No. 21-124378-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS; LOUD LIGHT; KANSAS APPLESEED CENTER FOR LAW AND JUSTICE; TOPEKA INDEPENDENT LIVING RESOURCE CENTER; CHARLEY CRABTREE; FAYE HUELSMANN; and PATRICIA LEWTER

Plaintiffs-Appellants

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; and DEREK SCHMIDT, in his official capacity as Kansas Attorney General

Defendants-Appellees

APPELLEES' RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

Appeal from the Kansas Court of Appeals
Case No. 21-124378-A

Appeal from the District Court of Shawnee County, Kansas
Honorable Teresa Watson, District Judge
District Court Case No. 2021-CV-000299

Bradley J. Schlozman (KS Bar #17621)
HINKLE LAW FIRM LLC
1617 N. Waterfront Parkway, Ste. 400
Wichita, KS 67206
Telephone: (316) 660-6296
Facsimile: (316) 264-1518
Email: bschlozman@hinklaw.com

TABLE OF CONTENTS

I. Introduction 1

K.S.A. 25-2438 1

II. Standard of Review 1

Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee Cnty. Comm'rs, 275 Kan. 525, 66 P.3d 873 (2003) 1, 2

Comanche Cnty. Hosp. v. Blue Cross of Kan., Inc., 228 Kan. 364, 613 P.2d 950 (1980) 2

Baker v. Hayden, 313 Kan. 667, 490 P.3d 1164 (Kan. 2021) 2

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014) 2

III. Argument 2

A. The Court of Appeals Correctly Held that Plaintiffs Lack Standing 2

League of Women Voters of Kan. v. Schwab, 62 Kan. App.2d 310, 513 P.3d 1222 (2022) 2, 3, 4, 5, 6

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014) 2

N.H. Right to Life Pol. Action Comm. v. Gardner, 99 F.3d 8 (1st Cir. 1996) 2, 3

Younger v. Harris, 401 U.S. 37 (1971) 3

K.S.A. 25-2438(a)(2) ..... 3, 5 ,6

K.S.A. 25-2438(a)(3) 3, 6

State v. Angelo, __ Kan. __, 2022 WL 4721238 (Sept. 30 2022) 3

K.S.A. 21-5202(i) 3, 4, 5

Black's Law Dictionary (11th ed. 2019) 3

K.S.A. 25-2483(a) 4

State v. Hobbs, 301 Kan. 203, 340 P.3d 1179 (2015) 5

K.S.A. 21-5202(f) 5

Elonis v. United States, 575 U.S. 723 (2015) 5, 6

Kan. Pub. Emps. Ret. Syst. v. Reimer & Koger Assocs., Inc., 262 Kan. 635, 941 P.2d 1321 (1997) 5, 6

State v. Chavez, 292 Kan. 464, 254 P.3d 539 (2011) 6

1. **Plaintiffs Wrongly Attach Significance to Press Releases Issued by Attorney General and Douglas County District Attorney** 6

K.S.A. 25-2438(a)(2) 6

K.S.A. 25-2438(a)(3) 6

League of Women Voters of Kan. v. Schwab, 62 Kan. App.2d 310, 513 P.3d 1222 (2022) 6, 7

Breedlove v. State, 310 Kan. 56, 445 P.3d 1101 (2019) 7

2. **LWV's Recent Election-Related Activities Underscore That Its Fears of Harms from K.S.A. 25-2438 are Not Credible** 7

K.S.A. 25-2438 ..... 7, 8

League of Women Voters of Kan. v. Schwab, 62 Kan. App.2d 310, 513 P.3d 1222 (2022) 8

K.S.A. 25-2438(a)(2) 8, 9

K.S.A. 25-2438(a)(3) 8, 9

Young Kansas Voters Embrace Political Power in Fight to Preserve Democracy, *Kansas Reflector* (September 15, 2022) 9

https://lwvk.org/ (last accessed on Oct. 17, 2022) 9

Roll v. Howard, 316 Kan. 278, 514 P.3d 1030 (2022) 9

State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (Kan. 2008) 10

3. Plaintiffs Lack Standing to Assert an Overbreadth Challenge 10

City of Wichita v. Trotter, 316 Kan. 310, 514 P.3d 1050 (Kan. 2022) 10

State v. Williams, 299 Kan. 911, 329 P.3d 400 (2014). 10

City of Wichita v. Wallace, 246 Kan. 253, 788 P.2d 270 (1990) 10

Winsness v. Yocom, 433 F.3d 727 (10th Cir. 2006) 11

Prime Media, Inc. v. City of Brentwood, 485 F.3d 343 (6th Cir. 2007) 11

K.S.A. 25-2438(a)(2) 11

K.S.A. 25-2438(a)(3) 11

League of Women Voters of Kan. v. Schwab, 62 Kan. App.2d 310, 513 P.3d 1222 (2022) 11

State v. Williams, 299 Kan. 911, 329 P.3d 400 (2014) 11

4. Plaintiffs Lack Standing to Challenge K.S.A. 25-2438(a)(2) and (3) on Vagueness Grounds 12

K.S.A. 25-2438(a)(2) 12

K.S.A. 25-2438(a)(3) 12

State v. Williams, 299 Kan. 911, 329 P.3d 400 (2014) 12

B. K.S.A. 25-2438(a)(2) and (3) Do Not Violate Sections 3 and 11 of the Kansas Constitution's Bill of Rights 12

K.S.A. 25-2438(a)(2) 12

K.S.A. 25-2438(a)(3) 12

Section 3 of the Kansas Constitution's Bill of Rights 12

Section 11 of the Kansas Constitution's Bill of Rights 12

1. **Plaintiffs' Freedom of Speech and Overbreadth Challenges Fail** 12

United States v. Alvarez, 567 U.S. 709 (2012)..... 12

Section 3 of the Kansas Constitution's Bill of Rights 12

Section 11 of the Kansas Constitution's Bill of Rights 12

2. **The Law is Not Unconstitutionally Overbroad** 13

City of Wichita v. Wallace, 246 Kan. 253, 788 P.2d 270 (1990)..... 13

Matter of A.B., 484 P.3d at 232..... 13, 14

State v. Boettger, 310 Kan. 800, 450 P.3d 805 (2019)..... 13

State v. Martens, 279 Kan. 242, 106 P.3d 28 (2005)..... 13

State v. Whitesell, 270 Kan. 259, 1 P.3d (2000)..... 14

State v. White, 53 Kan. App. 2d 44, 384 P.3d 13 (2016)..... 14

State v. Thompson, 237 Kan. 562, 701 P.2d 694 (1985)..... 14

State v. Huffman, 228 Kan. 186, 612 P.2d 630 (1980) 14

K.S.A. 25-2438(a)(2) 14

K.S.A. 25-2438(a)(3) 14, 15

K.S.A.25-2438(a)(1) 14, 15

3. **Plaintiffs' Vagueness Claims Lack Merit** 15

In re Comfort, 284 Kan. 183, 159 P.3d 1011 (2007)..... 15

K.S.A. 25-2438(a)(2) 16

K.S.A.25-2438(a)(1) 16

K.S.A. 25-2438(a)(3) 16, 17

League of Women Voters of Kan. v. Schwab, 62 Kan. App.2d 310, 513 P.3d 1222 (2022) 16

Agnew v. Gov't of D.C., 920 F.3d 49 (D.C. Cir. 2019) 16

In re BankVest Capital Corp., 360 F.3d 291 (1st Cir. 2004) 16

S.E.C. v. Familant, 910 F. Supp.2d 83 (D.D.C. 2012) 16

K.S.A. 25-2438 16

Kansans for Life, Inc. v. Gaede, 38 F. Supp.2d 928 (D. Kan. 1999) 16, 17

State v. Hobbs, 301 Kan. 203, 340 P.3d 1179 (2015) 17

C. ***The Challenged Statute Protects Election Integrity and Limits Voter Confusion*** *17*

K.S.A. 25-2438(a)(2) 17

K.S.A. 25-2438(a)(3) 17

Agnew v. Gov't of D.C., 920 F.3d 49 (D.C. Cir. 2019) 18

IV. Conclusion 18

K.S.A. 25-2438 18

CERTIFICATE OF SERVICE 19

I. – Introduction

Plaintiffs-Appellants' Supplemental Brief essentially restates the same arguments they made in their brief to the Court of Appeals, apparently believing that if they say the same thing over and over again, eventually it will become true. But no matter how many times Plaintiffs argue otherwise, nothing in K.S.A. 25-2438 proscribes the kind of conduct in which they seek to engage.

Plaintiffs continue to advocate for the least generous reading possible of a statute that merely seeks to ensure that private parties do not *knowingly* engage in conduct which misleads the public into thinking that such private parties are election officials. That is, Plaintiffs ask the Court to construe the statute as criminalizing the conduct of individuals whom certain members of the public mistakenly believe to be election officials, no matter how unreasonable that belief is and despite the absence of any intent whatsoever to convey such an impression. Not only does this argument fly in the face of traditional canons of statutory constructions, but actions taken by Plaintiff League of Women Voters of Kansas ("LWV") since this litigation commenced illustrates that no credible fear of prosecution exists. This Court should thus either affirm the district court's dismissal on the merits or affirm the Court of Appeals' dismissal of the appeal for lack of standing.

II. – Standard of Review

Plaintiffs seek review of a denial of a temporary injunction. This Court reviews a denial of a temporary injunction for abuse of discretion. *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee Cnty. Comm'rs*, 275 Kan. 525, 541, 66 P.3d 873 (2003). The burden is on

the Plaintiffs to show that the district court abused its discretion. *Comanche Cnty. Hosp. v. Blue Cross of Kan., Inc.*, 228 Kan. 364, 367, 613 P.2d 950 (1980).

Plaintiffs' pursuit of a temporary injunction is based on a facial, pre-enforcement challenge to a Kansas statute. Before they can proceed with any of their claims, however, Plaintiffs must establish that they have standing to raise the claims. *Baker v. Hayden*, 313 Kan. 667, Syl. ¶ 4, 490 P.3d 1164 (Kan. 2021). For a pre-enforcement challenge, Plaintiffs must prove that they have "an intention to engage in a course of conduct arguably affected with a constitutional interest, but prescribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). In determining the existence of standing, this Court here is required to construe statutory text, and such review is unlimited. *Gen. Bldg. Contractors*, 275 Kan. at 533.

III. Argument

A. The Court of Appeals Correctly Held that Plaintiffs Lack Standing

The Court of Appeals properly held that Plaintiffs failed to show "an objectively justified fear of real consequences as evidenced by a credible threat of prosecution or other consequences arising out of enforcement of the statute." *LWV v. Schwab*, 62 Kan. App.2d 310, 322, 513 P.3d 1222 (2022) (quoting *Susan B. Anthony List*, 573 U.S. at 159). Plaintiffs continue to proceed under the same erroneous premise that their own "subjective and irrational fear of prosecution" is enough to confer standing. *Id.* It is not. There must be a "substantial" threat of prosecution. *Id.* (citing *Susan B. Anthony List*, 573 U.S. at 164). Such fear must be "well-founded" and "not imaginary or wholly speculative." *Susan B. Anthony List*, 573 U.S. at 160. It also must be "objectively reasonable." *N.H. Right to Life*

Pol. Action Comm. v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996). "Persons having no fears of state prosecution except those that are imaginary or speculative, are not . . . appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42, (1971).

Plaintiffs maintain that a prosecution under K.S.A. 25-2438(a)(2) or (a)(3) can occur based solely upon the subjective beliefs of third parties that Plaintiffs are election officials, irrespective of how objectively unreasonable or naïve those beliefs are. Br. at 4-5. The Court of Appeals rightly rejected this theory. In drafting this statute, the Court observed, "the Legislature sought to subject only those individuals to prosecution who 'knowingly' engaged in the conduct prohibited by the provision." *LWV*, 62 Kan. App.2d at 323-24. Applying the doctrine of *in pari materia*, which is used to "reconcile and bring [statutory] provisions into workable harmony," *State v. Angelo*, __ Kan. __, 2022 WL 4721238, at *8 (Sept. 30 2022), the Court referenced Kansas' definition of "knowingly," which requires a charging prosecutor to show that a defendant is "aware that [his/her] conduct is *reasonably certain* to cause" another person to believe such defendant is an election official. *LWV*, 62 Kan. App.2d at 324 (citing K.S.A. 21-5202(i) (emphasis added).

Plaintiffs insist that the Court of Appeals improperly read an intent element into the statute by stating that "the misidentification must be preceded by an act or acts . . . with an eye toward the manifestation of that specific result." Br. at 4 (citing *LWV*, 62 Kan. App.2d at 326). To support their argument, Plaintiffs repeatedly emphasize different variations of the word "intent" as if that somehow proves their point. Br. at 4-5.[1] The Court of Appeals'

[1] Plaintiffs cite to the Black's Law Dictionary definition of "deceit," and emphasize the words "intentionally" and "designed to deceive" in that definition. Br. at 5 (quoting

statement, however, is entirely consistent with the "knowing" requirement in K.S.A. 25-2483(a), the *mens rea* mandated by the statute. In other words, "intent" is not what is at issue; the question in any prosecution would be whether the criminal defendant is "aware" that his/her "conduct is *reasonably certain to cause the result*." *LWV*, 62 Kan. App.2d at 324 (quoting K.S.A. 21-5202(i)) (emphasis added).

In correctly interpreting the reach of the statute, the Court of Appeals focused on the culpability of the *actor*, not the possible mistaken perceptions of *third parties*, as Plaintiffs propose. Br. at 5-7 (claiming it is possible to be prosecuted when third-parties mistakenly perceive Plaintiffs to be election officials despite no intent by Plaintiffs to be so perceived). That makes complete sense because the statute "strictly prohibits *knowing conduct* on the part of the speaker, which results in the misrepresentation of their [sic] identity." *LWV*, 62 Kan. App.2d at 326 (emphasis in original).

Plaintiffs continue to labor under a mistaken belief that the actor's state of mind is irrelevant and that the statute criminalizes communicative activity over which the actor has no control, i.e., how third-parties might perceive the actor's status (as an election official). Plaintiffs thus contend that they are susceptible to prosecution *even if they actively and openly try to avoid such a mistaken belief by third parties*. Br. at 4-7. This reading is not supported by the statute. Prosecutors must show that an actor *knew* his/her conduct would

---

DECEIT, Black's Law Dictionary (11th ed. 2019). While this definition does nothing to advance their argument, Plaintiffs conveniently omit that the word "deceit" in that same dictionary is defined as a person "knowingly" making a false statement and "knowingly" making a false representation that the person intends the other person to act on or rely upon. *See* DECEIT, Black's Law Dictionary (11th ed. 2019).

cause a third-party to believe he/she was an election official. *Cf. State v. Hobbs*, 301 Kan. 203, 210, 340 P.3d 1179 (2015) (holding that K.S.A. 21-5202(f) required the prosecution to prove, for an aggravated battery offense, that the defendant both knowingly engaged in the conduct and knew that the result of such conduct was reasonably certain). As succinctly stated by the court below, an actor must be engaging in conduct despite knowing that he/she is "reasonably certain to give the impression to event attendees, or '*would*,' *not* could, cause an event attendee to believe the appellants [are] election officials." *LWV*, 62 Kan. App.2d at 325 (citing K.S.A. 25-2438) (emphasis in original).

Plaintiffs next resort to telepathy, suggesting that they *know* from prior interactions with the public that they are improperly perceived to be election officials, notwithstanding their best efforts to disabuse voters of this mistaken belief. Br. at 5-7. Even if Plaintiffs are the mind-readers they purport to be – and it is not clear how a prosecutor would ever prove such a *fact* – the objective unreasonableness of the listener's/reader's belief as to the Plaintiffs' status during these exchanges undercuts any possible criminal exposure.

First, the definition of "knowingly" in K.S.A. 21-5202(i) must be interpreted from an objective point of view. The notion that K.S.A. 25-2438(a)(2) focuses solely on the subjective views of individuals with whom Plaintiffs interact – meaning that the culpable mental state is implicated any time the most naïve and gullible member of the public (the lowest common denominator, if you will) misperceives another's actions, notwithstanding strong evidence to the contrary – defies common sense and borders on frivolity.

Second, it is axiomatic that "wrongdoing must be conscious to be criminal." *Elonis v. United States*, 575 U.S. 723, 734 (2015); *accord Kan. Pub. Emps. Ret. Syst. v. Reimer &*

Koger Assocs., Inc., 262 Kan. 635, 644, 941 P.2d 1321 (1997) ("The court must give effect to the legislature's intent even though words, phrases or clauses at some place in the statute must be omitted or inserted."). Thus, even if K.S.A. 25-2438(a)(2) and (a)(3) could be read as Plaintiffs suggest, this Court must "read into the statute" the requisite "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Elonis*, 575 U.S. at 736 (quotations omitted).

Third, to the extent there is any doubt as to the criminal statute's meaning, the rule of lenity applies which would prohibit a finding that unknowing, innocent mistakes may be prosecuted. *See State v. Chavez*, 292 Kan. 464, 468, 254 P.3d 539 (2011) ("When there is reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction."). Thus, it is not enough for a prosecutor to simply show that a bystander could mistakenly interpret a defendant's words or actions.

1. Plaintiffs Wrongly Attach Significance to Press Releases Issued by Attorney General and Douglas County District Attorney

As they did below, Plaintiffs attach almost mystical significance to a press release issued by the Attorney General's Office in the wake of an announcement by the Douglas County District Attorney that she would not enforce K.S.A. 25-2438(a)(2) or (3). Br. at 8-10. This is silly. The Attorney General simply said that election crimes, "like all other crimes, will be prosecuted when warranted by the evidence," and that his office "will make . . . prosecution decision[s] based on the facts and law applicable to any individual case." *LWV*, 62 Kan. App.2d at 327-28. This statement, as the Court of Appeals recognized, is merely a recitation of the Attorney General's responsibility as the chief law enforcement

official of the State. *Id.* at 328. What *would* be dangerous, however, would be to defer to the Douglas County prosecutor's comments in interpreting the statute. Indeed, as Justice Stegall noted in his concurring opinion in *Breedlove v. State*, 310 Kan. 56, 72, 445 P.3d 1101 (2019), "giving prosecutors the authority to decide what the law is gives rise to doubts about whether such laws violate the doctrine of separation of powers and invite arbitrary power into the criminal justice system." (quotations omitted and cleaned up).

2. LWV's Recent Election-Related Activities Underscore That Its Fears of Harms from K.S.A. 25-2438 are Not Credible

Plaintiff LWV's recent activities confirm that it lacks a credible fear upon which to base its standing on these claims. In seeking a temporary injunction, LWV claimed that it was curtailing its voter registration efforts out of fear of prosecution. R. I, 115-116, at ¶¶ 23-25. To demonstrate its injury and potential irreparable harm, LWV filed an affidavit in the district court from Jacqueline Lightcap, its co-president, in which she stated:

> 3. . . . The Kansas League [of Women Voters] *has had to suspend all voter registration and education events* due to fear of prosecution for its members and volunteers under the Restriction. This is not a decision we made lightly. But as I explained in my first affidavit in this case, the threat of criminal prosecution of Kansas League members and volunteers—many of whom are older—is a risk we do not think we can bear, as unfortunate as it is for the achievement of our mission.
>
> 4. As a result of the Restriction, the Kansas League [of Women Voters] has had to cancel more than a dozen voter registration drives in the next two months. In Johnson County, the local Kansas League Chapter has canceled three voter registration events at local senior living centers on July 1, July 12, and August 12. In the Lawrence-Douglas County League Chapter, that number jumps to seven, including events at public libraries, local farmers markets, and a local grocery store. The Leavenworth County League Chapter has had to pull down two events at local farmers markets ahead of the upcoming local primary elections. Meanwhile, the Manhattan-Riley County League Chapter has canceled three voter registration events, including one at

> the Everybody Counts community-wide event on August 7, which is the League's second largest event each year in terms of voters registered. The Manhattan-Riley County League Chapter is also determining whether it can hand out voter registration literature at Kansas State University's welcome-back week in late August. In Salina, the League Chapter currently thinks it must cancel its annual Back-to-School Bash on July 30, and the Topeka-Shawnee County League Chapter will likely cancel its registration event at a naturalization ceremony in August if the challenged provision remains in place. Finally, the Wichita Metro League Chapter is canceling two registration events in July and August and will forego registering voters at the Visions of Our Future rally on July 10, even though it has already paid to partially sponsor the event.

R. II, 155-156 at ¶¶ 3-4 (emphasis added).

The suspension of "all voter registration and education events due to fear of prosecution" has been the primary basis for LWV's standing in its constitutional challenge to K.S.A. 25-2438. R. II, 237-238, at ¶ 16 (describing canceling registration events); *id.* at 387-388 (challenging "Voter Education Restriction" because it "threatens them with felony prosecution for engaging in their regular voter registration and engagement activities" and because they "*already* had to curtail, and in many instances entirely end, their election related activities due to the Restriction."); *cf. LWV*, 62 Kan. App.2d at 322 ("[A]ppellants' argument consists of a claim that they 'canceled and curtailed voter engagement and registration activities across the state, out of fear that their actions could be misconstrued and result in criminal liability' under subsections (a)(2) and (a)(3)"). In their Supplemental Brief, Plaintiffs ask this Court to reverse the lower courts' rulings so that they can "return to advocating for participation in the political process without fear of prosecution." Br. at 16.

Whatever the sincerity of LWV's fear of prosecution may have been at the time it filed this suit, it appears to have had a change of heart. As noted in a recent on-line media article (replete with pictures), *see* "Young Kansas Voters Embrace Political Power in Fight to Preserve Democracy," *Kansas Reflector* (Sept. 15, 2022) (Exhibit A), LWV clearly *has* been engaged in voter registration activities during the pendency of this appeal despite its consistent claims to the contrary. Indeed, the article interviews and even photographs a Washburn University student who had stopped at an LWV voter registration booth on the campus lawn on August 30, 2022. The article also quoted and photographed one of the LWV volunteers who was helping to staff a separate voter registration booth at the Topeka and Shawnee County Public Library on August 22, 2022. Given that LWV's own website claims that it is a "grassroots, volunteer, non-partisan political organization with nine local Leagues across the state," https://lwvk.org/ (last accessed on Oct. 17, 2022), these individuals clearly appear to have been acting on behalf of LWV.

The fact that LWV is engaged in the very activities it claimed to be avoiding due to a fear of prosecution shows that its fear was not, and is not, credible. Without a credible fear of prosecution, the organization lacks an injury-in-fact that would support standing to challenge K.S.A. 25-2438(a)(2) and (3) and its appeal must be dismissed for lack of jurisdiction.

Furthermore, given that LWV seeks a temporary injunction, and ultimately a permanent injunction, on the basis that it could not undertake the activities in which it is currently engaging, its recently reported conduct underscores that its constitutional attack on the statute is now moot. *See Roll v. Howard*, 316 Kan. 278, 284, 514 P.3d 1030 (2022)

("A case is moot when a court determines that it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights."); *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 895, 179 P.3d 366 (Kan. 2008) (Kansas appellate courts do not decide moot questions or render advisory opinions).

While Defendants lack firm evidence demonstrating that any Plaintiffs other than LWV have acted so brazenly inconsistent with the injuries they claim to have suffered in their Amended Petition and motion for temporary injunction, LWV's actions underscore the absence of any credible fear of prosecution in this case. Defendants will not speculate as to LWV's motives in engaging in conduct so at odds with its litigating positions.

3. Plaintiffs Lack Standing to Assert an Overbreadth Challenge

Plaintiffs next argue that even if their own actions do not violate the statute, the Court should nevertheless permit them to proceed with their overbreadth theory based on third-parties possibly being prosecuted. Br. at 10. Plaintiffs contend that they "need not establish a personal injury arising from th[e] law" to proceed on this claim. *Id.* (quoting *City of Wichita v. Trotter*, 316 Kan. 310, 312, 514 P.3d 1050 (Kan. 2022)). True enough. Following federal precedent, the Kansas Supreme Court has held that an overbreadth claim challenging First Amendment rights may be pursued on behalf of third parties "because the mere existence of the statute could cause a person not before the Court to refrain from engaging in constitutionally protected speech or expression." *State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400 (2014) (quoting *City of Wichita v. Wallace,* 246 Kan. 253, 267, 788 P.2d 270 (1990). But while overbreadth functions as an exception to the general rule that

plaintiffs must show their own rights (as opposed to the rights of third parties) have been violated, it does not exempt litigants from establishing the other basic elements of standing, i.e., injury-in-fact, causation, and redressability. *Winsness v. Yocom*, 433 F.3d 727, 734 (10th Cir. 2006); *accord Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007).

Plaintiffs claim that the Court of Appeals' "rationale" for rejecting their overbreadth claim was due to a misapplication of overbreadth standing law. Br. at 11. But the appellate court's analysis was spot on. The panel majority held that Plaintiffs had not established an injury-in-fact because their concerns over the application of K.S.A. 25-2438(a)(2) and (3) "faile[d] to rise above a mere subjective fear[.] *LWI*, 62 Kan. App.2d at 328. Once the statute is properly interpreted, and Plaintiffs' strained and unreasonable spin on its scope is set aside, it becomes clear that Plaintiffs failed to "demonstrate [that] their actions subject them to a credible threat of prosecution[.]" *Id.* at 330. The majority thus rightly rejected the dissent's view that overbreadth standing rules applied. This is not an issue of the Court of Appeals reviewing the "merits" of Plaintiffs' claim or applying standing principles to the merits. *See* Br. at 11-12 (wrongly citing "two fatal errors"). Plaintiffs failed to establish the initial requirement to proceed with *any* claim, i.e., that *they* suffered an injury-in-fact from the statute. Without an injury-in-fact, they cannot challenge the statute on behalf of others under the overbreadth third-party standing exception. *Williams*, 299 Kan. at 918-19.

4. Plaintiffs Lack Standing to Challenge K.S.A. 25-2438(a)(2) and (3) on Vagueness Grounds

Plaintiffs' constitutional vagueness attack on K.S.A. 25-2438(a)(2) and (3) also fails. "[A] party asserting vagueness 'cannot challenge the constitutionality of the statute on the grounds that the statute may conceivably be applied unconstitutionally in circumstances other than those before the court.'" *Williams*, 299 Kan. at 919 (citations omitted). As discussed above, Plaintiffs do not knowingly seek to misrepresent themselves as election officials. And because their self-described conduct is not proscribed by the statute, they cannot raise a vagueness challenge.

B. K.S.A. 25-2438(a)(2) and (3) Do Not Violate Sections 3 and 11 of the Kansas Constitution's Bill of Rights

1. Plaintiffs' Freedom of Speech and Overbreadth Challenges Fail

Even if Plaintiffs had standing without suffering an injury-in-fact, their claim still fails because the statute does not criminalize the behavior in which they claim to engage. For purposes of Plaintiffs' freedom of speech and overbreadth claims, Plaintiffs repeat their standing argument, i.e., that the statute penalizes conduct potentially entirely on a third-party's innocent misunderstanding. Br. at 12-13. As discussed previously, the challenged statute prohibits only those acts which an actor is "reasonably certain" would cause others to falsely believe he/she is an election official. And there is no constitutionally protected right under the First Amendment or its Kansas analogue to knowingly impersonate an election official. *See United States v. Alvarez*, 567 U.S. 709, 721 (2012) ("Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government

processes, quite apart from merely restricting false speech."). Thus, the conduct prescribed by the statute does not violate sections 3 and 11 of the Kansas Bill of Rights.

2. The Law is Not Unconstitutionally Overbroad

The fact that the law only restricts non-protected conduct is also a reason to reject Plaintiffs' overbreadth claim. To assert an overbreadth claim, Plaintiffs must show that the statute reasonably could cause "a person not before the Court to refrain from engaging in constitutionally protected speech or expression." *Wallace,* 246 Kan. at 267. Yet, under the plain and logical reading of the statute at issue here, there are no parties on behalf of whom Plaintiffs could assert a third-party overbreadth claim. The hypothetical third-party would either (1) lack the requisite knowledge to be subject to criminal prosecution under the statute, meaning the statute would not prohibit the third-party's conduct, or (2) have had to have engaged in conduct falling outside the protection of the First Amendment. Either way, Plaintiffs' overbreadth argument fails.

However, even if this Court determines that the statute could be read as Plaintiffs urge, their overbreadth challenge still fails because precedent dictates that this Court must issue a limiting construction rather than invalidate the statute. A litigant challenging a statute as overbroad bears the burden of establishing that (1) constitutionally protected activity is a significant part of the statute's target, and (2) there is no satisfactory method to sever the statute's constitutional applications from its unconstitutional applications. *Matter of A.B.*, 484 P.3d at 232 (citing *State v. Boettger*, 310 Kan. 800, 804, 450 P.3d 805 (2019)). "The overbreadth doctrine should be employed sparingly and only as a last resort." *State v. Martens*, 279 Kan. 242, 253, 106 P.3d 28 (2005). An overbreadth

challenge can only be successful if the challenged law "trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep." *State v. Whitesell*, 270 Kan. 259, 271, 1 P.3d 887 (2000) (citation omitted). "This court presumes statutes are constitutional" and "the party attacking the statute . . . has the burden of overcoming that presumption." *State v. White*, 53 Kan. App. 2d 44, 58, 384 P.3d 13 (2016) (citations omitted). The fact that "a statute appears on its face to make constitutionally protected speech criminal[,] does not . . . necessarily require that it be struck down as overbroad." *State v. Thompson*, 237 Kan. 562, 564, 701 P.2d 694 (1985). "A statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected and, so construed, the statute will thereafter be immune from attack on the grounds of overbreadth." *Id.* It is this Court's "responsibility to uphold the constitutionality of state statutes whenever possible." *State v. Huffman*, 228 Kan. 186, 192, 612 P.2d 630 (1980)).

The purpose of the statute in dispute here is to ensure election integrity and avoid voter confusion by prohibiting individuals from knowingly engaging in conduct that falsely conveys their status as an election official. Even accepting Plaintiffs' theory – that a person's purely innocent conduct could violate the statute – such actions are clearly not a "significant part of the statute's target." *Matter of A.B.*, 313 Kan. at 143. While Plaintiffs aver that prohibiting knowingly misleading activities cannot be the target of K.S.A. 25-2438(a)(2) or (a)(3) because (a)(1) already covers such conduct, Br. at 13-14, that is not accurate. K.S.A. 25-2438(a)(1) prohibits knowingly *representing* oneself as an election official, whereas subsections (a)(2) and (a)(3) address more indirect and/or subtle conduct

designed to create a false appearance of election official status. In other words, the statute prohibits an individual from knowingly taking actions that (1) falsely represents that he/she is an election official, (2) falsely gives the appearance that he/she is an election official, or (3) would cause another to falsely believe that he/she is an election official. Indeed, in their vagueness arguments, Plaintiffs even concede that (a)(1) and (a)(3) criminalize separate behavior. *See* Br at 14. Regardless, whether it is because they lack standing, because they misread the statute, or because this Court issues an authoritative construction, Plaintiffs' overbreadth argument must be rejected.

3. Plaintiffs' Vagueness Claims Lack Merit

Even if they have standing, Plaintiffs' vagueness claim does not stand up to scrutiny. In examining whether a statute is unconstitutionally vague, this Court uses a two-part test that considers (1) "whether the statute conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice" and (2) "whether the statute adequately guards against arbitrary and discriminatory enforcement." *In re Comfort*, 284 Kan. 183, 199, 159 P.3d 1011 (2007). The Court's focus is "whether the language of the provision conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice." *Id.* "A statute that either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." *Id.* (citations omitted). "At its heart, the test for vagueness is a common-sense determination of fundamental fairness." *Id.* (citations omitted).

Plaintiffs argue that K.S.A. 25-2438(a)(2) is unconstitutionally vague because no one can "describe the prohibited behavior," and any conceivable violations are already covered by subsections (a)(1) and (a)(3), which they separately challenge. But the Court of Appeals had little difficulty understanding the statute, and it correctly explained that the conduct prohibited by the statute must be undertaken "knowing that [the activities] were reasonably certain to give the impression to event attendees, or '*would*,' *not* could, cause an event attendee to believe the appellants were election officials." *LWV*, 62 Kan. App.2d at 325. Furthermore, even if some proscribed conduct can be prosecuted under multiple provisions, that is not a basis for striking down a criminal statute. *See Agnew v. Gov't of D.C.*, 920 F.3d 49, 57 (D.C. Cir. 2019); *In re BankVest Capital Corp.*, 360 F.3d 291, 301 (1st Cir. 2004); *S.E.C. v. Familant*, 910 F. Supp.2d 83, 95 (D.D.C. 2012).

In their discussion of K.S.A. 25-2438(a)(3), Plaintiffs again focus on the subjective understanding of third parties, rather than an actor's own state of mind. Plaintiffs contend that "a person could be prosecuted under section (a)(3) for engaging in conduct that they [sic] do not believe gives the impression of being an election official so long as they know someone else might reasonably disagree[.]". Br. at 15. As explained repeatedly, that argument misreads K.S.A. 25-2438, is inconsistent with the Kansas *mens rea* statute, and ignores fundamental criminal law principles.

Furthermore, the only case Plaintiffs cite in support of this position – *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928 (D. Kan. 1999), a dispute over regulatory campaign filing requirements – is of no help to their position. Br. at 14. In *Kansans for Life*, the court found vague a regulation which defined "express advocacy" as "[a] communication

which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office[.]" 38 F. Supp.2d at 931. The court concluded that "if reasonable people could disagree whether the communication urges a vote for or against a particular candidate, then the message is subject to the regulatory disclosure requirements[.]" *Id.* at 936-37. By contrast, K.S.A. 25-2438(a)(3) requires an individual to engage in action that he/she *knows would* cause another person to believe such individual is an election official before a conviction can be obtained. *See Hobbs*, 301 Kan. at 210 ("[T]he culpable mental state" applies "to all material elements of a crime if the statute does not distinguish among the material elements of the crime."). Plaintiffs' vagueness theory, that individuals may be prosecuted even if "they do not believe" their conduct "gives the impression of being an election official," but another "might reasonably disagree," ignores the statute's *mens rea*.

C. The Challenged Statute Protects Election Integrity and Limits Voter Confusion

Finally, Plaintiffs ask the Court to ignore the clear purpose of the statute, to ensure that voters are not mislead, and simply declare the statute serves no purpose because other statutes may accomplish the same objectives. Br. at 15-16. Yet the provisions cited by Plaintiffs – outright false election official representation, voter intimidation, transmitting false information, and not delivering voter registration applications – do not fully address the concerns of K.S.A. 25-2438(a)(2) and (a)(3). Those provisions were adopted by the Legislature to address indirect and/or subtle conduct by individuals that has the effect of creating a false appearance as to their status as an election official. But even if the other

provisions did cover the same purpose, the fact that targeted conduct overlaps multiple statutes is not a basis for invalidating a statute. *See Agnew*, 920 F.3d at 57.

IV. – Conclusion

For the reasons stated above and those set forth in Defendants-Appellees' briefing in the Court of Appeals, Defendants ask that this Court affirm the Court of Appeals' dismissal of this appeal for lack of jurisdiction. To the extent this Court reaches the merits, this Court should affirm the district court's decision that K.S.A. 25-2438 is constitutional.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman
Bradley J. Schlozman (Bar # 17621)
Scott R. Schillings (Bar # 16150)
HINKLE LAW FIRM LLC
1617 North Waterfront Parkway, Suite 400
Wichita, KS 67206
Telephone: (316) 267-2000
Facsimile: (316) 630-8466
Email: bschlozman@hinklaw.com
Email: sschillings@hinklaw.com

CERTIFICATE OF SERVICE

I certify that on this 26th day of October 2022, I electronically filed the foregoing Appellees' Response to Appellants' Supplemental Brief with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

Pedro L. Irigonegaray
Nicole Revenaugh
Jason Zavadil
J. Bo Turney
IRIGONEGARAY, TURNEY, & REVENAUGH LLP
1535 S.W. 29th Street
Topeka, KS 66611
Tel: (785) 267-6115
Email: Pedro@ITRLaw.com
Email: Nicole@ITRLaw.com
Email: Jason@ITRLaw.com
Email: Bo@ITRLaw.com

David Anstaett
PERKINS COIE LLP
35 East Main Street, Suite 201
Madison, WI 53703
Tel: (608) 663-5408
Email: danstaett@perkinscoie.com

Elizabeth C. Frost
Justin Baxenberg
Henry J. Brewster
Mollie A. DiBrell
Richard A. Medina
Marisa A. O'Gara
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
Tel: (202) 968-4513
Email: efrost@elias.law
Email: jbaxenberg@elias.law
Email: hbrewster@elias.law
Email: mdibrell@elias.law
Email: remdina@elias.law
Email: mogara@elias.law

/s/ *Bradley J. Schlozman*
Bradley J. Schlozman (KS Bar #17621)

Exhibit A – Article from Kansas Reflector

EXHIBIT
A

CIVIL RIGHTS | ELECTION 2022 | POLITICS + GOVERNMENT

Young Kansas voters embrace political power in fight to preserve democracy

Record turnout for abortion vote in Aug. 2 primary counters concerns about attempts to undermine election integrity

BY: **SHERMAN SMITH** - SEPTEMBER 15, 2022 3:55 AM

Isabella Vermooten, an 18-year-old Washburn University student, stops at a League of Women Voters of Topeka and Shawnee County voter registration booth Aug. 30, 2022, on the campus lawn. Vermooten says voting is a way for people her age to force older adults to listen to them. (Sherman Smith/Kansas Reflector)

TOPEKA – Isabella Vermooten is the kind of person who "literally went through and pestered everyone in my contacts" until they showed her evidence they were registered to vote.

The 18-year-old from Lawrence was eager to cast a ballot for the first time in the Aug. 2 primary, where access

This story is part of a project called Democracy Day, in which newsrooms across the country are shining a light on threats to democracy.

to reproductive health care was on the line. An unexpected landslide vote to preserve abortion rights only intensified her enthusiasm for democracy.

Vermooten is a freshman political science major at Washburn University in Topeka, where she stopped by a League of Women Voters registration booth in late August on the campus lawn. She spoke passionately about using the ballot box to guarantee basic rights and representation for her family and community.

"I mean, heck, half the women in my family wouldn't be alive if they wouldn't be able to have an abortion, because they miscarried or some other health effect," Vermooten said. "I want my little sister, if she ever, God forbid, was sexually assaulted, I want her to be able to have control over her body."

Vermooten paused for a deep exhale.

"Sorry," she continued. "It's really important to me. You know when you were younger and you wish that adults would listen to you? That's what this gives you – the right to be heard."

Young adults in Kansas, despite being disillusioned with government, now recognize their political power. Their willingness to vote in record numbers serves as a counterbalance to the prevailing sentiment that democracy is failing.

Mary Galligan, a volunteer with the League of Women Voters of Topeka and Shawnee County, presents a flyer with information about how to register and participate in the November 2022 election. (Sherman Smith/Kansas Reflector)

Researchers at Tufts University predict young voters in Kansas could have a decisive impact in the outcome of the governor's race and 3rd District congressional race. The university's Center for Information and Research on Civic Learning and Engagement, or CIRCLE, identified a spike in voter registrations among 18- to 24-year-olds in Kansas ahead of the primary election.

"It looks like young people are, as always, engaged and paying attention," said Ruby Belle Booth, election coordinator at CIRCLE.

"And a lot of young people have the intention to vote, just as many if not more than in 2018. And I think that young people are definitely attuned to a lot of the really big issues – abortion obviously being one of them."

But when those young voters consider their choices in November, they will see on their ballots the names of congressmen who opposed the certification of the 2020 election results and a candidate for attorney general whose political career is built on lies about widespread voter fraud.

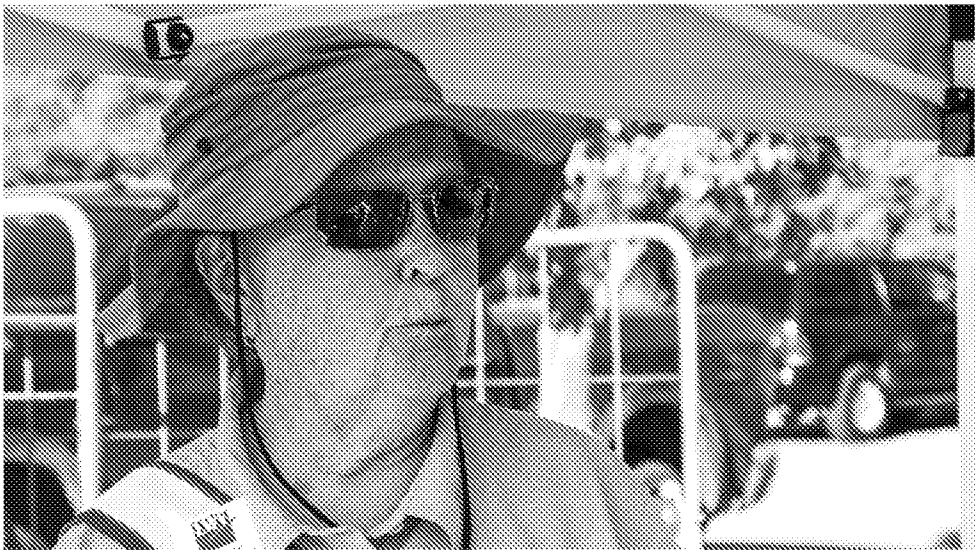
Election deniers even challenged the validity of the Aug. 2 vote on the constitutional amendment, subjecting exhausted election officials to a frivolous and costly recount.

The GOP-controlled Legislature, keenly aware of how President Donald Trump's Big Lie appealed to some Republicans, passed new laws that jeopardize participation in elections. Some legislators even courted hucksters who peddled debunked myths about election integrity.

And the sheriff of the state's most populous county spreads voter fraud conspiracies without providing evidence to support his extraordinary claims. Lawmakers have placed another constitutional amendment on the November ballot to protect the sheriff from being replaced by county commissioners.

Mary Galligan, a volunteer with the League of Women Voters of Topeka and Shawnee County, said these threats to democracy are troubling.

"We're teetering," Galligan said. "There's a lot of social rumble, or social murmur, that there's something wrong. We don't know what. We can't put our finger on it. But there's something wrong. Rather than increasing people's faith in the process that we have, it's discouraging people. It's making them hesitant."



Mary Galligan engages prospective voters at a League of Women Voters of Topeka and Shawnee County voter registration booth Aug. 22, 2022, at the Topeka and Shawnee County library. (Sherman Smith/Kansas Reflector)

Pale, male and stale

Galligan, gruff and 72, says the only good thing to come out of the Vietnam War "was that people my age learned that voting was important."

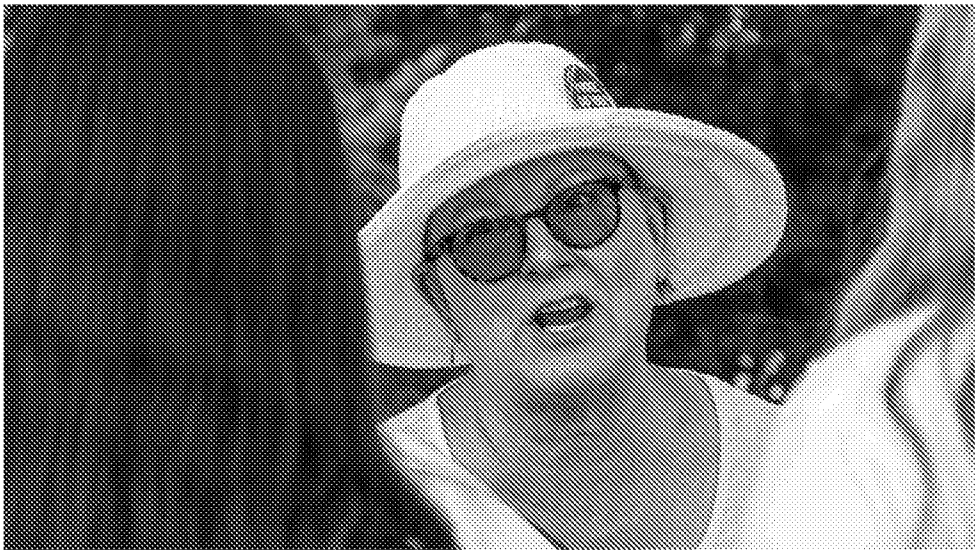
She bulldogged shoppers at the farmer's market on a hot August morning outside the public library, asking if they were registered to vote and informed about November ballot questions. Her 65-year-old sidekick, Gretchen Gleue, said the Watergate scandal had motivated her to vote.

Now, they said, the U.S. Supreme Court decision to overturn Roe v. Wade has become a catalyst for compelling young women to vote.

"They're outspoken," Gleue said. "They don't want male, pale and stale making decisions that impact them."

Amber Dickinson, an associate professor of political science at Washburn University, said record turnout for the Aug. 2 primary is a clear indication that politics is becoming more accessible to young people.

"Thank goodness," Dickinson said. "For so long in America, younger voters have been alienated from political discussions, and in many cases, issues concerning younger voters are never highlighted during election seasons or legislative sessions. With issues like the abortion amendment, minimum wage, and student loan debt, politicians are finally offering young people a seat at the table."



Gretchen Gleue, of the League of Women Voters of Topeka and Shawnee County, encourages students to register to vote during an Aug. 30, 2022, event at Washburn University. (Sherman Smith/Kansas Reflector)

Booth, the Tufts University researcher, said young people are especially interested in reproductive rights, climate, gun violence and the economy.

A lot of young people talk about being disillusioned with democracy, Booth said. Among adults younger than 30, 69% agree that elected officials are motivated by selfish reasons. More than half agree that politics have become too partisan and no longer meet the challenges the U.S. is facing. Republicans have a slightly greater feeling of dissatisfaction, she said, but the feelings are prevalent across partisan lines.

"People pretty overwhelmingly agree that the country's not on the right track," Booth said. "They don't feel like government necessarily represents them or is working effectively."

There is irony in the research: Young voters who are more cynical about government are also more likely to vote.

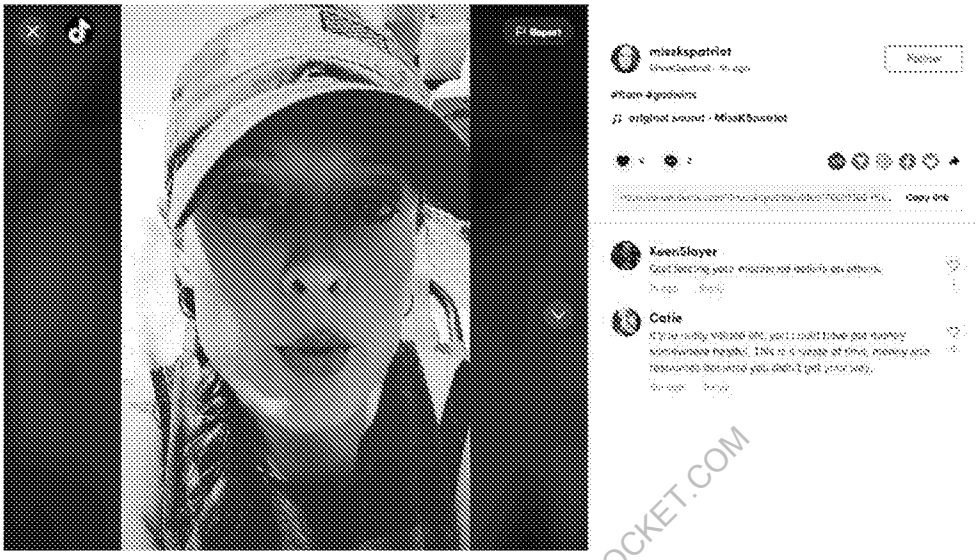
"Young people tend to not be disillusioned about their own power within our democratic system," Booth said. "I think that that highlights something really important when it comes to talking about young people in democracy, which is that even if they don't like the system, they can still participate in it, they're still willing to participate in it, and they know their role in democracy."

Vermooten, the student who voted for the first time in the Aug. 2 primary, said "it felt amazing." Opposition to the constitutional amendment, she pointed out, transcended political divides.

"It didn't matter whether you were red or blue or undecided, because this was a multiparty issue," Vermooten said. "So anyone

who felt this way voted this way. They put aside their differences and they were able to vote on this monumental issue and make their voices heard."

She added: "It was awe-inspiring, honestly."



Melissa Leavitt appears in a video she posted on TikTok about her request for a statewide recount of the vote on constitutional amendment on abortion. (Kansas Reflector screen capture from TikTok)

Hassle factor

The way Melissa Leavitt sees it, "the mainstream media is the worst thing that ever happened to this country."

The Colby resident lashed out at the media in a series of TikTok posts as election officials wrapped up their recount of the abortion amendment vote.

Leavitt, with the help of a faith-based online fundraiser and Wichita anti-abortion activist Mark Gietzen, agreed to pay $119,000 to recount 556,364 ballots by hand. The effort moved the margin of rejection by 63 votes.

Secretary of State Scott Schwab, who defeated an election denier in the GOP primary, said the recount proved there is no systemic election fraud in Kansas.

Leavitt remained unconvinced.

In an Aug. 19 interview with Gab TV, she blamed the media for "trying to weaponize our government against us." In her TikTok videos, she complained that reporters were too stupid to understand the truth about election fraud. She encouraged supporters to ready themselves for a fight.

"Now is the time," Leavitt said in an Aug. 24 video. "I believe a shift has taken place, and this is the last push. And things are going to get wild, and just take heart, guys, because I think it's all for the best."

Leavitt's distrust in the election system is an extension of lies told by political leaders for personal gain.

Former Secretary of State Kris Kobach falsely claimed for years that elections were compromised by illegal immigrants. He convinced legislators to support an unconstitutional law that required new voters to prove their citizenship, disenfranchising more than 30,000 eligible voters. The American Civil Liberties Union successfully challenged the law in a case where even the federal judge mocked Kobach's inability to prove his claims, and ordered him to take additional law classes.

Kobach is now the Republican nominee for attorney general.

Three incumbent Republican congressmen – U.S. Reps. Tracey Mann, Jake LaTurner and Ron Estes – all voted against the certification of the 2020 presidential election.

Douglas Frank appears March 15, 2022, before the House Elections Committee, where he defended his unproven claims about how easy it is to steal an election. (Kansas Reflector screen capture from Kansas Legislature YouTube channel)

Johnson County Sheriff Calvin Hayden claimed his office received 200 tips of election fraud, but an open records request by KCUR showed there was only one complaint, which wasn't credible enough to warrant prosecution.

At a recent public forum, Hayden claimed "nefarious" individuals were trying to compromise the county's voting machines. The warning came with this acknowledgement: "I can't prove it."

Local officials who were concerned by Hayden's behavior last year wondered if the sheriff should be an appointed position. The

Legislature responded by proposing a constitutional amendment that would require sheriffs in Kansas to be elected. The question will be answered by voters statewide in November.

In March, Republican lawmakers invited Ohio math teacher Douglas Frank to testify about his discredited algorithm for finding irregularities in voting data. Frank and other hucksters then entertained a Topeka church crowd, which included Republican legislators, with bogus conspiracies.

Dickinson, the Washburn University professor, said it is "deeply concerning to hear people make claims of fraudulent voting when it has been proven over and over again that this is simply not happening in Kansas."

"Voters should be extremely concerned," Dickinson said. "We are living in a time when election certainty is crucial to instill us with confidence in our leaders, and voters should not have to worry that their vote will be questioned because someone is not pleased with the outcome."

State lawmakers relied on concerns about hypothetical voter fraud to pass new laws restricting advanced voting and outreach efforts.

Galligan, the League of Women Voters volunteer, said voters have to be "absolutely doggedly determined" to participate in elections.

"The hassle factor has come from a variety of the laws that sometimes make it a little harder to register, make it a little harder to make a plan to vote," Galligan said. "It doesn't take much, as distracted and busy as people are today. We end up with discouraged voters."

Gretchen Gieue, left, and Mary Galligan appear at a League of Women Voters of Topeka and Shawnee County voter registration booth Aug. 22, 2022, at the Topeka and Shawnee County Public Library. (Sherman Smith/Kansas Reflector)

Democracy lives

Social media platforms and polarizing pundits have intensified political distrust, Dickinson said.

Most people, she said, just want solutions to the real problems they face regularly in their lives. Democracy would be better off if people left their online bubbles for the refuge of fact-based sources.

"We also need to find a way to educate people on the importance of regular voting habits from an early age," Dickinson said. "Waiting until someone is of voting age to bring this to their attention is not productive. We also need to start holding politicians accountable. We are not helpless."

Vermooten, the Washburn University student, gets frustrated with peers who think their votes won't matter.

"Democracy is not dead," Vermooten said. "Not so long as everybody is able and willing and fights to preserve our democracy, and fights to keep the truth. So long as you don't give in and you keep fighting for the truth and the policies you believe in and are willing to listen to other people about their opinions on topics.

"I feel like one of the reasons most people think democracy is dead is because a lot of the higher ups, they stopped listening to each other. They stopped talking and compromising. If you can't compromise, then what's democracy for? If you're not going to talk to each other on these issues, then they are complicit in breaking democracy."

SHERMAN SMITH

Sherman Smith is the 2021 and 2022 Kansas Press Association's journalist of the year. He has written award-winning news stories about the instability of the Kansas foster care system, misconduct by government

Exhibit B – Not-Yet-Reported Case

EXHIBIT
B

2022 WL 4721238
Only the Westlaw citation is currently available.
Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
Patrick ANGELO Jr., Appellant.

No. 124,071
|
Opinion filed September 30, 2022.

Synopsis

Background: Following affirmance on direct appeal of defendant's convictions on two counts of first-degree murder, 287 Kan. 262, 197 P.3d 337, defendant petitioned for postconviction DNA testing. The District Court, 29th Judicial District, Wyandotte County, Wesley K. Griffin, J., denied the petition. Defendant appealed.

Holdings: The Supreme Court, Wall, J., held that:

[1] defendant stated claim for postconviction DNA testing of murder victim's clothing;

[2] state's failure to disclose factual dispute regarding existence of biological material on murder victim's clothing required remand for evidentiary hearing;

[3] district court erred by considering whether other trial evidence established that murder defendant was shooter;

[4] DNA test results on presumed biological material from murder victim's clothing could have produced exculpatory evidence, as required to satisfy statutory threshold for postconviction DNA testing; and

[5] DNA test results on presumed biological material from murder victim's clothing could have produced noncumulative evidence, as required to satisfy statutory threshold for postconviction DNA testing.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (33)

[1] **Criminal Law**⇨Interlocutory, Collateral, and Supplementary Proceedings and Questions
Criminal Law⇨Discovery and disclosure

When a district court summarily denies a petition for postconviction DNA testing, its adjudication of the petition is based on the files, including the parties' pleadings, record of the underlying trial, and any legal arguments from a nonevidentiary hearing; thus, summary denial of a petition for DNA testing presents a question of law over which appellate court has unlimited review. Kan. Stat. Ann. § 21-2512.

[2] **Criminal Law**⇨Statutory issues in general

Interpretation of a statute presents a question of law over which appellate court has unlimited review. Kan. Stat. Ann. § 21-2512.

[3] **Criminal Law**⇨Discovery and disclosure

In deciding whether to order postconviction DNA testing in first instance, district court first determines whether biological material sought to be tested meets statutory criteria, and if those criteria are met, district court then considers whether testing may produce noncumulative, exculpatory evidence relevant to claim of petitioner that petitioner was wrongfully convicted or sentenced; if requirement is met, district court must order DNA testing of the biological material specified in the petition. Kan. Stat. Ann. §§ 21-2512(a)(1)-(3), 21-2512(c).

[4] **Criminal Law**⇨Discovery and disclosure

For purposes of a post-conviction motion for DNA testing, "noncumulative evidence" is the converse of cumulative evidence, or not of the same kind and character or not tending to prove the same thing. Kan. Stat. Ann. § 21-2512.

[5] **Criminal Law**⇨Discovery and disclosure

Evidence is "exculpatory," for purposes of postconviction motion for DNA testing, when it tends to disprove a fact in issue which is material to guilt or punishment; determining whether evidence is exculpatory is not a function of weighing the evidence, and it is enough that the evidence tends to establish a criminal defendant's innocence, even if it does so by only the smallest margin. Kan. Stat. Ann. § 21-2512(c).

[6] **Criminal Law**⇨Discovery and disclosure

Evidence need not be exonerating to be "exculpatory," for purposes of a post-conviction motion for DNA testing, that is, the evidence need not definitively establish a criminal defendant's innocence. Kan. Stat. Ann. § 21-2512(c).

[7] **Criminal Law**⇨Discovery and disclosure

When determining whether evidence is exculpatory on post-conviction motion for DNA testing, that potentially exculpatory evidence may be of very little evidentiary value does not matter when court is deciding whether to order testing in the first instance. Kan. Stat. Ann. § 21-2512(c).

[8] **Criminal Law**⇨Discovery and disclosure

It is only after postconviction DNA testing has been completed that a court may be called on to make a probabilistic determination about what reasonable, properly instructed jurors would do with the new evidence in light of the totality of the circumstances; statute does not contemplate that exercise of discretion in determining whether to order the testing in the first instance. Kan. Stat. Ann. § 21-2512(f).

[9] **Statutes**⇨Intent

Most fundamental rule of statutory construction is that intent of legislature governs if that intent can be ascertained.

[10] **Statutes**⇨Language and intent, will, purpose, or policy
Statutes⇨Plain Language; Plain, Ordinary, or Common Meaning

In ascertaining legislative intent, court begins with plain language of statute, giving common words their ordinary meaning.

[11] **Constitutional Law**⇨Judicial "reading into" or "out of" statutory language
Statutes⇨Purpose and intent; unambiguously expressed intent

When statute is plain and unambiguous, court should not speculate about legislative intent

behind that clear language, and it should refrain from reading something into statute that is not readily found in its words.

[12] Statutes⇐In general; factors considered

If statute's language is ambiguous, court will consult canons of construction to resolve ambiguity.

[13] Statutes⇐In pari materia

Even when the language of the statute is clear, court still considers various provisions of an act in pari materia to reconcile and bring those provisions into workable harmony, if possible.

[14] Statutes⇐In pari materia

Doctrine of in pari materia has utility beyond those instances where statutory ambiguity exists; it can be used as a tool to assess whether the statutory language is plain and unambiguous in the first instance, and it can provide substance and meaning to a court's plain language interpretation of a statute.

[15] Criminal Law⇐Discovery and disclosure
Criminal Law⇐Disposition

Statute governing postconviction DNA testing provides an opportunity for exoneration to innocent individuals convicted of severe crimes, and accomplishes this legislative purpose by using DNA testing to help determine if one who is in state custody was wrongfully convicted or sentenced and if so, to vacate and set aside the judgment, discharge the person if in custody, resentence, or grant a new trial. Kan. Stat. Ann. § 21-2512.

[16] Criminal Law⇐Discovery and disclosure

Scope of postconviction DNA testing statute is not unlimited; its legislatively-created procedures evince laudable, yet limited, effort to provide for postconviction DNA testing under narrow circumstances. Kan. Stat. Ann. § 21-2512.

[17] Criminal Law⇐Discovery and disclosure

Inmate convicted of first-degree murder or rape may petition the district court for DNA testing of any biological material that: (1) relates to the investigation or prosecution that led to the conviction; (2) is in the actual or constructive possession of the State; and (3) was not previously subjected to DNA testing or can be tested with new DNA techniques that provide a reasonable likelihood of more accurate and probative results. Kan. Stat. Ann. § 21-2512.

[18] Criminal Law⇐Discovery and disclosure

When addressing petition for postconviction DNA testing, district court first determines whether biological material on items sought to be tested meet statutory criteria. Kan. Stat. Ann. § 21-2512(a)(1)-(3).

[19] Criminal Law⇐Discovery and disclosure

Statute governing postconviction DNA testing limits the scope of testing to "any biological material" that is related to the case, in the actual or constructive possession of the State, and which was not previously tested or can be retested with new DNA techniques that are more accurate and probative. Kan. Stat. Ann. § 21-2512(a).

[20] Criminal Law⇔Discovery and disclosure

District court must notify prosecuting attorney of petition for postconviction DNA testing; purpose of notification requirement is at least two-fold: first, it gives the State an opportunity to respond to the request, and, second, it provides a warning to the State that the biological material in question must be preserved. Kan. Stat. Ann. § 21-2512.

[21] Criminal Law⇔Discovery and disclosure

Plain language of statute governing postconviction DNA testing does not impose a duty on the State to call its crime scene investigators back in to examine or re-examine the physical evidence and determine whether any of those items contain biological material that the prosecution had not previously secured, but instead state is only required to preserve biological material it previously secured in its investigation or prosecution of the defendant. Kan. Stat. Ann. § 21-2512(b).

[22] Criminal Law⇔Discovery and disclosure

Statute governing postconviction DNA testing creates a three-step process leading up to the district court's first decision point, i.e., whether to order DNA testing; first, the petition must allege that biological material exists and satisfies the threshold requirements for testing under statute, second, once the State has notice of the petition, it must preserve any remaining biological material that it previously "secured in connection with the case" and identify such biological material in its response, and, finally, once the pleadings have been filed, the parties will either agree or dispute that biological material satisfying the threshold requirements for testing under statute exists, and, if the parties agree such biological material exists, then they can proceed to argue whether testing will produce noncumulative, exculpatory evidence compelling the district court to order testing, but, if they continue to dispute the existence of such biological material, then they can present evidence to the district court for appropriate fact-finding: in that situation, the petitioner, as the proponent of DNA testing, bears the burden to prove the existence of such biological material. Kan. Stat. Ann. § 21-2512.

[23] Criminal Law⇔Discovery and disclosure

Defendant stated claim for postconviction DNA testing of murder victim's clothing, where defendant alleged that clothing contained "biological material" amenable to forensic DNA testing within meaning of governing statute, that clothing, and biological material on clothing, was related to murder case, that clothing was in state's possession, and that clothing had not been previously tested. Kan. Stat. Ann. § 21-2512.

[24] Criminal Law⇔Discovery and disclosure

An eligible inmate seeking postconviction DNA testing need not specifically allege how DNA testing would produce noncumulative, exculpatory evidence; instead, the statute merely requires the prisoner to allege that the evidence is related to the investigation or prosecution of

his or her conviction, that the State has possession or constructive possession of the evidence, and that the evidence was not previously subjected to DNA testing or that it could be tested using new DNA testing techniques. Kan. Stat. Ann. § 21-2512.

[25] Criminal Law⇨Discovery and disclosure

Because statute governing postconviction DNA testing does not authorize testing of physical evidence to determine whether biological material is present, when inmate's petition for postconviction DNA testing requests testing of other physical evidence, it must also contain allegations sufficient to establish that biological material is present on that physical evidence. Kan. Stat. Ann. § 21-2512.

[26] Criminal Law⇨Discovery and disclosure
Criminal Law⇨Discovery and disclosure

State's failure to disclose factual dispute regarding existence of biological material on murder victim's clothing in response to defendant's postconviction motion for DNA testing of clothing required remand for evidentiary hearing, where, because state's response to petition did not identify biological material it had previously secured or specifically deny allegations regarding the existence of biological material on victim's clothing, state's response did not trigger defendant's burden to prove up his allegation that biological material was present, and district court could not have known proper course was to conduct an evidentiary hearing for fact-finding to determine whether the victim's clothing contained biological material. Kan. Stat. Ann. § 21-2512.

[27] Criminal Law⇨Discovery and disclosure

District court erred by considering whether other trial evidence established that murder defendant was shooter, and whether DNA test results from presumed biological material on victim's clothing could have adequately overcome that evidence, on motion for postconviction DNA testing, where district court did not limit its inquiry to whether results could have produced noncumulative, exculpatory evidence, and instead found that consensus of trial testimony was that defendant was present and ran from scene very soon after shots were heard, that defendant's own son placed him at scene in direct contact with victim, and that, given incriminating trial testimony, test results confirming absence of defendant's DNA, or presence of third party's DNA, would not have proved that defendant was not shooter. Kan. Stat. Ann. § 21-2512(c).

[28] Criminal Law⇨Discovery and disclosure

When deciding whether statute governing postconviction DNA testing requires court to order testing in first instance, district court's inquiry is limited to whether results may produce noncumulative, exculpatory evidence; district court does not have discretion at this stage of proceedings to consider weight of exculpatory evidence or its potential effect on verdict. Kan. Stat. Ann. § 21-2512.

[29] Criminal Law⇨Discovery and disclosure

The strength of the inculpatory trial evidence is not a relevant consideration in determining whether DNA test results may produce exculpatory evidence under statute governing postconviction DNA testing; rather, at this stage, the focus of the inquiry is limited to whether such results may tend to prove or disprove a disputed material fact, even if the results would do so by only the slightest margin. Kan. Stat.

Ann. § 21-2512(c).

[30] **Criminal Law**⚭Discovery and disclosure

Petitioner seeking postconviction DNA testing need not show with certainty that DNA testing of specified items will produce noncumulative, exculpatory evidence; instead, possibility of generating such evidence will suffice. Kan. Stat. Ann. § 21-2512(c).

[31] **Criminal Law**⚭Discovery and disclosure

Summary dismissal of petition for postconviction DNA testing is proper if test results would be nonexculpatory as matter of law. Kan. Stat. Ann. § 21-2512(c).

[32] **Criminal Law**⚭Discovery and disclosure

DNA test results on presumed biological material from murder victim's clothing could have produced exculpatory evidence, as required to satisfy statutory threshold for postconviction DNA testing, where witness testified that victim slumped against defendant after defendant shot him, suggesting possibility that defendant's DNA transferred to victim's clothing after the first shot was fired, such that test results showing the lack of defendant's DNA on victim's clothing would tend to impeach witness's testimony that defendant was shooter, and DNA test results showing presence of witnesses' DNA on clothing could have implicated them in shooting, given that witnesses both admitted to being at the house at the time of the shootings and had motive to commit murders. Kan. Stat. Ann. § 21-2512(c).

[33] **Criminal Law**⚭Discovery and disclosure

DNA test results on presumed biological material from murder victim's clothing could have produced noncumulative evidence, as required to satisfy statutory threshold for postconviction DNA testing, where state tested two cartridge cases and two swabs of blood collected at the scene, and which produced DNA profiles matching only victims, none of the items recovered from scene and tested produced a profile matching defendant's DNA, if DNA test results showed the presence of defendant's DNA on victim's clothing, that result would have tended to corroborate witness's testimony that defendant was the shooter, but, on the other hand, if DNA test results showed the lack of his DNA, that result could have been used to challenge witness's account of shootings. Kan. Stat. Ann. § 21-2512(c).

Syllabus by the Court

***1** 1. The summary denial of a petition for DNA testing under K.S.A. 2021 Supp. 21-2512 presents a question of law over which the appellate court has unlimited review.

2. K.S.A. 2021 Supp. 21-2512 governs inmate requests for postconviction DNA testing. The statutory provisions governing the pretesting phase of the proceedings contemplate a three-part process leading up to the district court's decision whether testing shall be ordered. First, the petitioner must allege in the petition that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. Second, once the State has notice of the petition, the statute requires the State to preserve any biological material it previously secured in connection with the case and identify such material in its response. Finally, once the response is filed, the parties may agree that the State has identified and preserved all known biological material and proceed to argue whether testing that identified biological material

may produce noncumulative, exculpatory evidence warranting testing under K.S.A. 2021 Supp. 21-2512(c). But if the parties continue to dispute the existence of such biological material, they can present evidence to the district court for appropriate fact-finding. In that circumstance, the petitioner, as the moving party, has the burden to show biological material satisfying the threshold requirements of subsection (a) exists.

3. Under K.S.A. 2021 Supp. 21-2512(a), an inmate convicted of first-degree murder or rape may petition the district court for DNA testing of any biological material that: (1) relates to the investigation or prosecution that led to the conviction; (2) is in the actual or constructive possession of the State; and (3) was not previously subjected to DNA testing or can be tested with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

4. In reviewing a petition made under K.S.A. 2021 Supp. 21-2512, the district court first determines whether the biological material sought to be tested meets the criteria set forth in K.S.A. 2021 Supp. 21-2512(a). If those criteria are met, the district court then considers whether testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced. If this requirement is met, the district court must order DNA testing of the biological material specified in the petition.

5. Evidence is exculpatory when it tends to disprove a fact in issue which is material to guilt or punishment. Determining whether evidence is exculpatory under K.S.A. 2021 Supp. 21-2512(c) is not a function of weighing the evidence. It is enough that the evidence tends to establish a criminal defendant's innocence, even if it does so by only the smallest margin.

6. Noncumulative evidence is the converse of cumulative evidence—that is, it is evidence not of the same kind and character or not tending to prove the same thing.

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge.

Attorneys and Law Firms

Reid T. Nelson, of Capital and Conflicts Appeals Office, argued the cause and was on the brief for appellant.

Kayla L. Roehler, assistant district attorney, argued the cause, and Mark A. Dupree Sr., district attorney, and Derek Schmidt, attorney general, were on the brief for appellee.

Opinion

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

***2** A jury convicted Patrick Angelo Jr. of two counts of first-degree murder for the shooting deaths of Kevin Brown and Jamie Wilson at a house in Kansas City. These convictions were mainly supported by incriminating testimony from witnesses who were at or near the house around the time of the shooting. In hopes of challenging this testimony, Angelo later petitioned for postconviction DNA testing under K.S.A. 2021 Supp. 21-2512. This statute requires a district court to order testing of biological material that is related to the case and in the State's possession when results *may* yield exculpatory, noncumulative evidence.

In support of his petition, Angelo argued DNA testing of various biological material could show the lack of his DNA and the presence of another suspect's DNA. He claimed these results would constitute exculpatory evidence probative of the identity of the shooter. Angelo also argued these results would impeach the testimony of the State's lone eyewitness to the shootings, who identified Angelo as the culprit. But the district court summarily denied Angelo's petition after finding the only evidence in State custody that Angelo sought to have tested—the victims' clothing—would not produce exculpatory evidence.

Angelo now appeals the district court's denial of his petition. On appeal, the State defends the district court's conclusion that DNA testing of biological material on the victims' clothing could not produce exculpatory evidence. But the State also argues that summary denial of the petition was appropriate because Angelo failed to meet his burden to show the existence of biological material on the victims' clothing.

These issues require us to interpret K.S.A. 2021 Supp. 21-2512 to clarify the procedures and respective burdens of the parties during the pretesting phase of the proceedings. Our statutory interpretation reveals the Legislature contemplated a three-part process leading up to the district court's first decision point—whether to order DNA testing. First, the petitioner must allege in the petition that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. Second, once the State has notice of the petition, the statute requires the State to preserve any biological material it previously secured in connection with the case and identify such material in its response. Finally, once the response is filed, the parties may agree

that the State has identified and preserved all known biological material and proceed to argue whether testing that identified biological material may produce noncumulative, exculpatory evidence warranting testing under K.S.A. 2021 Supp. 21-2512(c). But if the parties continue to dispute the existence of such biological material, they can present evidence to the district court for appropriate fact-finding. In that circumstance, the petitioner, as the moving party, has the burden to show biological material satisfying the threshold requirements of subsection (a) exists.

Because the parties did not have the benefit of this statutory interpretation, their pleadings did not disclose the existence of a factual dispute concerning the presence of biological material on the victims' clothing, and thus the district court did not conduct an evidentiary hearing. These circumstances warrant a remand for further proceedings consistent with our statutory interpretation.

Of course, such a remand would be futile if the district court correctly concluded that testing the biological material on the victims' clothing (material the district court presumed existed) could not yield exculpatory evidence. But under the facts of this case, we conclude such potential DNA test results may be exculpatory, and the district court erred in concluding to the contrary. We thus reverse the district court's ruling that even if biological material exists on the victim's clothing, it would not produce exculpatory evidence. However, this holding alone is not sufficient for Angelo to prevail in his quest for DNA testing. This is because the district court never made any fact finding about the actual existence of biological material on the victim's clothing. As such, we remand the matter for this factual inquiry and further proceedings consistent with this opinion.

FACTS AND PROCEDURAL BACKGROUND

***3** In 2004, victims Brown and Wilson were staying at a house on Haskell Avenue in Kansas City with several other people, including Angelo's son, Patrick Angelo III (Little Pat). On February 18, police officers raided the house, seized drugs and guns, and arrested several people. Two days later, officers returned to the house on the report of a double homicide. They found Brown's body in a hallway outside the bathroom. Brown had suffered two gunshot wounds to the left side of his head, one of which was a contact wound. They also found Wilson's body on the floor of a nearby bedroom. She had suffered a single contact gunshot wound to the back of her head.

During the investigation, police identified Angelo, Little Pat, and Little Pat's friend, Maurice Williams Jr. (Little Reese), as potential suspects. In a police interview, Little Pat first denied being at the house the night of the murders. But Little Pat later admitted he and Angelo were there, and he pointed to Angelo as the shooter. The State charged Angelo with two counts of first-degree murder. Angelo was arrested in Missouri about a week after the murders and extradited to Kansas several months later.

At Angelo's trial, the State presented evidence that the owner of the Haskell house had agreed to rent it to Little Pat and his friends for several months to prevent the house from going into foreclosure. Little Pat, Little Reese, and others used the house to buy and sell drugs, and they also partied there. The State also presented evidence that a ring belonging to Angelo went missing before the murders. Brown was the last person known to have the ring. Angelo's girlfriend had also accused Brown of propositioning her.

The State's case relied most heavily on the testimony of four witnesses: Curtis Brooks, Maurice Williams Sr., Little Pat, and Little Reese.

Brooks, who was staying at the Haskell house with Brown and Wilson, testified he was at the house with the victims when Angelo and Little Pat came over. Both Angelo and Little Pat seemed upset. Little Pat immediately went upstairs while Angelo retrieved something from a vent. At trial, Brooks testified that he did not know what Angelo retrieved from the vent. But at preliminary hearing, Brooks said Angelo had retrieved a revolver. Angelo then asked Brooks where Brown was located. Brooks told Angelo that Brown was in the basement. Angelo instructed Brooks to direct Brown to the bathroom whenever he came upstairs. Brooks complied. Little Pat then came back downstairs, and Brooks told him Angelo and Brown were in the bathroom.

Brooks said he was afraid Little Pat had come to the house to collect money Brooks owed him. So Brooks asked another person at the house for a ride to Brooks' nephew's house. When Brooks left the Haskell house, Angelo, Brown, and Little Pat were all in the bathroom with the door closed. At his nephew's, Brooks requested a gun for protection. His nephew did not have a gun but offered to cover Brooks' debt. Brooks then returned to the Haskell house after being gone about 10 minutes. When Brooks opened the door, he saw two bodies lying on the floor. Brooks immediately returned to his nephew's house.

Williams testified he was at Brooks' nephew's house the

night of the murders. Brooks came over saying something was wrong with Brown, and Brown was lying on the floor of the Haskell house. Williams drove to the Haskell house. When he looked in the window, he saw someone lying on the floor. He went inside and saw Brown had been shot in the head. He also saw a woman, who had also been shot, lying in the bedroom. He left the house and drove to a nearby gas station to call the police.

Little Pat testified that Angelo drove him and Little Reese to the Haskell house on the night of the murders. Little Pat and Little Reese both went to the house to retrieve some of their property. But Little Pat was unsure why Angelo wanted to go with them. Angelo parked around the corner from the house, and he and Little Pat got out. Once in the house, Little Pat immediately went upstairs. He looked around for his and Little Reese's property for about 10 minutes. When he went back downstairs, he heard a loud noise, and saw Brown slump onto Angelo in the hallway outside the bathroom. Little Pat fled the house. As he ran to the car, he heard two more loud sounds.

***4** Little Pat said he got back to the car shortly before Angelo. Inside the car, Little Pat heard Angelo mumble something, but he could not understand what Angelo said. Little Reese later told Little Pat that Angelo had said Brown was dead.

Finally, Little Reese testified he was arrested during the drug raid on the Haskell house and was not released from jail until the day of the murders. Angelo drove him and Little Pat over to the house. Little Reese stayed in the car while Angelo and Little Pat went inside. Little Reese asked them to retrieve his coat and his keys from the house. When they returned to the car about 10 to 15 minutes later, Little Reese heard Angelo say Brown was dead. Little Reese later asked Little Pat what had happened. Little Pat said he heard gunshots and saw Brown slump onto Angelo. Little Reese later overheard Little Pat tell Angelo over the phone that he was not going to jail for something he did not do.

While this witness testimony provided the evidentiary foundation for the State's theory of the case, the State also introduced certain forensic evidence. None of the DNA evidence presented at trial linked Angelo to the shooting. A forensic scientist testified she performed DNA testing on biological material found on four items collected at the crime scene—two .380 caliber cartridge cases, a swab of blood taken from the living room floor, and a swab of blood taken from the hallway wall. No DNA profile was obtained from the first cartridge case. The second cartridge case contained a partial DNA profile matching victim Wilson. Both the swab from the living room floor and the swab from the wall contained a DNA profile consistent with victim Brown. Investigators collected other items from the scene for possible DNA testing, including a beer bottle, a sexual assault kit from each victim, and a stocking cap. But the forensic scientist did not test those items because she, along with investigators and prosecutors, found them to be nonprobative.

Angelo's first trial ended in a hung jury. At his second trial, the jury convicted him of two counts of first-degree murder. This court affirmed his convictions on direct appeal. *State v. Angelo*, 287 Kan. 262, 197 P.3d 337 (2008). Angelo has since filed several postconviction motions. See *Angelo v. State*, No. 123,237, 2022 WL 569738 (Kan. App. 2022) (unpublished opinion); *Angelo v. State*, No. 109,660, 2014 WL 1096834 (Kan. App. 2014) (unpublished opinion). The only relief he has obtained is a remand for resentencing after the Court of Appeals found his original sentence was illegal. 2014 WL 1096834, at *4-5. After resentencing, we affirmed his new sentence on appeal. *State v. Angelo*, 306 Kan. 232, 236, 392 P.3d 556 (2017).

In his most recent motion, Angelo petitioned for postconviction DNA testing under K.S.A. 2021 Supp. 21-2512. In that petition, he asked for DNA testing of: (1) the clothes he wore on the day of the murders; (2) the alleged murder weapon; (3) residue from his hands; and (4) the victims' clothing.

In response, the State noted that Angelo was in Missouri custody for nearly four months after the murders before he was extradited to Kansas. Thus, the State never had custody of the clothes he wore on the day of the murders. Likewise, law enforcement never recovered any guns in connection with the double homicide, so there were no guns to test. And the State did not collect any residue from Angelo's hands because he was in Missouri custody for several months after the murders.

***5** As for the victims' clothing, the State conceded these items remained in State custody. But it argued DNA testing of the clothing would not produce noncumulative, exculpatory evidence. The State explained that the victims lived in a home with several other people. And the residents hosted parties and sold drugs from the home, which meant there were often other visitors at this location. If the DNA of someone other than Angelo or the victims were found on the victims' clothing, the State argued the test results would establish only that the person may have had contact with the victims at an unknown time. It would not tend to prove that the person was the shooter.

The district court denied Angelo's petition without a hearing. The court found the State had only the victims' clothing in its custody and DNA testing of the clothing would not produce exculpatory evidence.

Angelo appeals the district court's denial of his petition. Jurisdiction is proper. K.S.A. 2021 Supp. 22-3601(b)(4) (right to appeal off-grid convictions to Supreme Court).

ANALYSIS

Angelo claims the district court erred by summarily denying his petition for postconviction DNA testing. He does not challenge the district court's finding that only the victims' clothing satisfied the threshold requirements for postconviction DNA testing under K.S.A. 2021 Supp. 21-2512(a). Instead, he argues only that the district court erroneously concluded that testing biological material on the victims' clothing could not produce exculpatory evidence. And at oral argument, appellant's counsel confirmed Angelo had narrowed his request for postconviction DNA testing to biological material on victim Brown's clothing only. As such, our analysis similarly focuses on the request to test biological material on this clothing.

Angelo argues DNA testing of the biological material from the victim's clothing would show the lack of his DNA, and such results would undermine Little Pat's trial testimony inculpating Angelo in the double murder and tend to prove Angelo was not the shooter. Angelo also contends the exculpatory character of these test results would be enhanced if the DNA profile also matched one of the witnesses who had opportunity and motive to commit the crimes.

The State argues summary denial of Angelo's petition was proper because the statute permits testing of biological material only and Angelo failed to carry his burden to prove biological material was present on the victim's clothing. The State also argues that if biological material is present on the victim's clothing, then the district court properly concluded that DNA test results would not be exculpatory.

To resolve these competing arguments, we first identify the scope of our review and the controlling legal framework. Second, we interpret K.S.A. 2021 Supp. 21-2512 to address the State's argument that Angelo failed to show the existence of biological material on the victim's clothing. Finally, we review and reverse the district court's ruling that DNA testing of biological material on the victim's clothing could not produce exculpatory evidence.

I. *Standard of Review and Legal Framework*

[1] [2]When a district court summarily denies a petition for postconviction DNA testing, its adjudication of the petition is based on the files (including the parties' pleadings), record of the underlying trial, and any legal arguments from a nonevidentiary hearing. Thus, appellate courts are in just as good a position as the district court to assess the merits of the petition, and our review is unlimited. *State v. Lackey*, 295 Kan. 816, 819, 286 P.3d 859 (2012). This appeal also requires us to interpret K.S.A. 2021 Supp. 21-2512. The interpretation of a statute presents a question of law over which we have unlimited review. *Lackey*, 295 Kan. at 819-20, 286 P.3d 859.

***6** The right to postconviction DNA testing is defined by statute. K.S.A. 2021 Supp. 21-2512 provides:

> "(a) Notwithstanding any other provision of law, a person in state custody, at any time after conviction for murder in the first degree as defined by K.S.A. 21-3401, prior to its repeal, or K.S.A. 2021 Supp. 21-5402, and amendments thereto, or for rape as defined by K.S.A. 21-3502, prior to its repeal, or K.S.A. 2021 Supp. 21-5503, and amendments thereto, may petition the court that entered the judgment for forensic DNA testing (deoxyribonucleic acid testing) of any biological material that:
>
> (1) Is related to the investigation or prosecution that resulted in the conviction;
>
> (2) is in the actual or constructive possession of the state; and
>
> (3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.
>
> "(b)(1) The court shall notify the prosecuting attorney of a petition made under subsection (a) and shall afford the prosecuting attorney an opportunity to respond.
>
> (2) Upon receiving notice of a petition made under subsection (a), the prosecuting attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with

the case is preserved pending the completion of proceedings under this section.

"(c) The court shall order DNA testing pursuant to a petition made under subsection (a) upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced.

"(d) The cost of DNA testing ordered under subsection (c) shall be borne by the state or the petitioner, as the court may order in the interests of justice, if it is shown that the petitioner is not indigent and possesses the means to pay.

"(e) The court may at any time appoint counsel for an indigent applicant under this section.

"(f)(1) Except as provided in subsection (f)(3), if the results of DNA testing conducted under this section are unfavorable to the petitioner, the court:

(A) Shall dismiss the petition; and

(B) in the case of a petitioner who is not indigent, may assess the petitioner for the cost of such testing.

(2) If the results of DNA testing conducted under this section are favorable to the petitioner and are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at a trial or sentencing, the court shall:

(A) Order a hearing, notwithstanding any provision of law that would bar such a hearing; and

(B) enter any order that serves the interests of justice, including, but not limited to, an order:

(i) Vacating and setting aside the judgment;

(ii) discharging the petitioner if the petitioner is in custody;

(iii) resentencing the petitioner; or

(iv) granting a new trial.

(3) If the results of DNA testing conducted under this section are inconclusive, the court may order a hearing to determine whether there is a substantial question of innocence. If the petitioner proves by a preponderance of the evidence that there is a substantial question of innocence, the court shall proceed as provided in subsection (f)(2).

***7** "(g) Nothing in this section shall be construed to limit the circumstances under which a person may obtain DNA testing or other postconviction relief under any other provision of law."

Together, these provisions contemplate at least two possible decision points for a district court in the adjudication of a petition for postconviction DNA testing: (1) whether testing should be ordered in the first instance under subsection (c); and (2) if testing is ordered, the appropriate disposition or remedy under subsection (f) depending on the nature of the test results.

[3]Because the district court summarily denied Angelo's petition and did not order DNA testing, we focus on those provisions relevant to the first decision point—whether testing shall be ordered. In deciding whether to order testing in the first instance, the district court first determines whether the biological material sought to be tested meets the criteria set forth in K.S.A. 2021 Supp. 21-2512(a)(1)-(3). *Lackey*, 295 Kan. at 820, 286 P.3d 859. If those criteria are met, the district court then considers whether "testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced." K.S.A. 2021 Supp. 21-2512(c). If met, then the district court "shall order DNA testing" of the biological material specified in the petition. K.S.A. 2021 Supp. 21-2512(c); 295 Kan. at 821, 286 P.3d 859.

[4]As for K.S.A. 2021 Supp. 21-2512(c)'s requirement that the potential evidence be "noncumulative," "[w]e have defined that term's opposite, i.e., cumulative evidence, as 'evidence of the same kind to the same point, and whether it is cumulative is to be determined from its kind and character, rather than its effect.' " *State v. George*, 308 Kan. 62, 71-72, 418 P.3d 1268 (2018) (quoting *State v. Rodriguez*, 295 Kan. 1146, 1158, 289 P.3d 85 [(2012)]); see also Black's Law Dictionary 479 (11th ed. 2019) ("[Of evidence] tending to prove the same thing <cumulative testimony>."). Thus, noncumulative evidence is the converse—that is, evidence "not of the same kind and character or not tending to prove the same thing." *George*, 308 Kan. 62, Syl. ¶ 4, 418 P.3d 1268.

[5] [6]As for K.S.A. 2021 Supp. 21-2512(c)'s requirement that the potential evidence also be "exculpatory," we have defined "exculpatory evidence" as evidence that "simply ' "tends to disprove a fact in issue which is material to guilt or punishment." ' " *State v. Johnson*, 299 Kan. 890, 894, 327 P.3d 421 (2014) (quoting *Lackey*, 295 Kan. at 823, 286 P.3d 859). Evidence need not be exonerating to be exculpatory—that is, the evidence need not definitively establish a criminal defendant's innocence. *George*, 308

Kan. at 67, 418 P.3d 1268; *Lackey*, 295 Kan. at 823, 286 P.3d 859. It is enough that the evidence tends to establish a criminal defendant's innocence, even if it does so by only the smallest margin. *George*, 308 Kan. at 71, 418 P.3d 1268; *Lackey*, 295 Kan. at 823, 286 P.3d 859.

[7] [8]When determining whether evidence is exculpatory under K.S.A. 2021 Supp. 21-2512(c), we have made clear that the district court should not weigh the evidence or consider its potential effect on the verdict. "That this potentially exculpatory evidence may be of very little evidentiary value does not matter at this stage [when the court is deciding whether to order testing in the first instance]." *George*, 308 Kan. at 68, 418 P.3d 1268. It is only after DNA testing has been completed that a court may be called on under K.S.A. 2021 Supp. 21-2512(f) to make " 'a "probabilistic determination about what reasonable, properly instructed jurors would do" with the new evidence in light of the totality of the circumstances.' " *State v. Hernandez*, 303 Kan. 609, 618, 366 P.3d 200 (2016) (quoting *Lackey*, 295 Kan. at 824, 286 P.3d 859). "But the statute does not contemplate that exercise of discretion in determining whether to order the testing in the first instance." *Lackey*, 295 Kan. at 824, 286 P.3d 859.

II. *The Allegations in Angelo's Petition Satisfied the Threshold Requirements for Postconviction DNA Testing, and Angelo's Failure to Make an Evidentiary Showing that Biological Material Is Present on the Victim's Clothing Does Not Provide an Independent Basis to Affirm the Summary Denial of Angelo's Petition*

***8** Here, the district court summarily denied Angelo's petition because DNA testing of any biological material would not produce exculpatory results. Nevertheless, the State argues summary denial of the petition was proper because Angelo failed to show biological material exists on the items he sought to test. According to the State, K.S.A. 2021 Supp. 21-2512 permits DNA testing of known biological material only—it does not permit testing to determine whether an item contains biological material. The State believes this interpretation of the statute places the burden on Angelo to show biological material is present on any physical evidence an inmate identifies for testing in the petition—here, victim Brown's clothing. Because Angelo purportedly failed to carry this evidentiary burden, the State argues the district court properly denied the petition without an evidentiary hearing. In other words, the State contends the district court's ruling was right, albeit for a different reason. See *State v. Vasquez*, 287 Kan. 40, 59, 194 P.3d 563 (2008) (Kansas Supreme Court may affirm a district court's ruling "if it is right even for the wrong reason.").

The State's argument requires us to interpret K.S.A. 2021 Supp. 21-2512 to identify the pretesting procedures and burdens of the respective parties leading up to the district court's decision whether to order DNA testing under K.S.A. 2021 Supp. 21-2512(c). As discussed in the following sections of the opinion, our statutory interpretation confirms the State's argument is not without merit—the statute authorizes testing of biological material only, and as the moving party, the burden is on Angelo to show the existence of biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a)(1)-(3).

But as we will explain, our statutory interpretation also reveals the Legislature contemplated a three-part process for the pretesting phase of the proceedings. And that three-part process is not set out in any of our prior decisions. Because neither the parties nor the district court had the benefit of this statutory interpretation at the time of the district court proceedings, those proceedings did not conform to this three-part procedure.

Thus, while we find the State's argument does not provide an independent basis to affirm the summary denial of Angelo's petition, it does demonstrate the propriety of a remand for further proceedings consistent with our statutory interpretation. To support this conclusion, we first interpret the various provisions of the statute to identify the procedures governing the pretesting phase of the proceedings. Then, we apply this statutory interpretation to circumstances at hand.

A. *K.S.A. 2021 Supp. 21-2512 Limits the Scope of Permissible Testing and Contemplates a Three-Part Process for the Pretesting Phase of the Proceedings*

We begin by interpreting the statute to define the permissible scope of postconviction DNA testing and to identify the procedures governing the pretesting phase of the proceedings.

1. *Rules of Statutory Interpretation*

[9] [10] [11] [12]The rules governing statutory interpretation are well-established:

"The most fundamental rule of statutory construction is

that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. [Citations omitted.]" *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

[13] [14]But even when the language of the statute is clear, we still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013). "Thus, the doctrine of *in pari materia* has utility beyond those instances where statutory ambiguity exists. It can be used as a tool to assess whether the statutory language is plain and unambiguous in the first instance, and it can provide substance and meaning to a court's plain language interpretation of a statute." *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022).

2. *The Statute Limits Testing to Biological Material, Not Physical Evidence, and Contemplates a Three-part Procedure Leading Up to the District Court's Decision Whether to Order Testing*

***9** [15]K.S.A. 2021 Supp. 21-2512 provides "an opportunity for exoneration to innocent individuals convicted of severe crimes." *State v. Cheeks*, 298 Kan. 1, 6, 310 P.3d 346 (2013), *overruled on other grounds by State v. LaPointe*, 309 Kan. 299, 434 P.3d 850 (2019). The statute accomplishes this legislative purpose by using "DNA testing to help determine if one who is in state custody 'was wrongfully convicted or sentenced' and if so, to vacate and set aside the judgment, discharge the person if in custody, resentence, or grant a new trial." *State v. Denney*, 278 Kan. 643, 654, 101 P.3d 1257 (2004).

[16]But the scope of K.S.A. 2021 Supp. 21-2512 is not unlimited. Its "legislatively-created procedures evince a laudable, yet limited, effort to provide for postconviction DNA testing under narrow circumstances." *State v. Denney*, 283 Kan. 781, 793-94, 156 P.3d 1275 (2007). These limitations and the procedures governing the pretesting phase of the proceedings are largely contained in K.S.A. 2021 Supp. 21-2512(a)-(c). Those subsections describe in chronological order a three-part procedure governing the pretesting phase of the proceedings, and each subsection reveals important substantive limits to the right to postconviction DNA testing.

[17] [18]First, K.S.A. 2021 Supp. 21-2512(a) identifies the class of individuals eligible to pursue postconviction DNA testing and the threshold requirements for such testing. Subsection (a) provides that inmates convicted of first-degree murder or rape may petition "for forensic DNA testing ... of any biological material" when such material:

> "(1) Is related to the investigation or prosecution that resulted in the conviction;
>
> "(2) is in the actual or constructive possession of the state; and
>
> "(3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results." K.S.A. 2021 Supp. 21-2512(a).

To state a claim for postconviction DNA testing, a petition must allege facts sufficient to meet these requirements. Thus, when addressing a petition under K.S.A. 2021 Supp. 21-2512, the district court first determines whether biological material on the items sought to be tested meet the criteria in K.S.A. 2021 Supp. 21-2512(a)(1)-(3). *Lackey*, 295 Kan. at 820, 286 P.3d 859.

[19]The plain language of this subsection contains two significant limitations. First, it limits the class of eligible petitioners to those who are in custody after being convicted of first-degree murder or rape. See K.S.A. 2021 Supp. 21-2512(a). Second, and more pertinent to the issue at hand, it limits the scope of testing to "*any biological material*" that is related to the case, in the actual or constructive possession of the State, and which was not previously tested or can be retested with new DNA techniques that are more accurate and probative. (Emphasis added.) Eligible petitioners may request DNA testing of biological material only. The plain language of subsection (a) does not contemplate or provide for testing of other physical evidence to determine whether biological material is present. And K.S.A. 2021 Supp. 21-2512(a) requires that a petition for postconviction DNA testing allege that biological material satisfying the threshold requirements for testing exists.

Once a petition for postconviction DNA testing has been filed, subsection (b) identifies the appropriate procedures

and duties of the prosecution and district court:

> ***10** "(b)(1) The court shall notify the prosecuting attorney of a petition made under subsection (a) and shall afford the prosecuting attorney an opportunity to respond.
>
> (2) Upon receiving notice of a petition made under subsection (a), the prosecuting attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section." K.S.A. 2021 Supp. 21-2512(b).

[20]The plain language of subsection (b) first requires the district court to notify the prosecuting attorney of the petition for postconviction DNA testing. "The purpose of the notification requirement is at least two-fold: First, it gives the State an opportunity to respond to the request; and, second, it provides a warning to the State that the biological material in question must be preserved." *Lackey*, 295 Kan. at 821, 286 P.3d 859.

[21]As for the State's preservation duty, once the prosecution has notice of the petition, it must take necessary steps to ensure that "biological material that was secured in connection with the case is preserved." K.S.A. 2021 Supp. 21-2512(b)(2). This statutory language is important in two respects. First, like subsection (a), it focuses on "biological material" specifically, rather than items of evidence generally. Second, the plain language requires the State to preserve only biological material that "*was secured* in connection with the case." K.S.A. 2021 Supp. 21-2512(b). The Legislature's use of the past-tense phrase, "was secured," makes clear the Legislature intended the State only preserve the "biological material" it previously secured in its investigation or prosecution of the defendant. See https://www.merriam-webster.com/dictionary/secured (defining verb "secure" "to relieve from exposure to danger: act to make safe against adverse contingencies"); see also https://www.oxfordlearnersdictionaries.com/us/definition/english/secure_1?q=secured (identifying "secured" as the past simple use of the term "secure"). The plain language cannot be read to impose a duty on the State to call its crime scene investigators back in to examine or re-examine the physical evidence and determine whether any of those items contain biological material that the prosecution had not previously "secured."

As for the State's opportunity to respond, when the pretesting provisions are read together in harmony, it is apparent the Legislature intended the State's response to identify all biological material it previously secured in connection with the case. As noted, under subsection (a), a petition must generally allege that biological material exists, and such material satisfies the threshold requirements for testing. Under subsection (b), the State must preserve any remaining biological material that it previously secured in connection with the case, and the State has an opportunity to respond to the petition. Only after the parties have submitted these pleadings does the statute then authorize the district court to decide whether testing shall be ordered because it "may produce noncumulative, exculpatory evidence relevant to" petitioner's wrongful conviction claim. K.S.A. 2021 Supp. 21-2512(c); *Lackey*, 295 Kan. at 821, 286 P.3d 859.

***11** The very purpose of these statutory provisions would be undermined if subsection (b) did not require that the State's response identify the biological material it previously secured in connection with the case. Without this information, neither the petitioner nor the district court would be alerted to the possibility the State controverts petitioner's allegations regarding the existence of biological material. And the district court could find petitioner's allegations to have been deemed admitted even though the State believes no such biological material exists. The district court could then proceed to subsection (c) and determine whether testing should be ordered without first conducting an evidentiary hearing to resolve (the undisclosed) factual dispute regarding the existence of biological material. In turn, the district court could order testing under subsection (c), even though the items to be tested may contain no biological material—an order that would contravene the Legislature's clear intention to limit postconviction DNA testing to biological material only.

[22]Reading the plain language of these subsections together and in harmony, K.S.A. 2021 Supp. 21-2512 creates a three-step process leading up to the district court's first decision point—whether to order DNA testing. First, the petition must allege that biological material exists and satisfies the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). Second, once the State has notice of the petition, it must preserve any remaining biological material that it previously "secured in connection with the case" and identify such biological material in its response. K.S.A. 2021 Supp. 21-2512(b)(2). Finally, once the pleadings have been filed, the parties will either agree or dispute that biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a) exists. If the parties agree such biological material exists, then they can proceed to argue whether testing will produce noncumulative, exculpatory evidence compelling the

district court to order testing under K.S.A. 2021 Supp. 21-2512(c). But if they continue to dispute the existence of such biological material, then they can present evidence to the district court for appropriate fact-finding. In that situation, the petitioner, as the proponent of DNA testing, bears the burden to prove the existence of such biological material. See *In re K.E.*, 294 Kan. 17, 23, 272 P.3d 28 (2012) ("movant generally bears the burden of proof on a motion"). With this statutory interpretation in mind, we apply the three-part procedure to the facts at hand.

B. *The Pretesting Procedures in K.S.A. 2021 Supp. 21-2512 Do Not Support the District Court's Decision to Summarily Deny Angelo's Petition*

To address the State's argument that Angelo failed to meet his burden to show the existence of biological material satisfying the threshold requirements for testing, we apply the three-part statutory procedure (outlined above) to the district court proceedings.

1. *Step One—Angelo Stated a Claim for Postconviction DNA Testing*

[23] [24]We first analyze the sufficiency of the allegations in Angelo's petition. Our precedent makes clear that an eligible inmate need not specifically allege how DNA testing would produce noncumulative, exculpatory evidence. Instead, K.S.A. 2021 Supp. 21-2512

> "merely requires the prisoner to allege that the evidence is related to the investigation or prosecution of his or her conviction, that the State has possession or constructive possession of the evidence, and that the evidence was not previously subjected to DNA testing or that it could be tested using new DNA testing techniques." *Bruner v. State*, 277 Kan. 603, 606, 88 P.3d 214 (2004).

[25]While the pleading requirement set forth in *Bruner* generally remains true, we must provide some clarification in light of our statutory interpretation. A petition for postconviction DNA testing must still generally allege that the "evidence" is related to the investigation, is in the possession of the State, and has not been tested previously or is eligible for retesting. But the "evidence" referenced in *Bruner* necessarily refers to "biological material" specifically because K.S.A. 2021 Supp. 21-2512 does not authorize testing of physical evidence to determine whether biological material is present. Thus, our point of clarification is that when an inmate's petition requests testing of other physical evidence, it must also contain allegations sufficient to establish that biological material is present on that physical evidence.

***12** But this pleading requirement is not rigorous. In *Hernandez*, the petitioner sought to test various items of physical evidence, including blankets, sheets, towels, and a box of condoms. He also alleged that he believed those items of physical evidence contained biological material. The State's response did not controvert this latter allegation. And we held the petition alleged facts sufficient to satisfy the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). *Hernandez*, 303 Kan. at 615, 366 P.3d 200.

Here, like in *Hernandez*, Angelo requested DNA testing of physical evidence—victim Brown's clothing. And also like *Hernandez*, he alleged his belief that biological material was present on that item:

> "In the States Ap[p]ellee Brief (Pg. 35) first paragraph (quoting) 'In fact, as the District Court noted the State could have spent much more time putting on evidence of the same [additional DNA evidence] but chose not to.' Jennifer S. Tatum, Assistant District Attorney[']s above statement, *petitioner is left to believe State prosecutor possibly withheld* [emphasis added] *exculpatory evidence, or had in her constructive possession some type of biological material that could have been tested or already had been tested*." (Emphasis added.).

Angelo couples these allegations with others claiming that DNA testing of the victim's clothing will yield exculpatory results. These allegations are premised on the belief that those items of evidence contain biological material amenable to forensic DNA testing. Angelo further alleged that these items (and the material on such items) are related to the case, are in the State's possession, and had not been previously tested.

As a pro se petitioner, we liberally construe Angelo's petition and the allegations in it. *Bruner*, 277 Kan. at 605, 88 P.3d 214. So construed, Angelo's petition sufficiently alleged the existence of biological material on the victim's clothing and that this material satisfied the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). Thus, under the first step of the three-part process governing the pretesting phase of the proceeding, Angelo's petition stated a claim for postconviction DNA testing.

2. *Step Two—The State's Response Did Not Disclose a Factual Dispute Regarding the Existence of Biological Material Sought to Be Tested*

Under the second step of the pretesting process, the State responds to the petition. Under our interpretation of K.S.A. 2021 Supp. 21-2512, the State's response should have identified the biological material it previously secured in connection with the case. Of course, the State did not have the benefit of this statutory interpretation at the time it filed the response. And not surprisingly, the response did not identify such biological material. Nor did it specifically controvert Angelo's allegations that biological material was present on the victim's clothing. Without this information, the district court was not alerted to the fact the State disputed Angelo's allegations that the items he sought to test contained biological material.

3. *Step Three—Without Disclosure of a Factual Dispute, the District Court Could Not Know an Evidentiary Hearing Was Necessary*

[26]The State's failure to disclose a factual dispute regarding the existence of biological material on victim Brown's clothing also impacts the third and final step of the pretesting process. In this final stage, the parties will either agree that all biological material has been identified or dispute this fact. If the parties agree, then they can proceed to argue whether testing should be ordered under K.S.A. 2021 Supp. 21-2512(c). But if the parties dispute that biological material exists, then they can present evidence to the district court for fact-finding. Here, because the State's response did not identify the biological material it had previously secured or specifically deny the allegations regarding the existence of biological material on victim Brown's clothing, the district court could not have known the proper course was to conduct an evidentiary hearing for fact-finding to determine whether the victim's clothing contained biological material.

***13** In sum, Angelo's petition stated a claim for postconviction DNA testing and the State's response did not disclose a factual dispute as to the existence of biological material on Brown's clothing. Without that disclosure, the State's response did not trigger Angelo's burden to prove up his allegation that biological material was present. Nor was Angelo otherwise given the opportunity to make this showing because the district court did not hold an evidentiary hearing. For these reasons, we cannot affirm the district court's summary denial of Angelo's petition on the alternative theory that Angelo failed to meet his burden to show the existence of biological material satisfying the threshold requirements for testing.

Nevertheless, the State's arguments on appeal suggest there may be a factual dispute regarding the presence of biological material on the victim's clothing. If the State had the benefit of our statutory interpretation at the time, then its response would have disclosed this dispute and the need for an evidentiary hearing. Because we conclude in the following section that the district court erred by concluding that testing biological material on the victim's clothing would not produce exculpatory evidence, these circumstances demonstrate the propriety of a remand for further proceedings consistent with our statutory interpretation.

III. *The District Court Erred by Concluding that Testing Would Not Produce Exculpatory Evidence*

Finally, we reach Angelo's challenge to the district court's ruling that testing would not have produced exculpatory evidence. As previously noted in section I, we apply the same statutory framework that controlled the district court's analysis below. Thus, we exercise unlimited review to determine whether DNA testing of the presumed biological material may have yielded noncumulative, exculpatory evidence under K.S.A. 2021 Supp. 21-2512(c).

Before addressing the merits of Angelo's argument, we briefly pause to address two other issues relevant to the scope of our review. First, the district court found the victims' clothing was the only item Angelo sought to have tested that met the threshold criteria for postconviction DNA testing. See K.S.A. 2021 Supp. 21-2512(a)(1)-(3). The court found the other items listed in Angelo's petition (Angelo's clothing from the day of the murders, the murder weapon, and any residue collected from Angelo's hands) did not meet these criteria because those items were not in the State's possession. See K.S.A. 2021 Supp. 21-2512(a)(2) (An inmate convicted of first-degree murder "may petition the court ... for forensic DNA testing [ ] of any biological material that ... is in the actual or constructive possession of the state."). Angelo does not challenge those findings on appeal. Thus, we affirm the district court's ruling that these other items failed to meet the threshold

requirements for testing under K.S.A. 2021 Supp. 21-2512(a).

Second, as discussed above, the district court was not alerted to any factual dispute about the presence of biological material on victim Brown's clothing, and thus it simply presumed biological material was present for the purposes of its ruling. We will likewise presume biological material is present on Brown's clothing for the limited purpose of testing the district court's legal conclusion. But nothing in this opinion should be construed to affirm or support the validity of the presumption that biological material is present as a matter of fact or to limit argument or evidence on the question in subsequent proceedings.

As for the district court's judgment, it ruled that testing the presumed biological material on the victims' clothing would not produce exculpatory evidence. It found "the DNA of a large number of people could be present in the house, [so t]he fact that another party's DNA was present on the clothes of either deceased party would simply not lead to the conclusion that the party was the shooter." Likewise, the court found that test results showing the absence of Angelo's DNA would not tend to show that someone other than Angelo was the shooter. The district court explained "[t]he consensus of the [trial] testimony is that Angelo was present and ran from the scene very soon after noises/shots were heard. His own son [Little Pat] places him at the scene in direct contact with one of the victims." Based on these findings the district court summarily denied Angelo's petition.

***14** We conclude the district court erred by summarily denying Angelo's petition for testing of the presumed biological material on Brown's clothing for two reasons. First, the district court erred by weighing the potential test results against other incriminating evidence adduced at trial. Second, even if the test results are not exonerating, they may be probative of the identity of the shooter—a disputed question of material fact at Angelo's trial. And favorable test results could be used to impeach the testimony of Little Pat, the State's only eyewitness to the shootings. Under the facts unique to this case, such evidence could be exculpatory under our precedent construing K.S.A. 2021 Supp. 21-2512(c). And this evidence would not be cumulative to the other forensic evidence introduced at trial.

A. *The District Court Improperly Weighed the Evidence to Summarily Deny Angelo's Petition*

[27]In summarily denying Angelo's petition, the district court focused on the potential for any DNA test results to be exculpatory. But in conducting this analysis, the court appears to have weighed the evidence. The district court found "[t]he consensus of the [trial] testimony is that Angelo was present and ran from the scene very soon after noises/shots were heard. His own son [Little Pat] places him at the scene in direct contact with one of the victims." And given the strength of this incriminating trial testimony, the district court concluded that test results confirming the absence of Angelo's DNA (or the presence of a third party's DNA) would not prove Angelo was not the shooter.

[28]But when deciding whether K.S.A. 2021 Supp. 21-2512(c) requires the court to order testing in the first instance, the district court's inquiry is limited to whether the results may produce noncumulative, exculpatory evidence. The district court does not have discretion at this stage of the proceedings to consider the weight of the exculpatory evidence or its potential effect on the verdict. *Lackey* illustrates this point.

Lackey was convicted of first-degree premeditated murder and rape. At trial, the State presented evidence that sperms cells found in the victim's vagina matched Lackey's DNA, and that Lackey could not be excluded as a contributor to the DNA profile from the victim's fingernail scrapings. Lackey later petitioned under K.S.A. 2021 Supp. 21-2512 for DNA testing of hairs found on the victim's body. The district court summarily denied Lackey's petition, and the Court of Appeals affirmed, finding " 'DNA testing on the short hairs would not produce exculpatory evidence in this case when Lackey's DNA was consistent with the DNA found in [the victim's] vagina and underneath her fingernails.' " *Lackey*, 295 Kan. at 823, 286 P.3d 859. We reversed the panel's decision, holding the Court of Appeals improperly weighed the evidence in determining whether DNA testing of the hairs would produce exculpatory evidence. 295 Kan. at 823-24, 286 P.3d 859.

[29]*Lackey* confirms that the strength of the inculpatory trial evidence is not a relevant consideration in determining whether DNA test results may produce exculpatory evidence under K.S.A. 2021 Supp. 21-2512(c). Rather, at this stage, the focus of the inquiry is limited to whether such results may tend to prove or disprove a disputed material fact, even if the results would do so by only the slightest margin. See *George*, 308 Kan. at 68, 418 P.3d 1268; *Haddock v. State*, 295 Kan. 738, 769, 286 P.3d 837 (2012). The district court may weigh the evidence only after testing has been ordered—when it makes a " 'probabilistic determination about what

reasonable, properly instructed jurors would do' with the new evidence in light of the totality of the circumstances" under K.S.A. 2021 Supp. 21-2512(f). *Lackey*, 295 Kan. at 824, 286 P.3d 859.

Thus, under K.S.A. 2021 Supp. 21-2512(c), the district court erred by considering whether other trial evidence convincingly established that Angelo was the shooter and whether the test results from the presumed biological material on Brown's clothing could adequately overcome that evidence.

B. *DNA Testing of the Presumed Biological Material from Brown's Clothing Could Produce Noncumulative, Exculpatory Evidence*

***15** [30]In reviewing the district court's conclusion that testing would not produce exculpatory evidence, we remain mindful that subsection (c) sets a low threshold for ordering DNA testing of biological material. A petitioner need not show with certainty that DNA testing of the specified items will produce noncumulative, exculpatory evidence. Instead, the possibility of generating such evidence will suffice. *Hernandez*, 303 Kan. at 617, 366 P.3d 200; see also K.S.A. 2021 Supp. 21-2512(c) ("The court shall order DNA testing" if "testing *may* produce noncumulative, exculpatory evidence." [Emphasis added.]). What is more, a petitioner need not specifically allege how the DNA testing would produce evidence that meets the standard set by K.S.A. 2021 Supp. 21-2512(c). *Lackey*, 295 Kan. at 824, 286 P.3d 859; *Bruner v. State*, 277 Kan. 603, 606, 88 P.3d 214 (2004). And as previously noted, test results need not be exonerating to be exculpatory. The potential DNA test results need only be probative of a material fact in issue at trial.

[31]Thus, summary dismissal of a petition under K.S.A. 2021 Supp. 21-2512(c) is proper if the test results would be nonexculpatory as a matter of law. This low threshold for testing may permit a petitioner to engage in a "fishing expedition" for DNA evidence, but it is an expedition the Legislature has deemed worthwhile. 277 Kan. at 606, 88 P.3d 214.

1. *Testing May Produce Exculpatory Evidence*

[32]Angelo argues DNA test results may show the lack of his DNA on the presumed biological material from Brown's clothing and the presence of a witness' DNA, and such evidence would be exculpatory. Angelo explains that Little Pat testified he saw Brown slump onto Angelo right after the shooting. From this testimony, Angelo infers that the physical contact created the opportunity for his biological material to transfer to Brown's clothing. Thus, Angelo claims test results showing the lack of his DNA in the presumed biological material on Brown's clothing would tend to impeach Little Pat's testimony and show Angelo was not the shooter. Angelo claims the exculpatory character of this evidence would be enhanced by the presence of the DNA of another witness at trial. This conclusion is especially true, according to Angelo, if the DNA profile matched Little Reese's or Little Pat's DNA because both had opportunity and motive to commit the murders.

In similar circumstances, we have held that DNA testing may produce exculpatory evidence. For example, in *Hernandez*, we held the lack of petitioner's DNA or the presence of a third-party's DNA in the biological material on items collected from the crime scene would be exculpatory evidence relevant to the identity of the perpetrator. There, petitioner was convicted of raping his 13-year-old daughter, C.H. Hernandez later petitioned for postconviction DNA testing of biological material on the bedding collected from C.H.'s bed and the bed Hernandez shared with his wife—the two locations where the sexual assaults occurred. The district court summarily denied the petition after a nonevidentiary hearing, and the Court of Appeals affirmed.

We reversed, explaining that test results confirming the lack of petitioner's DNA on the biological material from the bed sheets could be exculpatory:

> "[W]e disagree with the panel's assessment that the absence or presence of DNA from Hernandez, his wife, and/or C.H., in whatever combination, or in conjunction with third party DNA, could never tend to prove or disprove the materially disputed fact that sex acts between Hernandez and C.H. occurred in his bed or her bed. For instance, the presence of DNA from Hernandez and/or his wife on their bed, coupled with the absence of C.H.'s DNA, would tend to disprove that Hernandez sexually abused C.H. on that bed. Similarly, the presence of DNA from C.H. and/or her boyfriend on her bed, without any DNA from Hernandez, would be exculpatory evidence." *Hernandez*, 303 Kan. at 620, 366 P.3d 200.

***16** We reached the same conclusion in *George*. There, petitioner was convicted of raping a woman in a gas station storeroom. George maintained a defense of mistaken identity. He later petitioned for postconviction DNA testing of hair samples police collected from the

scene of the rape. We held that DNA test results showing the hair samples did not match George's DNA would be exculpatory for purposes of K.S.A. 2021 Supp. 21-2512:

> "[E]ven if the testing of the hairs found at the spot where the rape occurred only revealed that George's DNA was not present, the results would be exculpatory because they would 'tend' to disprove his guilt. At a minimum, they would tend to show he had not been at that spot. ... That this potentially exculpatory evidence may be of very little evidentiary value does not matter at this stage." *George*, 308 Kan. at 68, 418 P.3d 1268.

In a concurring opinion, Justice Stegall emphasized that the presence of a third party's DNA at the crime scene was not probative of whether George had also been at that scene. Justice Stegall reasoned that proof that one person was in a place sometime in the past has no tendency to prove or disprove that another person was also in that place sometime in the past. Even so, Justice Stegall concurred in the decision because DNA testing of the hairs could produce marginally exculpatory evidence probative of the identity of the perpetrator, if the profile did not match George's DNA:

> "The reason the DNA testing in this case has an ever-so-slight tendency to demonstrate George is not the perpetrator of this crime is [ ] because ... the evidence—i.e., the only hairs found in the entire large, publicly accessible storeroom which also just happened to have been found at the precise location of the crime—creates the possibility of doubt as to the identity of the perpetrator." 308 Kan. at 77, 418 P.3d 1268 (Stegall, J., concurring).

Hernandez and *George* suggest that where the identity of the perpetrator is in issue at trial, DNA testing of biological material from the items collected at the crime scene may produce exculpatory evidence where the results show the lack of petitioner's DNA coupled with the presence of a third party's DNA. See *Johnson*, 299 Kan. at 894, 327 P.3d 421 (" 'DNA testing is intended to confirm or dispute the identity of individuals involved in or at the scene of a purported crime.' So DNA evidence may be exculpatory if it tends to establish innocence based on an individual's identity. [Citation omitted.]").

The facts unique to Angelo's petition confirm that *Hernandez* and *George* are apposite and DNA test results showing the absence of Angelo's DNA and the presence of a witness' DNA on the presumed biological material from Brown's clothing would be exculpatory evidence under K.S.A. 2021 Supp. 21-2512(c).

First, the identity of the shooter was in issue at Angelo's trial. Angelo did not dispute that he was present at the scene on the night of the murders. Indeed, he called police shortly after the shooting and told them he had been at the Haskell house that night. But Angelo claimed Brown and Wilson were both alive when he left the house and denied that he was the shooter.

Second, Little Pat's trial testimony heightens the potential relevance of any biological material found on Brown's clothing. Little Pat testified that Brown slumped against Angelo after Angelo shot him. This physical contact suggests the possibility that Angelo's DNA transferred to Brown's clothing after the first shot was fired. If DNA testing of this presumed biological material revealed a profile matching Angelo's DNA, the district court would not have excluded the evidence as irrelevant. Indeed, such a test result would be highly probative of the identity of the shooter—the evidence would align with the State's theory of the case and corroborate Little Pat's account of the murders. So why would the opposite test result (no DNA from Angelo in the presumed biological material from Brown's clothing) not be probative of the identity of the shooter? Such a result would support Angelo's defense. It would rebut the State's theory of the case. And it could be used to impeach Little Pat's testimony. Little Pat's testimony (that Brown slumped onto Angelo after the shooting) creates a nexus between Angelo and Brown's clothing sufficient to conclude that testing the presumed biological material on that clothing may produce exculpatory evidence.

***17** Granted, there are several, nonexculpatory explanations for a test result showing the lack of defendant's DNA in the presumed biological material from Brown's clothing. The contact may have been too brief for any biological material to transfer, clothing may have impeded the transfer of DNA, and so forth. But those explanations go to the weight of the evidence. They do not deprive the evidence of all exculpatory value. Of course, as noted in section II, we have no confirmation that Brown's clothing contains biological material amenable for testing, which demonstrates the need for a remand for further proceedings. But presuming such biological material is present (as the district court did), we conclude test results may yield exculpatory evidence as a matter of law.

And if DNA testing not only showed the absence of Angelo's DNA but also the presence of a third party's DNA in the presumed biological material from Brown's clothing, then such results would enhance the exculpatory character of the evidence. This rationale is particularly true here if testing confirms the presence of Little Pat's or Little Reese's DNA.

The trial testimony established that Little Pat and Little Reese were at first suspects in the double homicide. Both Little Pat and Little Reese had the opportunity to commit the murders—both admitted to being at the house at the time of the shootings.

The trial evidence also showed Little Pat and Little Reese had potential motive for the killings. Little Pat and Little Reese were friends, and they, along with several associates, were selling drugs from the Haskell house. Police raided the home and seized drugs and other incriminating evidence two days before the murders. Police arrested several occupants during the raid, including Little Reese. But victim Wilson, who was present during the raid, was not arrested. This could have raised Little Reese's suspicion about Wilson's involvement with law enforcement. And the double homicide occurred on the very night Little Reese was released from jail, two days after police arrested him in the raid.

The raid on the Haskell house not only threatened Little Pat's and Little Reese's drug-selling operations and exposed them to potential imprisonment, but it also gave Brown a chance to steal from them. A witness at trial testified that after the raid, Brown stole money and electronic equipment that belonged to Little Pat from the house. According to that witness, Little Pat was angry about the stolen property and had been looking for Brown. Another witness testified Little Pat came over to the house shortly after the raid wielding a baseball bat and demanding to know what had happened to his missing property. Brown and Wilson were at the house at the time, and Little Pat threatened them, even hitting a wall with the bat.

Jurors could have inferred from other circumstantial evidence that Little Pat and Little Reese had decided to pin the murders on Angelo. During Little Pat's police interview, he lied to investigators for hours, claiming he had an alibi. Eventually, Little Pat admitted he was at the house at the time of the shooting but identified his father, Angelo, as the shooter. During Little Reese's police interview, he originally denied that anyone had said anything about a shooting when Angelo and Little Pat returned to the car on the night of the double homicide. But later, Little Reese testified that when Angelo returned to the car, he said Brown was dead.

Given this trial evidence, DNA test results showing the presence of Little Pat's or Little Reese's DNA on the presumed biological material from Brown's clothing could tend to implicate them in the shooting. And when coupled with the absence of Angelo's DNA, such test results would tend to disprove Little Pat's identification of Angelo as the shooter. While this potential evidence may or may not exonerate Angelo, it has at least a slight tendency to disprove his guilt. That alone satisfies the statutory threshold for ordering DNA testing under K.S.A. 2021 Supp. 21-2512(c).

2. *DNA Testing May Produce Noncumulative Evidence*

***18** [33]The district court did not find that DNA testing would produce cumulative evidence. And the State does not take that position on appeal. Even so, we briefly address whether testing of the presumed biological material on Brown's clothing would produce noncumulative evidence to ensure that our review of the petition under K.S.A. 2021 Supp. 21-2512(c) is complete and there is no alternative basis to affirm the district court ruling given the record before us. See *Vasquez*, 287 Kan. at 59, 194 P.3d 563 (Kansas Supreme Court may affirm a district court's ruling "if it is right even for the wrong reason.").

Angelo's trial was not devoid of DNA evidence. The State tested two cartridge cases and two swabs of blood collected at the scene, and this testing produced DNA profiles matching only victims Brown and Wilson. The forensic scientist also broadly affirmed that none of the items recovered from the scene and tested produced a profile matching Angelo's DNA.

But there is a crucial difference between those items the State tested and the presumed biological material on Brown's clothing. The trial evidence established a physical connection between Angelo and Brown's clothing. The evidence did not establish a similar connection between Angelo and any of the items the State tested.

At trial, Little Pat testified that he heard gunshots and then saw Brown slump onto Angelo. If true, this contact could have created the potential for Angelo's biological material to transfer to Brown's clothing. If DNA test results showed the presence of Angelo's DNA on Brown's clothing, that result would tend to corroborate Little Pat's testimony that Angelo was the shooter. On the other hand, if DNA test results showed the lack of Angelo's DNA, that result could be used to challenge Little Pat's account of the shootings and thus tend to show Angelo was not the shooter.

The same cannot be said for the other items the State

tested. No one saw Angelo load the gun or move any cartridge cases after the shooting. No one testified that Angelo had bled on the wall or the floor. The testimony established no nexus between Angelo and the items the State submitted for testing.

Thus, results from a DNA test of the presumed biological material on Brown's clothing would be unique in their potential to either corroborate or contradict the State's eyewitness testimony. The State's DNA testing of the cartridges and blood stains did not possess the same potential to serve as impeachment evidence. See *George*, 308 Kan. 62, Syl. ¶ 4, 418 P.3d 1268 (noncumulative evidence is evidence "not of the same kind and character or not tending to prove the same thing"). For these reasons, we conclude that DNA testing of the presumed biological material on Brown's clothing would not produce cumulative evidence. Those results may also be exculpatory because they would tend to disprove Little Pat's identification of Angelo as the shooter, even if by only the smallest degree.

CONCLUSION

We conclude the State's argument that Angelo failed to meet his burden to show the existence of biological material on Brown's clothing does not provide an alternate basis to affirm the district court's ruling. Angelo's petition alleged the presence of biological material satisfying the threshold requirements for testing under K.S.A. 2021 Supp. 21-2512(a). The State's response did not reveal a factual dispute as to this issue, likely because the State did not have the benefit of our statutory interpretation at the time. Thus, Angelo never had the opportunity to make this showing because no evidentiary hearing was conducted.

***19** Yet the State's argument suggests it disputes Angelo's allegations concerning the presence of biological material on the victim's clothing. If the State had the benefit of the three-step process identified in this opinion, then its response could have disclosed this factual dispute and demonstrated the need for an evidentiary hearing. Thus, we remand this case for further proceedings consistent with our statutory interpretation.

As we noted, such a remand would be futile if the district court nevertheless properly concluded that DNA testing of the presumed biological material on Brown's clothing could not produce exculpatory evidence. But assuming such biological material exists, DNA testing may produce exculpatory evidence if the results show the absence of Angelo's DNA on Brown's clothing coupled with the presence of Little Pat's or Little Reese's DNA. Such results may ultimately carry little evidentiary weight, but the Legislature has set a low bar for ordering DNA testing under K.S.A. 2021 Supp. 21-2512(c), and concomitantly, a high bar for summary dismissal at this stage. Based on the facts and evidence unique to this case, Angelo's petition surpasses the low bar.

We thus affirm the district court's judgment denying DNA testing of biological material on: (1) the clothes Angelo wore on the day of the murders; (2) the alleged murder weapon; and (3) residue from Angelo's hands. We reverse the district court's ruling that even if biological material exists on the victim's clothing, testing would not produce exculpatory evidence. But this holding alone is not sufficient for Angelo to prevail in his quest for DNA testing because the district court made no fact finding about the actual existence of biological material on the victim's clothing. As such, we remand the matter for this factual inquiry and further proceedings consistent with this opinion and the three-part procedure governing the pretesting phase of proceedings under K.S.A. 2021 Supp. 21-2512.

Judgment of the district court is affirmed in part and reversed in part, and the case is remanded.

Biles, J., concurs in the result.

All Citations

--- P.3d ----, 2022 WL 4721238