defense lawyers if their clients objected. *State v. Hines*, 269 Kan. 698, 703-04, 7 P.3d 1237 (2000). The Kansas Supreme Court has recognized that if a defendant is not present when his or her lawyer requests a continuance (and, thus, cannot object), any resulting delay should be counted in the statutory speedy trial period. *State v. Brownlee*, 302 Kan. 491, 507-08, 354 P.3d 525 (2015).

Premised on that rule, Sumpter says because he wasn't present when his lawyer requested and received the continuances, his trial was delayed more than 90 days in violation of K.S.A. 22-3402. We assume the calculation to be accurate for purposes of resolving the issue. Neither Sumpter's trial lawyer nor his appellate lawyer asserted a statutory speedy trial violation. Sumpter contends the omission compromised his Sixth Amendment right to adequate legal representation. The remedy for a statutory speedy trial violation requires any conviction be set aside and the underlying charges be dismissed with prejudice. K.S.A. 22-3402(1). The failure to assert a valid violation would fall below the standard of care and could not be justified as a strategic culling of potential issues. Prejudice to the defendant in overlooking or discarding a speedy trial violation would be manifest.

But Sumpter's claim fails because the Legislature amended K.S.A. 22-3402 while his case was on direct appeal to eliminate a speedy trial violation based on the circumstances he now argues. As amended, K.S.A. 2017 Supp. 22-3402 states in relevant part:

> "If a delay is initially attributed to the defendant, but is subsequently charged to the state for any reason, such delay shall not be considered against the state . . . and shall not be used as a ground for dismissing a case or for reversing a conviction unless not considering such delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to such delay." K.S.A. 2017 Supp. 22-3402(g).

That section of the statute precludes counting a continuance originally assessed to a criminal defendant against the State (and, thus, against the speedy trial time) if a court later concludes the time was erroneously charged to the defendant in the first place. The limitation would be applicable here if we assume the continuances should not have been assessed to Sumpter because he had not authorized or otherwise agreed to them. The Kansas Supreme Court has held the amendment of K.S.A. 22-3402 adding subsection (g)

to be procedural and, thus, applicable to any case on direct appeal when it became effective. *State v. Dupree*, 304 Kan. 43, Syl. ¶ 5, 371 P.3d 862 (2016). The court denied relief to the defendant in *Dupree* in circumstances legally comparable to those Sumpter now presents. 304 Kan. at 57. Sumpter cannot demonstrate a violation of his speedy trial rights under K.S.A. 22-3402. His lawyers, therefore, could not have inadequately represented him by failing to allege a purported violation.

• Sumpter contends his lawyers in the criminal case inadequately represented him by failing to challenge the panel of potential jurors summoned at the start of the trial because the group included no African-Americans. Sumpter is African-American. A criminal defendant has a Sixth Amendment right to a jury composed of persons both called for jury duty and then selected to serve in a manner free of racial discrimination, thus reflecting a fair cross-section of the community. *Berghuis v. Smith*, 559 U.S. 314, 319, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010); *Duren v. Missouri*, 439 U.S. 357, 359, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979) (recognizing right as incorporated through the Due Process Clause of the Fourteenth Amendment and, thus, applicable to state criminal proceedings). Sumpter did not challenge the composition of the panel of potential jurors at trial or on direct appeal. Ordinarily, a defendant cannot litigate points in a 60-1507 motion that could have been raised on direct appeal. To do so, a defendant must show extraordinary circumstances. Those circumstances may include the constitutional inadequacy of his lawyers in the criminal case. As with the other issues, we have no idea why Sumpter's trial and appellate lawyers did not pursue this claim.

To advance an underrepresentation claim, Sumpter must present evidence that African-Americans appear in venires or panels from which juries are selected in numbers disproportionately below their percentage in the community generally and the reason lies in their "systematic exclusion . . . in the jury-selection process." See 439 U.S. at 364. In support of his 60-1507 motion, Sumpter has offered nothing to show that African-Americans are routinely underrepresented in jury pools in Sedgwick County. His claim

sinks on that failure. The absence of African-Americans from the particular jury panel called for his case is nothing more than a statistical anomaly so far as the record evidence demonstrates. An aberration in one panel does not and cannot advance an underrepresentation claim that turns on the systemic exclusion of a recognized group, such as African-Americans, from jury service.

• As part of his sentence, Sumpter will be required to register as a sex offender when he gets out of prison and to report as directed under the Kansas Offender Registration Act, K.S.A. 2017 Supp. 22-4901 et seq. He challenges registration as cruel and unusual punishment violating the Eighth Amendment to the United States Constitution. He also submits a jury must make the specific findings requiring registration consistent with constitutional due process protections. As Sumpter concedes, the Kansas Supreme Court has rejected the arguments that KORA entails punishment subject to the Eighth Amendment or violates due process requirements for jury findings. See *State v. Huey*, 306 Kan. 1005, 1009-10, 399 P.3d 211 (2017), *cert. denied* 138 S. Ct. 2673 (2018) (KORA provisions not considered punishment under Eighth Amendment; in turn, no due process requirement jury find facts supporting registration).

• Sumpter similarly contends lifetime postrelease supervision imposed on him as part of his sentence amounts to constitutionally cruel and unusual punishment. Under this condition, Sumpter will have to report to a parole officer after his release from prison and will be subject to restrictions on his travel, searches of his residence, and other limitations on his liberty. Those limitations are different from (and in addition to) the reporting requirements under KORA.

Again, Sumpter acknowledges the Kansas Supreme Court has turned aside constitutional challenges to lifetime postrelease supervision for comparable convicted sex offenders. See *State v. Williams*, 298 Kan. 1075, 1089-90, 319 P.3d 528 (2014) (lifetime postrelease supervision not cruel and unusual punishment); *State v. Mossman*, 294 Kan.

901, 921, 930, 281 P.3d 153 (2012). Sumpter also suggests the requirement violates the Equal Protection Clause of the Fourteenth Amendment, but he neither clearly articulates the disadvantaged class to which he purportedly belongs nor explains why such a classification would be constitutionally impermissible. Our court has rejected equal protections attacks on lifetime postrelease supervision. *State v. Dies*, No. 103,817, 2011 WL 3891844, at *4-5 (Kan. App. 2011) (unpublished opinion) (holding that lifetime postrelease supervision for adult sex offenders does not violate equal protection).

• As he did on direct appeal, Sumpter contends the district court improperly considered his criminal history in determining his sentence. He argues that the district court's use of his past convictions in determining an appropriate sentence impairs his constitutional rights because the fact of those convictions was not proved beyond a reasonable doubt to the jury. He relies on the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to support that proposition. We denied relief on this issue on direct appeal. *Sumpter*, 2013 WL 6164520, at *11. We do so again now.

The Kansas Supreme Court has consistently rejected that argument and has found the State's current sentencing regimen conforms to the Sixth and Fourteenth Amendments with respect to the use of a defendant's past convictions in determining a presumptive statutory punishment. *State v. Fischer*, 288 Kan. 470, Syl. ¶ 4, 203 P.3d 1269 (2009); *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002). We, therefore, decline Sumpter's invitation to rule otherwise, especially in light of the court's continuing affirmation of *Ivory*. *State v. Pribble*, 304 Kan. 824, 838-39, 375 P.3d 966 (2016); *State v. Hall*, 298 Kan. 978, 991, 319 P.3d 506 (2014).

Conclusion

We have endeavored to meticulously review the numerous points Sumpter has raised on appeal from the denial of his motion for relief under K.S.A. 60-1507. In doing so, we have examined the underlying criminal prosecution, including the trial evidence and the briefing in the direct appeal. We find the district court properly denied the motion. Given the issues and the record, the district court did not need to hold an evidentiary hearing.

Affirmed.

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

TIMOTHY SUMPTER, Petitioner	)	
v.	)	District Court Case No. 16CV161
STATE OF KANSAS, Respondent	)	

AMENDED RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

The State of Kansas, through Assistant District Attorney Robin Sommer, responds as follows to petitioner's amended petition for writ of habeas corpus, which was timely filed on July 21, 2016.

Procedural History and Summary of Relevant Facts

1. Petitioner's motion emanates from his Sedgwick County criminal cases, 11CR1187, 11CR1290, and 11CR1638, which involved various sex crimes against four women, A.E., A.C., A.P. and J.B., in four separate incidents. The cases were consolidated prior to jury trial, where he was represented by Alice Osburn. A summary of the underlying facts follows. (Note: All references will be to transcripts of the jury trial, identified by corresponding volume.)

11CR1290

2. In September 2010, twenty-four-year-old A.C. met petitioner through a mutual friend at a party and the two exchanged phone numbers. (Vol. XI, 113-14.) They met at a fast food restaurant at approximately 8:00 one evening and then went to a nearby nature center where they proceeded to stroll and chat for nearly two hours. (Vol. XI, 116-118.) When it became dark and A.C. voiced a desire to leave, petitioner's mood altered and he started to engage in bizarre behavior, hiding A.C.'s purse in the brush and "[holding her] down with all of his force" so she could not retrieve her belonging and make her way out of the park. (Vol. XI, 120-121.) Petitioner occasionally apologized and pretended to morph between normal and peculiar behavior, attributing his conduct to a pill he took earlier that evening. (Vol. XI, 120, 123). At one point petitioner tackled A.C., held her to the ground, and repeatedly fondled her buttocks while masturbating himself. (Vol. XI, 121.) When she told him to stop and threatened to yell for help, petitioner warned her that doing so would only make the situation worse for her. (Vol. XI, 122.) A.C. managed to break free but the reprieve was brief; when she ran petitioner gave chase, grabbed her pants and pulled them down. (Vol. XI, 122.) Throughout the attack, petitioner's focus was on fondling her buttocks. (Vol. XI, 138.) The attack continued for approximately an hour when A.C. finally decided to feign compliance in an effort to somehow secure her release; during the course thereof, she recalled an earlier conversation the two shared regarding religion and inquired whether either Jehovah or petitioner's parents would approve of his conduct. (Vol. XI 123, 151.) Petitioner finally relented and allowed A.C. to exit the park. (Vol. XI, 124). On the way out, petitioner told her he needed to go to the

hospital to figure out what he had taken or the cause of his behavior; he later texted A.C. as though nothing had happened to let her know a nurse at the hospital thought the pill must have been Oxycontin. (Vol. XI, 130.) A.C. reported the incident to the police the following day. (Vol. XI, 132.)

11CR1638

3. In January 2011, J.B. left a bar, alone, in the Old Town area of Wichita, Kansas, at approximately 1:00 a.m. to retrieve some things from her car that was parked in a nearby parking lot. (Vol. XII, 13-19.) As she walked down the street petitioner approached her from behind, asked her name, who she was with, and where she was heading. (Vol. XII, 21.) J.B. told him several time to "kick rocks," or leave her alone. (Vol. XII, 21.) Petitioner continued to follow her and inquire if she was with anyone. (Vol. XII, 22.) J.B. stopped and repeated that she wanted him to leave. (Vol. XII, 23.) As petitioner put his hands up, J.B. thought he had left so she resumed her walk down the alley toward the parking lot. (Vol. XII, 23.) Seemingly out of nowhere petitioner appeared again; J.B. was irritated and inquired what petitioner did not understand about her order for him to go away. (Vol. XII, 23.) Petitioner apologized and told her he meant no disrespect; he was simply concerned about someone so beautiful walking alone and wanted to ensure that she was safe. (Vol. XII, 23.) J.B. let down her guard and agreed to let him continue to walk with her awhile longer because he seemed to be genuinely nice and was not engaging in behavior that normally would have raised flags for her as a person to be avoided. (Vol. XII, 23-25.) Once they reached the parking lot, J.B. again attempted to distance herself from petitioner so that he would not know which car was hers. (Vol. XII, 25.) She thanked him for walking her to her car and

told him to have a good evening. (Vol. XII, 25.) Petitioner was not so easily cast aside and against started pressuring J.B. to tell him where she was going and who with because he thought she was cool and wanted to hang out with her. (Vol. XII, 25.) Annoyed, J.B. proceeded on to her car, with petitioner not far behind. (Vol. XII, 38.) When she reached the vehicle J.B. again told petitioner it was time to part company, retrieved her key from the gas tank, and unlocked her door. (Vol. XII, 38-39.) Petitioner requested to at least open the door for her and when J.B. allowed him to do so petitioner seized the opportunity to force his way into the vehicle despite J.B.'s considerable resistance; at one point punching her in order to force her into the passenger side. (Vol. XII, 39-40.) Petitioner braced J.B.'s head against the dashboard and pressed his knee into her throat. (Vol. XII, 42.) As her breathing became labored J.B. felt petitioner reach around and start grabbing her buttocks. (Vol. XII, 42.) Petitioner then moved his hand around to her vaginal area but J.B. informed him she was on her period and was using a tampon. (Vol. XII, 42.) J.B. continued to try and struggle but petitioner punched her multiple times in the face and warned her that he was going to get what he wanted. (Vol. XII, 43.) When J.B. reached back for the door handle, petitioner punched her again and told her he was not playing around. (Vol. XII, 44.) At one point petitioner finally relieved the pressure against J.B.'s neck and she decided to feign compliance in an effort to secure an escape through a different angle; she told petitioner she would give him what he wanted but they needed to get in the back seat. (Vol. XII, 45.) J.B. complied with petitioner's demands to touch his penis and call him "Justin"; J.B. then climbed on top of his lap and punched him repeatedly in the face. (Vol. XII, 46-47.) She was eventually able to open the door

with her toes, force petitioner out by kicking him, and lock the doors. (Vol. XII, 47.) When she looked up, however, petitioner was standing outside the driver's side door, dangling her keys. (Vol. XII, 47.) Petitioner apologized and promised to give her the keys and allow her to leave. (Vol. XII, 49.) J.B. opened the door slightly and petitioner acted as though he was going to drop the keys down through the crack; instead he grabbed hold of the door, ripped it back open, and punched J.B. again. (Vol. XII, 50.) As they struggled, J.B. laid her elbow against the horn and honked it repeatedly in an effort to drawn attention to the situation. (Vol. XII, 51.) Just as J.B. managed to open the car door again with her foot and kick petitioner from the car again, a car pulled up and stopped. (Vol. XII, 52.) Petitioner ran over to the car, pants undone, and told the people he needed a ride and "needed to get out of here." (Vol. XII, 76-77.) The passenger heard J.B. scream that petitioner raped her. (Vol. XII, 77.) Petitioner told the occupants that J.B. was his girlfriend and repeated that he needed to go and get out of there; the occupants refused to give him a ride. (Vol. XII, 77-78.) J.B. took the opportunity to speed away, located her friends, and contacted police. (Vol. XII, 52-53.) J.B. relayed the events to the police officer and underwent a sexual assault exam at the hospital later that morning. (Vol. XII, 57, 97, 210-211.) The examining nurse documented J.B.'s injuries and collected fingernail scrapings as evidence. (Vol. XII, 220; Vol. XII 17-18.)

11CR1290

4. In February 2011, A.P. met petitioner, who had identified himself as 'Timothy,' when he came to cash a check at the Dillon's customer service counter where A.P. was employed. (Vol. XI, 175-76.) He visited the store several more times during which the

two would always engage in small talk. (Vol. XI, 175-76.) In a previous conversation he said he had a girlfriend so when A.P. agreed to exchange numbers with petitioner it was with the hope that she and her boyfriend had found a new couple to hang out with. (Vol. XI, 177.) Early the next morning, at approximately 2:00 or 3:00, petitioner called A.P. because he was upset over the death of a friend and needed someone to talk to. (Vol. XI, 177-78.) A.P. listened for nearly fifteen minutes before she terminated the call, explaining she needed to go back to bed as she had to go to work at 7:00 that morning. (Vol. XI, 178). When A.P. arrived for work at approximately 6:40 a.m., she was confronted by petitioner in the parking lot. (Vol. XI, 179.) He attempted multiple times to lure her into his vehicle to resume their previous discussion regarding the despondency he was experiencing over his friend, but A.P. declined and told him they could talk inside. (Vol. XI, 180.) When his efforts were rebuffed, he followed A.P. into the store and asked her to a private area to talk purportedly in an effort to conceal his crying. (Vol. XI, 180.) Once there however, petitioner quickly changed the discussion and inquired whether A.P. ever considered modeling and if she did, what she thought of as her best feature. (Vol. XI, 189.) When she responded that it was her eyes, petitioner probed further and she said her smile. (Vol. XI, 190.) Petitioner intensified his inquiry and asked if she would choose "her boobs or her butt." (Vol. XI, 190.) A.P. responded that she would guess her butt at which time petitioner reached out and grabbed her buttocks. (Vol. XI, 190.) A.P. told him he could describe something but he was not to touch her. (Vol. XI, 190.) Petitioner responded "okay" but then repeated the same behavior a few short moments later. (Vol. XI, 190.) A.P. walked away so petitioner grabbed her arm,

yanked her back, wrapped her in a bear hug and groped her buttocks. (Vol. XI, 190.) A.P. ordered petitioner to stop and let her go; when he finally did she bolted for customer service and called the police. (Vol. XI, 190.)

11CR1187

5. In April 2011, nineteen-year-old A.E. and two of her friends went to the apartment of a young man who one of her friends was romantically interested in, with the intent of fixing dinner for him and his roommate and then staying the night. (Vol. XI, 36-41.) Shortly after the girls' arrival, A.E. was introduced to a young guy who went by the moniker 'Slim' and was an acquaintance of the young men at the apartment; she later learned his name was Timothy Sumpter. (Vol. XI, 38.) After dinner the group hung out for a while and at one point A.E. went into an adjoining bedroom to grab a blanket. (Vol. XI, 42.) Petitioner followed her inside and closed the door behind him. (Vol. XI, 42.) A.E. attempted to exit the room but petitioner blocked the door; thinking he just needed to talk to someone A.E. sat down on the bed. (Vol. XI, 42.) The two chatted for a while then petitioner tried to get close to her and implied he wanted to have sex with her. (Vol. XI, 42, 44.) A.E. told him he might as well masturbate because she was not going to have sex with him. (Vol. XI, 44.) His response was to pull out his penis and begin to masturbate in her presence. (Vol. XI, 44.) A.E. wanted to leave but petitioner put his hand on her shoulder as she started to move. (Vol. XI, 42.) She told him to stop touching her as it was making her uncomfortable. (Vol. XI, 43.) Petitioner immediately started to cry and began telling A.E. about his father that had recently passed away. (Vol. XI, 42.) He ultimately composed himself and expressed a desire to go outside and smoke a cigarette. (Vol.

XI, 42.) Seeing it as her way to exit the room, A.E. accompanied him outside. (Vol. XI, 45.) A.E. was clad only in her sleep shorts and t-shirt, no shoes, and it was not long before she grew cold as they sat on the outside landing; petitioner gave her his jacket for warmth. (Vol. XI, 45.) A short time later, petitioner suggested that they sit in his vehicle, a white SUV, to chat and get out of the cold; A.E. agreed under the erroneous assumption that he did not have the keys. (Vol. XI, 47.) Once inside petitioner started the car and when A.E. inquired what he was doing, petitioner responded he wanted to kill himself. (Vol. XI, 47.) A.E. felt compelled to stay thinking it may help to prevent petitioner from hurting himself. (Vol. XI, 48.) Petitioner made statements that he had a gun and reached down under the seat several times as though he was going to pull out a gun, which prompted A.E. to grab his hand and implore him not to do it. (Vol. XI, 48.) Petitioner drove them to a parking lot of a nearby nature center and once there, made statements that led A.E. to conclude he was determined to take his own life. (Vol. XI, 49.) A.E. tried to jump from the vehicle but petitioner wrapped his arm around her waist and neck to prevent her escape. (Vol. XI, 49.) A.E. started kicking and screaming but petitioner refused to let go until a security officer pulled into the lot. (Vol. XI, 51.) Petitioner released her and promised to take her back to the apartment if she agreed not to say anything to the guard. (Vol. XI, 51.) The security officer explained it was after park hours so they need to leave; A.E. kept her promise to remain quiet thinking it would secure her freedom. (Vol. XI, 51.) Petitioner pulled out of the parking lot and began driving changing directions frequently, occasionally he would turn the truck around and say he was going back to the apartment because he was a good person but would then do another U-turn and

say he was going to kill himself instead. (Vol. XI, 51.) Approximately twenty minutes later petitioner pulled the truck over into an isolated dirt road. (Vol. XI, 52.) Petitioner immediately started groping A.E. (Vol. XI, 53.) She demanded that he stop but he continued the attack by trying to reach into her pants and grabbing her buttocks then leaning in to kiss her. (Vol. XI, 53-55.) Moments later, a sheriff's deputy pulled in behind petitioner's truck. (Vol. XI, 53.) Petitioner again employed his previous tactic and told A.E. that if she would remain quiet he would take her back to the apartment. (Vol. XI, 57.) He then attempted to get her to tell the deputy that he was drunk and they simply pulled over to switch drivers. (Vol. XI, 57.) When the deputy approached the window, A.E. started waving her hands and mouthed the words "help me." (Vol. XI, 57.) The deputy observed A.E.'s antics, noticed she looked terrified, and directed petitioner to step from the vehicle. (Vol. XI, 57, 85.) The deputy passed petitioner off to another deputy and made contact with A.E. to get an assessment of the situation. (Vol. XI, 85-86.) A.E. explained what had transpired that evening, which prompted the deputy to reinitiate contact with petitioner and issue Miranda warnings to him; Petitioner agreed to speak with the deputy. (Vol. XI, 87-95.) Petitioner explained that he had been drinking and was upset so he and A.E. were simply driving around talking. (Vol. XI, 95.) When the deputy inquired into the nature of their relationship, petitioner explained that they had been involved in a relationship for over a year; an assertion that stood in stark contrast with A.E.'s earlier statement to the deputy that she had only just become acquainted with petitioner that evening. (Vol. XI, 96.) Petitioner was taken into custody at the conclusion of his discussion with the deputy.

6. Detective Scott Wiswell was assigned as the lead detective in A.P.'s case and looking into similarities present in other cases as he conducted the investigation. (Vol. XII, 161-63.) Through that mechanism Wiswell became aware of A.C.'s case. (Vol. XII, 161-63.) The detective noted that both victims knew petitioner and he had given them the same phone number where he could be contacted. (Vol. XII, 163.) Wiswell eventually learned petitioner was in custody in connection with A.E.'s case and learned of J.B.'s case shortly thereafter. (Vol. XII, 165-66.) Wiswell arranged for an interview with petitioner and advised him of his rights pursuant to Miranda; petitioner agreed to speak with him. (Vol. XII, 173-74.) Petitioner repeatedly denied knowing each of the four women and disavowed any familiarity with the incidents or their respective locations. (Vol. XII, 175-203.)

7. Petitioner was charged in 11CR1187 with Kidnapping and Aggravated Sexual Battery as to A.E.; in 11CR1290 with Attempted Rape, or in the alternative, Aggravated Sexual Battery as to A.C. and Aggravated Sexual Battery as to A.P.; and in 11CR1638 with Aggravated Kidnapping, Attempted Rape (amended from Rape) and Aggravated Sexual Battery as to J.B.

8. Prior to trial the State filed a motion seeking to consolidate the three cases on the grounds they presented with the same or similar characteristics in that all four incidents involved nonconsensual sexual touching and were conducted in a physically aggressive manner against victims who bore similar physical characteristics; defendant also accomplished his attacks within a seven-month period by isolating his victims through emotional manipulation a focused on their buttocks during the assaults. (Vol. II, 1-6.)

The court conducted an extensive hearing on the matter and ultimately concluded consolidation was appropriate. (Vol. IX, 37-51.)

9. Upon hearing the evidence, the jury returned a verdict finding petitioner guilty of the lesser included offenses for the crimes committed against A.C. and A.P., as well as for one of the two charges against A.E.; the jury also concluded he was guilty of the remaining offense committed against A.E., as well as each of the three charges stemming from the assault of J.B. (Vol. I, 67, 88.) The court subsequently sentenced petitioner to serve a controlling term of 315 months in prison and 36 months in jail to be served consecutive to the prison sentence. (Vol. II, 90-91.)

10. On direct appeal, petitioner and his appellate attorney, Heather Cessna, raised several claims of error that included the following issues:

- The trial court erred in consolidating the three cases;
- petitioner's statement to law enforcement was involuntary and should have been suppressed;
- the trial court erred in giving an multiple acts instruction;
- the prosecutor improperly commented on defendant's credibility in closing argument;
- cumulative error;
- the trial court erred in using his previous convictions during sentencing in violation of *Apprendi*; and
- the trial court's imposition of a no-contact order at the time of his sentence resulted in an illegal sentence.

State v. Sumpter, 313 P.3d 105 (2013) (unpublished opinion), *rev. denied* January 15, 2015. The mandate was issued on January 28, 2015.

11. After analyzing each issue specifically noted above, the Court denied relief and affirmed the convictions, with the exception of the no-contact order which was vacated. In particular the Court stated the following about the issues mentioned above:

- Consolidation

> First, Sumpter argues the district court erred by consolidating all three of his cases for trial because the crimes involving J.B. were not of the same or similar character as the other crimes.
>
> . . .
>
> [W]e find that the district court properly concluded that the condition precedents had been met. We acknowledge that the crimes against J.B. were more violent than the other crimes and they occurred in central Wichita (Old Town), not in northeast Wichita like the other crimes. However, these differences do not prohibit consolidation because there are many other marked similarities—Sumpter obtained his victim's trust by appealing to her emotions, accompanied her to an isolated location, used physical force to restrain her, and touched her in a sexual manner against her will.[Citations omitted.]
>
> Finally, we conclude the district court did not abuse its discretion in allowing joinder. It cannot be said that no reasonable person would have found the crimes against J.B. to be similar to the crimes against the other women. Also, the court instructed the jury that each charge constituted a 'separate and distinct offense' and that the jury should 'decide each charge separately on the evidence and law applicable to it.' [Citation omitted.] Finally the jury demonstrated its ability to follow this instruction and judge each case independently when it acquitted Sumpter of the attempted rape of A.C. and convicted him of the sexual battery of A.E., A.C., and A.P. (rather than aggravated sexual battery) and the criminal restraint of A.E. (rather than kidnapping). [Citation omitted.]"

State v. Sumpter, at *3-*6.

- Statement to Law Enforcement

> Sumpter argues that the district court erred in denying his motion to suppress his statement to police and admitting it at trial because it was involuntary, given his youth, incarceration, precarious emotional state, and lack of knowledge that the interview was being recorded.

. . .

At the hearing on the motion to suppress, the district court heard the testimony of the lead detective in the case who interviewed Sumpter and took his statement. The court also viewed a video recording of the interview. At the conclusion of the hearing, the court concluded that Sumpter gave his statement "freely, voluntarily and intelligently" and it was "the product of his free will."

. . .

[S]ubstantial competent evidence—the video recording—supports the district court's findings that Sumpter understood his rights, was alert, had no trouble tracking the detectives' questions, and was not threatened or pressured into making a statement. Based upon those facts, the court reached the correct legal conclusion—that Sumpter's statement was voluntary.

State v. Sumpter, at *6- *7.

- Multiple Acts Instruction

Sumpter argues the use of the word "could" in the pattern multiple acts instruction constituted clear error because the jury may have interpreted it as an instruction to direct a verdict.

. . .

Neither party's proposed instructions included PIK Crim. 3d 68.09-B. At the jury instruction conference, the district court explained that the parties had "hashed … out" and agreed on the instructions the day before. The court proceeded to review each instruction. Defense counsel verified that she was "okay with" the multiple acts instruction, thought it was "appropriate," and had no objection to it.

[T]he district court instructed the jury using the exact language of PIK Crim.3d 68.09-B. This pattern instruction accurately states the current law on multiple acts. [Citations omitted.] The district court properly instructed the jury that more than one act possible, not certainly, constituted aggravated sexual battery or sexual battery of A.C. and J.B.

State v. Sumpter, at *7-*8.

- Closing Argument

> Sumpter argues the State committed prosecutorial misconduct by repeatedly and improperly commenting on his credibility during its initial closing argument. . . .
>
> . . .
>
> [S]umpter's theory of defense was that he committed the lesser included crimes. The prosecutor responded by listing the numerous false statements Sumpter had made to law enforcement during his interview. The prosecutor did not offer his personal opinion assailing Sumpter's credibility. [Citation omitted.] The prosecutor's comments were part of a permissible argument that the trial testimony of the victims was more likely to be credible, based on the evidence, than Sumpter's trial testimony. [Citation omitted.]

State v. Sumpter, at *9-*11.

- Cumulative Error

> Sumpter argues that the cumulative effect of multiple errors requires reversal.
>
> For errors to have a cumulative effect that transcends the effect of the individual errors, there obviously must have been more than one individual error. [Citation omitted.] Since, no errors occurred at trial, Sumpter's argument on this point fails.

State v. Sumpter *11.

- *Apprendi*

> Sumpter argues the district court violated his constitutional rights under *Apprendi* . . . by using his prior convictions to enhance his aggravated kidnapping sentence without requiring the State to prove them to a jury beyond a reasonable doubt.
>
> Sumpter acknowledges this issue was decided against him in *State v. Ivory*, 273 Kan. 44, 46–48, 41 P.3d 781 (2002), and he presents it strictly to preserve his federal review. We are duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous

> position. [Citation omitted.] Since there is no indication that the Supreme Court intends to depart from its position on this issue, this argument fails. [Citation omitted.]
>
> . . .
>
> Sumpter also argues the district court violated his constitutional rights . . . by imposing the aggravated sentence in the grid box without requiring the State to prove aggravating factors to a jury beyond a reasonable doubt.
>
> Sumpter acknowledges this issue was decided against him in *State v. Johnson*, 286 Kan. 824, 851–52, 190 P.3d 207 (2008), and he presents it strictly to preserve his federal review. Again, we are duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position. [Citation omitted.] Again, there is no indication that the Supreme Court intends to depart from its position on this issue. [Citation omitted.] Again, Sumpter's argument fails.

State v. Sumpter, at *11-*12.

- No-contact Order

> Finally, Sumpter argues the district court's imposition of a no-contact order at the time of his sentencing resulted in an illegal sentence. The State concedes this issue.
>
> [T]he no-contact order portion of Sumpter's sentence must be vacated. [Citation omitted.]

State v. Sumpter, at *12.

12. Petitioner and his attorneys, Katie Gates Calderon and Ruth Anne French-Hodson, timely filed a K.S.A. 60-1507 motion and an amended K.S.A. 60-1507 motion with attached memorandum of law, asserting two claims of ineffective assistance of trial counsel (Osburn), three claims of ineffective assistance of appellate counsel (Cessna), and three claims of mere trial error:

- **Claim #I(A)** (pp. 4-10 of motion): "Sumpter's trial counsel was ineffective because of her failure to understand and argue the elements of aggravated kidnapping in relation to the incident with J.B."
    - TRIAL IAC

- **Claim #I(B)** (pp. 3, 10 of motion): "Due to counsel's continuations without consent, Sumpter's statutory rights to speedy trial were violated."
    - TRIAL IAC

- **Claim #II(A)** (pp. 11-16 of motion): "Sumpter's appellate counsel provided ineffective assistance when she failed to argue that the district court abused its discretion in denying the motion to sever because of the manifest injustice and prejudice to Sumpter from consolidation."
    - APPELLATE IAC

- **Claim #II(B)** (pp. 11, 16 of motion): "Appellate counsel also provided constitutionally insufficient assistance by failing to raise the sufficiency of the kidnapping count."
    - APPELLATE IAC

- **Claim #II(C)** (pp. 11, 17-19 of motion): "Appellate counsel also failed to identify key instances of prosecutorial misconduct that were incredibly prejudicial."
    - APPELLATE IAC

- **Claim #III(A)** (pp. 20-22 of motion): "The lack of any African-Americans on Sumpter's jury venire denied Sumpter his right to a jury drawn from a fair cross section of the community."
    - TRIAL ERROR

- **Claim #III(B)** (pp. 22-23 of motion): "The offender registry and lifetime post-release supervision sentencing requirements are unconstitutional."
    - TRIAL ERROR

- **Claim #III(C)** (p. 24 of motion): "The district court violated Mr. Sumpter's Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey* when it did not require the State to prove the factors to a jury beyond a reasonable doubt."
    - TRIAL ERROR

13. This court should deny the motion without holding an evidentiary hearing. An evidentiary hearing will not bring forth evidence that will bear on the ultimate validity of petitioner's claims.

K.S.A. 60-1507 Law

14. In *Moncla v. State*, 285 Kan. 826, Syl. ¶ 1, 176 P.3d 954 (2008), our Supreme Court noted that a district court is not required to hold an evidentiary hearing if it can be conclusively determined that relief is not warranted:

> An evidentiary hearing on a K.S.A. 60-1507 motion is not required if the motion together with the files and records of the case conclusively show that the movant is not entitled to relief. The burden is on the movant to allege facts sufficient to warrant a hearing. If no substantial issues of fact are presented by the motion, the district court is not required to conduct an evidentiary hearing.

15. To meet the required burden, a petitioner must do more than raise conclusory contentions:

> [T]he movant must make more than conclusory contentions and must state an evidentiary basis in support of the claims or an evidentiary basis must appear in the record. [Citation omitted.] However, in stating the evidentiary basis, the K.S.A. 60–1507 motion must merely 'set forth a factual background, names of witnesses or other sources of evidence to demonstrate that petitioner is entitled to relief.' [Citation omitted.]

Swenson v. State, 284 Kan. 931, 938, 169 P.3d 298 (2007); see also *Burns v. State*, 215 Kan. 497, 500, 524 P.2d 737 (1974) (a movant's unsupported claims are never enough for relief pursuant to K.S.A. 60-1507). This threshold requirement prevents fishing expeditions into allegations that cannot be substantiated and is consistent with long-standing precedent.

16. If a movant alleges facts that are not in the original record, an evidentiary hearing is

not required if the court determines there is no legal basis for relief, even assuming the truth of the factual allegations. *Trotter v. State*, 288 Kan. 112, 137, 200 P.3d 1236 (2009).

17. Kansas law also provides that a movant cannot raise a mere trial error in a K.S.A. 60-1507 motion, but may raise an error affecting constitutional rights if there are exceptional circumstances:

> [A] proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on direct appeal, provided there are exceptional circumstances excusing the failure to appeal.

See Supreme Court Rule 183(c)(3); see also *Trotter v. State*, 288 Kan. at 127 (discussing exceptional circumstances for failing to raise an issue at trial or on direct appeal). The burden of showing exceptional circumstances lies with the movant. *Holt v. State*, 290 Kan. 491, 495, 232 P.3d 848 (2010).

18. When a petitioner is making a claim of ineffective assistance of counsel, our Supreme Court has also stated the following about the applicable two-part test:

> To prevail on a claim of ineffective assistance of counsel a criminal defendant must establish that (1) counsel's representation fell below an objective standard of reasonableness, considering all the circumstances and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been more favorable to the defendant. In considering the first element, the defendant's counsel enjoys a strong presumption that his or her conduct falls within the wide range of reasonable professional conduct. Further, courts are highly deferential in scrutinizing counsel's conduct and counsel's decisions on matters of reasonable strategy, and make every effort to eliminate the distorting effects of hindsight.

Moncla v. State, 285 Kan. 826, Syl. ¶ 3.

19. The burden of establishing ineffective assistance of counsel to the extent necessary to

overcome the presumption of regularity of a conviction and the presumption of reasonable assistance of counsel is upon movant. *Hogan v. State*, 30 Kan. App. 2d 151, 38 P.3d 746 (2002). "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Moreover, the adequacy of an attorney's representation must be judged by the totality of the representation, not "by fragmentary segments analyzed in isolated cells." *Schoonover v. State*, 2 Kan. App. 2d 481, Syl. ¶ 4, 582 P.2d 292 (1978).

20. Our Supreme Court has further recognized, "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of alleged deficiencies." *Edgar v. State*, 294 Kan. 828, Syl. ¶ 4, 283 P.3d 152 (2012). The United States Supreme Court holds the same view:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

21. To make this determination, this court may take judicial notice of district court files and case history. *In the Interest of A.S.*, 12 Kan. App. 2d 594, 598, 752 P.2d 705 (1998) (K.S.A. 60-409(b)(4) allows a court to take judicial notice of its case file, including journal entries contained therein). The State requests that this court take judicial notice of the district court files and case history in the current and underlying case.

Analysis

22. **Petitioner's first claim [#I(A)] is that trial counsel was ineffective because she did not argue the elements of aggravated kidnapping in relation to the incident with J.B.**

- Although this claim of ineffective assistance of trial counsel is properly brought under K.S.A. 60-1507, it should be summarily denied without an evidentiary hearing because it can be addressed based on the record before the court and on Kansas law.

- Petitioner argues that Osburn should have objected to the aggravated kidnapping count at preliminary hearing. Petitioner also asserts that had Osburn objected to the aggravated kidnapping count it would have resulted in an acquittal of that count. He is mistaken.

- Kidnapping as defined by K.S.A. 21-3420(b) is "taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime."

- Petitioner argues that there is no evidence to show that he forcibly took J.B. to her car to commit the crime and that in fact the evidence shows that J.B. voluntarily went to her car with him. However, petitioner fails to acknowledge that there is overwhelming evidence that he confined J.B. in the car to facilitate the crime of attempted rape:

    - Petitioner braced J.B.'s head against the dashboard and pressed his knee into her throat. (Vol. XII, 42.)

        - Confinement by force.

    - J.B. continued to try and struggle but petitioner punched her multiple times in the face and warned her that he was going to get what he wanted. (Vol. XII, 43.)

        - Confinement by force.
        - Confinement by threat.
    - When J.B. reached back for the door handle, petitioner punched her again and told her he was not playing around. (Vol. XII, 44.)
        - Confinement by force.
        - Confinement by threat.
    - J.B. opened the door slightly and petitioner acted as though he was going to drop the keys down through the crack; instead he grabbed hold of the door, ripped it back open and punched J.B. again. (Vol. XII, 50.)
        - Confinement by deception.
        - Confinement by force.

- Petitioner claims that trial counsel was ineffective because she failed to argue that the aggravated kidnapping did not meet the test set forth in *State v. Buggs*, 219 Kan. 203 (1976). *Buggs* found that the movement or confinement: "(a) must not be slight, inconsequential and merely incidential to the other other crime; (b) [m]ust not be of the kind inherent in the nature of the other crime; (c) [m]ust have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Id.* at 216.
    - Petitioner's confinement of J.B. was not slight, inconsequential or merely incidental to the attempted rape. He does not just attempt to rape J.B., he goes to great effort to confine her to the car by force, threat, and deception. Petitioner punched her, told her he was going to get his way, put his knee on her throat restricting her airway, and deceived her into letting him back in the car when he had her keys. These acts are significant to the confinement of J.B. and are not merely incidental to the attempted rape.
    - The confinement of J.B. in the car is not inherent in the nature of attempted rape. Petitioner could have raped J.B. at any point after he first contacted her but he consciously decided to wait to attempt the rape until J.B. is confined in the car with him. Confining a person in a car is not inherent in the nature of attempted rape. A rape can

occur anywhere, not just in a car. It could be argued that violence is inherent in the nature of attempted rape. What petitioner did to confine J.B. to the car goes beyond just violence. In addition to violence that he inflicted upon J.B., he also threatened her and then promised tolet her go in an effort to deceive her only to force his way back into the car and continue his attack.

- Confining J.B. to the car made the attempted rape substantially easier to commit and substantially lessened the risk of detection. Petitioner waited to begin his attack on J.B. until she was in the car because it was easier to physically control her when she was in a confined space. The car also helped conceal the attempted rape making it harder for passersby to hear or see his attack on J.B..

- Confining a victim to a vehicle is not inherent to the crime of rape. See *State v. Coberly*, 233 Kan. 100 (1983). Petitioner mistakenly argues that under the ruling in *State v Cabral*, 228 Kan. 741, 619 P.2d 1163 (1980), which held that when forcible rape occurs in a vehicle, some confinement is a necessary part of the force, the confinement in this case was merely incidental or inherent to the attempted rape and not part of the separate crime of aggravated kidnapping. However, the Court has made a distinction from *Cabral* in cases where the victim was forced to remain in a vehicle against her will. See *State v. Lile*, 237 Kan. 210, 213-14, 699 P.2d 456 (1985) and *State v. Blackburn*, 251 Kan. 787, 840 P.2d 497 (1992).

- The issue of the sufficiency of the aggravated kidnapping count is a matter of law. This court has the ability to review the facts in the record and make a legal determination regarding the sufficiency of the evidence without an evidentiary hearing.

- If this court finds that there is sufficient evidence to support the aggravated kidnapping count, then petitioner is not prejudiced because the outcome of the trial would not have changed, even if trial counsel would have raised the issue at the time of trial. If the prejudice prong of the test is not met, there is no reason for this court to even consider the reasonableness prong of the test.

- As for petitioner's claim that counsel was ineffective at the preliminary hearing, the claim must fail for the similar reasons. "As a general principle, after an accused has gone to trial and has been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is considered harmless unless it appears that the error caused prejudice at trial. *State v. Butler*, 257 Kan. 1043,

1062, 897 P.2d 1007 (1995)." *State v. Jones*, 290 Kan. 373, 381, 228 P.3d 394, 401 (2010). The evidence presented at the preliminary hearing was substantially similar to that presented at trial and was sufficient to bind over on the charge of aggravated kidnapping. Even if it was somehow insufficient, there is no indication the error caused prejudice at trial, as the evidence was more than sufficient at trial.

23. **Petitioner's second claim [#1(B)] is that his speedy trial rights were violated by trial counsel's continuations without his consent.**

- Although this claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507, it should be summarily denied without an evidentiary hearing because it can be addressed based on Kansas law.

- Petitioner fails to address how this court can rule in his favor when K.S.A. 2015 Supp. 22-3402(g) bars reversal of petitioner's convictions:

> If a delay is initially attributed to the defendant, but is subsequently charged to the state for any reason, such delay shall not be considered against the state under subsections (a), (b) or (c) and shall not be used as a ground for dismissing a case or for reversing a conviction unless not considering such delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to such delay.

- Pursuant to K.S.A. 2015 Supp. 22-3402(g), the time that was initially attributable to defendant cannot now be counted toward the State's time for speedy trial purposes, regardless of whether defendant failed to authorize the continuances. Moreover, there is no claim concerning the violation of the constitutional right to a speedy trial or prosecutorial misconduct. See *State v. Brownlee*, 302 Kan. 509, 354 P.3d 525 (2015). (K.S.A. 2012 Supp. 22-3402(g) is a procedural provision, and it can be retroactively applied to a defendant's case). See also *State v. Dupree*, 304 Kan. 43, 371 P.3d 862 (2016) (holding that amendment to speedy trial statute did not create vested right which would preclude retroactive application of statute to defendant).

- Moreover, petitioner was being held on multiple cases. He was arraigned on each of the three cases on August 25, 2011. The cases were consolidated on March 8, 2012 and the trial began on March 16, 2012. The K.S.A. 22-3402(1) speedy trial limit of 90 days does not apply to petitioner because he was being held on multiple cases. See *State v. Montes-Mata*, 292 Kan. 367,253 P.3d 354 (2011).

- In short, there is no basis for this court to conclude that either prong of the test for ineffective assistance of counsel has been met and there has been no showing of prejudice.

24. **Petitioner's third claim [#II(A)] is that appellate counsel was ineffective for not presenting a claim that the trial court abused its discretion in denying the motion to sever because of manifest injustice and prejudice.**

- Although this claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507, it should be summarily denied without an evidentiary hearing because it can be addressed based on the record before the court and on Kansas law.

- Petitioner has to prove both prongs of the ineffective assistance of counsel test. First that appellate counsel provided professionally unreasonable representation. Second, that he was prejudiced by that representation. An evidentiary hearing is not necessary on the first prong of the test because petitioner cannot meet the second prong of the test.

- Before trial, trial counsel attempted to prevent the consolidation of the three cases and to sever the counts as to the two victims in case number 11CR1290. Ultimately trial counsel argued for petitioner to have four separate trials. Trial counsel argued that consolidating the trials would prejudice petitioner against a fair trial and the jury would have difficulty separating the counts. Furthermore, trial counsel argued that an instruction from the court to consider the counts separately would not be effective. Finally, trial counsel argued that petitioner wanted to testify in some of the cases, but not as to all of the cases and this would prejudice petitioner's defense. (Transcript of Pretrial Motions, March 8, 2012, pp. 11-18).

- In the direct appeal, the Court of Appeals denied relief on the issue of consolidating the three cases for trial, specifically finding that the district court properly instructed the jury that each charge was a separate and distinct offense and the jury showed its understanding by acquitting on some counts. *State v. Sumpter*, at *6 (see summary of the evidence, which is set out above). Effectively the court found that there was no prejudice from the consolidation. The jury understood the instructions, applied the law separately to the counts, and reached a verdict. In two of the three cases the jury did not find a straight guilty verdict. In 11CR1290 the jury acquitted petitioner of Attempted Rape of A.C. and convicted him of two counts of Aggravated Sexual Battery, one as to A.C. and one as to A.P. In 11CR1638 the jury found petitioner guilty of

Aggravated Kidnapping, Aggravated Sexual Battery and Attempted Rape. In 11CR1187 petitioner was acquitted of Kidnapping and convicted of Aggravated Sexual Battery and Criminal Restraint.

- In making his current claim, petitioner fails to address the Court of Appeals' findings that run contrary to his claims and undermine his request for relief. See generally *State v. Conley*, 287 Kan. 696, 698, 197 P.3d 837 (2008) (a defendant may not file a motion to breathe new life into an appellate issue that was previously abandoned or adversely decided; doctrine of res judicata bars consideration).

- Citing *State v. Coburn*, 38 Kan. App. 2d 1036, 1057, 176 P.3d 203 (2008), petitioner instead attempts to convince this court that the jury was unable to consider each charge separately on the evidence and the applicable law in the jury instructions. *Coburn* is distinguishable. In that case, the jury found Coburn guilty as charged, thus persuading the majority to find prejudice:

> Because the jury found Coburn guilty on all offenses charged, we are unable to say with any certainty that the jury carefully considered each charge separately on the evidence and law applicable to that charge. See *State v. Walker*, 244 Kan. 275, 280, 768 P.2d 290 (1989) (When a jury acquits a defendant on one or more of the offenses charged, this is an indication that the jury carefully considered each charge separately on the evidence and the law applicable to that charge.). As a result, we do not believe that a jury instruction consisting of two sentences could cure the prejudice caused by the joinder in this case.

State v. Coburn, 38 Kan. App. 2d at 1057. In contrast, in the current case it can be said with absolute certainty that the jury considered each charge separately on the evidence and the applicable law in the jury instructions, as the jury found petitioner guilty of some lesser included offenses.

- Petitioner also attempts to convince this court that he had to take an all-or-nothing strategy and testify to the charges regarding all of the victims instead of just three of them, partly out of fear that the jury would not follow the instructions and would hold his silence on the charges for one victim against him. This is the same risk and pressure faced by any criminal defendant, whether there is one victim, many victims, one charge, or many charges. It is not a basis to reverse an otherwise proper decision to consolidate cases. In each instance, the law presumes and hopes the jury follows the law as

instructed. Here, we know that the jury followed the instructions and were guided by the evidence when reaching verdicts on each charge separately.

- The state notes that Sumpter's arguments here are very similar to the arguments made in pretrial motions, those arguments were thoroughly considered by this court and rejected. (Transcript of Pretrial Motions, March 9, 2012, pp. 37-52). None of Sumpter's arguments here create a basis to change that ruling.

- There is no basis for this court to conclude that both prongs of the test for ineffective assistance of counsel has been met.

25. **Petitioner's fourth claim [#II(B)] is that appellate counsel Cessna was ineffective for not raising the sufficiency of the kidnapping count.**

- Although this claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507, it should be summarily denied without an evidentiary hearing because it can be addressed based on the record before the court and on Kansas law.

- As discussed above, trial counsel was not ineffective in her failure to argue the sufficiency of the kidnapping count because ample evidence was presented at trial to sustain the count.

- There is no basis for this court to conclude that either prong of the test for ineffective assistance of counsel has been met. Trial counsel was not ineffective for failing to raise the issue, thus appellate counsel cannot now be found to be unreasonable for failing to raise that issue. In addition, there has been no showing of prejudice.

26. **Petitioner's fifth claim [#II(C)] is that appellate counsel did not identify key instances of prosecutorial misconduct.**

- Although this claim of ineffective assistance of new trial counsel is properly brought under K.S.A. 60-1507, it should be summarily denied without an evidentiary hearing because it can be addressed based on the record before the court and on Kansas law.

- Petitioner further asserts that the appellate counsel should have pointed out three specific instances of prosecutorial misconduct during closing argument—the prosecutor asserting his opinion regarding a video, the use of a letter written by petitioner, and a misstatement of the law.

- On direct appeal, the Court of Appeals denied relief on the issue of prosecutorial misconduct during closing argument. The Court specifically cites the use of petitioner's letter in closing argument, as well as other challenges to the prosecutor's comments and found that they "fell within the wide latitude afforded to prosecutors, and the prosecutor did not commit misconduct during closing argument." *State v. Sumpter*, at *9, *11 (see summary of the evidence, which is set out in the procedural history above).

- Petitioner's current complaints about prosecutorial misconduct concern statements that are of a similar benign ilk than those complaints raised on appeal. The prosecutor's comments were made in context of the evidence presented and aspects of the case that were being contested by petitioner. The jury was properly instructed on the law and the duty to follow the law. Petitioner has presented no basis to conclude that the jury disregarded the instructions.

- There is no basis for this court to conclude that either prong of the test for ineffective assistance of counsel has been met. Cessna was not unreasonable for failing to raise these issues and there has been no showing of prejudice.

27. **Petitioner's sixth claim [#III(A)] is that the lack of African-Americans on the jury venire denied him of a fair trial.**

- This is an allegation of mere trial error that should have been raised on direct appeal and should now be denied without an evidentiary hearing.

- Petitioner does not allege any exceptional circumstances that would excuse the failure to raise the issue on appeal.

28. **Petitioner's eighth claim [#III(B)] is that the offender registry and lifetime post-release supervision sentencing requirements are unconstitutional.**

- This is an allegation of mere trial error that should have been raised on direct appeal and should now be denied without an evidentiary hearing.

- Petitioner does not allege any exceptional circumstances that would excuse the failure to raise the issue on appeal.

- Moreover, petitioner recognizes that Kansas case law does not support his position. This court is duty bound to follow precedent against petitioner's position.

29. **Petitioner's ninth claim [#III(B)] is that the trial court imposed an aggravated sentence without requiring the State to prove the factors to a jury in violation of *Apprendi*.**

- This court should deny this claim without an evidentiary hearing.
- In the direct appeal, the Court of Appeals denied relief on the imposition of the aggravated sentence pursuant to case law. *State v. Sumpter*, at *12 (see summary of the evidence, which is set out in the procedural history above).
- Res judicata bars relief on this issue as it has already been settled by the appellate court.

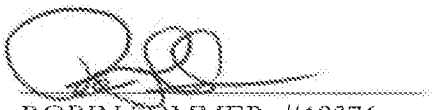
Conclusion

For the reasons stated above, this court should summarily deny petitioner's K.S.A. 60-1507 amended motion without conducting an evidentiary hearing because Kansas law along with the motion, files, and records of the case show that he is not entitled to relief.

ROBIN SOMMER, #19376
Attorney for the State

CERTIFICATE OF SERVICE

This is to certify that a copy of this response was emailed to petitioner's attorneys, Katie Gates Calderon and Ruth Anne French-Hodson at kgcalderon@shb.com and rhodson@shb.com on this 6th day of February 2017.



ROBIN SOMMER, #19376
Attorney for the State

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CASE NUMBER: 2016-CV-000161-HC

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DIVISION

TIMOTHY SUMPTER,

Petitioner-Plaintiff,

v.

STATE OF KANSAS,

Serve: Attorney General, Kansas
120 SW 10th Avenue, Fl. 2
Topeka, KS 66612

Respondent-Defendant.

Case No. 2016-cv-000161-HC

REPLY IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Sumpter's amended petition raises substantial issues as to the ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and additional constitutional errors. While the State seems to rest much of its defense on a supposed lack of prejudice to Sumpter from any of these errors, the record as well as supporting case law demonstrate why this is one of the rare cases where post-conviction relief is warranted given both the deficient performance of counsel and the resulting prejudice to Sumpter. Because of the substantial issues raised in Sumpter's petition, the Court should grant an evidentiary hearing to further flesh out as necessary the ineffectiveness claims.

Standard for Relief and Evidentiary Hearing Under 60-1507

The Court has three options available after the filing of a petition: (1) summarily deny the petition; (2) grant a preliminary hearing to admit limited evidence and consider arguments of counsel to determine the necessity of a full evidentiary hearing; (3) grant a full evidentiary hearing. *Bellamy v. State*, 285 Kan. 346 (2007). The Court can only summarily deny the

petition if the record "conclusively shows" that the movant is not entitled to relief. *Id.* If the Petitioner raises a potentially substantial issue, the Court must at least grant a preliminary hearing where limited evidence may be admitted and the Court must make findings of fact and conclusions of law. *Id.* at 354. It is "extremely rare" to be able to resolve a claim of ineffective assistance of counsel without an evidentiary hearing. *Rowland v. State*, 219 P.3d 1212, 1218-19 (Kan. 2009). Until there is a record available containing the evidence necessary to determine whether counsel made an informed choice or an "ignorant mistake," a court cannot decide the merits of an ineffective assistance claim. *Id.* at 1219.

Argument

I. Petitioner's trial counsel was ineffective at all stages from pre-trial to trial to post-trial motions when she failed to understand and—as a result—accurately argue the elements of aggravated kidnapping in relation to the incident with J.B.

The State failed to present any evidence at pre-trial or trial to show that Sumpter committed a confinement ***to facilitate the commission of the underlying crime*** that went beyond confinement that was inherent in the nature of the underlying crime. But Sumpter's trial counsel did not challenge the charge prior to trial nor through examination of the witness nor in closing argument nor in post-trial motions. As the trial record demonstrates, trial counsel failed to understand what the State had to show on the aggravated kidnapping count. This failure was not only deficient but highly prejudicial.

The State does not argue that trial counsel's error was not deficient but only that Sumpter was not prejudiced by her deficient performance. (State's Am. Response at p. 22.) The State seems to acknowledge that it never identified—at any stage of the trial—the act that it relied on to meet the "confinement" element on the aggravated kidnapping count. It provides no citation to the record to where the State notified the Court, Sumpter, or the jury what act it relief on to meet this element. It was not strategic for Sumpter's counsel to not demand to know what act

the State had relied on to meet this element. Rather, as the record demonstrates, trial counsel did not understand the facilitation requirement under *Buggs*, and, as such, failed at every stage to highlight and move against the insufficiency of the State's evidence.

Rather, the State relies wholly on its argument that Sumpter was not prejudiced by this error. To show prejudice, Petitioner only needs to show "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Phillips v. State*, 282 Kan. 154, 160 (2006). Given that the State never identified an act of "confinement by force" sufficient to meet the *Buggs* test prior to, at, or after trial and even now still struggles to identify such an act (even after additional briefing), Sumpter has successfully undermined confidence in the outcome on the aggravated kidnapping count. This demonstrates why the Kansas Supreme Court considers that a failure to understand the law is both deficient and prejudicial. *State v. Davis*, 277 Kan. 309, 329 (2004).

Sumpter's jury was instructed that the State had to prove that "Timothy Sumpter **confined** JB **by force**." (Trial Tr. Vol. XIV, 53:6-7.) At the status conference, the State conceded that it must withdraw its theories of sufficient evidence that do not support the actual charge on which the jury was instructed.[1] (Status Conf. Tr. at 56-58.) The State now points to four acts from J.B.'s testimony that it argues could support a confinement by force theory on the aggravated kidnapping count: (1) bracing J.B.'s head against the dashboard and pressing his knee to her throat while Sumpter tried to grab J.B.'s "butt and feel[] [her] legs . . . and put his hand

[1] Because, the State never pointed to the act that constituted the confinement or taking element of the aggravated kidnapping count as to J.B. at trial, Sumpter's petition demonstrated why either theory was insufficient. (See Am. Pet. at 4-5 (arguing that "confinement of J.B. in her car was merely incidental" to the underlying crimes); and at 5 (arguing that there is no evidence of a forcible taking)). At the status conference, the State abandoned its arguments regarding a taking. (Status Conf. Tr. at 56-58.)

around to go toward my vaginal area"; (2) while Sumpter was holding J.B. down and touching her, J.B. tried fighting back and he punched her in the face and said he was going to get what he wanted; (3) while Sumpter was holding J.B. down and touching her, J.B. tried reaching for the door handle and he punched her in the face and told her he was not playing around; (4) he forces the car door back open and punches J.B. again to put her over the console to try and get on top of J.B.[2]

The State contends—without citation to any analogous case—that these four "acts" are sufficient to show confinement to facilitate the crime of attempted rape. But none of these acts meet the standard set out in *Buggs* because the purported act of confinement cannot be "merely incidental to the other crime [attempted rape]" or "of the kind inherent in the nature of the other crime [attempted rape]." *State v. Buggs*, 219 Kan. 203, 214 (1976).

The fact that the victim testified that the struggle during the attempted rape was violent—including punching and a knee to the throat—only demonstrates the physicality and forcible nature of the attempted rape; but it does not—and cannot—show a confinement that went beyond the force inherent in a violent crime like attempted rape. *State v. Ransom*, 239 Kan. 594, 603 (1986) (holding that while the rape and battery at issue were "vicious, brutal crimes" because they involved moving the victim by pulling the victim by her hair, choking her, and threatening her, the State had not shown an act that **facilitated** the underlying crimes sufficient to support the aggravated kidnapping count); *cf. State v. Neal*, 34 Kan. App. 2d 485, 491-92 (Kan. Ct. App. 2005) (rejecting the State's argument that "throwing the victim to the ground, choking her,

[2] For three of these "acts," the State contends that the acts also could be confinement by deception or confinement by threat. (State Am. Response at p. 20-21.) But the jury was only instructed on confinement by force, so it would be improper to consider whether there is sufficient evidence to meet a confinement by threat or deception theory because the State cannot advance confinement theories that are not supported by the jury verdict. *Cf. State v. Rogers*, 276 Kan. 497, 503 (2003) ("As a general rule, juries are presumed to have followed instructions given by the trial court.")

punching her, and slamming her head to the ground" during a rape could be battery because it went "far beyond the force used to accomplish rape" and holding that the battery was multiplicitous of the rape). Indeed, the purported acts of confinement highlighted by the State—the punching, the knee to the throat, the threats—were so inherent in the underlying crime of attempted rape that the State highlighted the fighting in the car to demonstrate the elements of attempted rape; namely, that Sumpter's intent was nonconsensual sex. (Trial Tr. Vol. XIV, 75:21-76:1.)

As the amended petition highlights, Kansas courts have held that confinement in a vehicle is inherent when forcible rape occurs in a vehicle. *State v. Cabral*, 228 Kan. 741, 744-45 (1980) ("When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape."). In its amended response, the State now tries to discount *Cabral* by saying that "confining a victim to a vehicle is not inherent to the crime of rape." (State Am. Response at p. 22.) But this straw man argument does not counter the holding of *Cabral* which examined what type of confinement had to be shown *when aggravated rape occurs in a vehicle*—as occurred in this case. The Kansas Supreme Court stated: "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." *Cabral*, 228 Kan. at 744-45. The Court then held that when the perpetrator locked the door of the vehicle after the victim asked to go home, proceeded to steer the vehicle behind a tree, and raped the victim in the vehicle, the State had not shown sufficient evidence at trial "to establish the independent crime of aggravated

kidnapping and that the defendant should be discharged from the conviction on that charge." *Id.* at 745.[3]

The State also argues that the Supreme Court has subsequently distinguished *Cabral* when a victim is forced to remain in a vehicle against her will by pointing to *State v. Lile*, 237 Kan. 210, 213-14 (1985) and *State v. Blackburn*, 251 Kan. 787 (1992). (State Am. Response at p. 22.) But those cases do not stand for the proposition that aggravated kidnapping based on a confinement theory can be shown by simply showing that a victim had to remain in a vehicle against her will. In *Blackburn*, the jury was instructed on multiple theories: "taking or confining [] by force, threat, *or* deception." 251 Kan. at 793 (emphasis in original). The Court did not make a conclusive finding on what would be required on a confinement by force count. Rather it found that there was sufficient evidence to show the assailant had confined the victim by deception because he had tricked her to get into his vehicle by convincing her that he would take her home. *Blackburn*, 251 Kan. at 793. While the Court states that Blackburn held his victim against her will, it rested its decision on the "lessened [] risk of detection" on the fact that Blackburn "drive [his victim] in areas unfamiliar to [her]." *Id.* at 794.

Similarly, in *Lile*, the defendant forced the victim into his vehicle with a gun and drove her six miles away to a secluded field before raping her. 237 Kan. at 210. Again the Court did not determine what was sufficient for a confinement by force count alone. Rather it held that "[w]hen defendant removed her from the area of the road he substantially lessened the risk of detection and the rape was less likely to be discovered. Thus, the defendant's confinement *and*

[3] While the State does not seem to rest its sufficiency argument on it, the State notes Sumpter "could have raped J.B. at any point after he first contacted her but he consciously decided to wait to attempt the rape until J.B. is confined in the car with him." (State Am. Response at p. 22.) The State provides no citation for the novel argument that kidnapping can be shown when a perpetrator waits to perpetrate a crime until his victim is in a location less conducive to detection. This is unsurprising given that this broad reading of the kidnapping statute is not tied to either a "taking" or "confinement" and could apply to almost any crime that is committed.

movement of the victim from a public road to a secluded field was not merely incidental to the crime of rape and we hold that it was sufficient to establish the independent crime of aggravated kidnapping." *Id.* at 214.

Indeed, these cases are in accord with those highlighted in the amended petition which demonstrate that for confinement to go beyond what is inherent or incidental to actually facilitate the crime, Kansas courts have required some showing of confinement that *substantially* benefits the assailant such as handcuffing or tying up the victim. *State v. Zamora*, 247 Kan. 684 (1990) (finding that the confinement was more than incidental when the defendant tied up the victim, raped her, tied her up again, and left her tied up overnight amounting to confinement for seven hours); *State v. Richmond*, 250 Kan. 375, 378 (1992) (holding that tying up the victim during and after the commission of a rape and using a pillow to blindfold her was a confinement that was not incidental to the underlying crime); *State v. Little*, 26 Kan. App. 2d 713, 718-19 (1999) (finding confinement where the defendant bound the victims to facilitate the crime of robbery). The failure of the State to any confinement that substantially benefitted Sumpter is fatal to their argument that there was no prejudice on this claim.

Additionally, while the State argues that there is "overwhelming evidence" to support each of these acts, the only evidence the State points to is J.B.'s testimony and her testimony conflicts with that of Sumpter. Given that this contested aspect is subject to conflicting evidence and the fact that there is ***no*** evidence—even taking J.B.'s testimony at face value—of confinement ***to facilitate*** the underlying crime, counsel's error was substantially prejudicial to Sumpter. As the Kansas Supreme Court has held, counsel's failure to understand the applicable law is both deficient and prejudicial. *State v. Davis*, 277 Kan. 309, 329 (2004).

Additionally, the State seems to suggest that any error at the preliminary stage was not prejudicial because Sumpter was found guilty at trial and cites *State v. Jones*, 290 Kan. 373, 381, 228 P.3d 394, 401 (2010). This argument and the *Jones* case only deal with errors that occur at the preliminary stage. But as the amended petition details in comprehensive fashion, trial counsel's lack of understanding on the aggravated kidnapping count effected every aspect of the trial from pre-trial motions, to opening statements, to failing to properly cross-examine the victim based on prior inconsistent statements, to failing to challenge prosecutorial misstatements, to closing statements, to post-trial motions. (Am. Pet. at 6-10.) Because the errors by trial counsel were not confined to preliminary hearings, the State cannot rely on *Jones* to argue harmless error.

Finally, like the error in *Jones*, the error at the preliminary stages fundamentally altered the charges that Sumpter had to defend and counsel's error was prejudicial both in her failure to challenge the charge and to conduct proper cross-examination of the witnesses. As the Kansas Supreme Court stated in *Jones*, "the preliminary hearing is a critical phase of the criminal prosecution. In addition to determining whether probable cause existed sufficient to bring Jones to trial, sworn testimony was taken to which both the State and Jones referred during examination of witnesses at trial." 290 Kan. at 380. Trial counsel's failure to challenge the charges or conduct cross-examination to highlight the lack of sufficient confinement meant Sumpter had to go to trial on a charge that was not supported by the information or J.B.'s testimony at the preliminary hearing. Again, trial counsel's failures demonstrate why the Kansas Supreme Court considers that a failure to understand the law is both deficient and prejudicial. *State v. Davis*, 277 Kan. 309, 329 (2004). As is demonstrated here and in the amended petition,

Sumpter's claim that trial counsel's failure to under the aggravated kidnapping requirements raises a substantial issue as to the effectiveness of counsel and demands an evidentiary hearing.

II. Trial counsel's continuances without consent amounted to ineffective assistance of counsel.

Trial counsel's continuances amounted to ineffective assistance because they violated the duty of loyalty to her client and created a potential conflict given her duties to the court. While continuances attributable to a defendant do not normally count towards the State's time, Sumpter was not informed of the continuances and did not consent to them. As such, the continuances were not actually attributable to Sumter. Additionally, Sumpter's counsel did not request that the counts be consolidated to effectuate Sumpter's desire for a speedy trial. Trial counsel's performance amounts to a breach of the duty of loyalty to Sumpter that had implications for his right to a speedy trial and created a situation where Sumpter felt he needed to file a *pro se* bail motion with the Court because he had not heard from counsel. *Cf. Sola-Morales v. State*, 300 Kan. 875, 891-99 (2014) (holding that an evidentiary hearing was required where counsel had lied to defendant about continuances which resulted in the defendant filing a *pro se* motion). As is discussed in the prosecutorial misconduct section, that letter-motion was then used to prejudicial effect by the State at trial. Accordingly, trial counsel's continuations without his consent prevented him effectuating his speedy trial rights and created an impermissible conflict of interest.

III. Appellate counsel's failure to raise the motion to sever amounted to ineffective assistance of counsel because manifest injustice that resulted from the decision.

Appellate counsel's failure to challenge the denial of the motion to sever prevented Sumpter from raising a compelling challenge to the prejudice that occurred when all three cases were tried together. Appellate counsel only argued that the three cases (and four victims) were

improperly consolidated but failed to argue a similar, but distinct, trial error that occurred when the trial court refused to sever the cases after prejudice to Sumpter was shown. The consolidation argument only required the Court of Appeals to consider whether the trial court had abused its discretion when it found that the cases were of the same or similar character. But by failing to argue severance, appellate counsel could not present to the Court of Appeals the "continuing duty of the trial court to grant a motion for severance to prevent prejudice and manifest injustice." *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008). Because of appellate counsel's error, the Court of Appeals could not consider any prejudice that the consolidation created as part of its analysis. *State v. Sumpter*, 313 P.3d 105, at *3-6 (2013) (confining its analysis to whether the crimes were of the same or similar character). As the concurring opinion noted, this choice by appellate counsel had consequences: "As to the consolidation of the charges for trial, I concur in the result ***based on how the parties framed and argued the issue on appeal***." *State v. Sumpter*, 313 P.3d 105, at *12 (2013).

The State argues that the ineffectiveness claim is just an attempt to breathe new life into an argument that was already made on appeal. But the heart of this ineffectiveness argument is that appellate counsel erred by not raising this issue on appeal. In the case the State relies on, *State v. Conley*, 287 Kan. 696, 698 (2008), the issue that the defendant tried to argue had been explicitly raised and decided on the merits in the appeal. In contrast, appellate counsel did not raise the continuing duty to grant severance, nor did the Court of Appeals decide this issue on the merits. Therefore, unlike *Conley*, there is no res judicata to apply.

The State also contends that there was no prejudice to Sumpter because the jury was instructed to consider the charges separately and did not come to straight guilty verdict in two of the three cases. As in *Coburn*, a jury instruction is insufficient when the State does not keep the

charges separate and commingles the applicable evidence during examination of the witnesses or during closing argument. 38 Kan. App. 2d at 1056-57. The State attempts to argue that the Court of Appeals rested its decision on the fact that the jury had found a straight jury verdict in *Coburn*. (State Am. Response at p. 25.) However, the Court found this as only one of multiple reasons why the jury instruction was insufficient. The other two separate and independent reasons why the jury instruction was inadequate are applicable here. First, the Court found that the jury "likely could have considered the evidence [on one sexual offense charge] corroborative of [the other sexual offense charge]." 38 Kan. App. 2d at 1058. The Court noted that the evidence was not overwhelming on several counts because it rested solely on the victim's testimony and the jury could have unfairly "cumulated the evidence of the various offenses." *Id.* The same risk existed here when the only evidence in several of the cases was the victim's testimony and the State could have improperly used the evidence from the other cases to corroborate the testimony of the victims. Second, the Court of Appeals found that the jury instruction was insufficient in part because of the nature of the crimes themselves "substantially increased the risk of prejudice." *Id.* Admittedly, Coburn was about sex offenses against young children but the Court cited a case that observed "when joinder is sought involving crimes such as rape, the risk of prejudice is substantial." *Id.* (quoting *Bridges v. U.S.*, 381 A.2d 1073, 1078 (D.C. 1977), *cert. denied* 439 U.S. 842 (1978)).

Second, the jury instruction does not absolve the Court from its continuing duty to grant a severance motion to prevent prejudice or manifest injustice. *Coburn*, 38 Kan. App. 2d at 1058-59. Even in its amended response, the State does not dispute that the trial court has this continuing duty, nor does it argue that the trial court met this duty. (State Am. Response at p. 24-26.) As trial counsel highlighted at voir dire, the Court should have exercised this duty as

soon as jurors began expressing doubts on whether they could fairly consider Sumpter's claims of innocence given that there were four victims. (Am. Pet. at 13-14.) The candor of these jurors demonstrated how the State could use the multiple cases to imply the propensity of Sumpter to commit these types of offenses—evidence that is improper to use as proof of the charges. As is set out in full in the amended petition, this prejudice continued as the State commingled evidence and used incorrect broad generalities to overcome weaknesses on all of the cases. (Am. Pet. at 15.) As the Kansas Court of Appeals has held, even if joinder is possible, the denial of severance can amount to "manifest injustice" if a defendant is denied his right to a fair trial.

Finally, Sumpter faced actual prejudice because he was forced to choose between his Fifth Amendment right to avoid self-incrimination and his Sixth and Fourteenth Amendment right to testify on his own behalf. (Am. Pet. at 14-15.)

IV. Appellate counsel compounded trial counsel's error on the aggravating kidnapping count by failing to challenge the sufficiency of the evidence to meet the *Buggs* standard.

Appellate counsel also failed to challenge the most serious charge against Sumpter—aggravated kidnapping—despite the fact that the evidence did not meet the State's burden under *Buggs*. This failure cannot amount to strategy because it was a purely legal argument that did not require the Court of Appeals to give deference to trial court findings. The State only argues that any error was not prejudicial because there was sufficient evidence to show aggravated kidnapping. This argument is demonstratively false as none of the acts that the State now raises go beyond those that are inherent or incidental to attempted rape, as is demonstrated in *supra* Part I. Appellate counsel's failure to understand that the aggravated kidnapping charge was susceptible to appeal under *Buggs* was both deficient and prejudicial.

V. While appellate counsel made a prosecutorial misconduct argument, her failure to identify some of the most prejudicial instances of prosecutorial misconduct amounted to ineffective assistance.

As is demonstrated in the amended petition, appellate counsel failed to raise three serious instances of prosecutorial misconduct that allowed the State to improperly prejudice the jury: (1) the prosecutor impermissibly gave his opinion on what a video showed when there was no supporting evidence from J.B.; (2) the State's blatant mischaracterization of Sumpter's pro se letter; (3) the prosecutor's deliberately misleading statements on the law to the jury. The State's only argument against these claims appears to be that the Court of Appeals has already considered these claims and therefore they cannot be re-raised. But the only example the State gives to substantiate this claim is in reference to the letter. And, for that example, the State incorrectly asserts that the Court of Appeals "specifically cites the use of Sumpter's letter in closing argument." (State Am. Response at p. 25.) But a review of the Court of Appeals opinion demonstrates that the only reference to the letter comes in a large block quote from the prosecutor's closing statement. *State v. Sumpter*, 313 P.3d 105, at *9 (2013). In the block quote, the Court of Appeals italicizes the arguments at issue—all of which deal with Sumpter's credibility, and not with the letter. *Id.* The Court of Appeals never considers whether the reference to the letter was appropriate. *Id.* This is unsurprising given that appellate counsel never argued to the Court of Appeals that this was a blatant mischaracterization of the letter-motion that was actually filed. (*See* Appellant's Br., Ex. 5 to Am. Pet.) This failure of appellate counsel is exactly what is at issue and cannot be excused because the Court of Appeals held that the "challenged comments" regarding Sumpter's credibility did not amount to misconduct. *State v. Sumpter*, 313 P.3d 105, at *11 (2013). As to the other two types of misconduct raised in the amended petition (inappropriate comments on the video and misleading statements of the law),

the State does not even attempt to show that these were raised earlier. The State's conclusory statement that appellate counsel's failure was not prejudicial is insufficient to counter the substantial issue raised by Sumpter on this claim.

VI. Petitioner's additional constitutional claims highlight areas that require reconsideration or that demand additional scrutiny at this stage.

Petitioner acknowledges that his remaining constitutional claims are normally not considered at this stage. However, the serious nature of the voir dire issues along with the additional evidence of systemic problems in the Sedgwick County jury pool (which were not presented by trial or appellate counsel) demand consideration of the fair jury pool issue here. Additionally, Sumpter urges this Court to reconsider what he believes are improper holdings on *Apprendi*, post-release supervision, and the offender registry. Sumpter seeks to preserve his objection to these decisions in the event that the legal landscape changes or a higher court decides to take up these issues on appeal.

SHOOK, HARDY & BACON L.L.P.

By: */s/ Katie Gates Calderon*
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ATTORNEYS FOR PETITIONER-PLAINTIFF
TIMOTHY SUMPTER

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I electronically filed the foregoing with the Court which sent notification of such filing to all counsel of record. I also certify that a copy of this reply was emailed to the State's attorney, Robin Sommer, on February 21, 2017.

/s/ Katie Gates Calderon
Katie Gates Calderon

ATTORNEYS FOR PETITIONER-PLAINTIFF
TIMOTHY SUMPTER

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	
VS.	Case Nos. 11 CR 1187 11 CR 1290
TIMOTHY J. SUMPTER, Defendant.	11 CR 1638 CSR Registration No. 0359

TRANSCRIPT OF PRELIMINARY HEARING - TESTIMONY ONLY

PROCEEDINGS had before the Honorable David J. Kaufman, Judge of Division 15 of the District Court of Sedgwick County, Kansas, on August 25, 2011.

A P P E A R A N C E S

The State of Kansas appeared by and through Mr. Justin R. Edwards, Assistant District Attorney, Sedgwick County Courthouse Annex, 535 North Main Street, Wichita, Kansas 67203-3747.

The Defendant appeared in person and by and through Ms. Alice Knetsch Osburn, Attorney at Law, P.O. Box 781052, Wichita, Kansas 67278-1052.

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A. He forced my hand upon his genital area, his penis in fact, and then at that point I got -- I got him out of my vehicle, but I didn't have my keys. He had the keys in his hand. And --
Q. Was his --
A. I didn't get my -- Sorry.
Q. Was his penis exposed?
A. Yes.
Q. How did he force your hand onto his penis?
A. He was choking me and had his knee up against my throat on -- up against my dashboard and was choking me and then forced my hand upon -- like grabbed my hand physically, and as I was starting to pass out from lack of oxygen, I woke -- you know, lack of oxygen, and I woke up, and my hand was on his genital area.
Q. Were there other sexual touchings of you by him?
A. No. I convinced him to let me up so I could, you know, do what he wanted me to do 'cause at this point I thought I was gonna die, so I got up, but then when I got up, I -- you know, I touched his face so he would think that I was gonna do something, and then I didn't. I started fighting him again.
Q. At any point did he penetrate your genitalia?
A. No. The only thing was is [*sic*] I -- I got him out of my car. Then he got back in my vehicle, and at that

time he only threw me in, and I was facedown at that point. My face was on my center console, and I had a skirt, so he just held me down, and he threw up my skirt and started to, but I wiggled. I mean, he did not penetrate my genitalia area, no --

Q. Okay.

A. -- but there was that.

Q. Do you recall telling law enforcement officers that his fingers may have penetrated your vagina?

A. I -- I don't -- I think I might have told the police that. There was not definite penetration, but that his hands were definitely there.

Q. Okay.

A. So -- And that was on the passenger side then as well. His hands were in, but they did not penetrate me.

Q. Okay. There was never any penetration.

A. No, sir.

Q. Okay. How did this all end? How did you get away?

A. I was still fighting him off of me, still in my car. At this point my driver and passenger doors were both open 'cause I kept trying to open the doors to kick him out of the vehicle, and I was honking my horn and flashing my lights 'cause he was holding me down, and a car pulled up, and a gentleman got out of his vehicle and started -- was like, "What's going on," you know,

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APPELLATE COURT NO. 17-117732-A

RECORD – VOL. NO. TWELVE

EXHIBIT NO.

TIMOTHY SUMPTER
Appellee,

VS.

STATE OF KANSAS
Appellant.

DISTRICT COURT NO. 2016-CV-000161-HC

DISTRICT COURT JUDGE JEFFREY L SYRIOS

COUNTY SEDGWICK

DICIAL DISTRICT
CK COUNTY, KANSAS
ARTMENT

58

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ICase No. 11CR1187
11CR1290
11CR1638
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TRIAL- VOL III

edings had and entered
ed case on March 14,
ff Syrios, Judge of
Division No. 27 of the Eighteenth Judicial District of Kansas.

APPEARANCES:

The State of Kansas appeared by and through its attorney, Mr. Justin Edwards, Office of the District Attorney, 535 North Main, Wichita, Kansas, 67203.

The Defendant, Timothy Sumpter, appeared in person and by his attorney, Ms. Alice Osburn, Attorney at Law, Wichita, Kansas.

11CR1187

CARRI L. MILES, CSR
OFFICIAL COURT REPORTER

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,

Plaintiff,

vs.

TIMOTHY SUMPTER,

Defendant.

Case No. 11CR1187
11CR1290
11CR1638

TRANSCRIPT OF JURY TRIAL- VOL III

Transcript of proceedings had and entered of record in the above-entitled case on March 14, 2012, before the Honorable Jeff Syrios, Judge of Division No. 27 of the Eighteenth Judicial District of Kansas.

APPEARANCES:

The State of Kansas appeared by and through its attorney, Mr. Justin Edwards, Office of the District Attorney, 535 North Main, Wichita, Kansas, 67203.

The Defendant, Timothy Sumpter, appeared in person and by his attorney, Ms. Alice Osburn, Attorney at Law, Wichita, Kansas.

CARRI L. MILES, CSR
OFFICIAL COURT REPORTER

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CHRISTOPHER ROBINSON	4	10		
JESSICA BAKER	12	57	70	
JAMES CURRY	71	81		
ZACHARY BRENNEIS	87			
JUSTIN RAPP	92	109	121	
VINCENT REEL	126	133		
ANNA OWEN	135	149		
SCOTT WISWELL	155			
WENDY HUMMELL	187			
DEBBIE WENDT	206	241	245	

And that's when he took my hand and put my hand on his penis and made me touch his penis at that point. And he let up on my neck at that point and I just started talking dirty to him, saying things, you know, saying big daddy and things that they like to hear, saying -- making comments about how he looked, things like that, just to get him to relax so that I could breathe and I could get up.

So he eventually lets me up and I act like I'm going to sit on his lap. And so I get up and start to sit on his lap and that's when I started punching him in the face as many times as I could and as hard as I could. And he threw me off of him, of course, and was then started -- the fight started again, you know. That time I had an advantage so I began -- this time he threw me off into the driver's side, so I was kicking him in the face all -- you know, all those things.

I took my left foot and began to open the door with my toes because it's a pull handle, so I started opening with my foot and kicking him and opened the car door eventually. And I felt like I had won. And I started kicking him so

hard that he fell out of my car. And he -- after he fell out of my car, I jumped up and shut the door and then locked all my doors.

And I was like looking for my keys, looking for, you know, a way to get out, because I was so scared, I thought I was gonna die, you know, and trying to find my keys, because I have -- I had my keys in the console and they had mace on them, so during the fight I would try to grab 'em. And he'd be like you're gonna mace me? And he grabbed the keys and ripped 'em out of my hand, you know, at the very beginning of the fight. And I was reminiscing on those things and trying to find my keys.

And then I looked up to see where he was, because I was scared he was gonna like bust in my window, and he was standing outside my car and he was dangling my keys and he's like, where you goin', like you ain't goin' nowhere and was dangling my keys.

Q. Jessica, let me stop you. You told us earlier you had a cell phone?

A. Yeah.

Q. Why dind't you just pull out your cell phone right then and call for help?

A. At the time, you know, when -- I, at first, didn't expect me to blow him in the face with a punch and I fell, I dropped my cell phone, dropped my keys, you know, dropped everything in my hands and at that point I was fighting for my life, you know, and I wasn't thinking about my cell phone, you know. And then later, when I was in the car, at this point trying to just leave, at that point I'm still in survival mode. I'm like police aren't going to get here in 60 seconds or two minutes or a minute, I need to know what's going to happen right now in the next moment and I need to be protected and ready. And the best way for me to be safe was to leave the situation and drive away, so that was my main concern, was finding my keys and leaving, you know.

Q. So you see him standing there dangling your keys?

A. Uh-huh.

Q. Is your mace still on it?

A. At this point, no, I believe he took off the mace, maybe crushed it and smashed it, because I didn't see it on the keys at all.

Q. So what did you do?

A. I was like, if I get out of the car we're gonna

fight in the parking lot, if I stay in my car at least I know I'm safe and I'm away from him. And at this point I'm just shaking and panicking and thinking what can I do, what can I do. And I was just like give me my keys, of course, cussing the entire time, because I was so angry and so upset. And I'm cussing and cursing at him and I'm like, give me my keys. I'm yelling through the vehicle, of course. And that's when he comes over to my driver's door again, walks from behind my car and comes to my driver's door, he had the keys and he's like, I'm sorry, I'll give you your keys, you can leave, you can go on your way, again wooing me.

And dummy me, I let my guard down again. You'd think I'd learn the first time. So I didn't learn the first time, so I had a knife in my console that I had got out and I was gonna -- I planned -- you know, planned on using it, but I -- because I was thinking I'm going to fight him in the parking lot. And then he was like, you know, he's apologizing, you know, let my guard down. And I was like if I put both hands on the door and he drops my keys down then I can have one hand on the door and one hand on my

CROSS-EXAMINATION

BY MS. OSBURN:

Q. Good morning, Ms. Baker.

A. Morning.

Q. You had your friend call the police for you; is that correct?

A. That is correct.

Q. And you recall a patrol officer talking to you right there in Old Town about what happened to you?

A. Yes.

Q. Okay. And it's my understanding he sees you, you waived him down and then he asked you to step into his patrol car and tell you -- have you tell him what happened, do you recall that?

A. That's correct.

Q. Okay. One of the first things he asked you, if you would be able to identify the guy that did this to you, correct?

A. Yes.

Q. And you said that you would be able to identify him because of the bite marks on his penis, because you had, quote, bit the shit out of it, end quote. Did you do that?

A. I don't remember that exact statement. I do

remember talking to my friend, Jessica, who was there, about stating that I either wanted to or if I got the chance to I would, I don't think my -- I don't think my statement was to that I did.

Q. Did you tell the officer that he had a small penis and that you would be able to identify him by the bite marks, because you had bit the shit out of it?

A. I remember saying he had a small penis and I probably was just being facetious and disrespectful. I don't remember -- I remember talking about saying biting it, but I was -- I remember talking to my friend, Jessica was sitting with me, and making remarks about how if I got the chance, I would.

Q. You agree, though, his penis was never in your mouth, correct?

A. That is correct.

Q. And you never bit his penis?

A. No, that's correct.

Q. You were asked if you were penetrated by a finger, penis or any other object and you told the officer at that time no; is that correct?

A. That is correct.

Q. And when I say penetrated, your vagina?
A. That's correct.
Q. And he also asked you if your mouth was penetrated at any time, do you recall that? And you told him no?
A. Yeah, I don't recall that, but I said no.
Q. And that's when he questioned you about why did you say you bit the shit out of the guy's penis if your mouth was never penetrated by anything, do you recall that conversation?
A. I recall the conversation with my friend Jessica and --
Q. Was your friend Jessica in the back seat of the patrol car?
A. Yes.
Q. With you?
A. Yes.
Q. While you're being interviewed about what had just happened to you?
A. Yes.
Q. Okay. Did the officer take some photographs of you while you were still wearing the black dress that you were wearing?
A. Yes, he did.
Q. And he asked you to show him the injuries that you

had sustained; is that correct?
A. That is correct.
Q. And he had a camera right then and there, correct?
A. That's correct.
Q. And he photographed the injuries that you showed him, correct?
A. That's correct.
Q. He asked you if you would mind giving the clothes that you had on to law enforcement as evidence; is that correct?
A. That is correct.
Q. Did you start -- did you call your sister for a sweatshirt and sweats or some clothes to be brought to you?
A. I did.
Q. And did you start to remove your dress in the back seat of the patrol car to give the officer the clothes that he had asked --
A. He had told me that he could -- he said you can just change in the back seat of my car and give me the clothes. And so I was advised by the police officer that that's what I should do and that's what I did, because I thought that that's what I was supposed to do.
Q. Do you remember the officer saying no, you don't

have to change clothes in my car, I can take you to the Quik Trip and you can change there in a more private setting?

A. He gave that option to me after I was already undressed.

Q. So this is like in the parking lot at Old Town and the officer --

A. This is right in front of Club Indigo.

Q. And you understood the officer wanted you to undress in his patrol car?

A. That's what my understanding was.

Q. And you did that, correct?

A. Right. I was just doing what I needed to do and was told to do at the time, yes.

Q. He talked to you about that you could get a sexual assault kit --

A. That's correct.

Q. -- taken, correct?

A. That's correct.

Q. And you told him you didn't want to do that because you had to work at 7:00 in the next morning; is that correct?

A. That's correct. Originally, that was my original statement, yes, and then I changed my mind.

Q. And then you went to the hospital; is that correct?
A. And then I told him, I said no, what's the hospital, like where, where is it at? And I said I changed my mind, I'll just -- I'll go and do this because this is what needs to be done.
Q. Okay. You were asked by that patrol officer if the gentleman that was assaulting you had tried to remove your underwear or get in your underwear, do you recall those questions?
A. I do not recall.

MR. EDWARDS: Objection, relevance.

THE COURT: Overruled.

MR. EDWARDS: May we approach?

(An off-the-record discussion was had at the bench by Court and counsel, out of the hearing of the jury:)

Q. (By Ms. Osburn) Ms. Baker, the question I asked you was do you recall the officer asking you if the gentleman that was assaulting you was trying to get inside your underwear, do you recall that officer asking you about that?
A. I do not recall that question.
Q. Do you recall your answer was no, because I wasn't

wearing any underwear?
A. And I wasn't so --
Q. And do you know that the officer saw underwear on your person when he was photographing the injuries you were showing?
A. It was a thong, so that's not really underwear but --
Q. Okay. So when you say I'm not wearing underwear, you were wearing some type of undergarment and your description is a thong?
A. Right, yes.
Q. No penetration occurred to your vaginal area, correct?
A. No, his fingers touched me and tried to, but I had a tampon in at the time so there couldn't -- his fingers couldn't go in my --
Q. Do you recall telling the officer no, you were not penetrated?
A. Yes.
Q. Okay. Do you recall under oath that you said you were certain that you were not penetrated, there was definite -- there was not definite penetration; is that correct?
A. That is correct.
Q. When the his hand is near your vaginal area,

that's when your skirt got lifted up, when you were thrown with your butt up in the air over the console; is that correct?

A. That's not when he touched my vaginal area, it was --

Q. When did that happen?

A. That was when I was on the floorboard of the car and he had touched my butt and then went there.

Q. Okay. You kind of made a motion, but and then went there?

A. Sorry, he --

Q. How did it happen?

A. He grabbed my butt from behind and then reached and rolled over my leg to reach in for my vaginal area with his hand.

Q. Did he ever try to pull your underwear down, anything to that effect?

A. Well, no.

Q. Or your thong?

A. It's a thong so there's really -- you know, not to be too descriptive, but it's a string, so you don't have to really move anything, it just moves, you know, a finger slide will move that away.

Q. Okay. Did he ever try to put his penis inside of

of you?
A. When I was butt up over the console --
Q. Right.
A. -- I felt him, not his penis, but I felt his body start to come up against me.
Q. Okay.
A. And that's when I back bucked him. I never gave him the chance to even penetrate me, but that was definitely his intention.
Q. To get up against you?
A. To penetrate me, for sure.
Q. And was his penis erect?
A. I couldn't -- I can't see, I'm face down.
Q. Was it exposed?
A. Yeah, he still had his pants down, I don't know if it was exposed or if he was going to pull it out, I couldn't see, I was face down.
Q. Okay. Did any time you use this knife you had in the console?
A. No.
Q. This knife you had in the console on him?
A. No.
Q. At any time did you use the mace on him?
A. No.
Q. You've described your head being punched, how many

times do you think?
A. In the entier event, maybe 15 times --
Q. So your face --
A. -- 20 times.
Q. So your face area was punched 15 times; is that correct?
A. That's correct.
Q. And --
A. Or slapped or you know, just --
Q. Okay. And how soon after your friend calls 911 does the police officer arrive to see you?
A. They were there instantaneously. I think they were doing a patrol around the area and just driving around because it was bar closing time, so they were there instantaneously, I mean, I would say within two minutes, maybe three minutes.
Q. You later talked to Detective Hummell with the police department and you had a taped interview, do you recall that?
A. Yes, ma'am.
Q. How many days later was that?
A. I believe it was like two days after.
Q. And did she take photographs, as well?
A. It was on the 19th, so that's six -- yeah, two

days. And she took photographs, yes, ma'am.
Q. So the first photographs were taken by law enforcement at the scene; is that right?
A. That's correct.
Q. And then how long was it from the scene to the time you go to the hospital?
A. It was the same night, so I mean I'm not for --
Q. Did you wait a little bit to go?
A. No, we went immediately. My sister picked me up and was there with the police officers and she -- we asked them what hospital to go to. And I said well, my insurance is at Wesley, so that I have my medical insurance. And they said yeah, you can go to Wesley. So my sister drove me to Wesley, which then found out from Wesley, after being there for a while, that that's not where I needed to be and then she drove me to St. Joe.
Q. Okay. And at St. Joe they took some photographs of you?
A. Yes, they did.
Q. Is that correct?
A. Uh-huh.
Q. And then two more days go by and then Ms. Hummell or someone within the police department takes

photographs of you; is that correct?
A. That's correct.
Q. You said you knew that there were cameras before all this happened to you; is that right?
A. That's correct.
Q. Did you make any efforts to try to get who was doing this to you in your -- in front of the camera so their image would be captured?
A. I don't know the general area of where the cameras are focused, I just knew they were there and that that's what I always knew, is just to be in front of them. And it's not like I was thinking about -- I mean, I thought I was going to be killed, I thought I was going to die, I'm not thinking about where a camera is to get a shot -- snapshot.
Q. But even before you ended up at your car, you didn't want this guy around, right?
A. Right.
Q. You were annoyed and a little suspicious about why this guy was following you, correct?
A. That's correct.
Q. And you knew that you parked in a place that would capture things on video, according to your testimony?

A. That's correct.
Q. Ever get him in a situation where you knew that his face would be captured?
A. I assumed it would be, because I've not seen the -- him.
Q. At one point you said you were playing along with him, right?
A. That's correct.
Q. In the car?
A. Uh-huh.
Q. How long did that last?
A. Maybe two minutes, at the most, it was just for me to be able to get up to fight back.
Q. When that was going on is that when he asked you to touch his penis?
A. Yes.
Q. And you did?
A. He took my hand and put it on his penis, yes.
Q. And the same time you're talking dirty to him or whatever you needed to do to convince him you were --
A. Right.
Q. -- you were game, right?
A. Right.
Q. And also you suggested that the two of you go in

the back seat, correct?

A. That's correct.

MS. OSBURN: Okay. Thank you, ma'am. I don't have anything else.

THE COURT: Redirect?

MR. EDWARDS: Please.

REDIRECT EXAMINATION

BY MR. EDWARDS:

Q. Just to be clear, that's after he's already beaten you, choked you?

A. Yes.

Q. Made you pass out?

A. That's right.

Q. You were asked about your underwear, you were wearing a thong?

A. That's right.

Q. You don't consider that to be normal underwear?

A. No, I wouldn't call it underwear, but it feels like nothing so --

Q. Did you want to have sex with this guy?

A. Never.

MR. EDWARDS: Thank you. Nothing further.

THE COURT: Anything else, Ms. Osburn?

MS. OSBURN: No, Judge. Thank you.

A. Looked like to me and Greg, we were -- our observance was harassing, stalking her, following her. At that time we -- we were observing her, the behavior from both of them.
Q. What was her response to this male following her?
A. She kept looking back.
Q. Could you hear them talking to one another?
A. No.
Q. Did -- how far were you able to see them walking?
A. We watched them all the way up towards -- through the farmer's market and then she went on, we lost sight of her when she went on further north.
Q. You said you saw this male or maybe -- did you see both of them later or just the male?
A. We saw the male and female together earlier and then later on, after the situation.
Q. Okay. Tell us about what you saw later on.
A. Well, our first customer canceled out, so then we were dispatched to go pick up some people just north of where we were sitting at. And so we went up there, trying to find our other secondary customer, and of course, we couldn't find 'em. They said they were here, they were there, and we still couldn't find them, so we

were just riding around the parking lot, maybe you know, looking for this car. And we couldn't find and then we came up on a car that was honking real -- kept honkin' and honkin' and honkin', we figured that was our customer.

Q. That drew your attention, the honking?

A. Yeah, uh-huh.

Q. Did you think anything of it, other than hey, that's our customer?

A. That's our customer.

Q. Did you observe anything else about it besides the honking?

A. Just the honking and the movement in the vehicle.

Q. What were you able to see in the vehicle?

A. A lot of fightin', wrestlin' back and forth.

Q. At the time that you saw these people in the vehicle could you tell sex, race, anything about them?

A. Not at the time, no.

Q. Tell us what happened then, what you saw?

A. We came up, thought it was our customer, got out and about the time we had got out, the doors opened up and we could hear the female yelling and screaming and frantically. She got out of

Q. He did not or you don't recall?
A. I don't recall.
Q. Any tattoos, scars, anything like that you remember?
A. No.
Q. And you called 911?
A. Yes, I did.
Q. Which direction did he leave?
A. Excuse me?
Q. When he walked away which direction did he go?
A. He went towards the parking lot.
Q. Did you follow him till the police show up?
A. No.
Q. Did you see where the girl went?
A. She pulled out of the parking lot and went south.
Q. Okay. How much time do you think from the time you say you saw this guy walking behind her to the time that you come upon the car with the horn honking, how much time went by?
A. From our dispatch records we indicated it was anywhere from eight to 10 minutes.

MS. OSBURN: Okay. Thank you, sir. I don't have anything else.

THE COURT: Redirect?

A6

APPELLATE COURT NO. 17-117732-A

RECORD – VOL. NO. FOURTEEN

EXHIBIT NO.

TIMOTHY SUMPTER
Appellee,

VS.

STATE OF KANSAS
Appellant.

DISTRICT COURT NO. 2016-CV-000161-HC

DISTRICT COURT JUDGE JEFFREY L SYRIOS

COUNTY SEDGWICK

JUDICIAL DISTRICT
GWICK COUNTY, KANSAS
EPARTMENT
OCKET NO.

FILED
SEP 27 P 1:58
OF DISTRICT COURT
JUDICIAL DISTRICT
CK COUNTY, KANSAS

Case No. 11CR1187
11CR1290
11CR1638

RY TRIAL- VOL V

eedings had and entered
led case on March 16,
eff Syrios, Judge of

Division No. 27 of the Eighteenth Judicial District of Kansas.

APPEARANCES:

The State of Kansas appeared by and through its attorney, Mr. Justin Edwards, Office of the District Attorney, 535 North Main, Wichita, Kansas, 67203.

The Defendant, Timothy Sumpter, appeared in person and by his attorney, Ms. Alice Osburn, Attorney at Law, Wichita, Kansas.

11CR1187

CARRI L. MILES, CSR
OFFICIAL COURT REPORTER

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT
APP DOCKET NO.

FILED
2012 SEP 27 P 1:58
CLERK OF DISTRICT COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
BY

STATE OF KANSAS,
Plaintiff,
vs.
TIMOTHY SUMPTER,
Defendant.

Case No. 11CR1187
11CR1290
11CR1638

TRANSCRIPT OF JURY TRIAL- VOL V

Transcript of proceedings had and entered of record in the above-entitled case on March 16, 2012, before the Honorable Jeff Syrios, Judge of Division No. 27 of the Eighteenth Judicial District of Kansas.

APPEARANCES:

The State of Kansas appeared by and through its attorney, Mr. Justin Edwards, Office of the District Attorney, 535 North Main, Wichita, Kansas, 67203.

The Defendant, Timothy Sumpter, appeared in person and by his attorney, Ms. Alice Osburn, Attorney at Law, Wichita, Kansas.

CARRI L. MILES, CSR
OFFICIAL COURT REPORTER

I N D E X

Instruction conference	3
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Closing Argument of the State	100
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Instruction number 19, as to JB, Timothy Sumpter is charged in count one with the crime of aggravated kidnapping of JB. Timothy Sumpter pleads not guilty. To establish this charge each of the following claims must be proved: Number one, that Timothy Sumpter confined JB by force; number two, that it was done with the intent to hold such person to facilitate the commission of the crime of rape; number three, that bodily harm was inflicted upon JB; and number four, that this act occurred on or about the 16th day of January, 2011, in Sedgwick County, Kansas.

The elements of the completed crime of rape are as follows: Number one, that Timothy Sumpter had sexual intercourse with JB; number two, that the act of sexual intercourse was committed without the consent of JB, under circumstances when she was overcome by force or fear; and number three, this act occurred on or about the 16th day of January, 2011, in Sedgwick County, Kansas.

Bodily harm includes any act of physical violence, even though no permanent injury results. Trivial or insignificant bruises or

2011, in Sedgwick County, Kansas.

Instruction 23, as to JB, Timothy Sumpter is charged in count two with the crime of attempt to commit rape of JB. Timothy Sumpter pleads not guilty. To establish this charge each of the following claims must be proved: Number one, that Timothy Sumpter performed an overt act toward the commission of the crime of rape; number two, that Timothy Sumpter did so with the intent to commit the crime of rape; number three, that Timothy Sumpter failed to complete commission of the crime of rape; and number four, that this act occurred on or about the 16th day of January, 2011, in Sedgwick County, Kansas.

An overt act necessarily must extend beyond mere -- and that word is mere, not more. I'll read that again. An overt act necessarily must extend beyond mere preparation made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

line for the presiding juror, with a place to date and time that verdict.

We're now at that point, members of the jury, where the parties have a right to -- and an option of giving closing arguments. The State will go first. The State has the right and the option to split its time and that may be done here and then the defense will go. And then if the State has any additional time, the State will follow up with that. That being said, Mr. Edwards, you may proceed.

MR. EDWARDS: Thank you. So what the defendant's here asking you to do is find him guilty of the lesser included crimes. He admitted yesterday on the stand that well, of course, I committed those -- some of those lesser included crimes and you should find me guilty of those.

But what he's asking you to do, in essence, is ignore the law and find that you skip over the first step. You know, obviously lesser included crimes he's guilty of, they're lesser included crimes of the greater, there's no question he's guilty of those. He's admitted to some of those. But the question for you is

Again, that same excuse.

And then he tells detectives, I don't know her. I did fight with a girl down in Old Town, but it was never by a car and it was a woman wearing jeans, not a skirt. And now, ladies and gentlemen, he comes in here to court, almost a year later, since the last case, and he is telling you, you know what, I remember all of these things perfectly clear. And yes, I did some things, but all I did were the lesser included offenses.

And I ask you, do you believe him when he said that I didn't know they were lesser included crimes until today? When back in February, the evidence is, he wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense? Do you believe him when he tells you that Jessica attacked me, she pulled me into the car twice? Is there any reason to believe what he says?

In the end, ladies and gentlemen, I'd like you to go back there in that jury room, after you've elected your foreman, take a vote, look at the top line first, as you're supposed to,

don't even consider the lessers unless you cannot agree on the greater crimes, vote on the greater crimes, check the box for the top of each of those crimes, find him guilty of the greater crime on each count for each victim. Thank you.

THE COURT: Thank you. Ms. Osburn?

MS. OSBURN: Thank you. Judge, are the exhibits here?

THE COURT: We'll bring them in right away.

MS. OSBURN: I can go. Thank you. May it please the Court, counsel, Mr. Sumpter, members of the jury. Judge told you this is the law that applies to this case, he read it to you, about 35 minutes worth. The law that applies to this case includes lesser included offenses. You are the judge of the facts. Judge tells you here's the law. We have a dispute, the State and Mr. Sumpter, of what happened. That's why you're here, that's why we've been in trial all week, that's for you to decide.

What evidence did you hear? Have you been convinced beyond a reasonable doubt? And you go

bodily harm cannot be trivial, or insignificant bruises or impressions resulting from the act itself should not be considered as bodily harm. Do you, based on the evidence, believe that the bruises on her legs were part of the act of trying to confine her? If you believe Mr. Sumpter was trying to confine her and are those a result of that act? If so, that's part of the confinement part and they are trivial and insignificant because of the act itself.

But additionally, to prove aggravated kidnapping, the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her. Again, it's not what she thought was gonna happen, it's what was in Mr. Sumpter's mind when he was in the car with her. Were his intentions to have sexual intercourse with her? That's what they have to prove. If they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping.

So what do we know about the facts? We know from both of them they're cussin' at each other. He says she spit on him. They're calling each other names, it's getting heated,

included offenses. But they so want you to just move past the greaters and get down to the lessers and just find him guilty of those because that's easy, he's admitted those, why don't we just do that and go home. You can't do that. And I'd suggest if you have no reasonable doubt in your mind, that you hold firm and you say he is guilty of the greater offenses and you don't need to go to the lessers. There's no need to consider them if have you no reasonable doubt of the greater.

Let's talk about the different defenses in this case. I didn't do it. I didn't do anything with Avonlea, I didn't do it, I didn't do it, I didn't do it. And then on some, well, I did do part of it, I mean, I did do the lesser included offenses. I didn't kidnap anyone. I did touch their butts and that's it. She wanted it, Jessica wanted it, because that's the defense to the aggravated sexual battery and the attempted rape. She came onto me, she fought me, she wanted it.

These women weren't overcome, you heard that several times, there was no one overcome by force. And oh, oh, by the way, if none of those

stand, I was going to have sex with her, I thought, I thought she wanted it. Clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her -- or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do.

Self-defense, it's her fault, Jessica spit on him and by gosh, that means that he gets to defend himself. It has to be reasonable, it has to be an unlawful force, he can't retaliate, in other words. If she spits on him, he can't slap her, like he said that he did, he can't continue to slap her. And if she grabs him by the shirt and drags him down, I mean, do you really believe that actually happened? Watch that video and there's a time when you will see him as she gets out of the car and he is following along, grabbing her and pulling her back into that car. Are you kidding me? Do you really believe that this was self-defense? Or was this a man who was convinced that he was going to get what he wanted that night?

A7

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

TIMOTHY SUMPTER, Petitioner	)	
v.	)	Case No. 16CV161
STATE OF KANSAS, Respondent	)	

MEMORANDUM ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS

Now on this 2nd day of May, 2017, the above captioned matter comes before the Court on the petitioner's Petition for Writ of Habeas Corpus. Petitioner, Timothy Sumpter, appears by and through counsel Katie Gates Calderon and Ruth Anne French-Hodson. The State of Kansas appears by and through A.D.A. Robin Sommer.

WHEREUPON, the court, upon review of the pleadings filed by the parties, review of the records, and otherwise being duly advised in the premises, denies petitioner's Petition for Writ of Habeas Corpus and makes the following findings.

Procedural History and Relevant Facts

1. Petitioner's petition originates from his Sedgwick County criminal cases, 11CR1187, 11CR1290, and 11CR1638, charging various sex crimes against four women, A.S.E., A.C.C., A.R.P. and J.B., in four incidents. Trial counsel Alice Osburn represented petitioner. The court consolidated the three cases prior to trial. A jury found petitioner guilty of various crimes as charged and lesser offenses as

instructed by the court. Petitioner was sentenced to a controlling term of 351 months incarceration (315 months in prison consecutive to 36 months in the county jail). Petitioner subsequently filed a direct appeal and was represented by appellate counsel Heather Cessna. The Court of Appeals denied relief and affirmed the convictions, vacating only the no contact order. Petitioner timely filed the current petition.

2. The court refers to and hereby adopts the Procedural History and Summary of Relevant Facts as accurately stated in the State's Response to Amended Petition for Writ of Habeas Corpus (pp. 1-12); and as summarized in *State v. Sumpter*, No. 108,364, 2013 WL 6164520, 313 P.3d 105 (Kan. App. 2013) (unpublished opinion), *rev. denied* January 15, 2015. The court further adopts the appellate history as accurately summarized in the State's Response to Amended Petition for Writ of Habeas Corpus (pp. 12-17), and as stated in the above referenced opinion.

3. For the below stated reasons, this court denies the Petition for Writ of Habeas Corpus without holding an evidentiary hearing, which will not provide evidence affecting the ultimate validity of petitioner's claims.

K.S.A. 60-1507

4. In *Moncla v. State*, 285 Kan. 826, Syl. ¶ 1, 176 P.3d 954 (2008), the Supreme Court noted that a district court is not required to hold an evidentiary hearing if it can be conclusively determined that relief is not warranted:

> An evidentiary hearing on a K.S.A. 60-1507 motion is not required if the motion together with the files and records of the case conclusively show that the movant is not entitled to relief. The burden is on the movant to allege facts sufficient to warrant a

> hearing. If no substantial issues of fact are presented by the motion, the district court is not required to conduct an evidentiary hearing.

5. To meet the required burden, a petitioner must do more than raise conclusory contentions:

> [T]he movant must make more than conclusory contentions and must state an evidentiary basis in support of the claims or an evidentiary basis must appear in the record. [Citation omitted.] However, in stating the evidentiary basis, the K.S.A. 60–1507 motion must merely 'set forth a factual background, names of witnesses or other sources of evidence to demonstrate that petitioner is entitled to relief.' [Citation omitted.]

Swenson v. State, 284 Kan. 931, 938, 169 P.3d 298 (2007); see also *Burns v. State*, 215 Kan. 497, 500, 524 P.2d 737 (1974) (a movant's unsupported claims are never enough for relief pursuant to K.S.A. 60-1507). This threshold requirement prevents fishing expeditions into allegations that cannot be substantiated and is consistent with long-standing precedent.

6. If a movant alleges facts that are not in the original record, an evidentiary hearing is not required if the court determines there is no legal basis for relief, even assuming the truth of the factual allegations. *Trotter v. State*, 288 Kan. 112, 137, 200 P.3d 1236 (2009).

7. Kansas law also provides that a movant cannot raise a mere trial error in a K.S.A. 60-1507 motion, but may raise an error affecting constitutional rights if there are exceptional circumstances:

> [A] proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may

> be raised even though the error could have been raised on direct appeal, provided there are exceptional circumstances excusing the failure to appeal.

See Supreme Court Rule 183(c)(3); see also *Trotter v. State*, 288 Kan. at 127 (discussing exceptional circumstances for failing to raise an issue at trial or on direct appeal). The burden of showing exceptional circumstances lies with the movant. *Holt v. State*, 290 Kan. 491, 495, 232 P.3d 848 (2010).

8. The Supreme Court states the following regarding the two-part test applicable to a claim of ineffective assistance of counsel:

> To prevail on a claim of ineffective assistance of counsel a criminal defendant must establish that (1) counsel's representation fell below an objective standard of reasonableness, considering all the circumstances and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been more favorable to the defendant. In considering the first element, the defendant's counsel enjoys a strong presumption that his or her conduct falls within the wide range of reasonable professional conduct. Further, courts are highly deferential in scrutinizing counsel's conduct and counsel's decisions on matters of reasonable strategy, and make every effort to eliminate the distorting effects of hindsight.

Moncla v. State, 285 Kan. 826, Syl. ¶ 3.

9. A movant bears the burden of establishing ineffective assistance of counsel to the extent necessary to overcome the presumption of regularity of a conviction and the presumption of reasonable assistance of counsel. *Hogan v. State*, 30 Kan. App. 2d 151, 38 P.3d 746 (2002). "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

counsel's perspective at the time." *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Moreover, the adequacy of an attorney's representation must be judged by the totality of the representation, not "by fragmentary segments analyzed in isolated cells." *Schoonover v. State*, 2 Kan. App. 2d 481, Syl. ¶ 4, 582 P.2d 292 (1978).

10. The Supreme Court has further recognized, "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of alleged deficiencies." *Edgar v. State*, 294 Kan. 828, Syl. ¶ 4, 283 P.3d 152 (2012). The United States Supreme Court holds the same view:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

11. This court may take judicial notice of the content of district court files. *In the Interest of A.S.*, 12 Kan. App. 2d 594, 598, 752 P.2d 705 (1998) (K.S.A. 60-409(b)(4) allows a court to take judicial notice of its case file, including journal

entries contained therein). Therefore, this court takes judicial notice of the district court files and case history in the current and underlying case.

Analysis and Ruling

12. **Petitioner's First Claim [Claim I(A) – pp. 4-10 of petition]. Petitioner claims trial counsel was ineffective because she did not understand and argue the elements of aggravated kidnapping in relation to the incident with J.B.**

- Petitioner's claim of ineffective assistance of trial counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

- The issue of sufficiency of the aggravated kidnapping count is a matter of law. This court has the ability to review the facts in the record and make a legal determination regarding the sufficiency of the evidence without an evidentiary hearing.

- Petitioner claims Ms. Osburn should have objected to the aggravated kidnapping count at preliminary hearing, as well as at various stages of the trial, including cross examination of the victim, motion for judgment of acquittal, and closing argument.

- Kidnapping as defined by K.S.A. 21-3420(b) is "taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." Aggravated Kidnapping is "when bodily harm is inflicted upon the person kidnapped." See K.S.A. 21-3421.

- The Court in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), set out the necessary elements to establish kidnapping done to take or confine a person to facilitate the commission of another crime (in the present case, Attempted Rape). "We therefore hold that if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement: (a) Must not be slight, inconsequential and merely incidental to the other crime; (b) Must not be of the kind inherent in the nature of the other crime; and (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Id.* at 216.

- The evidence is that petitioner approached J.B. as she walked to her car after leaving a bar in the Old Town area of downtown Wichita. As J.B. was getting into her car, petitioner pushed her into the car and forced his way into J.B.'s car. J.B. struggled with and resisted petitioner by kicking and punching him in an effort to keep from coming into the car; to get petitioner out of the car once he was in; and to open the door to call for help or get out of the car. While in J.B.'s car, petitioner resisted J.B.s efforts to remove him from the car by holding her down and punching her in the face. Petitioner additionally prevented J.B. from opening her door by grabbing her hand and ripping it down and punching her in the face. Petitioner's physical force against J.B. was accompanied and further enhanced by verbal threats, taunts and profanity against J.B. *(Transcript of Jury Trial – Vol. III, March 14, 2012, pp. 38-52).*

- Petitioner's confinement of J.B. was not slight, inconsequential or merely incidental to the attempted rape. Petitioner's actions go beyond attempting to rape J.B. By using physical force, accompanied by verbal threats, taunts and intimidating profanity to enhance his objective, petitioner confined J.B. to her car, not allowing her to get out of the car or to drive away. By punching J.B. (at one point five times directly in her face); pushing his knee up against her throat (restricting her air way); and preventing J.B. from opening the passenger door; petitioner furthers the confinement by eliminating the possibility of third party aid responding to cries for help *(Transcript of Jury Trial – Vol. III, March 14, 2012, pp. 42-44).* After J.B. successfully pushed petitioner out of the car, petitioner further confined J.B. to the car (and to the parking lot) by taking her car keys which prohibited J.B. from safely exiting her car, or from driving off and leaving the parking lot *(Transcript of Jury Trial – Vol. III, March 14, 2012, pp. 47-50).* These acts are significant to the confinement of J.B. and are not merely incidental to the attempted rape.

- Confining a victim in a car; physically restraining her from leaving that car; and physically prohibiting her from yelling for help is not inherent in the nature of rape or attempted rape. Petitioner could have attempted to rape J.B. at any point after he first contacted J.B. and before entering her car. But petitioner decided to wait to attempt the rape until J.B. was confined in the car with him.

- Confining J.B. to her car made the attempted rape substantially easier to commit and substantially lessoned the risk that the attack would be detected by others. Again, petitioner could have attempted to rape J.B. outside of her car. But the close confines of the car helped conceal the rape by making it harder for others to see and hear.

- Petitioner highlights the rule stated in *State v. Cabral*, 228 Kan. 741, 619 P.2d 1163 (1980), where the Court held: "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." 228 Kan. at 744-45. However, the facts in this case are distinguishable from *Cabral* and more akin to those in *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983); *State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985) and *State v. Blackburn*, 251 Kan. 787, 840 P.2d 497 (1992). Unlike in *Cabral*, at no time did J.B. request, initiate or consent to any contact with petitioner. At no point was J.B. a willing companion of petitioner, or sufficiently acquiesce to petitioner's presence with her. In *Cabral*, the defendant and victim had spent the evening together at a bar and later with two other friends driving around in defendant's car. As the Court stated, "the defendant and victim had been together all evening, driving around Hutchinson and stopping at various places by mutual consent." 228 Kan. at 744. However, like the defendants in *Lile* and *Blackburn*, petitioner confined J.B. by forcing her to remain in her car against her will. Furthermore, J.B. was forced to remain in the parking lot (and not drive away) against her will. Petitioner physically prevented J.B. not only from leaving her car, but also from leaving the parking lot in her car.

- This court finds there is sufficient evidence to support the aggravated kidnapping conviction. Therefore, petitioner is not prejudiced. The outcome of the trial would not have changed, even if trial counsel would have raised the issue at any time before or during the trial. Because the prejudice prong is not met, there is no reason for this court to consider the reasonableness prong of the test.

- Petitioner's claim counsel was ineffective at the preliminary hearing fails for similar reasons. "As a general principle, after an accused has gone to trial and has been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is considered harmless unless it appears that the error caused prejudice at trial. *State v. Butler,* 257 Kan. 1043, 1062, 897

P.2d 1007 (1995)." *State v. Jones*, 290 Kan. 373, 381, 228 P.3d 394, 401 (2010).

13. **Petitioner's Second Claim [Claim I(B) – p. 10]. Petitioner claims his speedy trial rights were violated by trial counsel's continuations without his consent.**

- Petitioner's claim of ineffective assistance of trial counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed on the court record and on Kansas law.

- K.S.A. 2015 Supp. 22-3402(g) bars reversal of petitioner's convictions:

> If a delay is initially attributed to the defendant, but is subsequently charged to the state for any reason, such delay shall not be considered against the state under subsections (a), (b) or (c) and shall not be used as a ground for dismissing a case or for reversing a conviction unless not considering such delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to such delay.

Therefore, the time that was initially attributable to petitioner cannot now be counted toward the State's time for speedy trial purposes, regardless of whether petitioner failed to authorize the continuances. Additionally, there is no claim concerning a violation of the constitutional right to a speedy trial or prosecutorial misconduct.

- Petitioner has failed in proving that either prong of the test for ineffective assistance of trial counsel has been met.

14. **Petitioner's Third Claim [Claim II(A) – pp. 11-16]. Petitioner claims appellate counsel was ineffective for not claiming the trial court abused its discretion in denying the motion to sever because of manifest injustice and prejudice.**

- Petitioner's claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

- Trial counsel objected to and argued against the consolidation of the three cases, and to sever the counts as to the two victims in case number

11CR1290 – specifically requesting four separate trials. Trial counsel argued that consolidating the trials would unfairly prejudice petitioner; that the jury would have difficulty separating the counts; that the multiple counts verdict instruction would be insufficient; and that petitioner's right to testify would conflict with his right to remain silent. *(Transcript of Pretrial Motions, March 8, 2012, pp. 11-18).* In the direct appeal, the Court of Appeals denied relief on the issue of consolidating the three cases for trial, specifically finding the district court properly consolidated the cases for trial. The Court of Appeals found the jury demonstrated its ability to follow the court's multiple counts instruction by acquitting petitioner on a count and finding him guilty on multiple lesser included counts. *State v. Sumpter,* pp. 6-10.

- The jury was instructed that each crime charged was a separate and distinct offense, and that the jury was to decide each charge separately. The jury validated the presumption that a jury complies with the court's instructions. See *State v. Gaither*, 283 Kan. 671, 156 P.3d 602 (2007). As to victim A.S.E., in Count 1, the jury found petitioner guilty of the lesser included offense (of Kidnapping) – Criminal Restraint; and in Count 2, guilty as charged – Aggravated Sexual Battery. As to victim A.C.C., in Count 1, the jury found petitioner not guilty; and in Count 2, guilty of the lesser included offense (of Aggravated Sexual Battery) – Sexual Battery. As to victim A.R.P, the jury found petitioner guilty of the lesser included offense (of Aggravated Sexual Battery) – Sexual Battery. As to victim J.B., the jury found petitioner guilty as charged in Count 1 – Aggravated Kidnapping; Count 2 – Attempt to Commit Rape; and Count 3 – Aggravated Sexual Battery. Contrast this result with that in *State v. Coburn*, 38 Kan. App. 2d 1036, 1057, 176 P.3d 203 (2008) where the Court concluded:

> Because the jury found Coburn guilty on all offenses charged, we are unable to say with any certainty that the jury carefully considered each charge separately on the evidence and law applicable to that charge. See *State v. Walker,* 244 Kan. 275, 280, 768 P.2d 290 (1989) (When a jury acquits a defendant on one or more of the offenses charged, this is an indication that the jury carefully considered each charge separately on the evidence and the law applicable to that charge.). As a result, we do not believe that a jury instruction consisting of two sentences could cure the prejudice caused by the joinder in this case.

State v. Coburn, 38 Kan. App. 2d at 1057. Again, in this case, the jury's verdict belies the petitioner's claim that he was prejudiced by the consolidation of the cases. This finding additionally applies to the petitioner's claim of being forced to choose between his Fifth and Sixth Amendment rights to testify or not. There was no prejudice.

- The petitioner has failed in proving that either prong of the test for ineffective assistance of appellate counsel has been met.

15. **Petitioner's Fourth Claim [Claim II(B) – p. 16]. Petitioner claims appellate counsel was ineffective for not raising the sufficiency of the kidnapping count.**

- Petitioner's claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

- Neither trial nor appellate counsel was ineffective for failing to raise the issue. Neither prong of the test has been met. There has been no showing of prejudice. See the court's findings and ruling in paragraph #12 above.

16. **Petitioner's Fifth Claim [Claim II(C) – pp. 17-19]. Petitioner claims appellate counsel did not identify key instances of prejudicial prosecutorial misconduct.**

- Petitioner's claim of ineffective assistance of appellate counsel is properly brought under K.S.A. 60-1507. However, it is summarily denied without an evidentiary hearing because it can be addressed based on the court record and on Kansas law.

- On direct appeal, the Court of Appeals denied relief on the issue of prosecutorial misconduct during closing argument. The Court cites the use of petitioner's letter in closing argument, as well as other challenges to the prosecutor's comments and found that they "fell within the wide latitude afforded to prosecutors, and the prosecutor did not commit misconduct during closing argument." *State v. Sumpter,* pp. 14-18.

- Petitioner's current claims of prosecutorial misconduct are similar in nature to those raised on appeal. As with those previously raised, the prosecutor's comments were made in context of the evidence presented and fall within the wide latitude afforded to prosecutors. The prosecutor did not commit misconduct.

- The petitioner has failed in proving that either prong of the test for ineffective assistance of appellate counsel has been met.

17. **Petitioner's Sixth Claim [Claim III(A) – pp. 20-22]. Petitioner claims the lack of African-Americans on the jury venire denied him of a fair trial and due process.**

    - This is a claim of mere trial error that could have been raised on direct appeal and is not properly brought in a K.S.A. 60-1507 motion. It is denied without an evidentiary hearing based on the court record and on Kansas law. There are no exceptional circumstances that excuse the failure to raise the issue on appeal.

18. **Petitioner's Seventh Claim [Claim III(B) – pp. 22-23]. Petitioner claims the offender registry and lifetime post-release supervision sentencing requirements are unconstitutional.**

    - This is a claim of mere trial error that could have been raised on direct appeal and is not properly brought in a K.S.A. 60-1507 motion. It is denied without an evidentiary hearing based on the court record and on Kansas law. There are no exceptional circumstances that excuse the failure to raise the issue on appeal.

19. **Petitioner's Eighth Claim [Claim III(C) – p. 24]. Petitioner claims the trial court imposed an enhanced sentence without requiring the State to prove the factors to a jury beyond a reasonable doubt.**

    - This claim is denied without an evidentiary hearing based on the court record and on Kansas law.
    - In the direct appeal, the Court of Appeals denied relief on the imposition of the enhanced sentence pursuant to case law.
    - Res judicata bars relief on this issue as it has already been settled by the appellate court.

The court denies petitioner's Petition for Writ of Habeas Corpus.

IT IS SO ORDERED.

Judge Jeffrey L. Syrios

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of May, 2017, a true and correct copy of the above and foregoing order was served upon all interested parties properly addressed, as follows:

Robin Sommer
(via e-mail)

and

Katie Gates Calderon
Ruth Anne French-Hodson
(via e-mail)

Katie Harris, Administrative Assistant

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CLERK OF THE SEDGWICK COUNTY DISTRICT COURT
CASE NUMBER: 2016-CV-000161-HC

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DIVISION

TIMOTHY SUMPTER, Petitioner-Plaintiff, v. STATE OF KANSAS, Serve: Attorney General, Kansas 120 SW 10th Avenue, Fl. 2 Topeka, KS 66612 Respondent-Defendant.	)	Case No. 2016-cv-000161-HC

AMENDED PETITION FOR WRIT OF HABEAS CORPUS & *IN FORMA PAUPERIS* AFFIDAVIT

COMES NOW, Plaintiff Timothy J. Sumpter, petitioning the court for a writ of habeas corpus stating the following:

1. Place of detention: El Dorado Correctional Facility, 1737 S.E. HWY 54, P.O. Box 311, El Dorado, KS 67042.

2. Name and location of court which imposed sentences: Sedgwick County District Court (Eighteenth Judicial District), 525 N Main St., Wichita, KS 67203.

3. The case number and the offense for which sentence was imposed:

Cases Consolidated:

Case No. 11CR1638

Count 1 -- Aggravated kidnapping in violation of K.S.A. 21-3421(b)

Count 2 -- Attempted rape in violation of K.S.A. 21-3301 and 21-3502(a)(1)

Count 3 -- Aggravated sexual battery in violation of K.S.A. 21-2518(a)(1)

Case No. 11CR1187

Count 1 -- Aggravated sexual battery in violation of K.S.A. 21-3518(a)(1)

Count 2 -- Misdemeanor criminal restraint in violation of K.S.A. 21-3424(a)

Case No. 11CR1290

As to victim A.C.C., Count 1 -- misdemeanor sexual battery in violation of K.S.A. 21-3517

As to victim A.R.P., Count 2 -- misdemeanor sexual battery in violation of K.S.A. 21-3517

4. The date upon which sentence was imposed and the terms of the sentence: May 17, 2012. Controlling sentence--315 months with 36 months in jail consecutive to the prison sentence, Lifetime post-release and offender registration.

5. The finding of guilt was made after a plea of: Not Guilty.

6. The finding of guilt was made by a: Jury.

7. Did the petitioner appeal from the judgment of conviction or imposition of sentence? YES, judgment of conviction.

8. If you answered "yes" to (7), list:

   a. the name of each court to which you appealed:

      i. The Kansas Court of Appeals

      ii. The Kansas Supreme Court

   b. the result in each such court to which you appealed and the date of such result:

      i. Conviction affirmed November 22, 2013

      ii. Petition for review denied January 16, 2015

9. Reasons for not appealing: NOT APPLICABLE.

GROUNDS FOR WHICH IS THE BASIS FOR ALLEGATION THAT THE PETITIONER IS BEING HELD IN CUSTODY UNLAWFULLY

In relation to the incident involving A.S.E., Sumpter was convicted of one count of aggravated sexual battery and the lesser included offense of kidnapping, criminal restraint. Sumpter was convicted of one count of sexual battery in relation to the incidents involving A.R.P. and one count of sexual battery in relation to the incidents involving A.C.C. In relation to the incident involving J.B., Sumpter was convicted of aggravated kidnapping, attempted rape, and aggravated sexual battery.

I. Sumpter's Trial Counsel Provided Ineffective Assistance by Failing to Challenge the Insufficiency of the State's Aggravated Kidnapping Charges and the Violation of Sumpter's Speedy Trial Rights.

In multiple areas, Sumpter's trial counsel failed to prepare, defend, and advocate for Sumpter. These failures amounted to ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution that requires reversal of conviction. Ineffective assistance of counsel claims require the defendant to establish two things: (1) "counsel's performance was deficient"; (2) "the deficient performance prejudiced the defense." *State v. Davis*, 277 Kan. 309, 314 (2004). On the first prong, the defendant must "show that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances." *Edgar v. State*, 294 Kan. 828, 837 (2012) (quoting *Bledsoe v. State*, 283 Kan. 81, 90 (2007)). As to the second prong, the defendant "must establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A. Sumpter's Trial Counsel was Ineffective because of Her Failure to Understand and Argue the Elements of Aggravated Kidnapping in Relation to the Incident with J.B.

Sumpter was improperly convicted of aggravated kidnapping of J.B. because any confinement of the victim was merely incidental to the crime of attempted rape. Sumpter's trial counsel was ineffective in failing to raise this problem at all stages of the case: at the probable cause determination at the preliminary hearing, after the State's case at trial, in the jury instructions given, and in post-trial motions. "Kidnapping is the taking or confining any person, accomplished by force, threat or deception, with the intent to hold such person: (1) for ransom, or as a shield or hostage; (2) to facilitate flight or the commission of any crime; (3) to inflict bodily injury or to terrorize the victim or another; or (4) to interfere with the performance of any governmental or political function." K.S.A. § 21-5408(a). "Aggravated kidnapping is kidnapping . . . when bodily harm is inflicted upon the person kidnapped." K.S.A. § 21-5408(b).

The Kansas Supreme Court has held that to kidnapping to facilitate the commission of a crime must not be based on movement or confinement that is "slight, inconsequential and merely incidental to the other crime," is "inherent in the nature of the other crime," and its significance is dependent on the other crime. *State v. Buggs*, 219 Kan. 203, 216 (1976). In this case, the confinement of J.B. in her car was merely incidental to the crime of aggravated sexual battery and attempted rape. As the Kansas Supreme Court has concluded, "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." *State v. Cabral*, 228 Kan. 741, 744-45 (1980); *cf. Buggs*, 219 Kan. at 215 (stating that "the ordinary rape require[s] as a necessary incident some 'confinement' of the victim-they are nevertheless

not kidnappings solely for that reason"); *State v. Hays*, 256 Kan. 48, 63 (1994) (holding that the kidnapping conviction was not supported by the evidence because mere incapacitation while committing the underlying crime had no significance independent of the robbery).

There is no evidence that Sumpter forcibly took J.B. to her vehicle to commit a crime in seclusion as occurred in *Buggs*. Rather the evidence presented at the preliminary hearing and at trial showed that J.B. voluntarily walked to her car with Sumpter and that Sumpter entered the car against her wishes and that any confinement in the car was merely incidental to the commission of the alleged attempted rape. At the preliminary hearing, J.B. stated that when she got to her car and retrieved her key from the gas tank, Sumpter initially grabbed her and then she states:

> Q: What happened when you got to the car?
>
> A: I got to my car, and I got my key. . . . I was just gonna leave. So, you know, he grabbed me, pushed me up against the car . . . [and] I got away from him, walked around my car to my driver's side . . . . and got into my car, and that's when he came to my driver's door, forced his way into my vehicle, and we began [] fighting . . . [and] [h]e forced my hand upon his genital area.

(Prelim. Hearing Tr. 7:9-9:1) (Ex. 1).

And then at trial, J.B. similarly testified:

> Q: All right. Jessica, let's talk about what happened when you got to your car. Tell us what you recall.
>
> A: I got to my car and [after Sumpter refused to leave] . . . I got my key, walked behind my car and started walking towards my driver's door, and I thought he was still on the other side of the car, you know, and he [] was like, at least let me get the door for

> ya. And I was just like, whatever, put my key in the door, placed one foot into my car and . . . [h]e tried to force his way into my car. And so I had one leg in the car and . . . he gripped my door with his left hand and tried to shove his way into my car. And he pushed me and was like forcing me into the car.

(Trial Tr. III 38:2-39:21, Ex. 2).

As the testimony from J.B. at trial and at the preliminary hearing demonstrates, this is not a case where there is confinement or taking that had any significance beyond that necessary to commit the underlying offense, attempted rape. This is not a case where the victim was handcuffed or tied up, *see State v. Mitchell*, 784 P.2d 365, (Kan. 1989); *State v. Zamora*, 247 Kan. 684, 696 (1990), or a case where a victim was moved to a completely different location for strategic reasons, *Buggs*, at 216-17 (holding that kidnapping had been shown when the offenders moved the victims from the parking lot outside the store to inside the store to commit the rape when they could have simply robbed the victims outside the store). Rather, at most, the State's evidence shows that any confinement of J.B. by Sumpter was inherent in committing the underlying attempted rape and had no significance independent of the underlying offense itself. *See State v. Ransom*, 239 Kan. 594, 602-03 (1986) (reversing the aggravated kidnapping conviction because the movement around the road was part of the fighting, kicking, battery, and rape that occurred and did not make the commission of the rape "substantially easier").

But trial counsel failed to ever object to the aggravated kidnapping count based on the incident with J.B. on the grounds that the evidence did not support the legal definition of the count. Trial counsel did not challenge the sufficiency of the evidence at the preliminary hearing despite the lack of evidence to establish probable cause on the facilitation element.

Because trial counsel did not have a proper understanding of what the State had to show at trial on the aggravated kidnapping count, she missed crucial opportunities to challenge the State's claims and testimonial evidence. Most fundamentally, trial counsel failed to ever object to the aggravated kidnapping count based on the incident with J.B. on the grounds that the evidence did not support the legal definition of the count. At the preliminary hearing, trial counsel did not challenge the sufficiency of the evidence despite the lack of evidence to establish probable cause on the facilitation element.

At trial, Sumpter's trial counsel made several decision to not challenge the State's claims or witness testimony that make no strategic sense if counsel had actually understood the importance of the facilitation element of the aggravated kidnapping count. First, Sumpter's trial counsel failed to challenge the prosecutor's misstatement of the evidence on what affirmative act was being used to support the count during arguments on the Sumpter's motion for acquittal at the end of the State's case in chief. In his argument, the prosecutor stated that the aggravated kidnapping count with respect to J.B. was based on a "confinement" and that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (Trial Tr. IV 64:5-8, Ex. 21). But as the testimony set out above illustrates (Ex. 1 & 2), J.B. had instead testified at both the preliminary hearing and at trial that she had voluntarily gotten into her car and that Sumpter had pushed his way into the vehicle with her to accomplish the underlying crime—attempted rape. Second, J.B. changed her testimony about what happened as Sumpter entered the vehicle with her from the preliminary hearing to trial. But trial counsel did nothing during her cross-examination to clarify what happened at or in the vehicle that would amount to confinement beyond what was inherent or incidental to the commission of the attempted rape. Rather trial counsel's cross-examination focused almost

entirely on discounting the attempted rape allegations and J.B.'s changing story on whether penetration or attempted penetration occurred. (Trial Tr. III 57-70). Finally, at closing argument, the prosecutor impermissibly provides his opinion of what the jury should find occurred in a grainy and choppy surveillance video for the jury: "Watch that video and there's a time when you will see him as she gets out of the car and he is following along, grabbing her and pulling her back into that car." (Trial Tr. V 106:18-22, Ex. 22).[1] But the prosecutor never elicited testimony from J.B. on what was being shown in this section of the video. (Trial Tr. III at 28:11-32:6, Ex. 13) (the trial testimony just covered J.B.'s explanation of the events depicted in the video until Sumpter and J.B. reach the car). The quality of the video along with contradictory testimonial evidence required jury interpretation but trial counsel failed to challenge the prosecutor's unfounded assertions or point to the contradictory evidence. This failure to challenge misstatements of testimony and changing witness testimony on the aggravated kidnapping count—the charge that carried the largest maximum sentence—only made sense if trial counsel did not realize what was required of the State under *Buggs*.

Trial counsel's misunderstanding of the law was confirmed at closing. On the aggravated kidnapping count, trial counsel only states that Sumpter denies "ever confin[ing J.B.] in the car." (Trial Tr. V 92:19-20, Ex. 23). But trial counsel does not explain to the jury what the State must prove to satisfy the facilitation element and for that reason she makes no argument that the evidence elicited at trial shows no confinement beyond what is inherent or incidental to the underlying crime. Indeed, Sumpter's trial counsel seems to have accepted that holding J.B. during the alleged attempted rape was sufficient because she simply argued that the bruising that

[1] This is the only action identified by the prosecutor and it fails to support a confinement theory—as opposed to a takings theory—which the State said it was resting the aggravated kidnapping count on for trial. (See Ex. 21).

happened as "part of the confinement" could not be used to also support the "bodily harm" proof. (Trial Tr. V 92:24-93:10, Ex. 24).

Additionally, both trial counsel and the prosecutor incorrectly relayed the intent element of the aggravated kidnapping count to the jury. They both stated that all the State needed to prove for intent on the *aggravated kidnapping* count was that Sumpter intended to rape J.B. (Trial Tr. V 76:2-6, Ex. 25) (The prosecutor states that all he has to prove is "confined [J.B] by force" and that "he intended to commit the crime of rape."); and (Trial Tr. V 93:12-14, Ex. 26) (Trial counsel states "the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her.")). But the State actually had to prove that any confinement done by Sumpter was more than incidental *and* was done with the intent of facilitating—and not just committing—the underlying crime. By inappropriately conflating the intent element of the underlying crime—attempted rape—with the intent element of the separate kidnapping count, Sumpter's trial counsel once again demonstrated a lack of understanding of the facilitation element and what was required of the State beyond simply showing the type of confinement and intent inherent in the underlying crime. Trial counsel's arguments and explanations at closing belie any argument that these were strategic choices, rather than a misunderstanding of the law.

Trial counsel did move for a judgment of acquittal at the end of the State's case and during the post-trial proceedings but she made no mention of the *Buggs*-test or any specific evidentiary deficiency related to the facilitation element in the State's case. (Trial Tr. IV 59:2-23; Tr. Post-trial Motions and Sentencing 3:5-18, Ex. 3).

This failure was not only objectively deficient as far as assistance of counsel, it resulted in definite prejudice to Sumpter. *State v. Davis*, 277 Kan. 309, 329 (2004) (holding that

trial counsel's failure to understand the law applicable to the defendant's defense was both a deficient performance and prejudicial). Because of trial counsel's failure to argue that the evidence both at the preliminary hearing and trial failed to set out a *prima facie* case of kidnapping based on the rationale in *Buggs*, the prosecution was able to prevail on the count without ever having to establish on the record what taking or confinement went beyond that inherent in the underlying offense.

B. Due to Counsel's Continuations without Consent, Sumpter's Statutory Rights to Speedy Trial were Violated.

Sumpter was denied his statutory right to a speedy trial due to his trial counsel's actions and inactions as well as nefarious tactics by the prosecutor. Under K.S.A. § 22-3402(1), "[i]f any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged." K.S.A. § 22-3402(1) (2011). All three of the cases were heard together for the preliminary hearing on August 25, 2011. Sumpter was advised by his trial counsel to waive his arraignment and that his speedy trial date would begin that day. Sumpter was then arraigned and his trial date was originally set for October 17, 2011. But instead Sumpter's trial occurred 100 days after his arraignment on March 12, 2012. While there were three continuances on the docket that were recorded as taken by the defendant, Sumpter was not aware of these continuances until after the occurred and did not consent to or desire any continuance. He was not present or able to consent to these continuances. It is not clear why the continuances were taken because no motions were filed and no record was taken on the continuance determination. (Ex. 4, Docket). From October 17, 2012, onward, Sumpter was essentially being held on consolidated charges and his speedy trial clock should have run 90-days from October 17.

II. Sumpter's Constitutional Rights were Violated because of Ineffective Assistance of Appellate Counsel in Failing to Argue that the Trial Court Erred in Determining the Severance Motion, Failing to Argue the Sufficiency of the Kidnapping Charges related to J.B., and Missing Crucial Pieces of Prosecutorial Misconduct.

Sumpter's habeas petition should also be granted because his appellate counsel provided ineffective assistance that deprived him of his rights under the Sixth and Fourteenth Amendments to the Constitution. "For a defendant to be successful in asserting that he was denied effective assistance of counsel on appeal, it must be shown that (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the appellant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful." *Baker v. State*, 243 Kan. 1, 7 (1988).

A. Sumpter's Appellate Counsel Provided Ineffective Assistance when She Failed to Argue that the District Court Abused Its Discretion in Denying the Motion to Sever because of the Manifest Injustice and Prejudice to Sumpter from Consolidation.

Sumpter's appellate counsel was ineffective because of her failure to raise the prejudice to Sumpter that occurred from the consolidation of the charges in the three cases against Sumpter: 11-cr-1638; 11-cr-1187; 11-cr-1290. Appellate counsel only focused on whether the cases could be joined under K.S.A. § 22-3202(1) but did not argue that the trial court erred in denying Sumpter's motion for severance. (Appellant's Brief, Ex. 5 at 14-19). Appellate counsel failed to identify the issue despite noting that a severance motion and a motion for reconsideration were raised by trial counsel and denied by the trial court. *Id.* Appellate counsel's failure to correctly argue the consolidation claim was highlighted by the concurring judge in the appeal as he noted, "As to the consolidation of the charges for trial, I concur in the result based on how the parties framed and argued the issue on appeal." *State v. Sumpter*, 313 P.3d 105 (2013).

It was unreasonable for appellate counsel to leave out the argument that the motion for severance should have been granted because of the prejudice and manifest injustice to Sumpter that resulted from the consolidation of the cases. Even if the Court assumes that joinder was proper, as the trial and appellate courts found, the next step is to determine whether a motion for severance should have been granted. *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008) ("Nevertheless, for argument sake, assuming that one of the joinder requirements under K.S.A. 22–3202(1) was established, the trial court was under a continuing duty to grant a motion for severance to prevent prejudice and manifest injustice to the defendant.") (internal quotation omitted). In reviewing a severance decision, the reviewing court considers whether "severance should have been ordered to prevent prejudice and manifest injustice to the defendant." *State v. Shaffer*, 229 Kan. 310, 312 (1981).

The prejudice resulting from joinder must be weighed against any possible argument for efficiency. *Shaffer*, 229 Kan. at 312-13.

> The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

As predicted by trial counsel, Sumpter faced prejudice throughout the trial due to the trial court's decision not to sever the cases and its refusal to reconsider that decision as the

prejudice became apparent. (Order on Motion to Consolidate and Motion to Sever, Ex. 6; Order Denying Motion to Reconsider Motion to Sever, Trial Tr. I at 318:7-14, Ex. 7). The prejudice started immediately just through the optics of having an African-American man accused of various sexual crimes against four white women being considered by an all white jury. At the voir dire, two potential jurors stated to the group that they would have a hard time considering Sumpter's claims given that there were four victims.

> MR. EDWARDS: I want everybody to give him a fair trial, that's what the constitution affords and that's what we're here to do. Can you be one of those 13 people, 12 people who can sit here and give him a fair trial? In other words, presume him to be innocent right now?
>
> PROSPECTIVE JUROR NO. 21: Well, he was arrested and it's not just one woman's word.
>
> MR. EDWARDS: I understand. But you've heard me say it's four women, right?
>
> PROSPECTIVE JUROR NO. 21: (Juror nodding head up and down.)
>
> . . .
>
> MR. EDWARDS: As he sits there today can you look at him and say that he's an innocent man?
>
> PROSPECTIVE JUROR NO. 21: No.

(Trial Tr. I at 132:5-16, 133:6-9, Ex. 8).

> PROSPECTIVE JUROR NO. 13: I don't know how actually you would phrase the question, but I'm sitting here thinking, when we heard what he was accused of, if it would have been one victim I would have immediately felt well, it was going to be her word against his word. Now that know that there's four alleged victims, I can't help but think there must be something to it, that there's not one, but there's four accusing him.
>
> . . .
>
> MR. EDWARDS: And the question then becomes can you give him a fair trial, whether it's four victims, one or a thousand?
>
> PROSPECTIVE JUROR NO. 13: I think so.
>
> MR. EDWARDS: Okay.

> PROSPECTIVE JUROR NO. 13: But I'm just, in the back of my mind, as soon as I heard that there was four, just I don't know, affected me, made me wonder.

(Trial Tr. I at 215:25-216:9, 217:11-19, Ex. 9). These candid remarks from several potential jurors demonstrate how the multiple cases are seen as evidence that Sumpter had a propensity to commit a crime—an impermissible type of evidence under K.S.A. § 60-455

The consolidation of the cases also forced Sumpter to choose between his Fifth Amendment right to avoid self-incrimination and his Sixth and Fourteenth Amendment right to testify on his own behalf. Sumpter desired to testify about two of the cases (involving victims A.S.E., A.C.C., and A.R.P.) but wished to present a different defense in the case involving J.B. Sumpter believed that he had credibility over A.S.E. and wished to testify in 11-cr-1187 to bolster questions about her credibility and to explain why he had restrained her while driving. Sumpter also believed he needed to testify in 11-cr-1290 which involved A.C.C. and A.R.P. to bolster his credibility because that was the only case that involved the false statements to police. In deciding to testify to regain credibility vis-à-vis victims A.S.E., A.C.C., and A.R.P., Sumpter opened himself up to incredibly prejudicial lines of questioning in the case involving J.B. This very risk of prejudice is recognized as one of the factors to consider in deciding whether to sever consolidated cases:

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

State v. Howell, 223 Kan. 282, 284, 573 P.2d 1003, 1004-05 (1977) (quoting *Cross v. United States*, 335 F.2d 987, 989 (1964)).

The joinder of the cases was also incredibly prejudicial because the State did not carefully set out the evidence case-by-case but instead commingled evidence and used broad rhetoric to overcome weaknesses in all of the cases. In his closing statement, the prosecutor commingled facts to try and bolster the State's case and damage Sumpter's credibility in all of the cases. But as mentioned above, the credibility questions related to the false statements to police only called into question Sumpter's credibility in one of the cases, 11-cr-1290, related to the incidents with A.C.C. and A.R.P. That did not stop the prosecutor from generally averring that the jury should consider Sumpter's credibility in general: "Consider all of those mistruths, consider his entire lack of credibility." (Trial Tr. V at 108:8-10, *see also* Trial Tr. V at 102:11-12, 103:12-13, 107: 1-2, 107:23-108:10, Ex. 10). The prosecutor further commingled evidence to prejudicial effect on other important points in the closing. The prosecutor stated, "You're going to hear this common theme in all of these, he talks about a sadness, he talks about something that's going on in his life that he's using to manipulate each of these women to try and get them to feel bad for him, to get them into an isolated place." (Trial Tr. V at 66:1-6, Ex. 11). But, in fact, there was no evidence that in two of the four incidents—those involving J.B. and A.C.C.—that Sumpter had talked about sadness in his life. Given that the State's willingness to conflate the cases, intermingle evidence, and urge conclusions based on propensity, the State never took its role in carefully separating the cases seriously. All of the circumstances demonstrate "a legitimate concern that the jury was unable to consider each charge separately on the evidence and law applicable to it." *Coburn*, 38 Kan. App. 2d at 1057.

Given the demonstrable evidence of prejudice from trial, it was unreasonable for Sumpter's appellate counsel to argue improper joinder while ignoring the error on the related motions for severance. That failure likely made a difference in the outcome of the appeal. One justice explicitly called out the problem with how Sumpter's appellate counsel presented the consolidation argument. And the severance argument was the only way for Sumpter's appellate counsel to highlight the prejudicial nature of the proceedings. Given the unreasonableness of the decision and its impact on appeal, this Court should find that Sumpter was denied his right to effective appellate counsel.

B. Appellate Counsel Also Provided Constitutionally Insufficient Assistance by Failing to Raise the Sufficiency of the Kidnapping Count.

Appellate counsel was ineffective in failing to set out the trial court's error in denying Sumpter's motion for judgment of acquittal on the aggravated kidnapping count. As discussed above, the State did not produce any evidence of a taking or confinement that went beyond the force that was necessary for the commission of aggravated sexual battery. Sumpter's appellate counsel was ineffective in her failure to raise the improper denial of the motions for acquittal at the end of the State's evidence and at the end of trial and the motion for a new trial. (Ex. 12). This failure was not reasonable given the lack of evidence of any confinement outside of that inherent in the nature of the crime against J.B. Moreover, this question was one that was purely legal and, unlike the arguments that appellate counsel decided to focus on, did not require giving deference to the choices of the trial court. Again the choices of appellate counsel in crafting a winning appellate strategy were unreasonable and call into serious question the result of the appeal.

C. Appellate Counsel also Failed to Identify Key Instances of Prosecutorial Misconduct that were Incredibly Prejudicial.

Because appellate counsel failed to highlight the full extent of the prosecutorial misconduct at trial, appellate counsel was also ineffective in her presentation of the argument on appeal. Appellate counsel did discuss some instances of prosecutorial misconduct, notably areas where the prosecutor gave opinions on Sumpter's credibility. (Appellant's Brief, Ex. 5 at 19-24.) But the prosecutorial misconduct went further than that and led to even greater prejudice.

First, in his closing argument when discussing surveillance video, the prosecutor referred to events that were not in evidence. Notably the prosecutor provides his interpretation of what happened in the car based on the very grainy and choppy surveillance video from Old Town involving J.B. despite the fact that he never elicited testimony from J.B. on what was being shown in this section of the video. (Trial Tr. III at 28:11-32:6, Ex. 13) (the trial testimony just covered J.B.'s explanation of the events depicted in the video until Sumpter and J.B. reach the car). The quality of the video required jury interpretation but rather than allow the jury to decide what occurred the prosecutor impermissibly gave his opinion of what the video showed.

Second, after receiving no contact from his attorney for close to two months and after multiple continuances, Sumpter requested a bond modification *pro se* because his attorney was not available to do so for him. (pro se Bond Modification Motion, Ex. 14). The letter references his attorney's assessment that the information presented—while still not proven—at most sets out liability for misdemeanor offenses. *Id.* at ¶ 7 (stating that "his counsel and him have come to the conclusion that the testimonies at preliminary hearing are not equivilant [sic] to the definitions of the charges, but those of missdameanors [sic], thus showing the defendant should not be looking at charges of such high severity"). Sumpter is emphatic in the letter that when the matters are tried he would be found innocent. *Id.* at ¶ 5. But the prosecutor blatantly

mischaracterizes the letter in his closing stating that "he wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense." (Trial Tr. V at 80:15-18, Ex.15).

The prosecutor goes on to use this letter to tell the jury that Sumpter admitted to all of the lesser included crimes even though his testimony could only be interpreted to admissions on *some* of the lesser included crimes. (Trial Tr. V at 64:12-14 ("So what the defendant's here asking you to do is find him guilty of the lesser included crimes."); *id.* at 80:14-18 (arguing that "[Sumpter] wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense [sic]"); *id.* at 80:5-11 ("[H]e comes in here to court . . . and he is telling you . . . all I did were the lesser included offenses."); *id.* at 101:1-5 ("But they so want you to just move past the greaters and get down to those lesser and just find him guilty of those because that's easy, he's admitted those, why don't we just do that and go home."), Ex. 27)). The prosecutor's blatant mischaracterization of the letter and Sumpter's testimony was incredibly prejudicial given that it was used to demonstrate that Sumpter had purportedly admitted to all lesser-included crimes, and so all the jury had to do was consider the more serious charges on all counts.

Finally, the prosecutor misstated the requirements for attempted rape to make it appear that Sumpter's testimony conceded an intent to rape her. During his closing the argument, the prosecutor while explaining the charges involving J.B. states "clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her -- or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do." (Trial Tr. V at 106:2-9, Ex. 16). He illustrated the point by referencing Sumpter's

testimony that he wanted to have sex with J.B. when she came on to him and touched his penis. (Trial Tr. V at 105:22-106:9, Ex. 17). Indeed, J.B. had also testified that she had tricked Sumpter into thinking she wanted to have sex with him in order to get him out of her car. But the State had to do more than prove that Sumpter intended to have sex with J.B. at some point during their interaction; they had to prove that he intended to have sex with J.B. *without her consent*. The prosecutor's deliberately misleading guidance to the jurors on what the State had to show to meet the burdens outlined in the jury instructions went unchallenged[2] and provided the jury with a lessened burden for the State to meet—a burden that conveniently aligned with the testimony given by Sumpter.

The failure of appellate counsel to highlight the multiple additional instances of prosecutorial misconduct that unfairly prejudiced Sumpter amounts to exceptional circumstances that demand habeas relief. *See Moncla v. State*, 285 Kan. 826, 831 (2008), as corrected (Mar. 5, 2008) (noting that ineffective assistance of appellate counsel is an exceptional circumstance that would permit a petitioner to raise prosecutorial misconduct for the first time in his habeas petition).

[2] Not only was the prosecution's interpretation of the intent element on attempted rape unchallenged by Sumpter's attorney, but Sumpter's attorney actually compounded the injury by stating the incorrect burden in her closing argument. She told the jury:

[T]he state has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her. Again, it's not what she thought was gonna happen, it's what was in Mr. Sumpter's mind when he was in the car with her. Were his intentions to have sexual intercourse with her? That's what they have to prove. If they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping.

(Trial Tr. V at 93:12-21, Ex. 18). This additional legal mistake by trial counsel further emphasizes the prejudice Sumpter faced due to ineffective assistance by his trial counsel.

III. Sumpter's Trial and Sentence Also Violated Additional Constitutional Rights.

A. The Lack of Any African-Americans on Sumpter's Jury Venire Denied Sumpter His Right to a Jury Drawn from a Fair Cross Section of the Community.

Sumpter was deprived of his constitutional right to a fair trial and due process because the jury panel drawn for his voir dire did not have any potential jurors that were African-Americans. The Supreme Court "has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975); *Peters v. Kiff*, 407 U.S. 493, 504 (1972) ("[A] criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law."). To make a fair-cross-section allegations, the criminal defendant must allege that: (1) the group excluded "is a distinctive group in the community"; (2) "the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community"; and (3) "that this underrepresentation is due to a systematic exclusion of the group in the jury-selection process." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

African-Americans are a distinctive group in the national, and Wichita, community. *Accord Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (noting that the Court had previously held that African-Americans were properly designated as a distinctive group). Unfortunately, African-Americans are under-represented in the Sedgwick County venires. At Sumpter's jury trial, there were no African-Americans in his venire that could have become part of his jury panel even though African-Americans make up approximately 9.3% of the county's

population.[3] This underrepresentation is likely the result of systematic features in the jury selection process.[4] The manner in which jury notifications are sent, the excuses that are accepted, and the manner in which those reasons are verified all can systemically affect the racial composition of the jury. For example, if the court regularly excuses jurors that cannot find a babysitter, African-Americans, who are overrepresented as single parents in Sedgwick County, would be underrepresented in the venire.[5] In addition, previous studies of similar methods of composing the jury wheel through voting records supplemented by drivers licenses has shown that the method can actually increase the underrepresentation of African-Americans in a jury wheel.[6]

The District Court at Sumpter's trial incorrectly denied his motion for a mistrial and objection to the jury panel because of the absence of any African-Americans. (Trial Tr. 220:20-221:4; 319:15-320:5, Ex. 19). The District Court denied the motion because of the "systemic," random process of bringing in jurors brought in several minorities—at least two

[3] This does not include the individuals that stated that they were two or more races on the census. In Sedgwick County, 1.2% of individuals identified as white and African-American. *See* U.S. Census Bureau; 2010 Census, Profile of General Population and Housing Characteristics, Sedgwick County, Kansas (http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0500000US20173).

[4] Sumpter requests that the Court provide information on the racial make-up of Sedgwick County venires in 2012 to allow for a full statistical analysis of this underrepresentation. Sumpter also requests an evidentiary hearing to set out the process by which the District Court of Sedgwick County selects venires, the underrepresentation of African-Americans in venires, and why this underrepresentation is systemic. *See Berghuis*, 559 U.S. at 322 (noting that the state appellate court ordered the trial court to conduct an evidentiary hearing on the fair-cross-section claim).

[5] According to the 2010 census data, there are 23,926 family households with a female householder and no husband, and 5,141 are headed by an African-American female (21.5%). Additionally, there are 9,981 family households with a male householder and no wife, and 1,159 of those are headed by an African-American male (11.6%). Both of these are higher proportionally than the 9.3% of African-Americans in the general population of Sedgwick County.

[6] Ted C. Newman, *Fair Cross-Sections and Good Intentions: Representation in Federal Juries*, 18 JUSTICE SYSTEM J. 211, 226 (1996) (noting that a study of the U.S. District Court for the Northern District of Illinois found that supplementing voting records with drivers licenses information would actually increase the underrepresentation of African-Americans in the jury wheel and stating that based on this information the District decided not to change its jury plan).

Hispanics and persons of European descent—to the venire. (Trial Tr. 319:24-320:5, Ex. 20). But even a random process that systematically results in a venire that is grossly disproportionate to the population fails to comport with the Sixth and Fourteenth Amendments. *Taylor v. Louisiana*, 419 U.S. 522 (1975). Additionally, the presence of some minorities on Sumpter's venire, two men of Hispanic-descent, does not remedy the fact that a distinct group—African-Americans—had absolutely no representation on the panel. Undoubtedly Sumpter was "not entitled to a jury of any particular composition," but he should have at least been guaranteed that panels from which his jury was drawn did not "systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor*, 419 U.S. at 538. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters*, 407 U.S. at 502.

B. The Offender Registry and Lifetime Post-Release Supervision Sentencing Requirements are Unconstitutional.

Sumpter's sentence included a requirement that he register on the offender registry for his lifetime, K.S.A. § 22-4906(d), and be subject to a lifetime post-release supervision under K.S.A. § 22-3717(d)(1)(G). These requirements violate Sumpter's U.S. and Kansas constitutional rights to due process, equal protection of the law, and cruel and unusual punishment. Sumpter is aware that similar challenges to the Kansas Sex Offender Registration Act ("KSORA") and the lifetime post-release supervision have been previously rejected. *State v. Wilkinson*, 269 Kan. 603 (2000) (rejecting a due process challenge to KSORA); *State v. Scott*,

265 Kan. 1 (1998) (rejecting a cruel and unusual punishment challenge to KSORA); *State v. Snelling*, 266 Kan. 986 (1999) (same); *State v. Mossman*, 294 Kan. 901 (2012) (upholding cruel and unusual punishment challenge to lifetime post-release supervision); *State v. Cameron*, 294 Kan. 884 (2012) (same); *cf. Matter of Hay*, 263 Kan. 822, 833 (1998) (upholding Sexually Violent Predator Act against various constitutional challenges, including equal protection, because of threat of particular class of offenders). But those cases relied on the mistaken assumption that a registry would benefit public safety due to the belief that sexual offenders were habitual offenders and posed greater risks of recidivism. *Wilkinson*, 269 Kan. at 609 (stating that the purpose of KSORA is to protect the public from the unique threat posed by sex offenders "as a class of criminals who are likely to reoffend"); *Scott*, 265 Kan. at 11 (stating the legislature has the "right to determine that sex offenders pose a unique threat to society such that they are subject to registration and public disclosure requirements when other types of offenders are not"). But the very justification for unparalleled treatment of a certain class of offenders is completely disproven by the evidence:

> Another public supposition that defies scientific scrutiny is high recidivism rates among sex offenders. Recidivism rates for sex offenders are universally lower than other criminal offenders. In one of the largest, most prestigious, and well-funded studies conducted by the United States Department of Justice ("DOJ") in 2003, recidivism figures for 9,691 "violent" sex offenders, who were released in 1994, were evaluated. It found that, compared to non-sex offenders out of state prison, sex offenders demonstrated a lower overall recidivism rate over a three-year period.[7]

Sumpter encourages this Court to reconsider the previous holdings on KSORA and the lifetime post-release supervision in light of the faulty assumptions on which it is based.

[7] Dr. Mark Kielsgard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247, 256 (2014).

C. The District Court Violated Mr. Sumpter's Sixth and Fourteenth Amendment Rights under *Apprendi v. New Jersey* when It Did Not Require the State to Prove the Factors to a Jury Beyond a Reasonable Doubt.

The District Court sentenced Sumpter to an enhanced sentence based upon his prior criminal history and aggravating factors. Because the State was not required to prove the existence of these sentencing enhancement factors beyond a reasonable doubt, Sumpter's Sixth and Fourteenth Amendment Rights were violated. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Sumpter is aware that the Kansas Supreme Court has rejected this application of *Apprendi*, *see State v. Ivory*, 273 Kan. 44 (2002); *State v. Johnson*, 286 Kan. 824 (2008), but he contends that these cases were wrongly decided and warrant reconsideration or federal review.

IV. Conclusion

Sumpter has met his burden to show that his petition should be granted or, at a minimum, that the allegations warrant an evidentiary hearing. In particular, Sumpter seeks an evidentiary hearing to demonstrate that trial and appellate counsel failings were not a matter of strategy and that the fair-cross-section requirement for the jury venire was violated.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I electronically filed the foregoing with the Court by using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Katie Gates Calderon
Katie Gates Calderon

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CASE NUMBER: 117732

Case No. 17-117732-A

IN THE COURT OF APPEALS
FOR THE STATE OF KANSAS

TIMOTHY SUMPTER
Petitioner-Appellant,

v.

STATE OF KANSAS
Defendant-Appellee

Appeal from the District Court of Sedgwick County, Kansas
Eighteenth Judicial District
District Court Case No. 2016-cv-000161-HC
The Honorable Jeffrey L. Syrios

PETITIONER-APPELLANT TIMOTHY SUMPTER'S BRIEF

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Oral Argument: 20 minutes

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NATURE OF THE CASE

Sumpter challenged his convictions in three cases based on ineffectiveness of his trial counsel, appellate counsel, and additional constitutional errors through a habeas petition under K.S.A. 60-1507. The district court denied his petition, and Sumpter appealed.

STATEMENT OF ISSUES

Issue I: **Sumpter's trial counsel was ineffective because she did not understand the elements of the aggravated kidnapping count and, as a result, failed to challenge the sufficiency of the State's evidence at every phase.**

Issue II: **Sumpter's appellate counsel provided ineffective assistance by failing to raise the sufficiency of the evidence on the aggravated kidnapping count.**

Issue III: **Sumpter's appellate counsel provided ineffective assistance when she failed to raise the district court's error on the motion to sever and its continuing duty to sever in light of prejudice.**

Issue IV: **Sumpter's appellate counsel failed to identify key instances of prejudicial prosecutorial misconduct.**

Issue V: **Due to trial counsel's continuations without consent, Sumpter's statutory right to speedy trial was violated.**

Issue VI: **The lack of any African-Americans on Sumpter's jury venire denied him the right to a jury drawn from a fair cross-section of the community.**

Issue VII: **Sumpter's sentence was conducted in an unconstitutional manner and imposed unconstitutional requirements.**

Issue VIII: **The district court erred in denying Sumpter's request for an evidentiary hearing because his petition raised substantial issues and the State did not demonstrate that the record conclusively showed no entitlement to relief.**

STATEMENT OF FACTS

On April 19, 2011, the State filed three different Complaints involving four alleged incidents all involving the Petitioner-Appellant Timothy Sumpter.

I. Preliminary Hearing

While there was no formal consolidation of the cases until trial, the preliminary hearing on all three cases occurred on August 25, 2011. At the preliminary hearing, J.B. testified as to the incident underlying the State's aggravated kidnapping charge. She stated that she voluntarily walked to her car before and after Sumpter approached her and began talking with her. (R. VII, 4-7.) J.B. testified that she continued to walk to her car even though she did not want Sumpter to know which one it was because she thought it was nice for him to accompany her. (R. VII, 6.) She stated that when she got to the car: "I got to my car, and I got my key. . . . I was just gonna leave. So, you know, he grabbed me, pushed me up against the car . . . [and] I got away from him, walked around my car to my driver's side . . . . and got into my car, and that's when he came to my driver's door, forced his way into my vehicle, and we began [] fighting . . . [and] [h]e forced my hand upon his genital area." (R. VII, 7:9-9:1.) J.B. testified that they immediately started fighting when he pushed into the car with her and exposed himself. (*Id.* at 8.) J.B. testified that at one point while fighting she pulled out her keys with her mace on them to use on Sumpter but Sumpter grabbed the keys and mace and threw them out of the vehicle. (*Id.* at 20.) The fighting did not end until another vehicle pulled up. (*Id.* at 8-10.) At that point, J.B. testified that Sumpter got out of the car and J.B. drove off. (*Id.* at 10-11.) Trial counsel did not challenge the sufficiency of the evidence for the aggravated

kidnapping count at the preliminary hearing on any grounds including the standard articulated in *State v. Buggs*, 219 Kan. 203 (1976).

Prior to the preliminary hearing, Sumpter was advised by his trial counsel to waive his arraignment to begin his speedy trial date. Sumpter's trial date was originally set for October 17, 2011, but did not actually begin until March 12, 2012. While there were three continuances recorded as taken by the defendant, Sumpter was not aware of, did not consent to, and did not desire any of these continuances. After receiving no contact from his attorney for close to two months and after multiple continuances, Sumpter requested a bond modification *pro se* because his attorney was not available to do so for him. (R. IV, 54-60; R. V, 56-62; R. VI, 50-56.) The letter references his attorney's assessment that the information presented—while still not proven—at most sets out liability for misdemeanor offenses. (*Id.* at ¶ 7 (stating that "his counsel and him have come to the conclusion that the testimonies at preliminary hearing are not equivilant [sic] to the definitions of the charges, but those of missdameanors [sic], thus showing the defendant should not be looking at charges of such high severity").) Sumpter is emphatic in the letter that when the matters are tried he would be found innocent. (*Id.* at ¶ 5.)

II. Trial

A. Pretrial Motions and Voir Dire

On March 9, 2012, the trial court consolidated the three cases for trial upon motion by the State. (R. V, 93; R. VI, 83; R. IX, 8-9, 37-52.) Sumpter's trial counsel did not file a written opposition to the State's motion for consolidation but argued at the motion hearing for four separate trials to ensure Sumpter received a fair trial. (R. VIII, 2, 11-18.)

Sumpter's trial counsel informed the Court that Sumpter desired to testify about two of the cases but wished to present a different defense in the third case. (R. VIII, 13-15.)

At the voir dire, four potential jurors stated to the entire panel that they would have a hard time considering Sumpter's claims given that there were four victims. (R. X, 220, 316.) During the State's questioning of the panel, one juror stated outright that she did not believe Sumpter was innocent because there were four victims:

> MR. EDWARDS: I want everybody to give him a fair trial, that's what the constitution affords and that's what we're here to do. Can you be one of those 13 people, 12 people who can sit here and give him a fair trial? In other words, presume him to be innocent right now?
>
> NO. 21: Well, he was arrested and it's not just one woman's word.
>
> MR. EDWARDS: I understand. But you've heard me say it's four women, right?
>
> NO. 21: (Juror nodding head up and down.) . . .
>
> MR. EDWARDS: As he sits there today can you look at him and say that he's an innocent man?
>
> NO. 21: No.

(R. X, 132:5-16, 133:6-9.) Similarly, another potential juror was unsure whether the number of victims would always be at the back of her mind during the case:

> NO. 13: I don't know how actually you would phrase the question, but I'm sitting here thinking, when we heard what he was accused of, if it would have been one victim I would have immediately felt well, it was going to be her word against his word. Now that know that there's four alleged victims, I can't help but think there must be something to it, that there's not one, but there's four accusing him. . . .
>
> MR. EDWARDS: And the question then becomes can you give him a fair trial, whether it's four victims, one or a thousand?
>
> NO. 13: I think so.
>
> MR. EDWARDS: Okay.

NO. 13: But I'm just, in the back of my mind, as soon as I heard that there was four, just I don't know, affected me, made me wonder. . . .

MS. OSBURN: One thing you said before we broke and I want to talk about this with everyone is the fact that, you know, if there was one woman maybe, but we've got four, so I get a sense because you heard four different women are going to testify, that that has had an impact on your ability to presume Mr. Sumpter innocent today.

NO. 13: Somewhat.

(R. X, 215:25-216:9, 217:11-19, 263:17-25.) During the questioning by Sumpter's trial attorney, another potential juror noted that while he had not heard the facts, his mind threw red flags when he heard there were four victims:

MS. OSBURN: Are you able to presume Mr. Sumpter innocent?

NO. 14: Well, I -- at this point yes, but I will -- I agree with my neighbor here [Prospective Juror 13] that when I first heard four, bingo, my mind automatically kind of said, you know, what's going on here, but you know, I haven't heard the facts.

MS. OSBURN: Right.

NO. 14: And you know, I'm waiting to hear them.

MS. OSBURN: Waiting to hear them, okay.

NO. 14: But you know, that's all I can say on that, it did raise a red flag when I heard that there were more than one persons.

(R. X, 268:16-269:7.) Finally, one of the jurors who was eventually selected for the jury indicated that because she had heard four different women are going to testify that it would impact her ability to presume Sumpter innocent. (R. X, 263:17-264:5.) Even though she later testified that she could apply the law and weigh the evidence, she again stated that "when I raised my hand when I said about the four, that's just an automatic thought, well, if there's four women, you know." (*Id.* at 294:1-4.)

After the prosecutor's questioning of the panel, Sumpter's trial attorney moved for the Court to reconsider the consolidation of the cases and to sever for trial based on the prejudice being vocalized by the potential jurors. (R. X, 220-221, 316-319.) The Court denied the motion and noted that a limiting instruction was the appropriate manner for handling a consolidated case. (R. X, 318-319.)

At Sumpter's jury trial, there were no African-Americans in his venire even though African-Americans make up approximately 9.3% of the county's population. (R. X, 220-21.) The Court denied his motion for a mistrial and objection to the jury panel because of the absence of any African-Americans and the nature of the case with four white female victims and one black male defendant. (R. X, 220:20-221:4; 319:15-320:5.) The Court denied the motion because of the "systemic," random process of bringing in potential jurors had resulted several minorities—at least two Hispanics and persons of European descent—in the venire. (R. X, 319:24-320:5.)

B. Evidence related to Aggravated Kidnapping Count for Victim J.B.

As at the preliminary hearing, J.B. testified at trial that she had voluntarily walked to her car even when she was wary of Sumpter. (R. XII, 21-25.) Indeed, when she got to the parking lot, she testified that she was "blocking [Sumpter] out, wasn't paying attention to anything he said, because I really didn't care, I just was walking to my car, getting my stuff." (*Id.* at 25:10-13.) J.B. also testified about what happened outside the vehicle and as Sumpter entered the vehicle with her. This testimony changed from the account given at the preliminary hearing. At trial, she now testified that she had not fully gotten into her car when Sumpter pushed his way in:

Q: All right. Jessica, let's talk about what happened when you got to your car. Tell us what you recall.

A: I got to my car and [after Sumpter refused to leave] . . . I got my key, walked behind my car and started walking towards my driver's door, and I thought he was still on the other side of the car, you know, and he [] was like, at least let me get the door for ya. And I was just like, whatever, put my key in the door, placed one foot into my car and . . . [h]e tried to force his way into my car. And so I had one leg in the car and . . . he gripped my door with his left hand and tried to shove his way into my car. And he pushed me and was like forcing me into the car.

(R. XII, 38:1-40:1.)

Again J.B. testified about the fighting that occurred between the two in the vehicle. J.B. testified that after the initial punch and push from Sumpter, she started kicking him in the face and stomach to keep him out of the car. (R. XII, 40-41.) As Sumpter got further into her car, J.B. testified that she began to punch him which caused him to use his knee against her throat to hold her down. (*Id.* at 41-42.) After temporarily gaining control of her with his knee, J.B. testified that Sumpter then started to touch her sexually. (*Id.* at 42.) During his advances, J.B. testified that she continued to try and fight him by punching and pushing him. (*Id.* at 42-45.) At some point during the fight, J.B. tried to use the mace on her key ring on him but Sumpter grabbed the keys from her to prevent her from macing him. (*Id.* at 47.)

J.B. testified that at one point she was able to use her self-defense training to trick Sumpter and kick him out of the vehicle. (R. XII, 46-47.) She decided to stay in the car at that point because she felt safer there and thought that they would just fight in the parking lot if she got out. (*Id.* at 48-49.) But after realizing that her keys were outside of the car, J.B. testified that she asked Sumpter to drop the keys through a crack in the door.

(*Id.* at 50.) Instead, Sumpter tried to force his way back in to put his body against her. (*Id.* at 50-51.) Again, J.B. fought back and was able to kick him out again and flag down an approaching vehicle. (*Id.* at 51-52.) As Sumpter was distracted by the approaching vehicle, J.B. testified that she was able to find her keys and drive away. (*Id.* at 52.)

While the prosecutor used a grainy and choppy surveillance video of the Old Town parking lot to guide J.B. through some events of the night, the trial testimony just covered J.B.'s explanation of the events depicted in the video until Sumpter and J.B. reach the car. (R. XII, 28:11-32:6.) The prosecutor never elicited testimony from J.B. on what was being shown in the section of the video after the two reach the car. (*Id.*)

Sumpter's trial counsel did nothing during her cross-examination to clarify what happened at or in the vehicle that would amount to confinement by force beyond what was inherent or incidental to the commission of the attempted rape. (R. XII, 57-70.) Nor did trial counsel cross-examine J.B about what happened while she got into the vehicle with either her contradictory preliminary hearing testimony or the surveillance video of the incident.

C. Motion for Directed Verdict

Trial counsel did move for a judgment of acquittal at the end of the State's case but she made no mention of the *Buggs*-test or any specific evidentiary deficiency related to the facilitation element in the State's case. (R. XIII, 59:2-23.) Contrary to J.B.'s testimony that she had voluntarily gotten into her car, the prosecutor stated in his opposition to Sumpter's directed verdict motion that the aggravated kidnapping count with respect to J.B. was based on a "confinement" and that the act was "holding her

down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (R. XIII, 64:5-8.) Sumpter's trial counsel did not challenge misstatements of the evidence by the prosecutor on the facilitation element or base her directed verdict or motion for retrial on the *Buggs* standard.

D. Jury Instructions

The State submitted the following counts to the jury: (1) Case No. 11CR1187 (A.S.E.): aggravated sexual battery including the lesser included offense of sexual battery, and kidnapping including the lesser included offense of criminal restraint; (2) Case No. 11CR1290: attempted rape (A.C.C.), aggravated sexual battery including the lesser included offense of sexual battery (A.C.C.), and aggravated sexual battery including the lesser included offense of sexual battery (A.R.P.); (3) Case No. 11CR1638 (J.B.): aggravated kidnapping including the lesser included offenses of kidnapping and criminal restraint, attempted rape, aggravated sexual battery including the lesser included offense of sexual battery. (R. IV, 139-173; R.V, 142-176; R. VI, 139-173.)

Of relevance to Sumpter's habeas petition are two instructions:

- On the aggravated kidnapping count related to the incident with J.B., the jury was only instructed on one theory, confinement by force, so the State had to prove beyond a reasonable doubt that "Timothy Sumpter **confined** JB **by force**." The jury was also instructed that the confinement had to be "done with the intent to hold such person to facilitate the commission of the crime of Rape." (R. IV, 159; R. V, 162; R. VI, 159; R. XIV, 53:6-7.)
- On the attempted rape counts, the jury was instructed that they had to find beyond a reasonable doubt that Sumpter committed an overt act toward the commission of the crime of Rape "with the intent to commit the crime of Rape." Rape was defined, in part, for the jury as an "act of sexual intercourse . . . committed without the consent of [the victim] under circumstances when she was overcome by force or fear." (R. IV, 150, 163; R. V, 153, 166; R. VI, 150, 163; R. XIV, 47-48, 56.)

Sumpter's trial counsel made no request for a clarification of the facilitation element to state that any confinement sufficient to support an aggravated kidnapping count must meet the standard expressed by the Kansas Supreme Court in *Buggs*.

E. Closing Statements

1. Argument related to Aggravated Kidnapping Count for Incident involving J.B.

At closing argument, the prosecutor relied on an act not in evidence and not supported by the testimony of J.B. to support his argument for an aggravated kidnapping conviction. Rather than rely on J.B.'s testimony, the prosecutor provided his opinion for the jury of what they should find occurred in a grainy and choppy surveillance video of the incident with J.B. when the two were at the car: "Watch that video and there's a time when you will see him as she gets out of the car and he is following along, grabbing her and pulling her back into that car." (R. XIV, 106:18-22.) But the prosecutor never elicited testimony from J.B. on what was being shown in this section of the video. (R. XII, 28:11-32:6.)

Sumpter's trial counsel failed to challenge the prosecutor's unfounded assertions based on events not in evidence or point to the contradictory testimony from J.B. On the aggravated kidnapping count, Sumpter's trial counsel only stated that Sumpter denied "ever confin[ing J.B.] in the car." (R. XIV, 92:19-20.) But trial counsel did not explain to the jury what the State must prove to satisfy the facilitation element and for that reason she made no argument that the evidence elicited at trial did not show confinement beyond what is inherent or incidental to the underlying crime. Indeed, Sumpter's trial counsel

seems to have accepted that holding J.B. during the alleged attempted rape was sufficient because she simply argued that the bruising that happened as "part of the confinement" could not be used to also support the "bodily harm" proof. (*Id.* at 92:24-93:10.)

Additionally, both trial counsel and the prosecutor incorrectly relayed the intent element of the aggravated kidnapping count to the jury. They both stated that all the State needed to prove for intent on the *aggravated kidnapping* count was that Sumpter intended to rape J.B. (R. XIV, 76:2-6, 85:7-8, 88:13-21, 93:12-14 (The prosecutor states that all he has to prove is "confined [J.B] by force" and that "he intended to commit the crime of rape." Trial counsel states "the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her.").)

2. Argument related to Attempted Rape Count for Incident involving J.B.

During the closing argument, the prosecutor also misstated the requirements for attempted rape. While explaining the charges involving J.B., the prosecutor stated "clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her -- or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do." (R. XIV, 106:2-9.) He illustrated the point by referencing Sumpter's testimony that he wanted to have sex with J.B. when she came on to him and touched his penis. (*Id.* at 105:22-106:9.) Indeed, J.B. had also testified that she had tricked Sumpter into thinking she wanted to have sex with him in order to get him out of her car. (R. XII, 45-46.) But the State had to do more than prove

that Sumpter intended to have sex with J.B. at some point during their interaction; they had to prove that he intended to have sex with J.B. *without her consent.*

The prosecutor's misleading guidance to the jurors on what the State had to show to meet the burdens outlined in the jury instructions went unchallenged. Rather, Sumpter's trial attorney actually compounded the error by stating the incorrect burden in her closing argument. She told the jury:

> [T]he state has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her. Again, it's not what she thought was gonna happen, it's what was in Mr. Sumpter's mind when he was in the car with her. Were his intentions to have sexual intercourse with her? That's what they have to prove. If they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping.

(R. XIV, 93:12-21.)

3. The Prosecutor Commingled the Evidence from the Four Victims

In his closing statement, the prosecutor commingled facts on multiple occasions:

- Sumpter had made false statements to police in one of the cases, 11-cr-1290, related to the incidents with A.C.C. and A.R.P. But the prosecutor generally averred that for all of the cases the jury should consider Sumpter's credibility: "Consider all of those mistruths, consider his entire lack of credibility." (R. XIV, 108:8-10; *see also* R. XIV, 102:11-12, 103:12-13, 107:1-2, 107:23-108:10.)
- The prosecutor stated, "You're going to hear this common theme in all of these, he talks about a sadness, he talks about something that's going on in his life that he's using to manipulate each of these women to try and get them to feel bad for him, to get them into an isolated place." (R. XIV, 66:1-6.) But there was no evidence that in two of the four incidents—with J.B. and A.C.C.—Sumpter had talked about sadness in his life.

The prosecutor also mischaracterized the *pro se* bond modification motion (which the prosecutor called a "letter") in his closing. The prosecutor stated that "he wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser

included offense." (R. XIV, 80:15-18.) The prosecutor went on to use this motion to tell the jury that Sumpter admitted to all of the lesser included crimes even though his testimony could only be interpreted to admissions on *some* of the lesser included crimes. (R. XIV, 64:12-14 ("So what the defendant's here asking you to do is find him guilty of the lesser included crimes."); *id.* at 80:14-18 (arguing that "[Sumpter] wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense [sic]"); *id.* at 80:5-11 ("[H]e comes in here to court . . . and he is telling you . . . all I did were the lesser included offenses."); *id.* at 101:1-5 ("But they so want you to just move past the greaters and get down to those lesser and just find him guilty of those because that's easy, he's admitted those, why don't we just do that and go home.").)

F. Verdict and Sentencing

The jury returned a guilty verdict as follows: (1) Case No. 11CR1187: aggravated sexual battery and misdemeanor criminal restraint; (2) Case No. 11CR1290: misdemeanor sexual battery (victim A.C.C.) and misdemeanor sexual battery (victim A.R.P.); (3) Case No. 11CR1638: aggravated kidnapping, attempted rape, aggravated sexual battery. (R. IV, 174-176; R. V, 178-180; R. VI, 136-138.) After the verdict, trial counsel did move for judgment of acquittal in J.B.'s case but she did not mention the issues with the kidnapping conviction based on the *Buggs* standard. (R. VI, 180.)

Appellant-Petitioner Timothy Sumpter was sentenced to 351 months (36 months in jail consecutive to the prison sentence). (R. XV, 33-36.) Sumpter's sentence included a requirement that he register on the offender registry for his lifetime, K.S.A. 22-4906(d), and be subject to a lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G).

(*Id.*) The District Court sentenced Sumpter to an enhanced sentence based upon his prior criminal history and aggravating factors. The State was not required to prove the existence of these sentencing enhancement factors beyond a reasonable doubt.

III. Appeal

Sumpter timely appealed his convictions. Sumpter's appellate counsel argued that the trial court erred in granting the motion for consolidation under K.S.A. 22-3202(1); but appellate counsel did not challenge the denial of Sumpter's motion for severance or the district court's continuing duty to sever. The Court of Appeals upheld the trial court's decision on consolidation but one judge only concurred: "As to the consolidation of the charges for trial, I concur in the result based on how the parties framed and argued the issue on appeal." *State v. Sumpter*, 313 P.3d 105 (Kan. App. 2013). Additionally, appellate counsel made no objection to the sufficiency of the aggravated kidnapping conviction based on the standard articulated in *Buggs*, 219 Kan. 203 (1976).

Finally, his appellate counsel argued that the prosecutor's statements about credibility amounted to prosecutorial misconduct. (Appellant's Brief, at 19-24.) But appellate counsel did not challenge the prosecutor's unfounded argument about a surveillance video, the prosecutor's statements about a *pro se* bond modification request, or misstatements about Sumpter's testimony and the elements of attempted rape.

IV. Habeas Petition

Sumpter timely filed a *habeas* petition under K.S.A. 60-1507. The Court heard arguments on the petition during a status conference but denied counsel's request to have Sumpter attend the status conference. (R. I, 6.) At the status conference, the State

conceded that it must withdraw its theories of sufficient evidence for the aggravated kidnapping conviction that were not supported by the actual charge on which the jury was instructed. (R. III, 56-58.) The Court denied Sumpter's petition and request for an evidentiary hearing on May 2, 2017.

ARGUMENTS AND AUTHORITIES

Standard of Review

When the district court denies a petition under K.S.A. 60-1507 on the motion, files, and records after a preliminary hearing, the Court of Appeals reviews the issue *de novo* as it is in the same position as the district court to consider the merits. *Sola-Morales v. State*, 300 Kan. 875, 881 (2014).

Ineffective assistance of counsel claims have two elements: (1) "counsel's performance was deficient"; (2) "the deficient performance prejudiced the defense." *State v. Davis*, 277 Kan. 309, 314 (2004). On the former, the defendant must "show that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances." *Edgar v. State*, 294 Kan. 828, 837 (2012) (internal quotation omitted). As to the latter, the defendant "must establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "For a defendant to be successful in asserting that he was denied effective assistance of counsel on appeal, it must be shown that (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness,

and (2) the appellant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful." *Baker v. State*, 243 Kan. 1, 7 (1988).

Issue I: Sumpter's trial counsel was ineffective because she did not understand the elements of the aggravated kidnapping count and, as a result, failed to challenge the sufficiency of the State's evidence at every phase.

A. Preservation of the Issue

The issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 377-384.)

B. Analysis

The State failed to present any evidence at the preliminary hearing or trial to show that Sumpter committed a confinement by force to facilitate the commission of the underlying crime that went beyond confinement inherent in the nature of the underlying crime, attempted rape, as required by Kansas law. Indeed, the State has now abandoned the kidnapping act that it relied on at trial as sufficient to support the jury's verdict (and the district court does not use this act to support its denial of Sumpter's petition). But Sumpter's trial counsel did not challenge the count prior to trial nor through examination of the witness nor in closing argument nor in post-trial motions. As the trial record demonstrates, trial counsel failed to understand what the State had to show on the aggravated kidnapping count. This failure was not only deficient but highly prejudicial. The State's—and district court's—attempts to *post-hoc* rationalize the jury's verdict on theories not presented to the jury is not only inadequate as a matter of law but raises serious questions that sufficiently undermine the confidence in the outcome of Sumpter's trial on this count that demand retrial.

1. Kansas law has well-developed jurisprudence on the facilitation element for kidnapping.

Under the operative Kansas statute at the time of the incident, kidnapping is "the taking or ***confining*** of any person, accomplished ***by force***, threat or deception, with the intent to hold such person . . . to facilitate . . . the commission of any crime . . . ." K.S.A. 21-3420 (emphasis added).[1] Aggravated kidnapping "is kidnapping . . . when bodily harm is inflicted upon the person kidnapped." K.S.A. 21-3421. As the Kansas Supreme Court has explained, the confinement alleged to facilitate the commission of the underlying crime must meet three separate, essential elements: it "(a) [m]ust not be slight, inconsequential and merely incidental to the other crime; (b) [m]ust not be of the kind inherent in the nature of the other crime; and (c) [m]ust have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Buggs*, 219 Kan. at 216.

The Kansas Supreme Court has been especially critical of kidnapping charges where, as here, the confinement amounts to forcible, violent rape in a vehicle. "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." *State v. Cabral*, 228 Kan. 741, 744-45 (1980); *cf. Buggs*, 219 Kan. at 215 (stating that "the ordinary rape require[s] as a necessary incident some 'confinement' of the victim-they are nevertheless not kidnappings solely for that reason").

[1] The jury was only instructed on confinement "by force . . . to facilitate the commission of the crime of Rape." (R. VI, 159.)

In cases where kidnapping convictions on a confinement by force theory have been upheld the victim has been restrained in a manner beyond the assailant's superior strength, such as through tying up or handcuffing the victim. *See State v. Mitchell*, 784 P.2d 365, 1989 Kan. LEXIS, 199, at *15-16 (Kan. 1989) (holding that the confinement of tying the victim to a bedpost and binding her hands and feet had independent significance because it made it impossible for the victim to resist the assault, greatly inhibited her ability to attempt to identify her attacker or pursue him as he left); *State v. Zamora*, 247 Kan. 684, 696 (1990) (holding that the confinement met the *Buggs* standard because the defendant gagged the victim with a rope, tied her hands behind her head, and tied one leg to the bed before he raped her three times and then he further confined her by tying her to him, unplugging the phone, blocking the door from approximately 1:30 a.m. until approximately 8:30 a.m.); *State v. Richmond*, 250 Kan. 375, 378 (1992) (holding that tying up the victim during and after the commission of a rape and using a pillow to blindfold her was a confinement that was not incidental to the underlying crime); *State v. Little*, 26 Kan. App. 2d 713, 718-19 (1999) (finding confinement where the defendant bound the victims to facilitate the crime of robbery); *cf. State v. Hays*, 256 Kan. 48, 63 (1994) (holding that the kidnapping conviction was not supported by the evidence because holding the victim down with a crowbar while committing the underlying crime had no significance independent of the robbery).

Despite long-standing and developed jurisprudence on what forcible confinement is sufficient to support a separate crime of kidnapping, Sumpter's trial counsel did not challenge the sufficiency of this count through motion practice, cross- or direct-

examination, or arguments to the jury. And, as a result, Sumpter was improperly convicted of aggravated kidnapping despite the lack of sufficient evidence.

2. Trial counsel's ignorance of the law was deficient, not strategic.

The district court declined to decide whether trial counsel's performance was deficient but only held that Sumpter was not prejudiced by his counsel's performance. (R. II, 96.) Indeed, in the State's response to Sumpter's 60-1507 petition, the State also did not argue that trial counsel's performance was reasonable and it seems to acknowledge that it never identified—at any stage of the trial—an act that it relied on to meet the "confinement by force" element on the aggravated kidnapping count. It provides no citation to the record to where the State notified the Court, Sumpter, or the jury what act it relied on to meet this element.

Despite the lack of citation by the district court and State at the habeas stage, the State did, on one occasion, identify the act it was relying on in its opposition to Sumpter's directed verdict motion. But this act was not a confinement by force act and was unsupported by the evidence. Unsurprisingly, the State and district court have now abandoned this theory. On the motion to directed verdict, the State argued that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (R. XIII, 64:5-8.) But as the State and district court have now acknowledged, that act was insufficient because it is an evidence of a "takings" theory of kidnapping—a theory on which the jury was not instructed. (R. III, compare 38-39 (arguing that it was a taking for Sumpter to "tak[e] JB from outside the car to inside the car so he can control her and he can rape her"), and 55-58 (the State offering to

withdraw any argument on takings if the jury was not instructed on this act and the Court confirming that the State had abandoned those arguments).) Moreover, this "act" was not actually supported by the evidence. As Sumpter noted in his petition, the only "evidence" of this act was the prosecutor's interpretation for the jury of what they should find occurred in a grainy and choppy surveillance video of the incident with J.B. when the two were at the car: "Watch that video and there's a time when you will see him as she gets out of the car and he is following along, grabbing her and pulling her back into that car." (R. XIV, 106:18-22.) But the prosecutor never elicited testimony from J.B. on what was being shown in this section of the video. (R. XII, 28:11-32:6.)

Even though the State never identified for the Court or jury an act of confinement by force, trial counsel never objected to the aggravated kidnapping count based on the incident with J.B. on the grounds that the evidence did not support the legal definition of the count. Because trial counsel did not have a proper understanding of what the State had to show at trial on the aggravated kidnapping count, she missed crucial opportunities to challenge the State's claims and testimonial evidence. And Sumpter's trial counsel never challenged the sufficiency of the State's evidence on these grounds at any stage including at the preliminary hearing.

At trial, Sumpter's trial counsel made several decision to not challenge the State's claims or witness testimony that make no strategic sense if counsel had actually understood the importance of the facilitation element of the aggravated kidnapping count. First, Sumpter's trial counsel failed to challenge the prosecutor's misstatement of the evidence on what affirmative act was being used to support the count during arguments

on the Sumpter's motion for directed verdict at the end of the State's case in chief. As noted previously, the prosecutor stated that the aggravated kidnapping count with respect to J.B. was based on a "confinement" and that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." (R. XIII, 64:5-8.) But J.B. had instead testified at both the preliminary hearing and at trial that she had voluntarily gotten into her car and that Sumpter had pushed his way into the vehicle with her to accomplish the underlying crime—attempted rape.

Second, J.B. changed her testimony about what happened as Sumpter entered the vehicle with her from the preliminary hearing to trial. But trial counsel did nothing during her cross-examination to clarify what happened at or in the vehicle that would amount to confinement beyond what was inherent or incidental to the commission of the attempted rape. Rather trial counsel's cross-examination focused almost entirely on discounting the attempted rape allegations and J.B.'s changing story on whether penetration or attempted penetration occurred. (R. XII, 57-70.)

Finally, as noted previously, the prosecutor impermissibly provides his opinion of what the jury should find occurred in a grainy and choppy surveillance video for the jury. The quality of the video along with contradictory testimonial evidence required jury interpretation but trial counsel failed to challenge the prosecutor's unfounded assertions or point to the contradictory evidence. This failure to challenge misstatements of testimony and changing witness testimony on the aggravated kidnapping count—the charge that carried the largest maximum sentence—only made sense if trial counsel did not realize what was required of the State under *Buggs*.

Trial counsel's misunderstanding of the law was confirmed at closing. On the aggravated kidnapping count, trial counsel only stated that Sumpter denied "ever confin[ing J.B.] in the car." (R. XIV, 92:19-20.) But Sumpter's trial counsel did not explain to the jury what the State must prove to satisfy the facilitation element and for that reason she never argued that the evidence elicited at trial showed no confinement that would meet the *Buggs* standard. Indeed, Sumpter's trial counsel seems to have accepted that holding J.B. during the alleged attempted rape was sufficient because she simply argued that the bruising that happened as "part of the confinement" could not be used to also support the "bodily harm" proof. (*Id.* at 92:24-93:10.)

Additionally, both trial counsel and the prosecutor incorrectly relayed the intent element of the aggravated kidnapping count to the jury. They both stated that all the State needed to prove for intent on the *aggravated kidnapping* count was that Sumpter intended to rape J.B. (R. XIV, 76:2-6 (The prosecutor states that all he has to prove is "confined [J.B] by force" and that "he intended to commit the crime of rape.") and 93:12-14 (Sumpter's trial counsel states "the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her.").) But the State actually had to prove that any confinement done by Sumpter was more than incidental *and* was done with the intent of facilitating—and not just committing—the underlying crime. By inappropriately conflating the intent element of the underlying crime—attempted rape—with the intent element of the separate kidnapping count, Sumpter's trial counsel once again demonstrated a lack of understanding of the facilitation element and what was required of the State beyond simply showing the type of confinement and intent

inherent in the underlying crime. Trial counsel's arguments and explanations at closing belie any argument that these were strategic choices, rather than a misunderstanding of the law. Admittedly, trial counsel did move for a directed verdict at the end of the State's case and for acquittal during the post-trial proceedings but she made no mention of the *Buggs*-test or any specific evidentiary deficiency related to the facilitation element in the State's case. (R. XIII, 59:2-23; R. XV, 3:5-18.)

It was not strategic for Sumpter's counsel to not demand to know what act the State had relied on to meet the "confinement by force" element. Neither was it strategic to not argue the sufficiency of the State's evidence on confinement by force sufficient to meet the separate kidnapping requirements. Rather, as the record demonstrates, trial counsel did not understand the facilitation requirement under *Buggs*, and, as such, failed at every stage to highlight and move against the insufficiency of the State's evidence. This failure to understand the law and associated burden of proof is objectively deficient as far as assistance of counsel. *State v. Davis*, 277 Kan. 309, 329 (2004) (holding that trial counsel's failure to understand the law applicable to the defendant's defense was both a deficient performance and prejudicial).

3. Sumpter was denied a fair trial on the kidnapping count based on trial counsel's ignorance of the law.

The district court—at the State's urging—proposes a Herculean feat to prove prejudice: negate all possible acts that could form the basis for aggravated kidnapping even when those acts were not identified to the jury nor challenged through the normal adversarial process. Indeed, the heart of Sumpter's ineffectiveness claim is that his trial

counsel's ignorance of Kansas kidnapping law meant that she failed to properly challenge the State's testimonial evidence through cross-examination or admission of alternative evidence and she failed to highlight the weaknesses under the *Buggs* standard to either the judge or jury. To allow the State to now rely on acts that have neither been subjected to the adversarial process nor argued to the jury for a determination on their sufficiency would make a mockery of Sumpter's claim.[2]

And Kansas law does not require a habeas petitioner to meet so high a standard. Instead, a defendant need only show "that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Edgar*, 294 Kan. at 837 (internal quotation omitted). Courts in Kansas and elsewhere have held that counsel's failure to investigate the legal underpinnings and potential defenses to a criminal count is not only deficient but prejudicial because such a failure affects every strategic choice on evidence and argument that counsel makes at trial. *Davis*, 277 Kan. at 327-29 (holding that the fact that trial counsel was unaware of the proper legal standard was not only deficient but prejudicial because counsel could have made different strategic choices about witnesses and arguments to the trial court); *State v. Jury*, 576 P.2d 1302, 1307-08 (Wash. App. 1978) (holding that defendant was prejudiced and prevented from receiving a fair trial because the lack of preparation on the law could have caused counsel to overlook obvious legal issues and arguments at trial). "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial

[2] Moreover, as demonstrated below, these new acts have the same legal shortcomings under the *Buggs* standard.

testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice [is] required because the petitioner had been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *U.S. v. Cronic*, 466 U.S. 648, 659 (1984) (internal citation and quotations omitted); *cf. Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (holding that trial counsel had provided deficient assistance where counsel's justifications "for his omission betray a startling ignorance of the law-or a weak attempt to shift blame for inadequate preparation" and because such lack of investigation calls into question the "reliability of the adversarial testing process"). As the Kansas Supreme Court has recognized, even a guilty verdict at trial is insufficient to remedy trial counsel's failure to elicit evidence or raise legal issues that would have put him in a better posture at trial. *State v. Jones*, 290 Kan. 373, 381 (2010).

In most habeas petitions, the question relates to a particular piece of evidence or witness and there is not a general question about the validity of the other evidence. So the question becomes a counterfactual: if trial counsel had successfully suppressed this piece of evidence or if this witness had been called, would the court still have confidence in the verdict? But here the counterfactuals are never-ending, intertwined, and often dispositive: what if trial counsel had successfully challenged the State's proffered evidence based on the *Buggs*-standard at the preliminary hearing, or on the motion for directed verdict, or on the motion for acquittal? How would trial counsel's strategy have changed if she had forced the prosecutor to identify the act he was relying on for

confinement by force prior to the end of the State's evidence? How would trial counsel's strategy at the preliminary hearing and at trial—including her handling of the cross-examination of J.B. and the direct examination of Sumpter—have changed if she realized that the confinement by force could not be confinement that was incidental, inherent, or had no independent significance? How would have trial counsel's proposed jury instructions changed?[3] Or her closing arguments? Or her challenges of prosecutorial statements? These are not simple counterfactuals and require the Court to question every aspect of the trial from the preliminary hearing to post-trial motions. Moreover, because of the deficiencies of the newly-found acts—even on a record with no adversarial testing or argument—this Court should not have confidence in the outcome of the trial on this count.

4. The prejudice is also apparent because the new found acts are also insufficient to support the conviction.

Even though the habeas inquiry into whether counsel's failure to understand the law is not a sufficiency review, the acts that the district court now relies on to deny Sumpter's petition are also insufficient—even on the deficient trial record—to support a kidnapping conviction. The district court rests its holding on Sumpter's claim of ineffective assistance solely on a finding that there was sufficient evidence to support an aggravated kidnapping conviction. The State has abandoned the theory that it argued to the jury supported a conviction so the district court has adopted an alternative reasoning based on its determination that, despite the clear holding of *Cabral*, confinement to a

[3] *Little*, 994 P. 2d at 720 (acknowledging that the pattern instruction for kidnapping is vague and confusing on the facilitation language and noting that an instruction explaining the *Buggs* holding "would be advisable in any situation where the question of whether the restraint or movement facilitated the crime is at issue").

vehicle was sufficient in this instance: "Confining J.B. to her car made the attempted rape substantially easier to commit and substantially lessoned the risk that the attack would be detected by others. Again, petitioner could have attempted to rape J.B. outside of her car. But the close confines of the car helped conceal the rape by making it harder for others to see and hear." (R. II, 96.)

The district court then posits several acts that resulted in the confinement: (1) during the underlying crime, Sumpter punched J.B., pushed his knee against her throat, and prevented her from opening the passenger door, and thus "eliminate[ed] the possibility of third party aid responding to cries for help"; (2) when J.B. was able to kick Sumpter out of the car, he still had her keys which he had taken to avoid being maced "which prohibited J.B. from safely exiting her car, or from driving off and leaving the parking lot"; and (3) "Petitioner could have attempted to rape J.B. at any point after he first contacted J.B. and before entering her car. But petitioner decided to wait to attempt the rape until J.B. was confined in the car with him." (R. II, 95.)

Only one of these three *actus rei* by Sumpter could be considered confinement ***by force*** as required by the jury instructions: punching and kneeing J.B., in part, to purportedly prevent her from reaching for the vehicle door. But the fact that the victim testified that the struggle during the attempted rape was violent—including punching and a knee to the throat—only demonstrates the physicality and forcible nature of the attempted rape. It, however, does not—and cannot—show a confinement that went beyond the force inherent in a violent crime like attempted rape. *State v. Ransom*, 239 Kan. 594, 603 (1986) (holding that while the rape and battery at issue were "vicious,

brutal crimes" because they involved moving the victim by pulling the victim by her hair, choking her, and threatening her, the State had not shown an act that **facilitated** the underlying crimes sufficient to support the aggravated kidnapping count); *cf. State v. Neal*, 34 Kan. App. 2d 485, 491-92 (2005) (rejecting the State's argument that "throwing the victim to the ground, choking her, punching her, and slamming her head to the ground" during a rape could be battery because it went "far beyond the force used to accomplish rape" and holding that the battery was multiplicitous of the rape); *State v. Miller*, 2004 WL 1191017 at *3 (Kan. Ct. App. 2004) (rejecting confinement by force when the confinement only occurred when the defendant started to attack the victim). Indeed, the purported acts of confinement highlighted by the State—the punching, the knee to the throat, the threats—were so inherent in the underlying crime of attempted rape that the State used the fighting in the car to demonstrate the elements of attempted rape; namely, that Sumpter's intent was nonconsensual sex. (R. XIV, 75:21-76:1.) As J.B. testified, Sumpter was only able to begin to touch her in a sexual manner once he used his knee to control and minimize her resistance. (R. XII, 42.) Even taking the evidence in the best possible light, this force can only be seen as inherent or incidental to accomplishing the underlying crime of attempted rape. As the Supreme Court emphasized in *Buggs*, actions—even those that amount to confinement or movement—taken for the convenience or comfort of the defendant during the execution of the crime are insufficient to meet the test articulated by the Court. 219 Kan. at 216.

The other two action—following J.B. to her vehicle and standing outside J.B.'s vehicle after she kicked him out—do not involve any confinement ***by force*** by Sumpter.

Sumpter did not force J.B. to walk to her vehicle by any means; nor did he use any physical force to keep her in her vehicle once he was kicked out; nor was there any evidence that he kept her confined in the vehicle such as by tying her up or locking her in the trunk to facilitate flight. Instead, any confinement that resulted from these actions were based on voluntary choices by J.B. J.B. testified that it was her choice to walk to her vehicle and to try and leave by getting in the car. (R. XII, 21-25, 38-40.) She also testified that she stayed in her vehicle after she had pushed Sumpter out because she calculated that it was safer in her vehicle. (R. XII, 48-49.) A victim's voluntary choices, even if done out of fear, cannot amount to confinement of any kind, let alone confinement by force—the charge at issue here. *State v. Holt*, 223 Kan. 34, 41-43 (1977) (holding that voluntary choice to enter a vehicle without evidence of force or deception could not support the submission of an aggravated kidnapping count to the jury); *Miller*, 2004 WL 1191017 at *3 (holding that a kidnapping does not occur when any movement or confinement was the result of voluntary actions by the defendant); *State v. Quintero*, 183 P.3d 860, 2008 WL 2186070, at *5 (Kan. Ct. App. 2008) (rejecting the State's suggestion that "a 'taking or confinement' may be accomplished by instilling fear in the victim" and noting that "K.S.A. 21–3420(b) requires a taking or confining by force, threat or deception—not fear").

Reduced to its essence, the district court's decision concludes that committing the attempted rape while the victim was confined in her vehicle through the punches and the knee to the kneck amounts to aggravated kidnapping because it "made the attempted rape substantially easier to commit and substantially lessoned [sic] the risk that the attack

would be detected to others." (R. II, 95.) In an attempt to avoid the clear Kansas precedent that confinement in a vehicle is inherent when forcible rape occurs in a vehicle, *State v. Cabral*, 228 Kan. 741, 744-45 (1980) ("When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape."), the district court tries to distinguish *Cabral* by noting that J.B. never "*sufficiently* acquiesce[d] to petitioner's presence with her" while the victim in *Cabral* had originally voluntarily entered the vehicle with the defendant. But the district court seems to recognize that J.B. acquiesced to Sumpter's presence until he started attacking her. The same was true in *Cabral*. There the victim had acquiesced to some contact with the defendant but when the victim asked to go home, the perpetrator grabbed her arm, locked the vehicle door, and moved the car behind a tree where he raped her. *Id.* at 745. There neither the movement of the vehicle to a more discrete location nor confining the victim through locking the doors nor using force to commit the rape were seen by the Court as anything more than incidental to the commission of the crime. *Id.* at 744-45.

The district court also argues that the Supreme Court has subsequently distinguished *Cabral* when a victim is forced to remain in a vehicle against her will by pointing to *State v. Coberly*, 223 Kan. 100 (1983); *State v. Lile*, 237 Kan. 210, 213-14 (1985); and *State v. Blackburn*, 251 Kan. 787 (1992). (R. II, 95.) The district court ignores the fact that the victim in *Cabral* was also forced to stay in the vehicle once she withdrew her consent to be with the defendant. 228 Kan. at 744-45. Additionally, those

cases do not stand for the proposition that aggravated kidnapping based on a confinement theory can be shown by simply showing that a victim had to remain in a vehicle against her will. In *Blackburn*, the jury was instructed on multiple theories: "taking or confining [] by force, threat, *or* deception." 251 Kan. at 793 (emphasis in original). The Court did not make a conclusive finding on what amounts to confinement by force. Rather it found that there was sufficient evidence to show the assailant had confined the victim by deception because he had tricked her to get into his vehicle by convincing her that he would take her home. *Id.* at 793. While the Court states that Blackburn held his victim against her will, it rested its decision on the "lessened [] risk of detection" on the fact that Blackburn "drive [his victim] in areas unfamiliar to [her]." *Id.* at 794.

Similarly, in *Lile*, the defendant forced the victim into his vehicle with a gun and drove her six miles away to a secluded field before raping her. 237 Kan. at 210. Again the Court did not determine what was sufficient for a confinement by force count alone. Rather it held that "[w]hen defendant removed her from the area of the road he substantially lessened the risk of detection and the rape was less likely to be discovered. Thus, the defendant's confinement *and movement* of the victim from a public road to a secluded field was not merely incidental to the crime of rape and we hold that it was sufficient to establish the independent crime of aggravated kidnapping." *Id.* at 214.

Finally, in *Coberly*, the victim, as in *Cabral*, had entered the vehicle voluntarily. What made the case more akin to *Lile* was that after the victim asked to go home, the defendant continued to drive her around for almost four hours until it was dark and they were in an isolated area. As such the Court determined that the "length of the

confinement . . . was not inherent in the facilitation of the rape" and that "driving [the victim] to a rural road in an isolated area of the county . . . substantially reduced the risk of detection." *Coberly*, 233 Kan. at 105-06. The fact that a violent rape occurred in a vehicle where the victim was kept against her will was not sufficient in *Coberly* either. Rather, the factors that mattered to the Court were the amount of time that the victim was kept in the car between she voiced her desire to leave and when the rape occurred and the movement of the vehicle to a more secluded, rural location. *Id.* A closer look at all of the cases that the district court cites—*Coberly*, *Lile*, *Blackburn*—all stand for the proposition set forward by Sumpter that confinement in a vehicle just during the time when a defendant commits the underlying crime is insufficient to support the independent crime of aggravated kidnapping. Accordingly, even if prejudice is a question of sufficiency of evidence, the newly found *actus rei* also fail the test set out in *Buggs* and its progeny.

Issue II: Sumpter's appellate counsel provided ineffective assistance by failing to raise sufficiency of the evidence on the aggravated kidnapping count.

A. Preservation of the Issue

This issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 390.)

B. Analysis

Appellate counsel was ineffective in failing to challenge the sufficiency of the aggravated kidnapping counts. As discussed above, the State did not produce any evidence of a confinement by force that went beyond what was necessary for the commission of the underlying crime. This failure was not reasonable given the lack of

evidence of any confinement outside of that inherent in the nature of the crime against J.B. Again the choices of appellate counsel in crafting a winning appellate strategy were unreasonable and call into serious question the result of the appeal. *Mashaney v. State*, 238 P.3d 763 (Kan. Ct. App. 2010) (holding that an evidentiary hearing is required to determine why appellate counsel abandoned a "highly prejudicial" error); *Khalil-Alsalaami v. State*, No. 115,184, 2017 WL 2610044, at *8 (Kan. Ct. App. June 16, 2017) (holding that appellate counsel provided ineffective assistance when the attorney failed to raise a meritorious issue).

Issue III: Sumpter's appellate counsel provided ineffective assistance by failing to raise the district court's error on the motion to sever and its continuing duty to sever in light of prejudice.

A. Preservation of the Issue

This issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 390.)

B. Analysis

Sumpter's appellate counsel was ineffective because of her failure to raise the prejudice to Sumpter that occurred from the consolidation of the charges in the three cases against Sumpter. Appellate counsel only argued that the district court had erred in joining under K.S.A. § 22-3202(1) on the State's motion for consolidation but did not argue that the trial court erred in denying Sumpter's motion for severance or from raising the issue *sua sponte* when prejudice was apparent. (R. I, 459-500.) Appellate counsel's failure to correctly argue the consolidation claim was highlighted by the concurring judge in the appeal as he noted, "As to the consolidation of the charges for trial, I concur in the

result based on how the parties framed and argued the issue on appeal." *State v. Sumpter*, 313 P.3d 105 (Kan. Ct. App. 2013).

1. By choosing to focus on the motion for consolidation and not severance, appellate counsel ignored a means of challenging the joinder that would allow the Court of Appeals to consider the prejudice to Sumpter and not just the similarity of the cases.

Appellate counsel's failure to challenge the denial of the motion to sever prevented Sumpter from successfully raising the prejudice that occurred when all three cases were tried together. The consolidation argument presented by appellate counsel only allowed the Court of Appeals to consider whether the trial court had abused its discretion when it found that the cases were of the same or similar character. By failing to argue severance, appellate counsel could not present to the Court of Appeals the "continuing duty of the trial court to grant a motion for severance to prevent prejudice and manifest injustice." *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008). Because of appellate counsel's error, the Court of Appeals could not consider any prejudice that the consolidation created as part of its analysis *Sumpter*, 313 P.3d at *3-6 (confining its analysis to whether the crimes were of the same or similar character). As the concurring opinion noted, this choice by appellate counsel had consequences: "As to the consolidation of the charges for trial, I concur in the result ***based on how the parties framed and argued the issue on appeal***." *Sumpter*, 313 P.3d at *12.

It was unreasonable for appellate counsel to leave out the severance argument. Even if this Court assumes that joinder was proper, as the trial and appellate courts found, the next step is to determine whether a severance should have been granted (either by

motion or *sua sponte*). *State v. Coburn*, 38 Kan. App. 2d 1036, 1058-59 (2008) ("Nevertheless, for argument sake, assuming that one of the joinder requirements under K.S.A. 22–3202(1) was established, the trial court was under a continuing duty to grant a motion for severance to prevent prejudice and manifest injustice to the defendant.") (internal quotation omitted). In reviewing a severance decision, the reviewing court considers whether "severance should have been ordered to prevent prejudice and manifest injustice to the defendant." *State v. Shaffer*, 229 Kan. 310, 312 (1981).

While the district court stated in its denial of Sumpter's habeas petition that petitioner failed to prove either deficiency or prejudice (R. II, 99), the district court had no analysis on the reasonableness of appellate counsel's choice of omitting the only argument that would allow her to argue and the Court of Appeals to consider the prejudice to Sumpter. In fact, the district court never mentioned the motion to sever or its continuing duty to grant a severance in its denial of the habeas petition. (R. II, 97-99.)

2. Appellate counsel missed multiple and compounding prejudicial incidents that would have supported an argument on severance.

A defendant can be prejudiced from the consolidation of cases for multiple reasons:

> "(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one."

Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

As predicted by trial counsel, Sumpter faced prejudice throughout the trial due to the trial court's decision not to sever the cases and its refusal to reconsider that decision as the prejudice became apparent. The prejudice started immediately just through the optics of having an African-American man accused of various sexual crimes against four white women being considered by an all white jury. At the voir dire, four potential jurors stated to the group that they would have a hard time considering Sumpter's claims given that there were four victims. (R. X, 132:5-16, 133:6-9, 215:25-216:9, 217:11-19, 263:17-264:5, 268:16-269:7, 194:1-4.) These candid remarks from potential jurors demonstrate how the multiple cases are seen as evidence that Sumpter had a propensity to commit a crime—an impermissible type of evidence under K.S.A. 60-455.

The consolidation of the cases also forced Sumpter to choose between his Fifth Amendment right to avoid self-incrimination and his Sixth and Fourteenth Amendment right to testify on his own behalf. Sumpter desired to testify about two of the cases (involving A.S.E., A.C.C., and A.R.P.) but wished to present a different defense in the case involving J.B. Sumpter believed that he had credibility over A.S.E. and wished to testify in 11-cr-1187 to bolster questions about her credibility and to explain why he had restrained her while driving. Sumpter also believed he needed to testify in 11-cr-1290 which involved A.C.C. and A.R.P. to bolster his credibility because that was the only case that involved the false statements to police. In deciding to testify to regain credibility vis-à-vis victims A.S.E., A.C.C., and A.R.P., Sumpter opened himself up to incredibly prejudicial lines of questioning in the case involving J.B. This very risk of prejudice is recognized as one of the factors to consider in deciding whether to sever

consolidated cases. *State v. Howell*, 223 Kan. 282, 284, 573 P.2d 1003, 1004-05 (1977) ("Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence.") (quoting *Cross v. United States*, 335 F.2d 987, 989 (1964)).

The joinder of the cases allowed the State to commingle evidence and use broad rhetoric to overcome weaknesses in all of the cases. In his closing statement, the prosecutor commingled facts to try and bolster the State's case and damage Sumpter's credibility in all of the cases. But as mentioned above, the credibility questions related to the false statements to police only called into question Sumpter's credibility in one of the cases, 11-cr-1290. That did not stop the prosecutor from generally averring that the jury should consider Sumpter's credibility in general: "Consider all of those mistruths, consider his entire lack of credibility." (R. XIV, 108:8-10, *see also* 102:11-12, 103:12-13, 107: 1-2, 107:23-108:10.) The prosecutor further commingled evidence to prejudicial effect on other important points in the closing. The prosecutor stated, "You're going to hear this common theme in all of these, he talks about a sadness, he talks about something that's going on in his life that he's using to manipulate each of these women to try and get them to feel bad for him, to get them into an isolated place." (R. XIV, 66:1-6.) But, in fact, there was no evidence that in two of the four incidents—those involving J.B. and A.C.C.—that Sumpter had talked about sadness in his life. Given that the State's willingness to conflate the cases, intermingle evidence, and urge conclusions based on propensity, the State never took its role in carefully separating the cases seriously. All of the circumstances demonstrate "a legitimate concern that the jury was

unable to consider each charge separately on the evidence and law applicable to it." *Coburn*, 38 Kan. App. 2d at 1057.

Given the demonstrable evidence of prejudice from trial, it was unreasonable for Sumpter's appellate counsel to argue improper joinder while ignoring the error on the related motions for severance. That failure likely made a difference in the outcome of the appeal. One justice explicitly called out the problem with how Sumpter's appellate counsel presented the consolidation argument. And the severance argument was the only way for Sumpter's appellate counsel to highlight the prejudicial nature of the proceedings. Given the unreasonableness of the decision and its impact on appeal, this Court should find that Sumpter was denied his right to effective appellate counsel.

3. The prejudice was not cured with a jury instruction.

In its decision, the only finding that the district court made was that any prejudice was overcome by the jury instruction requiring that each charge be decided separately. Because the jury did not return a straight guilty verdict, the district court determined that Sumpter was not prejudiced the consolidation.

But a jury instruction is insufficient when the State does not keep the charges separate and commingles the applicable evidence during examination of the witnesses or during closing argument. 38 Kan. App. 2d at 1056-57; *U.S. v. Foutz*, 540 F.2d 733, 738 (4th Cir. 1976). The district court attempts to distinguish *Coburn* by noting that the Court of Appeals concluded that the jury instruction did not cure the prejudice caused by the joinder in that case because the jury found Coburn guilty on all charges. (R. II, 98.) However, the Court found the jury's verdict as only one of multiple independent reasons

why the jury instruction was insufficient. The other two separate and independent reasons why the jury instruction was inadequate are applicable here. First, the Court found that the jury "likely could have considered the evidence [on one sexual offense charge] corroborative of [the other sexual offense charge]." 38 Kan. App. 2d at 1058. The Court noted that the evidence was not overwhelming on several counts because it rested solely on the victim's testimony and the jury could have unfairly "cumulated the evidence of the various offenses." *Id.* The same risk existed here when the only evidence in several of the cases was the victim's testimony and the State could have improperly used the evidence from the other cases to corroborate the testimony of the victims. Second, the Court of Appeals found that the jury instruction was insufficient in part because of the nature of the crimes themselves "substantially increased the risk of prejudice." *Id.* As the Court of Appeals noted, "when joinder is sought involving crimes such as rape, the risk of prejudice is substantial." *Id.* (quoting *Bridges v. U.S.*, 381 A.2d 1073, 1078 (D.C. 1977), *cert. denied* 439 U.S. 842 (1978)). Importantly, the Court of Appeals never concluded that a jury instruction is only insufficient when there is a straight jury verdict as the district court seems to suggest here. (R. II, 99 (holding that "in this case, the jury's verdict belies the petitioner's claim that he was prejudiced by the consolidation of the cases").)

Second, the jury instruction does not absolve the Court from its continuing duty to grant a severance motion to prevent prejudice or manifest injustice. *Coburn*, 38 Kan. App. 2d at 1058-59. In its decision, the district court never addresses the trial court's continuing duty, nor does it argue that the trial court met this duty. (R. II, 97-99.) As

trial counsel highlighted at voir dire, the Court should have exercised this duty as soon as jurors began expressing doubts on whether they could fairly consider Sumpter's claims of innocence given that there were four victims. (R. X, 220-221, 316-319.) The candor of these jurors demonstrated how the State could use the multiple cases to imply the propensity of Sumpter to commit these types of offenses—evidence that is improper to use as proof of the charges. As is set out above, this prejudice continued as the State commingled evidence and used incorrect broad generalities to overcome weaknesses on all of the cases. Even if joinder is possible, the denial of severance can amount to "manifest injustice" if a defendant is denied his right to a fair trial.

Issue IV: Sumpter's appellate counsel failed to identify key instances of prejudicial prosecutorial misconduct.

A. Preservation of the Issue

The issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 391-93.)

B. Analysis

Because appellate counsel failed to highlight some of the most egregious examples of prosecutorial misconduct at trial, appellate counsel also ineffectively presented the prosecutorial misconduct argument on appeal. Appellate counsel did discuss some instances of prosecutorial misconduct, notably areas where the prosecutor gave opinions on Sumpter's credibility. (R. I, 482-88.) But the prosecutorial misconduct went further than that and led to even greater prejudice. The district court rejected this claim on the grounds that all of the prosecutorial behavior described by Sumpter in his petition fell "within the wide latitude afforded to prosecutors." (R. II, 99-100.) But the district court

never discussed why any of the following examples would be acceptable. And as amply demonstrated below, these incidences of prosecutorial misconduct were egregious, not harmless, and should have been raised by appellate counsel.

First, as described previously, in his closing argument when discussing surveillance video, the prosecutor referred to events that were not in evidence and provided his own interpretation on what the jury should find. The quality of the video required jury interpretation but rather than allow the jury to decide what occurred the prosecutor impermissibly gave his opinion of what the video showed. *Berger v. U.S.*, 295 U.S. 78, 88 (1935) ("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.")

Second, after receiving no contact from his attorney for close to two months and after multiple continuances, Sumpter requested a bond modification *pro se* because his attorney was not available to do so for him. (R. IV, 54-60; R. V, 56-62; R. VI, 50-56.) The letter references his attorney's assessment that the information presented—while still not proven—at most sets out liability for misdemeanor offenses. *Id.* at ¶ 7. Sumpter is emphatic in the letter that when the matters are tried he would be found innocent. *Id.* at ¶ 5. But the prosecutor blatantly mischaracterizes the letter in his closing stating that "he wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense." (R. XIV, 80:15-18.)

The prosecutor goes on to use this letter to tell the jury that Sumpter admitted to all of the lesser included crimes even though his testimony could only be interpreted to admissions on *some* of the lesser included crimes. (R. XIV, 64:12-14 ("So what the defendant's here asking you to do is find him guilty of the lesser included crimes."); *id.* at 80:14-18 (arguing that "[Sumpter] wrote a letter to the Court, suggesting to the Court that he thought he was guilty of the lesser included offense [sic]"); *id.* at 80:5-11 ("[H]e comes in here to court . . . and he is telling you . . . all I did were the lesser included offenses."); *id.* at 101:1-5 ("But they so want you to just move past the greaters and get down to those lesser and just find him guilty of those because that's easy, he's admitted those, why don't we just do that and go home.").) The prosecutor's blatant mischaracterization of the motion and Sumpter's testimony was incredibly prejudicial because it was used to argue Sumpter had purportedly admitted to all lesser-included crimes, and so all the jury had to do was consider the more serious charges on all counts.

Finally, the prosecutor misstated the requirements for attempted rape to make it appear that Sumpter's testimony conceded an intent to rape her. During his closing the argument, the prosecutor while explaining the charges involving J.B. states "clearly he intended to have sex. I don't have to prove rape occurred, I don't have to prove sex occurred, I have to prove he took her -- or I'm sorry, he confined her with the intent to commit sex, commit rape against her. Clearly that was his intent, he told you even yesterday that's what he intended to do." (R. XIV, 106:2-9.) He illustrated the point by referencing Sumpter's testimony that he wanted to have sex with J.B. when she came on to him and touched his penis. (R. XIV, 105:22-106:9.) Indeed, J.B. had also testified

that she had tricked Sumpter into thinking she wanted to have sex with him in order to get him out of her car. But the State had to do more than prove that Sumpter intended to have sex with J.B. at some point during their interaction; they had to prove that he intended to have sex with J.B. *without her consent.* The prosecutor's deliberately misleading guidance to the jurors on what the State had to show to meet the burdens outlined in the jury instructions went unchallenged[4] and provided the jury with a lessened burden for the State to meet—a burden that conveniently aligned with the testimony given by Sumpter. As the Kansas Supreme Court has held, misstatement of the law by the prosecutor can amount to prosecutorial misconduct. *State v. McCullough*, 293 Kan. 970, 988-89 (2012); *State v. Phillips*, 295 Kan. 929, 945 (2012).

The failure of appellate counsel to highlight the multiple additional instances of prosecutorial misconduct that unfairly prejudiced Sumpter amounts to exceptional circumstances that demand habeas relief. *See Moncla v. State*, 285 Kan. 826, 831 (2008) (noting that ineffective assistance of appellate counsel permits a petitioner to raise prosecutorial misconduct for the first time in his habeas petition).

Issue V: Due to trial counsel's continuations without consent, Sumpter's statutory right to speedy trial was violated.

A. Preservation of the Issue

This issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 384.)

[4] Not only was the prosecution's interpretation of the intent element on attempted rape unchallenged by Sumpter's attorney, but Sumpter's attorney actually compounded the injury by stating the incorrect burden in her closing argument. She told the jury:

> [T]he state has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her. Again, it's not what she thought was gonna happen, it's what was in Mr. Sumpter's mind when he was in the car with her. Were his intentions to have sexual intercourse with her? That's what they have to prove. If they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping.

(R. XIV, 93:12-21.) This additional legal mistake by trial counsel further emphasizes the prejudice Sumpter faced.

B. Analysis

Sumpter was denied his statutory right to a speedy trial due to his trial counsel's actions and inactions. Under K.S.A. 22-3402(1), "[i]f any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged." All three of the cases were heard together for the preliminary hearing on August 25, 2011. Sumpter was advised by his trial counsel to waive his arraignment and that his speedy trial date would begin that day. Sumpter was then arraigned and his trial date was originally set for October 17, 2011. But instead Sumpter's trial occurred 100 days after his arraignment on March 12, 2012. While there were three continuances on the docket that were recorded as taken by the defendant, Sumpter was not aware of these continuances until after the occurred and did not consent to or desire any continuance. He was not present or able to consent to these continuances. It is not clear why the continuances were taken because no motions were filed and no record was taken on the continuance determination. From October 17, 2012, onward, Sumpter was essentially being held on consolidated charges and his speedy trial clock should have run 90-days from October 17.

Trial counsel's continuances amounted to ineffective assistance as they violated the duty of loyalty to her client and created a potential conflict given her duties to the court. While continuances attributable to a defendant do not normally count towards the State's time, Sumpter was not informed of the continuances and did not consent to them. As such, the continuances were not actually attributable to Sumpter. Trial counsel's

performance amounts to a breach of the duty of loyalty to Sumpter that had implications for his right to a speedy trial and created a situation where Sumpter felt he needed to file a *pro se* bail motion with the Court because he had not heard from counsel. *Cf. Sola-Morales v. State*, 300 Kan. 875, 891-99 (2014) (holding that an evidentiary hearing was required where counsel had lied to defendant about continuances which resulted in the defendant filing a *pro se* motion). As is discussed in the prosecutorial misconduct section, that letter-motion was then used to prejudicial effect by the State at trial. Accordingly, trial counsel's continuations without his consent prevented him effectuating his speedy trial rights and created an impermissible conflict of interest.

Issue VI: The lack of any African-Americans on Sumpter's jury venire denied him the right to a jury drawn from a fair cross-section.

A. Preservation of the Issue

This issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 394-96.)

B. Analysis

Sumpter was deprived of his constitutional right to a fair trial and due process because the jury panel drawn for his voir dire did not have any potential jurors that were African-Americans. The Supreme Court "has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975); *Peters v. Kiff*, 407 U.S. 493, 504 (1972). To make a fair-cross-section allegations, the criminal defendant must allege that: (1) the group excluded "is a distinctive group in the community"; (2) "the representation of this group in venires from which juries are selected is not fair and

reasonable in relation to the number of such persons in the community"; and (3) "that this underrepresentation is due to a systematic exclusion of the group in the jury-selection process." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (internal quotation omitted).

African-Americans are a distinctive group. *Accord Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (noting that the Court had previously held that African-Americans were properly designated as a distinctive group). Unfortunately, African-Americans are under-represented in Sedgwick County venires. At Sumpter's jury trial, there were no African-Americans in his venire even though African-Americans make up approximately 9.3% of the county's population.[5] This underrepresentation is likely the result of systematic features in the jury selection process.[6] The manner in which jury notifications are sent, the excuses that are accepted, and the manner in which those reasons are verified all can systemically affect the racial composition of the jury. For example, if the court regularly excuses jurors that cannot find a babysitter, African-Americans, who are overrepresented as single parents in Sedgwick County, would be underrepresented in the venire. In addition, previous studies of similar methods (using voting records supplemented by drivers' licenses) have shown that the method can actually increase the underrepresentation of African-Americans.[7]

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[5] This does not include the individuals that stated that they were two or more races on the census. In Sedgwick County, 1.2% of individuals identified as white and African-American. *See* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0500000US20173.

[6] Sumpter requested that the Court provide information on the racial make-up of Sedgwick County venires in 2012 to allow for a full statistical analysis of this underrepresentation. Sumpter also requested an evidentiary hearing to set out the process by which the District Court of Sedgwick County selects venires, the underrepresentation of African-Americans in venires, and why this underrepresentation is systemic. *See Berghuis*, 559 U.S. at 322 (noting that the state appellate court ordered the trial court to conduct an evidentiary hearing on the fair-cross-section claim).

[7] Ted C. Newman, *Fair Cross-Sections and Good Intentions: Representation in Federal Juries*, 18 JUSTICE SYSTEM J. 211, 226 (1996) (noting that a study of the U.S. District Court for the Northern District of Illinois found that

The trial court incorrectly denied his motion for a mistrial and objection to the jury panel because of the absence of any African-Americans. (R. X, 220:20-221:4; 319:15-320:5.) The trial court denied the motion because of the "systemic," random process of bringing in jurors brought in several minorities—at least two Hispanics and persons of European descent—to the venire. (R. X, 319:24-320:5.) But even a random process that systematically results in a venire that is grossly disproportionate to the population violates the Constitution. *Taylor*, 419 U.S. 522. Additionally, the presence of some minorities on Sumpter's venire, two men of Hispanic-descent, does not remedy the fact that a distinct group—African-Americans—had absolutely no representation on the panel. Undoubtedly Sumpter was "not entitled to a jury of any particular composition," but he should have at least been guaranteed that panels from which his jury was drawn did not "systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538.

Issue VII: Sumpter's sentencing was conducted in an unconstitutional manner and imposed unconstitutional requirements.

A. Preservation of the Issue

This issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 396-98.)

B. Analysis

Sumpter urges this Court to reconsider what he believes are improper holdings on *Apprendi*, post-release supervision, and the offender registry.

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supplementing voting records with drivers licenses information would actually increase the underrepresentation of African-Americans in the jury wheel and stating that based on this information the District decided not to change its jury plan).

1. The Offender Registry and Lifetime Post-Release Supervision Sentencing Requirements are Unconstitutional.

Sumpter's sentence included a requirement that he register on the offender registry for his lifetime, K.S.A. § 22-4906(d), and be subject to a lifetime post-release supervision under K.S.A. § 22-3717(d)(1)(G). These requirements violate Sumpter's U.S. and Kansas constitutional rights to due process, equal protection of the law, and cruel and unusual punishment. Sumpter is aware that similar challenges to the Kansas Sex Offender Registration Act ("KSORA") and the lifetime post-release supervision have been previously rejected. *State v. Wilkinson*, 269 Kan. 603 (2000); *State v. Scott*, 265 Kan. 1 (1998); *State v. Snelling*, 266 Kan. 986 (1999); *State v. Mossman*, 294 Kan. 901 (2012); *State v. Cameron*, 294 Kan. 884 (2012) (same); *cf. Matter of Hay*, 263 Kan. 822, 833 (1998). But those cases relied on the mistaken assumption that a registry would benefit public safety due to the belief that sexual offenders were habitual offenders and posed greater risks of recidivism. *Wilkinson*, 269 Kan. at 609; *Scott*, 265 Kan. at 11. But the very justification for unparalleled treatment of a certain class of offenders is completely disproven by the evidence.[8] Sumpter encourages this Court to reconsider the previous holdings on KSORA and the lifetime post-release supervision in light of the faulty assumptions on which it is based.

2. The Trial Court Violated Sumpter's Sixth and Fourteenth Amendment Rights under *Apprendi*.

The trial court sentenced Sumpter to an enhanced sentence based upon his prior

[8] Dr. Mark Kielsgard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247, 256 (2014) ("Recidivism rates for sex offenders are universally lower than other criminal offenders.").

criminal history and aggravating factors. Because the State was not required to prove the existence of these sentencing enhancement factors beyond a reasonable doubt, Sumpter's Sixth and Fourteenth Amendment Rights were violated. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Sumpter is aware that the Kansas Supreme Court has rejected this application of *Apprendi*, *see State v. Ivory*, 273 Kan. 44 (2002); *State v. Johnson*, 286 Kan. 824 (2008), but he contends that these cases were wrongly decided and warrant reconsideration or federal review.

Issue VIII: The district court erred in denying an evidentiary hearing because Sumpter's petition raised substantial issues and the State did not demonstrate the record conclusively showed no entitlement to relief.

A. Preservation of the Issue

This issue was raised in Sumpter's petition under K.S.A. 60-1507. (R. I, 398.)

B. Analysis

The trial court had three options available after the filing of a petition: (1) summarily deny the petition; (2) grant a preliminary hearing to admit limited evidence and consider arguments of counsel to determine the necessity of a full evidentiary hearing; (3) grant a full evidentiary hearing. *Bellamy v. State*, 285 Kan. 346 (2007). The Court can only summarily deny the petition if the record "conclusively shows" that the movant is not entitled to relief. *Id.* If the Petitioner raises a potentially substantial issue, the Court must at least grant a preliminary hearing where limited evidence may be admitted and the Court must make findings of fact and conclusions of law. *Id.* at 354. It is "extremely rare" to be able to resolve a claim of ineffective assistance of counsel without an evidentiary hearing. *Rowland v. State*, 219 P.3d 1212, 1218-19 (Kan. 2009).

Until there is a record available containing the evidence necessary to determine whether counsel made an informed choice or an "ignorant mistake," a court cannot decide the merits of an ineffective assistance claim. *Id.* at 1219. But the district court denied Sumpter's request for an evidentiary hearing even though his petition raised multiple substantial issues on which relief may be warranted. At a minimum, this Court should remand the petition back to the district court for an evidentiary hearing.

CONCLUSION

Sumpter's amended petition raises substantial issues as to the ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and additional constitutional errors. While the district court rested much of its decision on a lack of prejudice to Sumpter from any of these errors, the record as well as supporting case law demonstrate why this is one of the rare cases where post-conviction relief is warranted given both the deficient performance of counsel and the resulting prejudice to Sumpter. Because of the substantial issues raised in Sumpter's petition, this Court should at least remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 25th day of August, 2017, the undersigned hereby certifies that service of the above and foregoing Brief of Petitioner-Appellant was made by mailing a full and complete copy of same to:

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