No. 08-101978-A

IN THE

COURT OF APPEALS OF THE STATE

OF KANSAS

JASON MASHANEY,

Movant-Appellant,

vs.

STATE OF KANSAS,

Respondent-Appellee.

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County,

Kansas

Honorable Anthony Powell

District Court Case No. 08 CV 1490

Michael P. Whalen,#16611

Law Office of Michael P. Whalen

6235 W. Kellogg

Wichita, Kansas 67209

(316) 265-2598

ATTORNEY FOR APPELLANT, JASON MASHANEY

TABLE OF CONTENTS AND INDEX OF AUTHORITIES

No. 09-101978-A

_____

IN THE
COURT OF APPEALS OF THE STATE
OF KANSAS

_____

JASON MASHANEY,
Movant-Appellant,
vs.
STATE OF KANSAS,
Respondent-AppelMashasney.

_____

BRIEF OF APPELLANT

_____

I.

NATURE OF THE CASE

Mr. Mashaney appeals the district court's summary denial of his Motion filed pursuant to K.S.A. 60-1507.

II.

ISSUE ON APPEAL

A. The district court erred in denying Mr. Mashasney's 60-1507 petition without providing an evidentiary hearing, making erroneous findings of fact and conclusions of law.

III.

FACTS OF THE CASE

Mr. Mashaney was convicted of one count of aggravated criminal sodomy and one count of aggravated indecent liberties with a child following a jury trial.

Prior to sentencing, new counsel, Mr. Richard Ney, was appointed to represent Mr. Mashaney based on the deficiencies of trial counsel, Sarah McKinnon. Mr. Mashaney had filed a motion for new trial based on ineffective assistance of counsel. An evidentiary hearing was held on the matter and Ms.

McKinnon testified regarding numerous errors that occurred during the course of trial.

Ms. McKinnon testified that the State presented evidence at trial regarding Mr. Mashaney's relationship with Amber Ashley, the victim's mother, when she was 14 and he was 17 years of age. Ms. McKinnon testified that the evidence was improper and that she believed it should have been excluded based on a previously granted motion in limine. Ms. McKinnon did not object to the information being presented in the case in chief several times. (R. XII, 8-9). Ms. McKinnon admitted that the evidence was prejudicial to her client. (R. XII, 10).

Ms. McKinnon admitted that there had been numerous references by the State in opening and closing argument and during the State's case in chief regarding Mr. Mashaney's paternity of a number of children out of wedlock with different mothers and that none of the incidents were objected to by Ms. McKinnon. (R. XII, 10-11). Ms. McKinnon admitted there was no strategic reason for not objecting to the evidence and admitted that such evidence was irrelevant and potentially prejudicial to Mr. Mashaney. (R. XII, 11).

Ms. McKinnon testified that there was information that directly contradicted the testimony of Ms. Ashley and that she did not discredit the testimony with that information. (R. XII, 13-15). The State stipulated at the hearing that the impeachment evidence regarding the statements of Ms. Ashley to the police was part of the information that was provided to Ms. McKinnon as part of discovery. (R. XII, 80).

Again, Ms. McKinnon noted that there were several instances of evidence related to Mr. Mashaney's other children and that such testimony was not objected to. The strategic reason given for not objecting was that Ms. McKinnon believed such testimony would come out during Mr. Mashaney's direct testimony. (R. XII, 17). Ms. McKinnon did admit that this repetition of the bad character evidence, including evidence about Mr. Mashaney's lack of involvement with A.A. in the early years of her life was prejudicial to Mr. Mashaney's case. (R. XII, 18).

Ms. McKinnon admitted that the State's case was rife with a theme of the bad character of Mr. Mashaney for his fathering numerous children out of wedlock, not being involved in his kids' life, wasn't a good father and didn't give his kids presents. (R. XII, 22). Ms. McKinnon did not recall objecting to any of that evidence. Id.

Ms. McKinnon admitted she never had a hearing to assess A.A.'s capacity to testify. Ms. McKinnon testified that she did not believe there was a capacity problem. (R. XII, 24-25). However, she did admit that she did later attack the ability of A.A. to know the difference between the truth and a lie in closing argument, but did not challenge said capacity either prior to trial or during trial. (R. XII, 27).

Ms. McKinnon did not object to the trial court's telling A.A that she was "the best witness." Ms. McKinnon did admit it was objectionable and that she used it for a basis for a new trial in her motion. (R. XII, 28-29).

Ms. McKinnon also admitted that a police detective testified that "bed-wetting was a common symptom of children who have been sexually abused" and that the detective had not been qualified as an expert on the profiling of abused children and that she had not objected to the testimony. (R. XII, 31-33). Ms. McKinnon also admitted that there had been testimony that A.A. was not yet toilet trained. (R. XII, 33). Ms. McKinnon stated that she allowed the detective to testify that is was common for perpetrators to groom victims with gifts and that she did not object to this unqualified testimony. (R. XII, 33). And she admitted there was no strategic reason for failing to object to the testimony. (R. XII, 34).

Ms. McKinnon admitted that she did not object to the State's cross examination of a defense witness about her size and weight and the implication that Mr. Mashaney liked 'little women'. (R. XII, 35). Again, with this same witness, Mr. Mashaney's different children with different mothers was raised and not objected to by counsel. (R. XII, 36-37). Ms. McKinnon stated that part of her trial

strategy was to talk to Mr. Mashaney about his other children and how he was a good father. (R. XII, 37-38). However, when confronted with the record, counsel admitted that there was nothing in direct appeal about Mr. Mashaney and any children other than that with Ms. Ashley and Nicole Hand, who had testified. (R. XII, 38-39). Ms. McKinnon also acknowledged that there were several other questions by the State of Mr. Mashaney regarding his other children and how many called him daddy and whether he was involved in their lives and that that testimony was prejudicial and was not objected to. (R. XII, 42-43).

Ms. McKinnon testified that she was aware that Mr. Mashaney had met with a detective, that he had counsel with him and that counsel stopped the interview. Ms. McKinnon did not file a motion in limine to exclude the reference to Mr. Mashaney invoking his Miranda rights. (R. XII, 43-45). Ms. McKinnon did not object to the State's question that "at first" Mr. Mashaney denied the allegations and confirmed that he had never admitted to the allegations. (R. XII, 45-46).

Ms. McKinnon admitted she was familiar with a Doyle violation, that the State cannot refer to the invocation of one's right to remain silent, and that she did not raise the issue in a pretrial motion because she didn't think the State was allowed to raise the issue. (R. XII, 47).

Ms. McKinnon also did not object to several statements attributed to Mr. Mashaney's attorney that should not have been admissible. (R. XII, 47-48).

Ms. McKinnon also did not object to the State's inquiries regarding whether Mr. Mashaney had ever filed a paternity action and that she had no strategic reason for failing to do so and that said inquiry was prejudicial to Mr. Mashaney. (R. XII, 49). During rebuttal, the State introduced a Petition for Declaration of Paternity and Order for Support as well as a Journal Entry of Default Judgment of Paternity and there was no objection to the admission of either of the documents. Ms. McKinnon admitted that the documents had no relevancy and even less so, as the documents had been filed after the date of the allegations in Mr. Mashaney's case. (R. XII, 50-51).

Ms. McKinnon also admitted that the State made numerous improper statements in closing argument that were not objected to and the one statement that was objected to was objected to on incorrect grounds. (R. XII, 51-56).

Ms. McKinnon testified that she had been told of some cell phone records that would have shown that Amber Ashley had called Mr. Mashaney a number of times following the allegations, contrary to other statements that she had made. She also stated that the records were only retained for 6 months and were not accessible when she attempted to retrieve them, even though she had been made aware of the records within the appropriate time frame and could have retrieved the records had she done so in a timely manner. (R. XII, 59-61).

Ms. McKinnon also testified that she had contacted Dr. Richard C. Gilmartin who reviewed the allegation in the case and had received a letter from him stating that the allegations made by the complaining witness were neither reasonable nor logical. Also, Dr. Gilmartin opined that there appeared to be evidence that the complaining witness was under the influence of drugs at the time of her emergency room exam. (R. XII, 62-63). Ms. McKinnon testified that she did not follow up on any of the information provided to her by Dr. Gilmartin and did not file a Greg motion based upon the doctor's findings. (R. XII, 64).

Ms. McKinnon admitted that her failure to object to the judge's comments to A.A. regarding her good job may have acted to have waived the issue for appellate review. (R. XII, 78).

Ms. McKinnon also admitted that the information and feed back that she got from Dr. Gilmartin was beneficial to the defense but that she did not utilize the information. (R. XII, 79).

The trial court ruled that her statements to A.A. regarding her testimony were appropriate and that the defense strategy had invited the State to address the Doyle issue. (R. VI, 8-10). The trial court made no other specific findings of fact or conclusions of law related to any of the other issues raised. Id. at 11.

On direct appeal, the issue of ineffective assistance of counsel was ignored. Further, none of the twenty some issues raised in the presentence ineffective assistance hearing were raised on direct appeal.

Mr. Mashaney filed a timely 60-1507 motion regarding the ineffective assistance of appellate counsel and for the district court to address the issues of ineffective assistance of trial counsel regarding the failure of the trial court to make appropriate findings of fact and conclusions of law. (R. I, 16-26). Mr. Mashaney had listed in his petition and memorandum of law that Mr. Carl Maughn could testify about the failure of appellate counsel and the impact of the decision on the outcome of the appeal. (R. I, 7; 27). Further, Mr. Richard Ney was listed as a witness to testify that it was ineffective assistance of counsel for the failure of appellate counsel to address any of the issues raised in the ineffective assistance of counsel hearing. Id.

The district court held a preliminary hearing on the matter. Following the argument of counsel, the district court found that Mr. Mashaney had to show that the issues raised would have been successful on appeal. (R. I, 32). The district court found that the Doyle issue would not have succeeded on appeal in that the court found that the question was invited based upon Mr. Mashaney's testimony. (R. I, 34). The district court further found that admitting the evidence would have been harmless error. Id.

As to the question of Detective Krausch testifying as an expert, the court found that the detective was testifying within his experience and training and there was no dutyu for appellate counsel to raise the issue on appeal. (R. I, 36).

The failure of trial counsel to act on the information presented to her by Dr. Gamin was found by the district court to have been a strategic decision by counsel and there was no duty on appellate counsel to raise the issue on appeal. (R. I, 37).

The district court found that the failure of the trial court to address all the issues raised in the

"trial" 60-1507 motion and failure to make specific findings of fact and conclusions of law was okay because the judge said she was addressing "all" the claims, the findings satisfied Supreme Court Rule 183(c)(3).

The district court found that the irrelevant evidence of Mr. Mashaney's child support order and the petiteness of his prior partners was relevant to the trial of the case against Mr. Mashaney. The court found that counsel was not required to lodge futile objections. (R. I, 40). Similarly, the court found that the testimony of A.A.'s mother regarding inconsistent statements was okay in that her testimony was relevant and probative. (R. I, 42). The court also found that there was no showing of prejudice on this issue. The district court speculated "Indeed, counsel could well have decided that he client would look worse in the jury's eyes..." (R. I, 61).

The district court that the issue of the trial court's gushing over the child witness's performance while testifying did not need to have been reviewed on appeal because no reasonable person could have believed that the judge was commenting on the substance of the victim's testimony. (R. I, 62). The court also found that there would have been no success in challenging the competence of the child witness to testify because counsel was satisfied that the witness knew the difference between a truth and a lie. (R. I, 63).

Finally, the district court found that Mr. Mashaney was not seeking a new trial or another evidentiary hearing based upon the allegations of ineffective assistance of trial counsel and any newly raised issues were barred by the evidentiary hearing prior to the time of sentencing, finding that the issues raised in the petition were successive. (R. I, 64).

A timely notice of appeal was filed and this brief follows.

IV.

ARGUMENTS AND AUTHORITIES

A. The district court erred in denying Mr. Mashasney's 60-1507 petition without providing an evidentiary hearing and making erroneous findings of fact and conclusions of law.

1. Standard of review.

"When reviewing the district court's decision on a K.S.A. 60-1507 motion after the district court conducts a preliminary hearing, an appellate court applies a findings of fact and conclusions of law standard of review to determine whether the findings are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. The district court's ultimate legal conclusion regarding whether the petitioner has established that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, or (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack is reviewed as a conclusion of law using a de novo standard." Bellamy v. State, 285 Kan. 346, Syl. 4 (2007).

2. Appellate counsel was ineffective for failing to address the Doyle violation on appeal despite trial counsel's ineffectiveness in failing to object to the admission of the evidence in the first place.

Impeaching a defendant with his or her post- *Miranda* silence violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Mims,* 220 Kan. 726, 729-30, 556 P.2d 387 (1976). In *State v. Edwards,* 264 Kan. 177, 195, 955 P.2d 1276 (1998), this court explained: "A *Doyle* violation occurs when the State attempts to impeach a defendant's credibility at trial by arguing or by introducing evidence that the defendant did not avail himself or herself of the first opportunity to clear his or her name when confronted by police officers but instead invoked his or her constitutional right to remain silent." The prohibition applies even where the defendant invoked his or her rights after having initially spoken with law enforcement pursuant to a waiver. See *State v. DuMars,* 33 Kan.App.2d 735, 748, 108 P.3d 448, *rev. denied* 280 Kan. 986 (2005).However, appellate courts have typically declined to review an alleged *Doyle* violation where the defense fails to make a contemporaneous objection. See *State v. Sanchez,* 282 Kan.

307, 311, 144 P.3d 718 (2006); *State v. Fisher,* 222 Kan. 76, 84, 563 P.2d 1012 (1977). Hunt concedes that he did not object to the question, "Did you tell Agent Papish everything you knew?" Indeed, defense counsel's only concern was that his client be directed to provide a "yes or no" answer. State v. Hunt, 176 P.3d 183, 195 (2008).

Thus, the failure of counsel to object to the testimony was ineffective assistance of counsel and had the issue been raised on appeal, a different outcome in the appeal was probable.

Further, the matter could have been raised independently as an issue of prosecutorial misconduct even absent an objection by trial counsel and the issue could and should have been raised by appellate counsel on appeal. See Id.

The district court relied on State v. Brinkley, 256 Kan 808, 820-821 (1995) to support its position that the State was allowed to introduce evidence of defendant's post-arrest silence for impeachment purposes in responding to arguments made by the defense. (R. I, 52).

However, Brinkley says no such thing. The Doyle violation argument in Brinkley arose from the State's response to Mr. Brinkley's use of his invocation of his right to remain silent as a support for the consistency of his position. It was Mr. Brinkley's counsel that raised the issue of Mr. Brinkley's silence and the State responded in kind. There was no finding that the use of one's right to remain silent may be brought up independently by the State for "impeachment" purposes. Id. at 820-821.

It should be noted that the district court blindly adopted the State's findings of fact and conclusions of law as its own. This is the problem when we do not have an independent judiciary and the court fails to check the substance of the law upon which it relies to deny a petitioner his right of review.

The issue of Ms. McKinnon's ineffective assistance for failing to object to the Doyle violation was raised before the trial court and was wrongfully decided. The issue of the ineffective assistance of trial counsel should have been addressed on appeal. Further, the Doyle issue itself should have been raised on appeal, yet it was ignored by appellate counsel for some unknown reason. And evidentiary hearing was necessary for the district court to be able to discern whether or not the choice was strategic

by appellate counsel or if it was incompetence.

Further, an evidentiary hearing was necessary so that both Mr. Maughn and Mr. Ney could address the question of the invalidity of counsel's actions and the prejudice to Mr. Mashaney regarding the failure of appellate counsel to address either of these issues.

The district court's decision was based on incorrect case law. Thus, the legal findings of the district court were erroneous and the matter should be remanded to the district court for an evidentiary hearing and a review of appropriate case law.

Mr. Mashaney had two experts prepared to testify as to the validity of this issue, the prejudice and the failing of appellate counsel in her role presenting the issues raised by Mr. Mashaney before the trial court. Let us not also forget that Ms. McKinnon testified that she believed the State could not raise Mr. Mashaney's right to remain silent and was surprised to inaction when it came before the jury at trial.

The district court found that scant argument was raised by Mr. Mashaney in his memorandum regarding this beyond citing general case law regarding Doyle violations. First, it is better to have valid case law than inaccurate case law. Second, the evidence of trial counsel's failure to object to the issue and the failure of appellate counsel to address the issue on appeal were already a part of the record. Third, a Doyle violation is a question of constitutional magnitude and should have been addressed by both counsel. Fourth, Mr. Maughn and Mr. Ney were available to testify as to the error of trial and appellate counsel and the prejudice to Mr. Mashaney. Fifth, a K.S.A. 60-1507 petitioner is not required to plead in such a manner as to prove every aspect of his case within the original 60-1507 filing.

Lest we not forget: "'Where a K.S.A. 60-1507 motion alleges facts which do not appear in the original record and which if true would entitle plaintiff to relief, and identifies readily available witnesses whose testimony would support such facts or other sources of evidence, it is error to deny the

motion without an evidentiary hearing.' Floyd v. State, 208 Kan. 874, Syl. p1, 495 P.2d 92 (1972). 'Even where factual issues raised seem improbable, an evidentiary hearing is required unless the files and records of the case enable their complete resolution.' Rodgers v. State, 197 Kan. 622, 624, 419 P.2d 828 (1966)." Wright v. State, 5 Kan.App.2d 494, 495-496, 619 P.2d 155 (1980).

Factual issues existed as to whether or not trial counsel made a strategic decision and this needed to be reviewed on appeal. Factual issues related to appellate counsel's reason for not including this issue, as well as no other issues related to the pre-sentencing challenge, as to whether it was a strategic choice or ineffective assistance of counsel. A mix of factual and legal issues existed based upon the potential testimony of Mr. Maughn and Mr. Ney and the impact of the actions of trial and appellate counsel as well as testimony of prejudice and the success of the arguments, had they been made on direct appeal.

Mr. Mashaney would most likely have succeeded on appeal had the Doyle issue been preserved and raised on appeal. Recently, in State v. Pruitt, 211 P.3d 166, (2009), this Court found that the evidence against Mr. Pruitt was not overwhelming and that the Doyle violation could not be called harmless error, as the case was based on issues of credibility, and that Mr. Pruitt was prejudiced by the Doyle violation. Based upon that finding, as well as other considered trial errors, this Court reversed Mr. Pruitt's convictions. Id. at 171-172.

Further, the trial court had erred in finding trial counsel was not ineffective for failing to file a motion in limine and for failing to object when the Doyle violation occurred. "These questions were prompted by this court's previous recognition of a "potential conflict" between our prosecutorial misconduct analysis and K.S.A. 60-404 in the context of potential Doyle violations. See State v. Hernandez, 284 Kan. 74, 79, 159 P.3d 950 (2007). Today, we clarify that a contemporaneous objection under K.S.A. 60-404 must be lodged by a defendant at trial in order to preserve a Doyle issue for appellate review when the alleged error arises during a prosecutor's questioning of a witness." State v.

King, 288 Kan. 333, 336, (2009). Thus, trial counsel was ineffective for failing to object to the violation and appellate counsel was ineffective for failing to raise the issue of counsel's ineffectiveness and for failing to raise the issue of the violation itself.

It was also significant that in closing argument, the prosecutor again referenced Mr. Mashaney's meeting with the police and having a lawyer with him. (R. X, 141).

For all of these reasons, the district court erred in not granting an evidentiary hearing and for denying Mr. Mashaney the opportunity to ever have any of these issues reviewed based upon his statutory right to competent appellate counsel.

An evidentiary hearing was, and is necessary in the instant case. The matter should be remanded for an evidentiary hearing.

3. Appellate counsel was ineffective for failing to address the issue of the 'expert testimony' of Detective Krausch despite trial counsel's ineffectiveness in failing to object to the testimony in the first place and for failing to address the issue of ineffectiveness of trial counsel.

The primary detective in the case was able to testify as an expert that children who have been molested have bed wetting problems and that perpetrators often groom their victims with gifts. He also testified that it was not uncommon for victims of molestation to remember more details of the molestation days, months or years after the incident. (R. X, 9; 11-12).

Ms. McKinnon admitted that a police detective testified that "bed-wetting was a common symptom of children who have been sexually abused" and that the detective had not been qualified as an expert on the profiling of abused children and that she had not objected to the testimony. (R. XII, 31-33). Ms. McKinnon also admitted that there had been testimony that A.A. was not yet toilet trained. (R. XII, 33). Ms. McKinnon stated that she allowed the detective to testify that is was common for perpetrators to groom victims with gifts and that she did not object to this unqualified testimony. (R. XII, 33). And she admitted there was no strategic reason for failing to object to the testimony. (R. XII,

34).

The district court found that Ms. McKinnon had testified that Detective Krausch had testified as to his general experience as a detective and his experience dealing with child victims. (R. I, 54). This, however, was a mischaracterization of the evidence. Ms. McKinnon stated the detective testified that he had been a detective for a number of years and the number of years he had worked with children. She then went on to state that she did not specifically recall any qualifications as a profiler. This was an erroneous factual finding by the court number.

The district court found that he had been a police officer for fourteen years and he had been to recent training and for him to testify about the child sex abuse victim characterizations based upon his training and experience. Therefore, he was properly qualified to answer the questions and having the issue raised on appeal would not have afforded Mr. Mashaney any relief. (R. I, 55).

Trial counsel did not object to this testimony. The admission of such evidence was significant enough to have warranted Mr. Mashaney's case being overturned on appeal.

> "Therefore, it is necessary to proceed to the second prong of the *Donesay* test. We must determine whether the erroneous admission of Paynter's testimony "had little, if any, likelihood of having changed the result of the trial." 265 Kan. at 88, 959 P.2d 862. here, a major factor in Villanueva's trial was credibility; jurors had to decide whether to believe S.M. or Villanueva. In that regard, the physical evidence of bruises and scratches on S.M. would appear to corroborate her story. However, defense counsel was able to elicit testimony from Dr. McCoy indicating that S.M. could have scratched herself. KBI testing of the vaginal swabs taken during the rape examination of S.M. was negative for semen and seminal fluid. Despite stating that she was unable to make a diagnosis, Paynter testified that "classic characteristics of a victim of a rape" were documented in S.M.'s records. The trial court erroneously allowed Paynter, unqualified to diagnose or to testify as an expert witness on rape trauma syndrome, to state to the jury that S.M.'s behavior was consistent with that of rape trauma victims. Her testimony undoubtedly bolstered S.M.'s credibility to the detriment of Villanueva. The evidence against Villanueva, although strong enough to convince many of his guilt, cannot be characterized as "overwhelming." We find that the trial court's admission of Paynter's testimony had a higher likelihood of changing the results of the trial than "little, if any." We reverse and remand this matter for a new trial. State v. Villanueva, 274 Kan. 20, 32-33(2002).

Trial counsel's failure to object to these statements prevented the issue from being raised on

direct appeal. Appellate counsel's failure to address this issue as an ineffective act by trial counsel meant that, absent a finding by this court, the issue could never again be raised or reviewed.

Had the issue been raised and Detective Krausch's testimony been challenged on appeal, there would likely have been a reversal. Mr. Mashaney's case is very similar to Villanueva. In Villanueva, a social worker testified about traits common to victims of rape. Although the diagnosis of "rape trauma syndrome" was never stated, the Court found that the witness's testimony was the equivalent of expert testimony for which she was not qualified to give. Here, the same occurred. The State elicited from Detective Krausch commonalities and traits of sexually abused children that applied distinctly to the facts of the instant case without properly qualifying Detective Krausch as an expert nor properly laying a foundation as to the basis of his findings. The question about represessed memories is a poignant example of the Detective explaining how similarly abused children to A.A. could remember and relate more details of the abuse even after years have passed. This not only confirmed a "trait" of an abused child that existed with A.A., but it further bolstered her credibility in that her new "memories" and greater detail in her testimony were just a part of her syndrome. This was a grave error and should never have been allowed to be heard by the jury from an unqualified cop.

The necessity of such testimony coming from an expert was reaffirmed in State v. Macintosh, 274 Kan. 939 (2002). The Kansas Supreme Court found that it was appropriate for a qualified expert to present information regarding common traits of sexually abused children. The expert in Macintosh was a licensed clinical social worker, with special training and had performed a specific evaluation of the victim in the case. Id. at 958-959. The Court also cited State v. Reser, 244 Kan. 306 (1989) wherein the expert there was qualified to give an opinion.

"In Reser, this court addressed whether there was an adequate foundation to qualify a State's witness as an expert on symptoms consistent with child sexual abuse. The State's witness was a licensed clinical specialist with 12 years of experience in the area of mental health, had a master's

degree in social work, and had world-wide recognition in the field of child sexual abuse. The witness testified that sexually abused children have common patterns of behavior resulting from the trauma, including failing to report the abuse immediately. The witness testified that it was her opinion that the victim exhibited behavior consistent with a child who had been sexually abused. The Reser court looked to other jurisdictions in which expert testimony regarding characteristics of sexually abused children had been held proper to provide helpful information to the jury and concluded that the expert was "imminently qualified" as an expert to testify as to common patterns of behavior resulting from child sexual abuse and that this victim had symptoms consistent with those patterns. 244 Kan. at 315, 767 P.2d 1277." State v. McIntosh, 274 Kan. 939, 956 (2002).

Thus, not only was it improper for the cop to give his personal opinion about the characteristics of sexually abused children as it was done simply to bolster the credibility of the complaining witness, but he was not qualified to give such an opinion based upon a long line of Kansas Supreme Court cases.

It is even more significant that the State relied upon this "expert testimony" in closing argument rebuttal. "...and yet is it common for victims of sexual abuse to develop some additional detail as time goes by?" (R. X, 141).

The district court erred in its findings that it was perfectly okay for an unqualified police detective to have given his opinion about common traits without foundation and without any expertise. Also, considering there were two expert witnesses willing to testify that the exclusion of this issue on appeal was ineffective assistance and the failure was prejudicial to Mr. Mashaney, an evidentiary hearing, at the very least, should have been granted.

As shown above, the issue regarding the detective's "expert testimony" would have likely led to a different outcome of the appeal and this Court should either remand the matter for an evidentiary hearing or allow Mr. Mashaney a new appeal on the issues that were ignored by appellate counsel.

4. Appellate counsel was ineffective for failing to address the issue of ineffective assistance of counsel of trial counsel as it related to the failure of trial counsel to utilize the evidence of her expert that the alleged conduct of Mr. Mashaney was such that he had never heard of such a case ever having occurred.

Trial counsel had a consultation from a medical expert who said the conduct for which Mr. Mashaney was tried was an unlikely scenario, that he had never heard of this type of molestation and that evidence existed in medical records that child had been drugged at the time of her exam at the hospital. Trial counsel did not use any of this information that was admittedly favorable to Mr. Mashaney. (R. XII, 62-64

This issue was not addressed by appellate counsel. The matter was completely ignored. Dr. Gilmartin could have testified about his experience in dealing with child abuse cases and whether, in his years of experience, he had ever heard of abuse of this nature. Argument by trial counsel was that A.A.'s skin condition was so gross a person would not have found any pleasure in committing the alleged acts for which Mr. Mashaney was accused. At very least, Dr. Gilmartin could have testified about the medical condition and how it manifests and let the jury draw its own conclusions. Further, unlike Detective Krausch, Dr. Gilmartin was an actual expert with credentials and his testimony would have been admissible.

The fact that there was helpful evidence available and it was completely ignored by counsel was ineffective assistance. A new trial should be granted so that this information can be reviewed and presented. At the very least, an evidentiary hearing should be granted so that this issue may be explored and properly reviewed and evaluated.

This is especially true in light of the evidence from the case detective regarding his "profiling" of victims and perpetrators.

Additionally, this short coming was not addressed by the trial court in rendering its decision against Mr. Mashaney on his ineffective assistance of counsel claim.

Supreme Court Rule 183(j) states : **Judgment** "The court shall make findings of fact and conclusions of law on all issues presented."

In State v. Moncla, 269 Kan. 61, (2000), "the Kansas Supreme Court made clear that Rule 183(j) has teeth." State v. Bolden,, 28 Kan.App.2d 879 (2001).

In Moncla, the defendant filed a motion for new trial based upon newly discovered evidence. The trial court denied the motion without analyzing the paper evidence presented regarding the new information and did not comply with Supreme Court Rule 183(j) in that he did not make findings of fact or conclusions of law in support of his denial of Moncla's decision. Moncla at 61.

The Supreme Court found the failure of the district court to consider the affidavits regarding new evidence and the failure to comply with Rule 183(j) to require a remand of the case. In support of this finding, the Supreme Court stated:

> "The merits of Moncla's motion aside, the fundamental problem with the district court's approach here is that it impedes appellate review. How are we to review the decision, even under the abuse of discretion standard, when neither findings nor conclusions based on the findings are stated? Motions for new trials, like many 60-1507 motions, may be meritless and, thus, not entitled to evidentiary hearings. However, the district court must tell us what its findings are and why it concluded the motion to be without merit if we are to conduct any sort of meaningful appellate review."

Id at 65.

This view was affirmed in Bolden.

> "Under Moncla, the district court's order in this case was insufficient because it failed to make findings of fact and conclusions of law regarding each of Bolden's arguments. The court's failure to address the two-part ineffective assistance of counsel test is very similar to the court's neglect of the applicable test for newly discovered evidence in Moncla. Even if this case were not ripe for reversal for an evidentiary hearing, it would be remanded for compliance with Rule 183(j)."

Bolden at 884.

> "Due to the failure of the district court to declare any findings of fact or

> conclusions of law, Mr. Stewart's case must be remanded at the very least for compliance with Rule 183(j). Otherwise, this court will not be able to conduct any meaningful appellate review.
>
> The journal entry in the instant case is very similar to that in Bolden. Under Bolden and Moncla, the district court's order in this case was insufficient because it failed to make findings of fact and conclusions of law regarding each of Stewart's arguments. Boilerplate journal entries such as the one used in the instant case do not comply with Rule 183(j). This case must be remanded for compliance with Supreme Court Rule 183(j) before review can be attempted."

Stewart v. State, 42 P.3d 205, 206-207 (2002).

The failure of the trial court to make any findings on this issue required the 60-1507 court to make appropriate findings as to the original claims raised in addition to the failure of appellate counsel to address this issue in the appeal.

Instead, the district court found that counsel made a strategic choice not to call the doctor because she believed that a health care provider would not be allowed to testify as to the credibility of a victim and that appellate counsel could not have prevailed upon the claim for failing to present a witness.

First, Ms. McKinnon testified that in her closing argument, she used Dr. Gilmartin's information about the child's impetigo being "gross", and thereby making it unlikely that Mr. Mashaney would have been inclined to be physically involved with such skin disease. (R. XII, 75). She relied on the doctor's information that he had never heard of such a thing.

However, she presented no expert testimony regarding impetigo, how it presents and no education to the jury from an expert regarding such information. And while Ms. McKinnon may have believed that she would not be allowed to have an expert testify that they had never encountered such a type of abuse before. The doctor would not have been commenting on the veracity of the child witness, he would have been making an informed statement about his knowledge and experience with these types of cases. This situation is no different than that noted above in Macintosh where a child abuse

expert speaks about similar traits or characteristics of victims.

"Two requirements must be present before expert testimony is admissible at trial. First, the testimony must be helpful to the jury. Second, before expert scientific opinion may be received into evidence at trial, the basis of that opinion must be shown to be generally acceptable within the expert's particular scientific field." State v. Hodges, 239 Kan. 63, Syl. ¶ 1, 716 P.2d 563 (1986). Whether or not such a type of abuse ever occurred or had been reviewed either by his experience or his research was an issue that was relevant and outside the scope of the general knowledge of the jury.

Thus, Ms. McKinnon may have had a belief as to why she didn't call Dr. Gilmartin, but it was wrong and misguided and prejudicial to Mr. Mashaney.

And the trial court never made a ruling on the issue making findings of fact and conclusions of law on the matter. The 60-1507 court, for some reason, found that the trial court's general statement refuting all other issues not specified was enough to qualify the matter as reviewable. (R. I, 56-57). This was also wrong.

The district court erred in both its finding that trial counsel made a strategic decision in not calling the doctor because counsel's decision was based upon a lack of knowledge of the law. As noted above, had the issue been presented on appeal, there was a probability of a different outcome and Mr. Mashaney had a right to have competent appellate counsel present the argument for a final determination.

This matter should be remanded to the district court for the appointment of new appellate counsel or, at the very least, for a real evidentiary hearing because there are still numerous facts that are at issue. Appellate counsel should be called to testify and Mr. Mashaney should have an opportunity to present his expert in his own defense.

5. Appellate counsel was ineffective for failing to address the issue of trial counsel's failure to object to irrelevant and prejudicial character evidence which was so plentiful and pervasive as to cause Mr. Mashaney to suffer a constitutionally invalid trial.

The State, as noted above, from opening argument to evidence elicited from Amber Ashley, to the admission of paternity documents in rebuttal and into closing argument trundled out before the jury improper evidence of Mr. Mashaney's other children with different women, lack of contact with his children, child support papers filed after the alleged incident, an implied predilection for "small" women and the failure of his children to call him "daddy".

Ms. McKinnon admitted that she did not object to the State's cross examination of a defense witness about her size and weight and the implication that Mr. Mashaney liked 'little girls". (R. XII, 35; R. X, 28). Ms. McKinnon objected to the first question about Ms. Amber's weight on the basis of relevance, but did not continue objecting to the ensuing, similar questions. (X, 28-29). Ms. McKinnon did not understand the import of these questions until the State's closing argument. (R. XII, 36). Because in closing argument, the State talked about how gross Mr. Mashaney was for his predilection of small woman and different mothers and on and on. (R. X, 141-142).

Ms. McKinnon did not object to any of the questions about Mr. Mashaney's other children, who the mother's were or where they were living or information that he had put one of his children up for adoption. (R. X, 28-29, 32-33).

Ms. McKinnon admitted that she objected to none of this evidence and that all of it was prejudicial to Mr. Mashaney's case.

Ms. McKinnon also testified that she believed the State violated the in limine order by questioning Ms. Ashley about her having sexual relations with Mr. Mashaney when she was 14 years old and by raising it, without objection, in opening statement; admitted the testimony was prejudicial and admitted that she did not object to the evidence. As a further insult to effective representation, Ms. McKinnon allowed the underage contact information to be presented to the jury. (R. XII, 7-9; R. IX, 5).

The State, through Ms. Ashley and again with Ms. Hand, went through all of Mr. Mashaney's other children and wives and his involvement with his children and his lack of being involved in A.A's life. (R. IX, 39-42; 32-33). Ms. McKinnon admitted this information was prejudicial, irrelevant and went to the jury without objection. (R. XII, 7-11; 15-17). And again, the same admission by Ms. McKinnon based upon the State's questioning of Ms. Ashley about what types of gifts had Mr. Mashaney provided his daughter. (R. XII, 21-22; R. IX, 88-89).

Mr. Mashaney's case was a close case. The only evidence against him was the statements of A.A. There was no other corroboration of any sort.

In the recent case of State v. Huntley, 39 Kan.App.2d, 180 (2008), the Kansas Court of Appeals found that evidence that a defendant in a child sex cased gave a nightgown to the victim was prejudicial and irrelevant and such evidence should not be presented at the retrial of the case. Similarly, all of the above irrelevant and inflammatory evidence presented by the State should have been objected to and excluded and the State should have been prevented from producing its parade of insult and innuendo. "Regardless of whether the testimony that Huntley bought M.E. a nightgown several months prior to the abuse was too remote, the evidence was not relevant to prove that Huntley sexually abused M.E. There is no logical or material connection between the asserted fact that Huntley bought M.E. a nightgown sometime around Christmas and the intended inference that Huntley raped or sodomized M.E. in March. We conclude this evidence had no relevance and should not be admitted on remand." State v. Huntley, 39 Kan.App.2d, 180 (2008).

> influence other people to kill the victims. Garcia's level of culpability was 100%. There was no evidence to suggest otherwise. The trial court did abuse its discretion in admitting the testimony. The State urges that if this court finds errors in admission of the testimony of Bertsch and Armstrong, it further finds that the errors were harmless rather than prejudicial. To determine whether trial errors are harmless or prejudicial, each case must be scrutinized in the light of the trial record as a whole. State v. Abu-Fakher, 274 Kan. 584, 613, 56 P.3d 166 (2002). Reversal is required only where an erroneous admission of evidence is of such a nature as to affect the outcome of the trial and deny substantial justice. State v. Engelhardt, 280 Kan. 113, 130, 119 P.3d 1148 (2005)." State v. Garcia, 282 Kan. 252, 270, 144 P.3d 684, 696 - 697 (2006).

Thus, the evidence admitted by the State of bad character was irrelevant, should have been objected to and excluded from the consideration of the jury. In contrast to Garcia, the evidence in Mr. Mashaney's case was not overwhelming and had the State been forced to rely on what little actual evidence it had and not on imprecations and innuendo, a different outcome would have been probable. Again, as noted in Mr. Mashaney's memorandum of law, Mr. Maughn and Mr. Ney were available and willing to testify as to the errors of both trial and appellate counsel and the impact such would have had on the outcome of the case. (R. I, 27).

The district court found that Ms. McKinnon testified that she expected Mr. Mashaney to testify about being a good father and that she didn't believe she needed to object to the information about the other children out of wedlock, citing her testimony on page 17 of R. XII. (R. I, 58). However, that finding ignores the rest of testimony from Ms. McKinnon that she believed the evidence was prejudicial and irrelevant and that there was no reason for the matter to come up over and over again. Ms. McKinnon stated that part of her trial strategy was to talk to Mr. Mashaney about his other children and how he was a good father. (R. XII, 37-38). However, when confronted with the trial record, Ms. McKinnon admitted that there was nothing in direct her direct examination of Mr. Mashaney and any children other than that with Ms. Ashley and Nicole Hand, who had testified. (R. XII, 38-39). Ms. McKinnon also acknowledged that there were several other questions by the State of Mr. Mashaney regarding his other children and how many called him daddy and whether he was involved in their lives and that that testimony was prejudicial and was not objected to. (R. XII, 42-43). So, the district

court's factual finding on this issue was wrong.

The district court found that whether or not the State questioned Ms. Hand about her size, the jury was able to view her and could tell that she was a small person and that the questions had no impact and that discussions about the size and age of teens or women were completely relevant in a case where Mr. Mashaney was accused of sexually abusing a five year old. (R. I, 58-59). What? How does one make the leap from a five foot three inch grown woman to a five year old girl as being similar? How is it relevant to the charges and the case? This was jury-baiting and nothing more. It was an appeal to the passions of the jury, just as all of the harping on the other children Mr. Mashaney had. Mr. Mashaney was not on trial for fathering children out of wedlock, however, you couldn't tell that by reviewing the record and the arguments of the State.

And Ms. McKinnon admitted that all of this evidence was prejudicial. And the issue was completely ignored by appellate counsel. And again, Mr. Ney and Mr. Maughn could have testified about the ineffective assistance and prejudice to Mr. Mashaney's case.

The district court's finding regarding the evidence of all the other children, etc. was that because Mr. Mashaney's defense was that he was a good father, all of that information was fair game for the State. (R.I, 60). This was simplistic and was not supported by the record. Further, while it may have been Ms. McKinnon's pretrial strategy to portray Mr. Mashaney as a good father, that information was not presented to the jury in opening argument or at any time prior to Mr. Mashaney's testimony. Thus, all of the State's blatant inflaming was presented to the jury before this "strategy" was ever put into place. Couple that with the fact that Mr. Mashaney only testified about his children with Ms. Ashley and Ms. Hand, and the findings of the district court are ludicrous. (R. XII, 38-39).

Further, appellate counsel was ineffective for failing to raise these issues on direct appeal as the degree of subterfuge by the State in its little parade of irrelevant horribles reached the level of denying Mr. Mashaney of his constitutionally guaranteed right of a fair trial and the issue could and should have been raised on direct appeal, both as to the question of the effectiveness of counsel and her failure to protect Mr. Mashaney's rights but also as an independent trial issue ripe for review by the Court of

Appeals.

And again, Mr. Ney and Mr. Maughn could have testified about the ineffective assistance and prejudice to Mr. Mashaney's case.

Ms. McKinnon also did not object to the State's inquiries regarding whether Mr. Mashaney had ever filed a paternity action and that she had no strategic reason for failing to do so and that said inquiry was prejudicial to Mr. Mashaney. (R. XII, 49). During rebuttal, the State introduced a Petition for Declaration of Paternity and Order for Support as well as a Journal Entry of Default Judgment of Paternity and there was no objection to the admission of either of the documents. Ms. McKinnon admitted that the documents had no relevancy and even less so, as the documents had been filed after the date of the allegations in Mr. Mashaney's case. (R. XII, 50-51). This was purely inflammatory information that was prejudicial and irrelevant. The district court did not address this issue although it was raised in Mr. Mashaney's legal memorandum.

The findings of the district court were not supported by the record. The issues raised required either that a new appeal be granted or that an evidentiary hearing be held in order to address the ineffectiveness of appellate counsel and trial counsel. This matter should be remanded to the district court.

6. Appellate counsel was ineffective for failing to address the issue of improper judicial comments regarding the child witness and the improper truth-testing of the witness before the jury.

Ms. McKinnon never challenged the competency of A.A. and her ability to discern the truth from a lie. Ms. McKinnon allowed the prosecutor to ask one question regarding the color of her pants and allowed the testimony to go forward. This "test" of competency occurred in front of the jury.

Before A.A. testified, Judge Pilshaw addressed A.A. about how she needed to present herself when testifying. At one point, Judge Pilshaw stated: "This is Dana. Right here, the one that made you raise your right hand and promise to tell the truth." (R. X, 99).

Then, during the direct examination, in front of the jury, the State asked if A.A. knew the difference between a truth and a lie. (R. X, 102).

At the end of A.A.'s testimony, the Judge Pilshaw, in front of the jury, informed A.A. that she was the best at testifying. "You know what? I think you're the best at testifying. You really stayed still much longer than I thought you ever would. You did a very nice job, and you said yes most of the time or no instead of shaking your head. I think you did a good job, and I'm very pleased. Thank you for coming here today."

All three of these issues were reviewed in State v. Chappell, 26 Kan.App.2d 275, 278-281 (1999).

voir dire of the witness by stating that it was satisfied that B.C. was capable of telling the truth and had given illustrations of her ability to tell the truth. This court has previously observed that it is reversible error for a prosecutor to vouch for the credibility of a witness. State v. Gammill, 2 Kan.App.2d 627, 632, 585 P.2d 1074 (1978). Chappell has identified several cases from other jurisdictions which are instructive in the present matter. Those include People v. Rush, 250 Ill.App.3d 530, 190 Ill.Dec. 1, 620 N.E.2d 1262, *cert. denied* 153 Ill.2d 567, 191 Ill.Dec. 627, 624 N.E.2d 815 (1993); State v. Zamorsky, 159 N.J.Super. 273, 387 A.2d 1227 (1978); and State v. Suttles, 767 S.W.2d 403 (Tenn.1989). We find Zamorsky to be most closely on point. In Zamorsky, the trial judge interrogated a child witness in the presence of the jury to determine the child's competency as a witness. At the conclusion of the interrogation, the trial judge stated, " 'I think she will try to tell us the truth. I will find her qualified.' " 159 N.J.Super. at 281, 387 A.2d 1227. The trial judge further stated, " 'We have to judge what the child [*sic*] to see whether the *child will tell her version truthfully, just as you would with any of your children.*' [Emphasis supplied]." 159 N.J.Super. at 281, 387 A.2d 1227. The Zamorsky court held that the trial court's comments were inherently prejudicial because they conveyed to the jury the impression that the trial court found the child witness to be credible. The Zamorsky opinion reasoned: "There is no doubt that K's testimony was crucial to the State's case. The implied endorsement of her credibility by the trial judge thus 'had the capacity to tip the scale against defendant.' " Zamorsky, 159 N.J.Super. at 281-82, 387 A.2d 1227 (quoting State v. Corbo, 32 N.J. 273, 276, 160 A.2d 625 [1960]). A trial court must avoid making any comments which could be interpreted by a jury as an endorsement of the credibility of a witness. As in Zamorsky, the trial judge's comments in the present matter improperly lent credence to the testimony of B.C. The evidence in this matter was closely balanced, with the outcome hinging upon the jury's perception of B.C.'s credibility. Under these circumstances, the trial court's comments during the interrogation of B.C. in the presence of the jury substantially prejudiced Chappell's right to a fair trial. The purpose of the interrogation was to determine whether B.C. understood her duty to tell the truth, not whether she would tell the truth. The Zamorsky court states: "Interrogating a child offered as a witness, where the qualification of the child to testify is in issue, is a difficult task which cannot be performed in a *pro forma* or perfunctory manner. Since the goal is to ascertain the child's comprehension of the duty of a witness to tell the truth, it is first necessary to explore the child's conceptual awareness of truth and falsehood. The younger the child, the more searching the inquiry must be. When it has been established that the child understands the meaning of those terms, the next area of inquiry is not, as is so often the case, whether the child *will tell the truth,* but rather whether the child understands that it is his or her *duty to tell the truth*....It should suffice if the child understands that it is wrong to tell a lie and that one must always speak the truth. If the trial judge is satisfied from his interrogation that the child is sensitive to his or her obligation to tell the truth, we will not disturb his conclusion unless it is plainly unsupported by the evidence." 159 N.J.Super. at 280, 387 A.2d 1227. The credibility of B.C. was for the jury to determine. However, the trial court's comments conveyed a message to the jury that B.C. would tell the truth while testifying and, thus, was credible. We recognize that the remarks made by the trial judge during his voir dire of B.C. were well intentioned; however, Chappell has a right to a fair trial devoid of comments by the court which bolster the credibility of the State's primary witness. In those instances where the qualification of a child witness to testify is in issue, the voir dire, whether conducted by court or counsel, should occur outside the presence of the jury. The failure to adopt this procedure in conducting the

> voir dire of B.C. allowed the jury to hear the improper comments of the trial court and prosecutor. This compels us to find that Chappell was seriously prejudiced and his constitutional right to a fair trial was, accordingly, denied. Chappell's convictions are, therefore, reversed, and this matter is remanded for a new trial. In view of this determination, other issues raised on appeal need not be addressed. Reversed and remanded for a new trial. State v. Chappell, 26 Kan.App.2d 275, 278-281, 987 P.2d 1114,1117 - 1119 (1999).

Thus, the improper comments of Judge Pilshaw could and should have acted as a basis for a mistrial, had counsel only requested one or, at the very least, lodged an objection that would have preserved the issue for appellate review. The error is further substantiated by Ms. McKinnon's reliance on this question as a basis for a new trial. (R. III, 42).

Finally, it was error for the prosecutor to question A.A. about her ability to distinguish truth from lie in front of the jury as such determinations should be made outside the presence of the jury so that such testimony does not unduly influence the jury.

The district court found that any witness is presumed competent to testify and there was nothing in the record to suggest that the victim did not have the capacity to testify. (R. I, 63). Then why was it okay for the prosecutor to test the witness's knowledge of truth and lie before the jury? Why was it necessary for the judge to reiterate to the witness that she had promised to tell the truth? Why was it okay for the judge to tell the witness that she was the best at testifying? The factual finding of the district court was erroneous in that it was trying to have its cake and eat it, too.

The district court found that the statements of Judge Pilshaw to A.A. were obviously not a comment on her testimony. Id. 62. However, the support and the words used by the court were influential and could certainly have been regarded as such by the jury. Further, the potential harm of the judge's statement was emphasized by the pre-testimony colloquy in which the judge reminded AA that she had promised to tell the truth.

The district court made a non sequitorial, erroneous finding in that it found that Mr. Mashaney did not "directly seek a new trial or another evidentiary hearing based on the allegations of ineffective

assistance of trial counsel" and seems to state that the issues raised in the instant petition are barred as successive. Id. 64.

First, Mr. Mashaney sought an evidentiary hearing regarding the ineffective assistance of appellate counsel. That was why Mr. Mashaney had Mr. Maughn and Mr. Ney listed as expert witnesses to testify on his behalf because a host of valid issues were raised in the ineffective counsel hearing that could and should have been raised on direct appeal.

Second, as noted above and in the original petition, the trial court did not make specific findings of fact or conclusions of law regarding any of the ineffective assistance of trial claims that were raised at the presentencing hearing. The only issue addressed by the trial court was her statements to A.A and the Doyle issue. All other denials were general in nature and based on the judge's knowledge of Ms. McKinnon. (R. VI, 11). As such, none of those issues were ripe for appeal and an appropriate finding needed to be made on all of the issues, with particularity.

Third, a pre-sentence hearing regarding the effectiveness of counsel is not K.S.A. 60-1507 hearing because no request for habeas relief has been filed. There was and is, no bar to Mr. Mashaney filing a timely 60-1507 petition as the prior hearing was based upon a motion to the court, not a habeas corpus petition. Therefore, the current petition could not, legally, be a successive motion. Further, this argument was recently rejected in Rice v. State, 37 Kan.App.2d 456, 459, 154 P.3d 537, *rev. denied,* 284 Kan. 946 (2007). Just as in this case, *Rice* involved an appeal from a denial of a 60-1507 motion raising additional claims of ineffective assistance of trial counsel after the effectiveness of trial counsel had already been litigated on direct appeal through a Van Cleave remand. In Rice, the State argued that the Van Cleave remand was the equivalent of a first 60-1507 motion and, thus, the current motion was barred as a successive 60-1507 motion. The panel disagreed, holding that a motion to remand for a Van Cleave hearing in a direct appeal is not to be construed as a 60-1507 motion triggering the successive motions provisions of Rule 183(d). According to the panel, because a Van Cleave remand motion is

filed in the criminal case before the conviction becomes final, it is "part and parcel of the direct criminal appeal." Accordingly, the 60-1507 was not a second or successive motion for relief, as contemplated in Rule 183(d). Rice, 37 Kan.App.2d at 461, 154 P.3d 537.

For all of these reasons, this Court should either order this case remanded to the district court for additional and proper findings of fact and conclusions of law, grant Mr. Mashaney a new appeal, or remand the matter for an evidentiary hearing.

Respectfully submitted,

By:_____

Michael P. Whalen
Sup. Ct. No. 16611
Law Office of Michael P. Whalen
6235 W. Kellogg
Wichita, Kansas 67209
Telephone: (316) 265-2598
ATTORNEY FOR MOVANT/APPELLANT

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the above and foregoing Brief was placed in the U.S. Mails, postage prepaid to the following:

David Lowden
Office of the District Attorney
Appellate Division
1900 E. Morris
Wichita, KS 67211

this ____ of August, 2009.

Michael P. Whalen