Case No. 08-100362-A

IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

IN THE MATTER OF THE CARE AND TREATMENT
OF ROBERT ONTIBEROS,
Respondent/Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Ben Burgess
Judge of the District Court
District Court Case No. 07 PR 816

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 PLAINTIFF/APPELLANT ROBERT ONTIBEROS

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I.

NATURE OF THE ACTION

This is a direct appeal to the Kansas Court of Appeals following the determination by a jury that Mr. Ontiberos was a sexualy violent predator.

II.

ISSUE ON APPEAL

A. Mr. Ontiberos did not receive a fair trial due to prosecutorial misconduct that reached a level that hindered the jury from returning a fair and impartial verdict.

B. Is the KSVPA constitutional in that it does not allow for review of ineffective assistance of counsel claims?

C. Trial counsel was ineffective.

III.

FACTS OF THE CASE

In July 2007, the State filed a petition pursuant to K.S.A. 59-29a01, et seq., wherein the State initiated proceedings to have Mr. Ontiberos declared to be a sexually violent predator. (R. I, 7).

Mr. Ontiberos stipulated to the initial probable cause finding and he was transported to Larned State Security Hospital for an evaluation. Id. at 24.

Following the completion of the Larned evaluation, a jury trial was held regarding the question of whether Mr. Ontiberos was a sexually violent predator pursuant to the Kansas Sexually Violent Predator Act. (KSVPA).

The parties stipulated that Mr. Ontiberos had two index crimes, one for attempted rape and one for aggravated sexual battery. (R. II, 7).

In opening statement, the counsel for the State, Mr. Bennett, told the jury in explicit detail about the underlying facts of Mr. Ontiberos' index crimes. Id. at 15.

The State's first, and only witness was Dr. Deborah McCoy. Dr. McCoy testified about her education, training and experience. Id. at 24-31. She stated that prior to doing the clinical interview with Mr. Ontiberos, she reviewed all the records available to her, possibly including treatment in sex offender treatment programs while incarcerated, his Kansas Department of Corrections records, social history, and any previous psychological evaluations that had been done. Id. at 34-35.

Dr. McCoy testified that she had done a clinical interview with Mr. Ontiberos and had used the records in the case to use two actuarial assessments, the Static 99 and the MNSOST. Id. at 35-37. Dr. McCoy stated she reviewed legal records, documents of past crimes or whatever the most recent conviction was, psychological evaluations that may have been done and records from Larned State. Dr. McCoy, when asked, stated that those records were kept in the ordinary course of business, although what business and who's business, she did not, or could not, say. Id. at 38-39.

Dr. McCoy stated the records revealed Mr. Ontiberos had completed two sex offender treatment programs while incarcerated. Id. at 40. She described her interview with Mr. Ontiberos. She said Mr. Ontiberos was cooperative and was able to identify triggers and he was able to express that he had caused his victims psychological harm. Id. at 44-45.

Through leading questions from the prosecutor, Dr. McCoy gave overly detailed accounts of Mr. Ontiberos index crimes and the prosecutor prompted and pushed and was able to get Dr. McCoy to eventually say that in the second index crime, Mr. Ontiberos stated "I want pussy." Id. at 46-48. Dr. McCoy stated that she had reviewed other

treatment records of Mr. Ontiberos and stated that he had made more elaborate statements about his crimes in the past than he had in her interview. Id. at 50.

Dr. McCoy stated she had utilized two actuarial tools, the Static 99 and the MNSOST-R and she explained that the Static 99 measured unchanging, static, factors and was used to predict the recidivism risks of the individual. Id. at 51-53. She testified that based on the Static 99, Mr. Ontiberos had a 52% risk of being reconvicted after 15 years. Based on the MNSOST Mr. Ontiberos had a 29% risk of being rearrested after six years. Id. at 54; 56. She stated that she diagnosed Mr. Ontiberos with paraphilia and a personality disorder, NOS. Id. at 59; 63. She stated that within a degree of medical certainty that Mr. Ontiberos' mental abnormality and personality disorder would make him likely to reoffend and found him to be a sexually violent predator. Id. at 65-66.

Mr. Barker began his cross examination of Dr. McCoy by having her read to the jury an explicit account of Mr. Ontiberos' attempted rape incident. Id. at 70. Mr. Barker then brought out the fact that Mr. Ontiberos had been intimate with 75 or more prostitutes and that that could be a basis that supported the diagnosis of paraphilia. Id. at 72-73.

Mr. Barker pointed out that between the two actuarial tests, the Static 99 results showed Mr. Ontiberos had a greater risk of being convicted for a new crime than the MNSOST-R showed his risk of being rearrested and Dr. McCoy agreed. Id. at 74-75.

Mr. Barker got questioned Dr. McCoy about the fact that age can effect the recidivism rates as presented in the Static 99. Dr. McCoy would not agree. Id.

Mr. Ontiberos testified on his own behalf. He stated that he had learned about his triggers in treatment and that he believed he needed to continue with alcohol and

narcotics treatment. (R. III, 9-11). That was about it for Mr. Barker's direct examination.

Mr. Bennett then cross examined Mr. Ontiberos. Throughout the course of cross examiniation, Mr. Bennett referenced documents from Exhibit 1as a basis for inquiry of Mr. Ontiberos. Mr. Bennett also quoted, numerous times, unidentified police and treatment reports that had never been admitted into evidence. Id. at 15; 17-18; 18-19; 19-22; 24; 31-32; 34; 48-51; 52; 50; 52-53; and 53.

Dr. Barnett testified as Mr. Ontiberos' expert. He stated that the Static 99 and MNSOST-R were unreliable. Id. at 71-72. He stated that a plesythemograph was the most accurate way to measure sexual deviancy. Id. at 97. Dr. Barnett testified that he did not agree that Mr. Ontiberos suffered from either paraphilia or a personality disorder and that Mr. Ontiberos problems arose from his sever substance abuse issues. Id. at 74.

On cross examination, Mr. Bennett used unidentified records to impeach Mr. Ontiberos through the testimony of Dr. Barnett regarding disciplinary reports from KDOC and even an incident where Mr. Ontiberos had allegedly forged a knife out of a pen and duct tape. An incident that never occurred. Id. at 86; R. XIII, 23; Id. at 35-36.

The jury found Mr. Ontiberos to be a sexually violent predator and Mr. Ontiberos was ordered committed to the Larned State Hospital. (R. I, 57-59).

A timely notice of appeal was filed. Appellate counsel filed a motion for remand to the district court for a Van Cleave hearing based on the fact that there was ineffective assistance of counsel and that no form of habeas relief was available to KSVPA victims.

An evidentiary hearing was held in district court before Judge Burgess, the trial

judge in the care and treatment case.

Mr. Bennett was called to the stand. He agreed that Exhibit 1 was admitted into evidence for the exclusive use of the appellate court because case law required that experts testifying must either have personal knowledge of the information used to formulate their opinions or it must be made known to them through the course of the trial. (R. XIII, 7-10). Mr. Bennett agreed that he had Dr. McCoy testify in detail about the prior crimes of Mr. Ontiberos. He also stated that he had been prepared to subpoena record keepers, police officers and the victim of the 2001 aggravated sexual battery. Id. at 12-15. Mr. Bennett acceded that without the victims available to testify, that the police officer statements about what the victims had told them would have been hearsay. Id. at 20. Mr. Bennett agreed that he had asked Mr. Ontiberos based upon documents from Exhibit 1 but did not recall actually presenting documents to Mr. Ontiberos. Id. at 22-23.

Mr. Bennett didn't recall, but agreed that the transcript showed he had questioned Dr. Barnett about an incident in prison where Mr. Ontiberos had made a weapon and acknowledged that in his review of the record prior to the hearing, could not find any documents to support the claim. Id. at 23.

Mr. Bennett testified that he believed Dr. Barnett had reviewed all of the same documents as Dr. McCoy. Id. at 30. In point of fact, Dr. Barnett only reviewed the Larned evaluation. (R. III, 65).

Mr. Ontiberos testified that he had never created a weapon while incarcerated and that he had never been disciplined for such conduct. (R. XIII, 35-36).

Mr. Barker then took the stand. He testified that he agreed to the stipulation of the

admission of evidence because he didn't want the State to bring in a lot of cumulative evidence. Id. at 39. Mr. Barker acknowledged that there was a difference between the DSM-IV and the DSM-IV R as to the definition of paraphilia, but he did not know what changes were made in the new edition. Id. at 45.

Mr. Barker testified that his strategy at trial regarding the actuarial tests was to attack the validity of the tests. (R. XIII, 54). At the hearing, Mr. Barker was presented with a copy of Mr. Ontiberos discharge summary from the sexual offender treatment program. (R. VI, 1107). Mr. Barker testified that he reviewed all three thousand pages of the exhibit looking for something that would help Mr. Ontiberos and found nothing. He did not recall this document. (R. XIII, 55). Mr. Barker acknowledged that the discharge summary showed a Static 99 score that set a recidivism rate for Mr. Ontiberos to only have a recidivism rate of nine per cent. Id. Mr. Barker had acknowledged that Dr. McCoy, the State's expert, utilizing the same tool, found Mr. Ontiberos to have a much higher recidivism rate. Id. at 50. In point of fact, Dr. McCoy had placed Mr. Ontiberos in the highly likely to recidivate category with a 59 per cent chance of recidivating. (R. II, 53).

Mr. Barker admitted that Dr. McCoy had testified that the Static 99 score was significant in her assessment of Mr. Ontiberos being a sexual predator. (R. XIII, 56). Mr. Barker testified that since his strategy was to attack the tests, it wouldn't work if he used a prior test and said that one was better. Id. at 58. Mr. Barker had also testified that he had personal knowledge and information that the recidivism rate dropped for persons as they aged under the scoring for the Static 99. (R. XIII, 54).

Mr. Barker also testified that he believed the Static 99 scores may have been different because people change over time. (R. XIII, 69). Mr. Barker did not understand that the Static 99 is a static test, meaning that it only relates to issues that don't change over time. Id. This was true even though he was present at Mr. Ontiberos' trial where Dr. McCoy testified that the Static 99 takes into consideration factors that don't change over time. (R. II, 51). Dr. McCoy also testified as to what the factors were that were assessed in the Static 99. Id. at 52. Even Dr. Barnett testified that the Static 99 was faulty because they have no dynamic capability and do not account for changes in individuals. (R. III, 73).

Mr. Barker testified that he had relied on Dr. Barnett to tell him that the Static 99 was unreliable and he did not investigate the basis or background of the test and he would have had no idea where to begin. (R. XIII, 71). Mr. Barker didn't even know how many questions were on the test nor what or how it measured anything. (R. XIII, 70).

Mr. Barker confirmed in his testimony that Dr. Barnett testified that the best means of determining whether a sexual offender will recidivate is through the use of a plesythmograph. (R. XIII, 60-61). In fact, Dr. Barnett testified that he didn't know why Larned didn't use the plesythmograph in their evaluations because it was the most effective tool in the assessment of the future dangerousness of sex offenders. (R. III, 97).

And the fact of the matter is that Mr. Ontiberos had been tested on the plesythmograph and that the record of his score, etc. was contained within Exhibit 1 at page 1191-2005. (R. XIII, 61). Mr. Barker testified that his defense was based on the

fact that Mr. Ontiberos was a drug addict and an alcoholic and not a sexual deviant. (R. XIII, 63). The 2004 sexual offender treatment program discharge summary which was admitted as a part of Exhibit 1, stated that Mr. Ontiberos had no sexual deviancy and his problems were cocaine and drug abuse. (R. VI, 1107). Mr. Barker testified that it possibly could have bolstered Mr. Ontiberos case to have presented the fact that within two years of Dr. McCoy's evaluation that the sexual treatment provider made the same exact findings as Dr. Barnett. But, Mr. Barker said that he didn't want to get parts of Exhibit 1 introduced into evidence because he felt the vast majority of the information was detrimental to Mr. Ontiberos and so he *chose* not to use any of it. (R. XIII, 64). Mr. Barker did also testify that he did not, at present, remember everything that was contained in Exhibit 1, but that he did go through all of it and decided not to use any of it because he didn't want to start validating part of it. Id. at 64.

Judge Burgess made his ruling following the submission of trial briefs by both parties. The district court found that, as to the stipulation and Exhibit 1, Mr. Barker made a knowing and strategic choice to agree to the stipulation. (R. XII, 19). The district court stated that it appeared from the record that some of Dr. McCoy's information came from Mr. Ontiberos in the course of her interview and that would not have been considered hearsay. Id. at 20. The court found that it wasn't clear what records Dr. Barnett reviewed, based on a review of the transcript, but that the documents were there for his use if he wanted them. Id. at 22. Mr. Ontiberos directed the court to the fact that Dr. Barnett testified that he only reviewed the Larned report. Id. at 26.

The court came down to a final finding, based on the judges 37 years experience as a judge and a lawyer, that there are good attorneys, bad attorneys and attorneys that

fall in between and, in considering the record the briefs and analyzing the underlying circumstances, the court did not find that Mr. Barker fell into the bottom of the attorney pool. Id. at 24. The court found Mr. Barker made strategic choices and that even if different choices had been made, the outcome of the trial would have been the same. Id. at 25.

This brief follows.

IV.

ARGUMENTS AND AUTHORITIES

A. Mr. Ontiberos did not receive a fair trial due to prosecutorial misconduct that reached a level that hindered the jury from returning a fair and impartial verdict.

1. Standard of review.

"Most important, however, we observe that this court has held that attorney misconduct can require reversal in purely civil cases. Smith v. Blakey, Administrator, 213 Kan. 91, 515 P.2d 1062 (1973), contains some parallels. There, even though defense counsel had not objected, this court reversed and remanded for a new jury trial in a personal injury case because of the opposing counsel's conduct, including improper statements in closing argument. As this court stated: Under what circumstances do remarks of counsel result in reversible error? An uncontradictable answer must be: they are reversible error when, because of them, the parties have not had a fair trial. Factors necessary to a fair trial are an adequate hearing before an impartial tribunal based on legally admissible evidence relevant to the issues involved, free from bias or prejudice.

We are not concerned in this proceeding with discipline for violations of our Code of Professional Responsibility ... except as the actions which may constitute violations relate to the issue of a fair trial. After carefully reviewing this record, we have no hesitancy in finding *the remarks and conduct of counsel materially distracted and hindered the jury from returning an impartial verdict based upon the issues between the parties* and the evidence presented relevant to those issues." (Emphasis added.) 213 Kan. at 96, 515 P.2d 1062.See, e.g., McKissick v. Frye, 255 Kan. 566, 876 P.2d 1371 (1994); Henderson v. Hassur, 225 Kan. 678, 693, 594 P.2d 650 (1979) (Remarks of counsel result in reversible error when, because of them, the parties have not had a fair trial.); K.S.A. 60-261 (new trial may be ordered if substantial rights of a party affected)." In re Care and Treatment of Foster, 280 Kan. 845, 854-855, 127 P.3d 277, 284 - 285 (2006).

Thus, reversible error based upon State conduct in a KSVP trial is whether the actions deprived the Respondent of his right to a fair trial.

2. The prosecutor abused the evidence that was entered as an exhibit solely for the purpose of the expert witnesses.

"The case - - or excuse me, the statutory authority for the testimony of an expert requires that they be - - any records about which they are testifying, they need to be able to be presented with those documents in court. And so, by agreement of the parties, before we began, there was a stipulation to both foundation for those records and then, also, that they would be admitted for the appellate record only, in the event that either doctor needs to be presented with something admitted." (R. II, 84). Mr. Barker agreed to the admission of the documents based upon the stipulation that the exhibit was only being admitted for the use of the experts if necessary. Id. at 85.

However, during the course of Mr. Bennett's cross examination of Mr. Ontiberos at trial, Mr. Bennett testified about Mr. Ontiberos' 25 year old prior case, while trying to ask Mr. Ontiberos about facts to which he had blacked out and would not have been allowed anyway. (R. III, 13-15). Further, Mr. Bennett pulled a document from the exhibit, a report of the clinical evaluation of Mr. Ontiberos from November, 1983, and confronted Mr. Ontiberos with it. Id. at 15. (R. VIII, 1981). In other words, without objection from Mr. Barker, Mr. Bennett violated the stipulation about the documents and presented evidence to the jury from the exhibit that was entered not to be presented to the jury and which would not be reviewable by the jury and, by agreement, was to specifically, be kept from the jury.

And again. "You told him about the - - it says here the '93 incident, I think it means the '83 incident, dealing with your friend, the gal you'd gone to high school with, you told him, this is a quote here, they siad I picked up a female friend, age 31, and took her into the bedroom and tried to pull her pants down. I was drunk and don't remember what happened?" (R. III, 29). This was in reference to Mr. Ontiberos interview with Dr. Barnett and was referring to the expert report done by Dr. Barnett. The expert report by Dr. Barnett was not a part of Exhibit 1. In fact, the expert report was not admitted into evidence during Dr. Barnett's testimony. Thus, again, Mr. Bennett is quoting and using a document to impeach Mr. Ontiberos that has never been entered into evidence and was not available to the jury for review. And Mr. Barker did nothing.

This occurred a few more times. Mr. Bennett cross examined Mr. Ontiberos about a KDOC document where he did not accept responsibility for his actions. (R. III, 31-32). (R. IV, 181). This document was a Department of Corrections document in which Mr.

Ontiberos had allegedly given his version of the events related to his prior conviction. This was a violation of the stipulation and a presentation of documents and evidence that could not be challenged and could not be presented to the jury and there was no objection from Mr. Barker.

And again. Mr. Bennett asked Mr. Ontiberos if he had told an evaluator in 1991 that he didn't understand why he had to do treatment again. (R. III, 34). (See document 1367). This document reflected alleged statements Mr. Ontiberos made to an unidentified female psychologist in 1991 regarding his questioning of why he was being required to coplete sex offender treatment again. This was violation of the stipulation and a presentation of documents and evidence that could not be challenged and could not be presented to the jury and there was no objection from Mr. Barker.

And again. Mr. Bennet questioned Mr. Ontiberos about his statements to a KDOC counselor back in 1983. Mr. Ontiberos could not remember making any of the alleged statements, attirbuted to Mr. Ontiberos to an unknown KDOC counselor 23 years previously. (R. III, 17-18). Mr. Bennett testified, without referring to a specific document from the exhibit, that Mr. Ontiberos told a psychiatrist that his victim picked up a knife and that Mr. Ontiberos took it out of her hand and threw it on the floor. Mr. Ontiberos did not remember that. Mr. Bennett testified about the entire incident and referenced to the statements given by Mr. Ontiberos twenty-fives years earlier and challenged Mr. Ontiberos credibility by showing that Mr. Ontiberos remembered more about the incident at the time of the KSVP trial than he did twenty five years earlier. Id. at 18-19.

And again, Mr. Bennett questioned Mr. Ontiberos about non-violent, non-sex related parole violation. Mr. Bennett questioned Mr. Ontiberos about a time that he left his residential facility and did not return at the required time and had his parole violated. Mr. Ontiberos testified that he was picked up by police the same day as he failed to appear at the facility. Mr. Bennett responded: "if the records indicate it was a matter of several days, your memory's different than that, at least." (R. III, 19-22). Mr. Bennett was challenging Mr. Ontiberos memory and credibility by citing official reports that were not entered into evidence, that were not placed before the jury and to which Mr. Ontiberos could neither confront nor refute.

And again, on cross examination of Mr. Ontiberos, Mr. Bennett pulled a presentence examination report from Exhibit 1, bates stamp 167, (R. IV, 167) and confronted Mr. Ontiberos with the document attempted to impeach Mr. Ontiberos' testimony from the use of an unauthorized document. (R. III, 39).

As will be shown below, not one of these abuses of the "exhibit" was objected to by Mr. Barker.

And again, Mr. Bennett quoted a police report that had not been entered into evidence, stating, "The police arrive that night and you told them - - your were asked what was going on. And you said, quote - - to the police officer, quote, sir, I wanted to get some pussy so I called Betty up, end quote?". (R. III, 24).

Then, Mr. Bennett again cross examined Mr. Ontiberos utilizing information that had not been legitimately put into evidence and reference the facts of prior crimes without the evidence of the crimes ever have been put into evidence legitimately. (R. III,

48-51; 52-53). Mr. Bennett asked Mr. Ontiberos about a flashing incident in 1991. Mr. Ontiberos testified that he did not get completely unclothed and that he had left his shorts on. Mr. Bennett said "The police report - - if the police reports indicate that you made - - quote, he made no effort to conceal his genital area and walked up the stairs in a sort of - - they called it a strutting manner..." Id. at 50. Thus, Mr. Bennett was able to impeach Mr. Ontiberos with quotations from a police report that was not identified, was not even alleged to have been a part of Exhibit I, but, if it was a part of State's Exhibit 1, it was improper for Mr. Bennett to use such a document in violation of the stipulation of use to apply only to the testimony of the experts. Mr. Bennett then went on: "When the police asked you put your clothes on, you told them not o mess with you, to leave you alone, otherwise, and your quote was, Charlie's going to get you." Id. at 50-51. And again, no objection from counsel.

And it goes on. Mr. Bennett questioned Mr. Ontiberos regarding letters he wrote as a part of his sex offender treatment. Mr. Bennett: "Your words, you wrote here, in your own hand, in 1998, it was not charged, I went into my wife's bedroom, when I told her I wanted sex, she told m no, that I was too drunk and high. I proceeded to kiss her neck and fondle her breasts, as well as touched her vagina. She reported this to the police about a month and a half later." Id. at 51-52. Mr. Bennett read into the record an unidentified letter, apparently something that was a part of Exhibit 1, however the document was not properly placed into evidence. Further, Mr. Ontiberos was unable to remember the incident discussed and that he only knew about it because he had read it in police reports. And there was no objection by Mr. Ontiberos' counsel.

And it goes on. Mr. Bennett: "In '99 the police also had contacted you in January

of '99 about a woman named Paula, who indicated that you had - - you had walked up to her residence in October of '98, two monts after the deal with your wife, October '98, walked up to her at her residence and told her, quote, I want some pussy?" Id. at 52. Mr. Bennett is again quoting Mr. Ontiberos based upon unidentified police reports that had not been entered into evidence, had not been authenticated and to which there was no objection by Mr. Barker. And Mr. Bennett goes on: "Remember telling the police that you denied everything, all you remembered was staying with a friend back in October and that you didn't know this woman? You don't remember telling the police that?" Id. at 53. Mr. Bennett then, again, references the quote from the police report, allegedly made by the woman involved that Mr. Ontiberos supposedly stated "I want pussy."

So, again, a reference to quotes and police reports that were not admitted, were not admissible and Mr. Ontiberos' counsel continued to exercise his right to remain silent.

Mr. Ontiberos was deprived his right to a fair trial due to the abuse of the prosecutor by repeatedly impeaching Mr. Ontiberos based upon either specific documents that were admitted as a part of Exhibit 1 and which were prohibited by stipulation to be used against Mr. Ontiberos and which were specifically prohibited from being admitted into evidence and were prohibited from being reviewed by the jury. Further, without reference to any specific documents, Mr. Bennett repeatedly read quotes from writings attributed to Mr. Ontiberos or law enforcement agents, going back as many as twenty-five years, and to which no one, including Mr. Ontiberos, could confirm or deny whether they were actual documents, whether or not they were admissible evidence nor whether or not any of the information was real or true. The State was given free rein to testify about anything he wanted to without any attribution to where the information came from.

This was furthered during Mr. Bennett's cross examination of Dr. Barnett, Mr. Ontiberos' expert psychologist. Mr. Bennett questioned Dr. Barnett about Mr. Ontiberos disciplinary sanctions during his incarceration. Mr. Bennett testified, in the guise of cross examination, that from 2000 to 2007, that Mr. Ontiberos had sixteen disciplinary reports while incarcerated. This "fact" elicited from Dr. Barnett an admission that Mr. Ontiberos understated his record during the clinical interview. (R. III, 86). The unadmitted evidence was used to impeach Mr. Ontiberos' through his own expert without any documents or evidence of such ever having been admitted into evidence nor placed before the jury.

Mr. Bennett asked Dr. Barnett if he was aware of a 2003 inmate fight involving Mr. Ontiberos. Mr. Bennett asked Dr. Barnett about "The **fact** that he (Mr. Ontiberos) was listed in a disciplinary report as having taken duct tape and wrapped it around a pen in order to fashion a rude knife of some kind, that - - did he tell you about that?" Id. at 86. (Emphasis added).

This was the State's most egregious act, presenting "evidence" or making inquiries regarding non-sexual negative conduct related to the possession of a "duct tape knife" while incarcerated. Again, no objection from Mr. Barker. Again, not evidence, if it had been a part of the exhibit.

But the incident didn't exist. At the remand hearing, Mr. Bennett was unable to find the document in his review of Exhibit 1. (R. II, 23). Mr. Ontiberos testified that he had never had a disciplinary write up or incident involving a knife of any sort. Id. at 35-36. Further, a review of the entire record of Exhibit 1 shows that no such incident was

ever documented.

Mr. Bennett testified that he would not have just made something up but that he had asked the question with a basis in proof, but he could not recall from where the information may have come.

In reviewing the KSVPA, the United States Supreme Court emphasized civil involuntary commitment is permissible only if "the confinement takes place pursuant to proper procedures and evidentiary standards." Hendricks, 521 U.S. at 357, 117 S.Ct. 2072. This is because the liberty interest in freedom from physical restraint " 'has always been at the core of the liberty protected by the Due Process Clause....' " 521 U.S. at 356, 117 S.Ct. 2072 (quoting Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 [1992]). Moreover, if "the typical civil case involving a monetary dispute between private parties," where "society has a minimal concern with the outcome," is reversible absent a fair trial, so much more should an appellate court consider allegations of abusive argumentation where a party has been civilly committed, which is "a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 423, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The State violated Mr. Ontiberos' right to have a trial free of improper procedures and an abuse of agreed upon evidentiary standards that were put into place by the agreement of the parties. Mr. Bennett's reliance on confronting Mr. Ontiberos and impeaching his testimony and challenging his statements in the clinical evaluations by the use of documents that were specifically excluded from such use by stipulation prevented Mr. Ontiberos from having a fair trial. Mr. Bennett's reading and quoting of unidentified

police reports and documents and statements attributed to other unidentified parties was improper and prevented Mr. Ontiberos from having a fair trial.

The State's impeachment of Mr. Ontiberos by presenting his expert with "evidence" that had not been entered into the record and with "evidence" that just did not exist, deprived Mr. Ontiberos from receiving a fair trial.

3. The State deprived Mr. Ontiberos of a fair trial by continually referencing a quotation attributed to Mr. Ontiberos for no other reason than to inflame the passions of the jury.

Mr. Bennett started the "I want pussy" parade in opening statement. "And the testimony was that he gained access ito his in-laws' home, proceeded to take off his clothes and then come after his mother in law and saying words to the effect, saying the words over and over again, I want pussy, over and over again to her." (R. II, 16).

Prior to trial, the parties stipulated that the index crimes for Mr. Ontiberos would be his conviction for attempted rape and the conviction for attempted sexual battery. (R. II, 7). While it has been found by this court that it is okay for the State to explore the factual basis for the underlying index crime, in the instant case, there was an abuse of the evidence and it was repeatedly presented to the jury for the purpose of inflaming the passions of the jury.

During the direct examination of Dr. McCoy, Mr. Bennett elicited from the doctor that, as related to the 2001 incident of aggravated sexual battery, she had reviewed the records, the legal documents and police records related to the incident. Mr. Bennett led Dr. McCoy by stating that Mr. Ontiberos went to his in-law's home, entered the hose and removed his clothes. Dr. McCoy confirmed that. Mr. Bennett continues to lead saying

the allegation was that Mr. Ontiberos got into the house naked. Dr. McCoy said uh huh. Mr. Bennett then asked "And then did what?" Dr. McCoy testified that she believed Dr. McCoy grabbed his mother-in-law's wrists and proceeded to state in some terms he wanted to have sex with her.

Mr. Bennett then proceeded to correct Dr. McCoy and elicit more explicit testimony from her saying "To be indelicate here, but the reports, what words did they attribute to Mr. Ontiberos? What was he saying to her, as reported in the records, over and over?" Dr. McCoy: "I believe he said I want to have sex with you and I want pussy." (R. II, 47-48).

Mr. Bennett had started the "I want pussy" theme in opening statement and when the doctor didn't testify specifically to that point, he pushed and led her to state "I want pussy."

But the parade continued on. Mr. Bennett, again quoting from an unidentified police report that was not entered into evidence, stated "The police arrive that night and you told them - - your were asked what was going on. And you said, quote - - to the police officer, quote, sir, I wanted to get some pussy so I called Betty up, end quote?". (R. III, 24).

During the cross examination of Mr. Ontiberos, Mr. Bennett again asks Mr. Ontiberos "You then begin to yell I want sex, I want pussy, right? Yes?" Mr. Ontiberos again confirmed that he did not remember that part of the incident. Id. at 28.

Still on cross examination and still quoting from police reports that have never been identified nor admitted into evidence, Mr. Bennett stated: "That quote, though, I

want pussy, isn't that the same thing you told betty three years later, in 2001, your mother-in-law?" Id. at 53.

But why should the State let a good thing go? In the cross examination of Dr. Barnett, Mr. Bennett asked if Mr. Ontiberos had told him about the woman he approached in '98 "saying I want pussy from her?" (R. III, 94-95). This is doubly troubling in that the cross examination was impeachment about incidents that Mr. Ontiberos excluded from his conversation with Dr. Barnett, and Mr. Ontiberos had already testified that he did not remember the incident. Id. at 53.

And closing argument. "And what's he saying over and over again? What did he tell the cops? I wanted sex so I gave Betty a call. I wanted some pussy. Sorry, being indelicate here, folks, but those are his words, not mine. Do you have any doubt that he is likely, not 100 percent guaranteed, but likely to engage in repeat acts of sexual violence?" Id. at 114.

Finally, the parade is past. Oh,wait, closing rebuttal. "He took his pants off and assaulted his ex-mother-in-law sexually, yelling what he yelled, I'm not going to repeat it again for the umpteenth time." Id. at 127. It would appear that even Mr. Bennett realized that he may have overdone it.

What was the relevancy of "I want pussy" that it had to be referred to in opening, closing, closing rebuttal and specifically raised with each witness and multiple times with Mr. Ontiberos? The underlying crimes were stipulated to, as presented by the court in the opening instructions. The constancy of the discomfiting phrase served no evidentiary purpose, but was an emotional theme, drummed upon over and over and over by Mr.

Bennett with no other purpose than to inflame the passions of the jury with no factual relevance beyond the first time that the incident was raised with Dr. McCoy.

> In conducting this review, we keep in mind the fundamental duty of counsel in closing arguments-to argue the evidence. See Hudson v. City of Shawnee, 246 Kan. 395, Syl. ¶ 16, 790 P.2d 933 (1990). The mandate to argue the evidence and not appeal to passion or prejudice has "a long history in Kansas. In State v. Laird, 79 Kan. 681, Syl. ¶ 3, 100 Pac. 637 (1909), the district court properly excluded argument on facts "immaterial and evidently intended to excite the sympathy of the jury...." In Forsyth v. Church, 141 Kan. 687, Syl. ¶ 3, 42 P.2d 975 (1935), the Supreme Court condemned "inflammatory argument of counsel reciting testimony not introduced in evidence, ridiculing witnesses, and making appeals to passion and prejudice...." In State v. Majors, 182 Kan. 644, 648, 323 P.2d 917 (1958), the Supreme Court taught that "appeals to the self-interests of jurors .... are not to be condoned because they are obviously prejudicial to the defendant's right to a fair trial." In State v. Kelley, 209 Kan. 699, Syl. ¶ 4, 498 P.2d 87 (1972), the Supreme Court stated that prosecutors "should not use statements calculated to inflame the passions or prejudices of the jury," and "should refrain from argument which would divert the jury from its duty to decide the case on the evidence...." Finally, in State v. McHenry, 276 Kan. 513, 523, 78 P.3d 403 (2003), the Kansas Supreme Court examined whether a prosecutor used a "golden rule" argument, which the Supreme Court defined as "the suggestion by counsel that jurors should place themselves in the position of a party, a victim, or the victim's family members." The Supreme Court explained such arguments were improper because "they encourage the jury to depart from neutrality and to decide the case on the improper basis of personal interest and bias." 276 Kan. at 523, 78 P.3d 403. In summary, there exists in Kansas civil and criminal jurisprudence a long history wherein our Supreme Court has admonished trial counsel to argue the evidence and avoid rhetoric designed to inflame the passions and prejudices of the jury, thereby diverting the jury from its duty to fairly and impartially evaluate the evidence." In re Ward, 35 Kan.App.2d 356, 376-377 (2006).

This Court should find that after reviewing this record that the remarks and conduct of counsel materially distracted and hindered the jury from returning an impartial verdict based upon the issues between the parties and the evidence presented relevant to those issues and that the remarks and actions of counsel resulted in reversible error when,

because of them, the parties have not had a fair trial. K.S.A. 60-261 allows that a new trial may be ordered if the substantial rights of a party have been affected.

Mr. Ontiberos is entitled to a new trial.

B. Is the KSVPA constitutional in that it does not allow for review of ineffective assistance of counsel claims?

1. Standard of review.

Our Supreme Court set out our standard of review on equal protection grounds in State v. Mueller, 271 Kan. 897, 902-03, 27 P.3d 884 (2001), *cert. denied* 535 U.S. 1001, 122 S.Ct. 1570, 152 L.Ed.2d 491 (2002): Whether a statute violates equal protection is a question of law over which this court has unlimited review. Peden v. Kansas Dept. of Revenue, 261 Kan. 239, Syl. ¶ 1, 930 P.2d 1 (1996), *cert. denied* 520 U.S. 1229, 117 S.Ct. 1821, 137 L.Ed.2d 1029 (1997). The concept of equal protection of the law is one which 'emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.' Ross v. Moffitt, 417 U.S. 600, 609, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). In Farley v. Engelken, 241 Kan. 663, 667-68, 740 P.2d 1058 (1987), this court discussed equal protection claims, stating: When a statute is attacked on equal protection grounds, the general rule is that the statute is presumed constitutional, and the burden is on the party attacking the statute to prove otherwise. Only in cases involving "suspect classifications" or "fundamental interests" is the presumption of constitutionality displaced and the burden placed on the party asserting constitutionality to demonstrate a compelling state interest which justifies the classification.

2. Persons persecuted under the KSVPA have no means of redress regarding ineffective assistance of counsel, whereas similarly situated criminal defendants to have a means of redress.

K.S.A. 59-29a06 (b) provides: "At all stages of the proceedings under K.S.A. 59-29a01 et seq., and amendments thereto, any person subject to K.S.A. 59-29a01 et seq., and amendments thereto, shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person."

> "We acknowledge that there is no constitutional right to effective assistance of legal counsel on collateral attacks because they are civil, not criminal, actions. See Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *State v. Andrews,* 228 Kan. 368, 375, 614 P.2d 447 (1980); Robinson v. State, 13 Kan.App.2d 244, 767 P.2d 851. For that reason, the *R*obinson court rejected its movant's argument, which is virtually identical to Brown's: "When appealing the dismissal of a motion filed pursuant to K.S.A. 60-1507, a petitioner has no due process right either to counsel or to the effective assistance of counsel. Therefore, petitioner's due process rights are not violated when his appeal from the dismissal of his 1507 motion is dismissed due to failure of counsel to timely perfect the appeal." 13 Kan.App.2d 244, Syl. ¶ 4, 767 P.2d 851.As pointed out by Judge Greene's dissenting opinion in McCarty v. State, 32 Kan.App.2d 402, 83 P.3d 249 (2004), however, under certain circumstances Kansas does provide a *statutory* right to counsel on collateral attack. See 32 Kan.App.2d at 406, 83 P.3d 249. K.S.A.2003 Supp. 22-4506(b) provides: "If the court finds that the petition or motion [*e.g.,* 1507] presents substantial questions of law or triable issues of fact and if the petitioner or movant has been or is thereafter determined to be an indigent person as provided in K.S.A. 22-4504 and amendments thereto, the court *shall* appoint counsel from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services, *to assist such person. ...*" (Emphasis added.)See also State v. Andrews, 228 Kan. at 375, 614 P.2d 447 ("[o]ur statutes provide that an indigent defendant is entitled to counsel ... in habeas corpus proceedings and motions attacking sentence under K.S.A. 60-1507."). Moreover, K.S.A.2003 Supp. 22-4522(e)(4) suggests certain standards of competence are required for appointed counsel. It provides that the State Board of Indigents' Defense Services "shall ... adopt rules and regulations ... for the guidance of appointed

> counsel ... including ... qualifications, standards and guidelines for ... appointed counsel." As Judge Greene argued in his McCarty dissent: "For this court to recognize that an indigent has a statutory right to counsel, but then refuse to require some modicum of competence by such counsel, seems repugnant to the obvious legislative intent." 32 Kan.App.2d at 408, 83 P.3d 249. Not surprisingly, other jurisdictions agree that some standard is required. In Cullins v. Crouse, 348 F.2d 887, 889 (10th Cir.1965), the Tenth Circuit held: "Although the right to counsel in a civil case is not a matter of constitutional right under the Sixth Amendment, counsel should be appointed in post conviction matters when disposition cannot be made summarily on the face of the petition and record. *When counsel is so appointed he must be effective and competent. Otherwise, the appointment is a useless formality.*" (Emphasis added.) See Lozada v. Warden, 223 Conn. 834, 838, 613 A.2d 818 (1992) (when statute provides for appointment of counsel for an indigent person " 'in any habeas corpus proceeding arising from a criminal matter....' It would be absurd to have the right to appointed counsel who is not required to be competent."); contra Ex parte Graves, 70 S.W.3d 103, 114 (Tex.Crim.App.2002) (statutory right to competent counsel in habeas proceedings concerns only the initial appointment of counsel and continuity of representation rather than the final product of representation). We agree with the Tenth Circuit: When counsel is appointed by the court in postconviction matters, the appointment should not be a useless formality. In the instant case, appointed counsel failed to notify his client of his appointment and of the hearing. Most important, he failed to notify his client of the denial of the 1507 motion and of Brown's right to appeal by certain deadlines. Counsel's failure to advise his client of the right to appeal-for over 2 years-cannot even meet the most minimal of standards, and the appeal must be allowed. *Cf.* State v. Ortiz, 230 Kan. 733, Syl. ¶ 3, 640 P.2d 1255 (1982) (A late filing of direct criminal appeal is allowed "in the interest of fundamental fairness only in those cases where a defendant either was not informed of the rights to appeal or was not furnished an attorney to perfect an appeal or *was furnished an attorney for that purpose who failed to perfect and complete an appeal.*" [Emphasis added.]) Accordingly, to the extent *Robinson* and its progeny may hold otherwise, they are overruled. See McCarty v. State, 32 Kan.App.2d 402, 83 P.3d 249 (2004); *Holt v. Saiya,* 28 Kan.App.2d 356, 17 P.3d 368 (2000). Brown v. State, 278 Kan. 481, 483-485, 101 P.3d 1201, 1203 - 1204 (2004).

Thus, when counsel is appointed, there exists a statutory right to effective counsel.

The finding in Brown was affirmed in Campbell. Finally, we understand the Supreme Court's enunciation of a statutory right to effective counsel in K.S.A. 60-1507

proceedings in *Brown* was extended to an egregious instance of ineffectiveness of counsel that resulted in a highly prejudicial outcome. We view the ineffectiveness in *Brown* as highly prejudicial as it is extraordinary because, unless remedied, it foreclosed a right to appeal. Similarly, in the case before us, court-appointed counsel's advocacy against her client's K.S.A. 60-1507 motion seriously prejudiced Campbell's legal position and, in essence, compelled the district court's adverse judgment. As a result, we believe the Supreme Court's precedent enunciated in Brown is applicable to Campbell's unique factual situation. Campbell v. State, 34 Kan.App.2d 8, 13-14, 114 P.3d 162, 168 (2005).

However, the decisions in *Brown* and *Campbell* were extended only within the context of 60-1507 proceedings and basically because the incompetence of counsel would have prevented either the continuation of an appeal and prevented the ability to pursue legal malpractice actions and the denial of review of matters of constitutional import.

Under the Sexual Predator Act, if a potential life-long commitant has a horrible and incompetent attorney, he has no means of redress or review as there are no habeas actions available for relief, let alone, review. K.S.A. 60-1507 actions are available only to persons in state custody under color of a criminal conviction. K.S.A. 60-1501 actions, while available to all under commitment by the state, they can only be applied to address problems in the conditions of commitment. Thus, there is no means to address or redress the failure of counsel. As such, the Act does not protect the substantive due process rights guaranteed by the constitution. The fundamental requirement of due process is a fair trial in a fair tribunal. State v. Green, 245 Kan. 398, 404, 781 P.2d 678 (1989). To the same result, in Crane v. Mitchell County U.S.D. *273,* 232 Kan. 51, Syl. ¶ 1, 652 P.2d 205

(1982), we said: "'The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.' These requirements are clearly satisfied by this Act, which provides for all necessary basic protections, including appointed counsel, a probable cause hearing, appointment of qualified experts

for examinations, a jury trial requiring a unanimous decision, appeals, annual examinations, discharge petitions, hearings, and the strictest possible burden of proof on the State. Matter of Hay, 263 Kan. 822, 831, 953 P.2d 666, 674 (1998).

However, the rights recognized by the Kansas Supreme Court that when counsel is appointed that an individual has a right to competent counsel and has been held to be applicable to those in criminal settings, then the denial of that right of access and enforcement of the review of ineffective assistance of counsel is being denied KSVPA victims and they being treated differently although similarly situated.

This is a constitutional flaw of the KSVPA and it invalidates the validity of the Act as a whole.

3. This issue is properly before this Court.

In order to have the question of ineffective assistance of counsel reviewed, Mr. Ontiberos filed a motion for remand for an evidentiary hearing with this Court.

At the time of the ruling of the district court, Mr. Ontiberos presented to the district court before the end of its ruling that there existed no statutory basis for an ineffective assistance of counsel claim pursuant to K.S.A. 60-1507. (R. XII, 27).

If this Court were to find that the presentation to the district court was not enough

to preserve the issue, this Court can still review the matter. While it is generally true that when a defendant fails to argue a constitutional challenge at the district court level, but later tries to make the argument at the appellate level, the defendant runs counter to the long-standing general rule that constitutional issues cannot be asserted for the first time on appeal. Ortega-Cadelan, 287 Kan. at 159, 194 P.3d 1195 (citing State v. Gaudina, 284 Kan. 354, 372, 160 P.3d 854 [2007]). For an appellate court to proceed under these circumstances, it is necessary for the party raising the constitutional issue to satisfy one of three recognized exceptions to the general rule, which are: (1) The newly asserted claim involves only a question of law arising on provided or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. Pierce v. Board of County Commissioners, 200 Kan. 74, 80-81, 434 P.2d 858 (1967).

In the instant case, the claim involves only a question of law that can be decided based upon the record and would be determinative of the case. Further, consideration of the claim is necessary to serve the ends of justice and to prevent the denial of fundamental rights. If denied the ability to challenge the actions of ineffective counsel would deny equal protection and fundamental due process as the issue is prevented from being reviewed in any way at any time.

This applies to the instant case in that a Van Cleave hearing is only a replacement or a means of conserving judicial economy and preventing the later filing of a K.S.A. 60-1507 petition.

> "The seeking of a remand from the appellate court so a determination of whether a defendant was denied effective assistance of counsel may first be considered by the trial court carries with it a solemn caveat. As the reason for the rule is to provide the trial court which observed trial counsel's actions with an opportunity to consider the effective assistance of counsel rather than the appellate court relying on a cold record, it is incumbent upon appellant's counsel to do more than read the record and then determine that he or she would have handled things differently. In the instant case, appellate counsel admitted in argument that no attempt had been made to determine the circumstances under which trial counsel did or did not proceed as appellate counsel thought preferable. The defense attorney was not contacted nor was the prosecutor which would seem to be the minimum investigation to lodge a charge of ineffective assistance of counsel unless the conduct is so blatant that it is obvious from the record. Except in the most unusual cases, to assert a claim of ineffective assistance of counsel without any independent inquiry and investigation apart from reading the record is questionable to say the least. We trust that the use of a remand procedure as an alternative remedy to K.S.A. 60-1507 will prove of benefit to defendants, the courts and the bar, and that it will not be abused by overzealous appellate counsel." State v. Van Cleave, 239 Kan. 117, 120-121, (1986).

Thus, it is questionable as to whether or not the procedure used in this case to remand the matter for an evidentiary hearing for the basis of determining the ineffective assistance of counsel was legal under the present statutory scheme.

While this Court might question whether or not this was a question of invited error as Mr. Ontiberos made the request for the Van Cleave hearing, the fact of the matter was there was no other way to have ever raised the issue. Since Mr. Ontiberos would not have had the right or the ability to filed a 60-1507 petition because of the "civil" nature of the KSVPA proceedings, he could not have challenged the effectiveness of counsel following the appeal because he is not being held in custody.

This Court should find that the KSVPA is deficient in that it cannot protect the right to the effective assistance of counsel, as determined by the Kansas Supreme Court

in Brown and Campbell when counsel is appointed and provided by the State, and that it violates both the rights of due process and equal protection.

C. Trial counsel was ineffective.

1. Standard of review.

The appropriate standard of review for K.S.A. 60-1507 motions when the district court conducts a full evidentiary hearing is findings of fact and conclusions of law. Under this standard, an appellate court must determine whether the district court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the district court's conclusions of law. The district court's ultimate legal conclusion regarding whether the prisoner 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, 172 P.3d 10, Syl. ¶ 5 (2007).

(Just as an aside, it should be noted that the Bellamy decision specifically states that the ultimate legal conclusion is whether the **prisoner** has established the necessary facts. Mr. Ontiberos would not be considered a prisoner, even though he is facing a life sentence without appropriate treatment and very little chance of ever being released.)

2. Trial counsel was ineffective for failing to object to a single instance of prosecutorial misconduct regarding the use of Exhibit 1 to impeach Mr. Ontiberos or of reading and quoting reports that were never entered into evidence nor shown to Mr. Ontiberos to refresh his memory.

As noted in the first section of this brief, Mr. Bennett produced at least four documents from Exhibit 1 and cross examined Mr. Ontiberos about the information contained in those documents. Mr. Barker did not object to any of the questions nor about the use of Exhibit 1 which, by stipulation, would not be entered into evidence for the jury and would be kept from the jury and was only to be used if it was necessary for the presentations of the experts.

At argument before the district court, Mr. Bennett stated that he had merely used the documents to refresh Mr. Ontiberos memory and that he was allowed to do that with any document and it did not have to be entered into evidence. (R. XII, 8-9).

However, Mr. Bennett pulled a document from the exhibit, a report of the clinical evaluation of Mr. Ontiberos from November, 1983, and confronted Mr. Ontiberos with it. Id. at 15. (R. VIII, 1981). (R. III, 15). The document was not presented to Mr. Ontiberos. The document was not used to refresh Mr. Ontiberos' memory. The document was used by Mr. Bennett to testify about hearsay from the victim in 1983. This was improper use of the document and the exhibit and Mr. Barker sat mute.

Next, Mr. Bennett cross examined Mr. Ontiberos about a KDOC document where he did not accept responsibility for his actions. (R. III, 31-32). (R. IV, 181). This document was a Department of Corrections document in which Mr. Ontiberos had allegedly given his version of the events related to his prior conviction. The document was not shown to Mr. Ontiberos. He did not review the document and it was not used to refresh Mr. Ontiberos' memory. While it may have been okay to question Mr. Ontiberos about his prior statement, Mr. Bennett proceeds to quote from the DOC document that "it

says here he does not accept responsibility for this crime, claiming he was set up, right?" (R. III, 32). So, Mr. Bennett then quotes some anonymous KDOC worker who is passing judgment on Mr. Ontiberos in their official capacity and is using a document that could not have been admitted. And Mr. Barker sat mute.

And on and on and on.

And this does not even compensate the many instances of Mr. Bennett confronting Mr. Ontiberos with quotes from undidentified documents and police reports which were never identified and weren't even claimed to have been a documented part of Exhibit 1 that anyone could review.

Mr. Barker never objected to any of this cross examination. Mr. Barker did not request to see any of the documents Mr. Bennett quoted with impunity to cross examine Mr. Ontiberos. Mr. Barker didn't lift a finger or raise a voice when Mr. Bennett told Dr. Barnett that Mr. Ontiberos had been disciplined for creating a weapon while imprisoned, which was a completely false statement.

The district court made no findings of fact or conclusions of law on this issue, despite the fact that it was briefed by counsel and presented in oral argument to the court. Apparently, the trial brief for Mr. Ontiberos was never added to the record on appeal. It will be added pursuant to Rule 3.02. Regardless, the issue was not addressed by the court except for the court to note that in his personal time on the parole board there were good, bad and in between parole officers and that the same went for attorneys and that Mr. Barker didn't fall into the bottom of the lot and that Mr. Barker made some strategic decisions and that a different outcome wasn't likely. (R. XII, 23-25).

Supreme Court Rule 183(j) requires judges to make findings of fact and conclusions of law on all issues raised in the 60-1507 proceeding. The district court did not do that. However, this Court has a valid record before it and can make the determination that the shortcomings of counsel, allowing the prosecutor to run roughshod over the rules of evidence and to testify about quotations from police and psychological reports without a single objection was extremely deficient. Further, the prejudice to Mr. Ontiberos was such that he was deprived of a fair trial because a slew of inadmissible "evidence" was used to impeach him when he had no idea where the information came from and no documents were presented to him to refresh his memory. And the evidence, direct quotes from documents and persons not present, had the imprimatur of authority and authenticity because they came from the mouth of the prosecutor, quoting officials.

This should not be allowed to stand. Mr. Ontiberos deserves a new trial.

3. Trial counsel was ineffective for failing to utilize corroborative evidence.

Mr. Barker testified that his strategy at trial regarding the actuarial tests was to attack the validity of the tests. (R. XIII, 54). At the hearing, Mr. Barker was presented with a copy of Mr. Ontiberos discharge summary from the sexual offender treatment program. (R. VI, 1107). Mr. Barker testified that he reviewed all three thousand pages of the exhibit looking for something that would help Mr. Ontiberos and found nothing. He did not recall this document. (R. XIII, 55). Mr. Barker acknowledged that the discharge summary showed a Static 99 score that set a recidivism rate for Mr. Ontiberos to only have a recidivism rate of nine per cent. Id. Mr. Barker had acknowledged that Dr. McCoy, the State's expert, utilizing the same tool, found Mr. Ontiberos to have a

much higher recidivism rate. Id. at 50. In point of fact, Dr. McCoy had placed Mr. Ontiberos in the highly likely to recidivate category with a 59 per cent chance of recidivationg. (R. II, 53).

Mr. Barker admitted that Dr. McCoy had testified that the Static 99 score was significant in her assessment of Mr. Ontiberos being a sexual predator. (R. XIII, 56). Mr. Barker testified that since his strategy was to attack the tests, it wouldn't work if he used a prior test and said that one was better. Id. at 58. Mr. Barker had also testified that he had personal knowledge and information that the recidivism rate dropped for persons as they aged under the scoring for the Static 99. (R. XIII, 54).

So, Mr. Barker was not aware that he had a document in his possession that directly contradicted the testimony of the State's expert. And, even if he had known that document existed he wouldn't have used it because...it wasn't any good either? Mr. Barker had a document that had been entered into evidence and stipulated to be admissible for review of the experts in the case and Mr. Barker failed to utilize it. Even though Mr. Barker claimed to have made a strategic decision not to contest the Static 99 or the results of Dr. McCoy's tests which she used as a signficant basis for her finding that Mr. Ontiberos was a sexual predator, Mr. Barker did challenge the use and utilization of the Static 99 in his cross examination of Dr. McCoy. In fact, he questioned her about the effect of aging on the scoring of the Static 99! (R. II, 75). So which is it? Did he not seek to impeach the scoring of the test or did he stick to his trial strategy of saying the tests are bunk?

And since he did choose to challenge the scoring of the test by the failure of Dr.

McCoy to take into account aging and its impact on the scoring of the test, why would he not use a score from another qualified tester who found that Mr. Ontiberos had nearly no chance of recidivating? It just doesn't make any sense.

Mr. Barker also testified that he believed the Static 99 scores may have been different because people change over time. (R. XIII, 69). Mr. Barker did not understand that the Static 99 is a static test, meaning that it only relates to issues that don't change over time. Id. This was true even though he was present at Mr. Ontiberos' trial where Dr. McCoy testified that the Static 99 takes into consideration factors that don't change over time. (R. II, 51). Dr. McCoy also testified as to what the factors were that were assessed in the Static 99. Id. at 52. Heck, even Dr. Barnett testified that the Static 99 was faulty because they have no dynamic capability and do not account for changes in individuals. (R. III, 73).

Mr. Barker testified that he had relied on Dr. Barnett to tell him that the Static 99 was unreliable and he did not investigate the basis or background of the test and he would have had no idea where to begin. (R. XIII, 71). Mr. Barker didn't even know how many questions were on the test nor what or how it measured anything. (R. XIII, 70).

Mr. Barker, had he known the 2004 report existed, would not have known what to do with it because he completely failed to inform himself about the Static 99 and anything to do with it.

But there's more. Mr. Barker confirmed in his testimony that Dr. Barnett testified that the best means of determining whether a sexual offender will recidivate is through the use of a plesythmograph. (R. XIII, 60-61). In fact, Dr. Barnett testified that he didn't

know why Larned didn't use the plesythmograph in their evaluations because it was the most effective tool in the assessment of the future dangerousness of sex offenders. (R. III, 97).

And the fact of the matter is that Mr. Ontiberos had been tested on the plesythmograph and that the record of his score, etc. was contained within Exhibit 1 at page 1191-1205. (R. XIII, 61; R. VI, 1191-1205). And Mr. Barker wasn't even aware of it and he had not provided that information to Dr. Barnett for analysis.

So, yet again, Mr. Barker had evidence in his discovery and admitted at the time of trial for the specific use to be presented to the experts and he didn't even know it was there and never gave it to his expert for review.

But wait, there's more. Mr. Barker testified that his defense was based on the fact that Mr. Ontiberos was a drug addict and an alcoholic and not a sexual deviant. (R. XIII, 63). The 2004 sexual offender treatment program discharge summary which was admitted as a part of Exhibit 1, stated that Mr. Ontiberos had no sexual deviancy and his problems were cocaine and drug abuse. (R. VI, 1107). Mr. Barker testified that it possibly could have bolstered Mr. Ontiberos case to have presented the fact that within two years of Dr. McCoy's evaluation that the sexual treatment provider made the same exact findings as Dr. Barnett. But, Mr. Barker said that he didn't want to get parts of Exhibit 1 introduced into evidence because he felt the vast majority of the information was detrimental to Mr. Ontiberos and so he *chose* not to use any of it. (R. XIII, 64). Mr. Barker did also testify that he did not, at present, remember everything that was contained in Exhibit 1, but that he did go through all of it and decided not to use any of it because

he didn't want to start validating part of it. Id. at 64.

This was utter nonsense. How could a recent report, from the sexual offender treatment program in which Mr. Ontiberos had participated, that made findings exactly opposite of the State's expert and completely validated Mr. Ontiberos' expert, have done any harm to Mr. Ontiberos case? How could using a document that was already admitted into evidence for the use by the experts have validated anything else in the exhibit? It is obvious that Mr. Barker knew nothing of this document, did not share it with Dr. Barnett and failed to present the strongest evidence in the case to show that Mr. Ontiberos was not a sexual predator, was not a sexual deviant and suffered from substance abuse and not a mental disorder.

The district court made no findings of fact or legal conclusions based upon these shortcomings of trial counsel. This Court has the means and the legal ability to make the findng that counsel had direct evidence that contradicted the testimony of the State's expert and was not aware of it, did not present it to his expert and did nothing to contradict the testimony of the State.

Mr. Ontiberos deserves a new trial.

4. Mr. Barker was ineffective in his complete lack of knowledge of the Static 99 and the results of such were prejudicial to Mr. Ontiberos.

Dr. McCoy testified that based on Mr. Ontiberos score on the Static 99, that he was highly likely to reoffend and this was a big reason for her finding that Mr. Ontiberos met the definition of a sexual predator. (R. II, 65-66).

At the remand hearing, Mr. Barker stated that it was his defense strategy to show

that the Static 99 wasn't valid and was unreliable. (R. XIII, 58). Mr. Barker also testified that he believed the Static 99 scores may have been different because people change over time. (R. XIII, 69). Mr. Barker did not understand that the Static 99 is a static test, meaning that it only relates to issues that don't change over time. Id. This was true even though he was present at Mr. Ontiberos' trial where Dr. McCoy testified that the Static 99 takes into consideration factors that don't change over time. (R. II, 51). Dr. McCoy also testified as to what the factors were that were assessed in the Static 99. Id. at 52. Heck, even Dr. Barnett testified that the Static 99 was faulty because they have no dynamic capability and do not account for changes in individuals. (R. III, 73).

Mr. Barker testified that he had relied on Dr. Barnett to tell him that the Static 99 was unreliable and he did not investigate the basis or background of the test and he would have had no idea where to begin. (R. XIII, 71). Mr. Barker didn't even know how many questions were on the test nor what or how it measured anything. (R. XIII, 70).

"'Choices made by counsel after a less than complete investigation can be reasonable, but only to the extent that the decision to limit or forego certain investigation is reasonable under the circumstances.' Strickland v. Washington, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, reh. denied 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984)." State v. Sanford, 948 P.2d 1135 (Kan.App. 1997).

Mr. Barker's testimony doesn't make sense. If his "strategy" was to show that the Static 99 was invalid, then why didn't he challenge it by motion prior to trial? Why didn't he have some working knowledge of the test so that he could challenge the findings and assertions of Dr. McCoy? Mr. Barker relied on Dr. Barnett to testify that the

tests were not the most exact tests that could be used, and that is all. Dr. Barnett testified that the Static 99 was questionable of value and that there were better tests, and that was all. (R.III, 71; 97). That's it. That was all of the defense that Mr. Barker presented because he was completely ignorant of the test.

Mr. Barker testified that it was possible that age could impact the scores on the Static 99 but but that his knowledge was limited. However, on pages 75-77 of Volume II of the trial record, Mr. Barker questioned Dr. McCoy about the impact of age on the scores.

Well, which was it. Was Mr. Barker completely ignorant at the time of trial or at the remand hearing? Sadly, it was both. He failed to educate himself about the main reason Dr. McCoy used to find Mr. Ontiberos to be a sexual predator and failed to present any evidence to challenge or indict Dr. McCoy's findings. Mr. Barker failed to adequately investigate the issue and failed Mr. Ontiberos in his representation. Further, despite the strong presumption that trial counsel provided reasonable professional assistance, a defense counsel cannot "make a strategic decision against pursuing a line of investigation when he or she has not yet obtained facts upon which that decision could be made." Mullins v. State, 30 Kan.App.2d 711, 716, 46 P.3d 1222, rev. denied 274 Kan. 1113 (2002). When trial counsel lacks information and facts to make an informed decision specifically because of inadequacies in his or her investigation, "any argument of 'trial strategy' is inappropriate." 30 Kan.App.2d at 716-17, 46 P.3d 1222. Thus, invocation of the phrase "trial strategy" does not insulate the performance of a criminal defendant's lawyer from constitutional criticism. See, *e.g.,* Bledsoe, 283 Kan. at 95, 150 P.3d 868.

Mr. Barker's representation was abysmal. And the district court did not address this issue in its findings of fact and conclusions of law except to find that Mr. Barker was in the bottom of attorneys and that he had made some strategic choices.

Mr. Ontiberos deserves a new trial.

5. Mr. Barker was ineffective for allowing all of the discovery in Mr. Ontiberos case to be admitted by stipulation for the purpose of appellate review and solely to satisfy the testimony of the experts. He was also ineffective for failing to prevent abuse of the exhibit by the State.

At Mr. Ontiberos' trial, the State called Dr. McCoy as an expert witness. Dr. McCoy authored a substantial report, opining that Ontiberos meets the criteria set forth in K.S.A. 59-29a01 for a "sexually violent predator". In reaching her opinion, Dr. McCoy reviewed an extensive number of documents, including nearly three thousand pages of documents and entered as Exhibit 1 at the time of trial. (R. II, 38-39). This exhibit included all of the records from Mr. Ontiberos' time in KDOC, including evaluations and statements made and produced by Mr. Ontiberos during the course of his sex offender treatment in which he was forced to participate or face loss of his good time credits. Further, the documents apparently included police reports related to different crimes in which Mr. Ontiberos was supposed to have been involved. The information also included a list of Mr. Ontiberos alleged KDOC rules violations, as well as assorted medical information. (R. II, 84-85).

Based upon a stipulation between Mr. Baker and the prosecutor, all of these documents were entered into evidence solely for the purpose of the testimony of the

experts who would testify and was admitted in order to meet the requirements of K.S.A. 60-456(b)(1) that expert testimony must be "based on facts or data perceived by or personally known or made known to the witness at the hearing." (R. II, 84).

At the Van Cleave hearing, Mr. Barker testified that he agreed to the admission of the evidence because he thought it would make the trial easier by not forcing the state to put on all of the witnesses necessary to support the admissibility of the evidence and because there were witnesses Mr. Barker did not want to have present. (XIII, 39).

This was a horrible mistake by counsel, not just that it led to unrestricted, derogatory hearsay by Dr. McCoy, but it also allowed for abuse of the information, without objection by Mr. Barker, by the state. This action by Mr. Barker also prevented the issue from being addressed on the direct appeal.

First, these documents were hearsay, and many contained multiple levels of hearsay. The State cannot meet its burden of proving either that they are non-hearsay, or that any exception allows for their admission into evidence. Nor should Dr. McCoy's opinion based on this inadmissible hearsay be admitted. K.S.A. 60-456(b)(1) (expert testimony must be "based on facts or data perceived by or personally known or made known to the witness at the hearing"); In re Watson, 5 Kan. App.2d 277, 278-79, 615 P.2d 801 (1980) (excluding expert opinion testimony based on hearsay); In re Care and Treatment of Foster, 280 Kan. 845, 846 (2006).("Expert opinions based upon inadmissible evidence are inadmissible.")

Further, the Kansas Supreme Court in State v. Gonzalez, 282 Kan. 73 (2006), stated: "In contrast to the federal rule, Kansas has adopted the traditional approach to the

question whether an expert may rely on reports from third parties, such as other experts, if the reports do not fall within any hearsay exception. Under the Kansas rule, experts' opinions based upon hearsay are not admissible in any court proceedings. See In re Care & Treatment of Foster, 280 Kan. 845, Syl. ¶ 9, 127 P.3d 277 (2006). Because the California records were not qualified and admitted under one of the exceptions to the hearsay rule, the records themselves remained inadmissible hearsay upon which Dr. Huddleston could not base her opinion that defendant was incompetent to stand trial." Id. at 88. This limitation on expert testimony is codified in K.S.A. 60-456(b), Testimony in Form of Opinion: "(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness." The Gonzales decision stated: "On the facts given, we must disapprove of the *Kaiser* opinion in its holding that past reports and information concerning the defendant, not admitted in evidence, may be considered by a testifying expert in rendering his or her opinion at trial. The opposite is true. We therefore reject this holding in Kaiser." Id. at 95-96.

What impact was there on Mr. Ontiberos trial?

First, in opening statement, the state, in depth, elaborately described to the jury the factual circumstances of Mr. Ontiberos prior crimes. Such information was not objected to by Mr. Barker while such evidence was clearly hearsay and would not have been admissible without the stipulation between the parties. Further, since the "exhibit" was admitted by stipulation only for use by the experts, it was inappropriate for such

evidnce to be utilized by the State at the time of opening statement. And Mr. Barker let it go. (R. II, 13-15).

Dr. McCoy testified that she reviewed Mr. Ontiberos sexual offender treatment program records, evaluations produced by others and KDOC records and some other social history. (R. II 35). Thus, all of Dr. McCoy's conclusions regarding Mr. Ontiberos' were based upon hearsay that would not have been allowed absent the testimony of the other evaluators, members of KDOC, law enforcement and the actual victims of other prior crimes evidence.

Dr. McCoy also testified that she had used actuarial tables/tests to predict Mr. Ontiberos' likelihood of future sexual misconduct. All of her findings on the actuarial tests were based on unrevealed hearsay that would not have been admissible absent testimony from witnesses that could have supported the information upon which she based her predictions. (R. II, 36).

Shortly thereafter, through the state's leading questions, Dr. McCoy testified in minute detail about Mr. Ontiberos' prior crimes based upon police reports she reviewed, including things he said and that the victims reported and that would not have been otherwise admissible. None of this was objected to by counsel and the stipulation was supposedly the basis for such multiple hearsay to be admitted at trial. (R. II, 45-46). This really went beyond the purpose of the admission of the exhibits and was an abuse of Mr. Barker's poor representation. The purpose of the "exhibit" was to allow the experts to present the factual basis upon which they relied in rendering their opinions. In this exchange, Dr. McCoy is led into the nitty gritty of Mr. Ontiberos 20 year old conviction

and it was merely presented in order to inflame the passions of the jury. What possible legitimate medical diagnosis could have depended on Dr. McCoy's declaration "I want pussy" relating the details of Mr. Ontiberos aged crime? How did this leading give and take assist the jury in their understanding of the evidence and their decision as to whether or not Mr. Ontiberos was likely to reoffend in the future? This information was never related to a nexus between "I want pussy" and how that related to the issue to be presented to the jury. The State is charged with not making any remarks that might prejudice the minds of the jurors or appeal to the sympathy and prejudice of the jury. State v. McCorkendale, 267 Kan. 263, 285, 979 P.2d 1239 (1999). Further, a prosecutor should not use statements which inflame the passions of the jury or which divert the jury from its duty to decide the case based on the evidence. See State v. Spresser, 257 Kan. 664, 669, 896 P.2d 1005 (1995).

Dr. McCoy then testified about other prior crime evidence she gleaned from reports made by other evaluators. (R. II, 49-50). This also would have been inadmissible double/triple hearsay.

Dr. McCoy testified that the actuarial tests, the MnSTOT and the Static 99 showed Mr. Ontiberos likely to reoffend. Dr. McCoy testified that the results of these tests were her basis for believing Mr. Ontiberos would reoffend. Dr. McCoy did not testify as to the basis of the tests, their validity nor what information she utilized in scoring the tests. (R. II, 51-56; 65-66).

At the Van Cleave hearing, Mr. Bennett, the prosecutor in the case, testified that by his knowledge of the Static 99, the test relied upon prior criminal history and other

historical information.

Thus, the testing used by Dr. McCoy was based on inadmissible evidence. "Expert opinions based upon inadmissible evidence are inadmissible." In re Care and Treatment of Foster, 280 Kan. 845, 846 (2006).

During the course of Mr. Bennett's cross examination of Mr. Ontiberos at trial, Mr. Bennett testified about Mr. Ontiberos' 25 year old prior case, while trying to ask Mr. Ontiberos about facts to which he had blacked out and would not have been allowed anyway. (R. III, 13-15). Further, Mr. Bennett pulled a document from the exhibit and confronted Mr. Ontiberos with it. Id. In other words, without objection from Mr. Baker, Mr. Bennett violated the stipulation about the documents and presented evidence to the jury from the exhibit that was entered not to be presented to the jury and which would not be reviewable by the jury and, by agreement, was to be kept from the jury.

This occurred a few more times, as documented previously. Thus, because of Mr. Barker's "strategic" choice to make it easier for the State to present their case and allow thousands of pages of information to be placed in evidence as an exhibit only for the use of the experts, the jury was allowed to hear an excessive amount of prejudicial hearsay evidence that would not have been admissible under the Gonzalez decision. Further, it allowed the State to improperly cross examine Mr. Ontiberos about specific documents that had been designated only for use by the experts and which would not have been allowed to have been viewed by the jury or questioned by Mr. Barker. And all of this was allowed without Mr. Barker's vigilance and without objection. Finally, it allowed Mr. Bennett to question Mr. Ontiberos' credibility with KDOC information that

didn't even exist.

The district court found that the Gonzalez was definitely applicable to the instant case. And, the court found that Mr. Bennett was prepared to call the records custodians and one or more of the witnesses involved in the 2001 incident. (R. XII, 18). The court found Mr. Barker made a conscious decision to exclude certain testimony in his agreement to allow the records in under the stipulation. Id. at 18-19. The court also found that, while the record wasn't clear, it appeared that Dr. Barnett relied upon the same information but the point of the stipulation was that they were available to him and he could have used them had he chosen to do so. Id. at 22.

Here are a few problems with the court's findings. First, the testimony of all "victims" would have been necessary. Mr. Bennett's calling police officers would not have satisfied the hearsay issues that arose from the statements attributed to people going back to 1983. Further, while Mr. Bennett might have been able to bring the mother-in-law from the 2001 incident, Mr. Bennett was not aware of other witnesses that might have been available or who they might have been able to find. (R. XIII, 26).

Second, it is questionable that the Larned records would have all been admissible as business records. The records contained police reports from prior incidents, even non-charged issues. These were not records created by anyone at Larned and were not kept in the regular course of business. They would have created the file and gathered the information in the course of evaluating Mr. Ontiberos, but prior to that, none of the 3,000 pages of information would have been Larned records and there would have been no exceptions. The same would apply to treatment and evaluation records from KDOC.

The person who did the evaluation or the treatment would still have needed to appear in order to testify about their qualifications and their findings. These would not have simply been business records that needed no further authentication. And, as shown previously, the problems weren't with the records of Mr. Ontiberos' placement, incarceration or treatment, the prosecutorial abuse arose in the context of 25 year old police reports and unidentified statements of treatment providers such as "the female psychologist."

Third, the record was clear as to what Dr. Barnett reviewed in preparing his report. "I reviewed the records that were provided to me, and this consisted primarily of Larned State Security Hospital report, and of course, visited with you (Mr. Barker) about the background of the case." (R. III, 65). Dr. Barnett reviewed what he was given by counsel. And the finding by the court that the Exhibit 1 documents were available to Dr. Barnett was not based in fact or evidence in that if Mr. Barker didn't reveal or give the documents to Dr. Barnett, he could not have reviewed them.

The prejudice to Mr. Ontiberos was obvious. He was denied a fair trial because the standard of proof against him was lowered by the admissibility of of unsubstantiated hearsay, the utilization of improper actuarial predictive tools that were based on inadmissible evidence and were the "strongest evidence " of Mr. Ontiberos likelihood to reoffend, and allowed the State to introduce nonexistent, credibility evidence.

Mr. Ontiberos deserves a new trial with competent counsel.

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 PLAINTIFF/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, Kansas 67211

this ____ of June, 2009.

_____
Michael P. Whalen