APPENDIX B
Timetable, Checklists and Examples

Timetable for Steps in an Appeal

STEP	TIME
1. Appellant serves, files notice of appeal with clerk of district court. (Appellant may seek a stay of the judgment pending appeal.)	30 days from date journal entry is filed in Chapter 60 and Chapter 61 appeals. K.S.A. 60-2103(a). 14 days from sentencing in criminal appeals under Sentencing Guidelines. K.S.A. 22-3608(c).
2. Appellant requests transcript if an evidentiary hearing was held.	21 days from notice of appeal. Rule 3.03.
3. Appellant files docketing statement, certified copies of notice of appeal, journal entry of judgment, any post-trial motions, journal entry ruling on such motions, request for transcript.	21 days from notice of appeal. Rules 2.04, 2.041.

STEP	TIME
4. District clerk compiles record then available	14 days from notice that the appeal has been docketed. Rule 3.02.
5. Notice of cross-appeal.	21 days from notice of appeal. K.S.A. 60-2103(h). Docketing statement to be filed with clerk of appellate courts within 21 days of notice of cross-appeal. Rule 2.04(a)(2), 2.041(a).
6. Either party may move for transfer to Supreme Court for final determination.	30 days from notice of appeal. K.S.A. 20-3017; Rule 8.02.
7. Reporter files transcript.	40 days from service of order. Rule 3.03.
8. Written requests to clerk of the district court to add to the record on appeal.	Any time before record is sent to appellate court. Rule 3.02.
9. Appellant's brief.	30 days from completion of transcript (or 40 days from docketing if no transcript or if transcript has been completed prior to docketing). Rule 6.01.

STEP	TIME
10. Counsel may suggest place of hearing by Court of Appeals.	Before appellee's brief due. Rule 7.02(d)(3).
11. Appellee's brief (including cross-appellant's brief).	30 days from appellant's brief. Rule 6.01(b)(2).
12. Cross-appellee's brief.	21 days from cross-appellant's brief. Rule 6.01(b)(3).
13. Reply brief.	14 days from brief to which addressed. Rule 6.01(b)(5).
14. Clerk of appellate courts calls for record from clerk of district court.	After time for briefs has expired, usually when case is set for hearing. Rule 3.07.
15. Clerk notifies parties of time and place of hearing.	30 days before hearing. Rule 7.01(d), 7.02(e).
16. Oral arguments.	Rule 7.01(e), Rule 7.02(f).

STEP	TIME
17. Motion for rehearing or modification.	14 days from decision of Court of Appeals. Rule 7.05. 21 days from decision of Supreme Court. Rule 7.06.
18. Motion for assessment of appellate costs and attorney fees.	14 days from oral argument or assignment to summary calendar. Rule 7.07(b).
19. Petition for review or summary petition for review by Supreme Court.	30 days from Court of Appeals decision, regardless of a motion for rehearing by Court of Appeals unless rehearing is granted. Rule 7.05, 8.03(b), 8.03A(b).
20. Cross-petition or conditional cross-petition for review.	30 days from petition for review. Rule 8.03(c).
21. Response to petition for review, cross-petition, or conditional cross-petition.	30 days from petition for review, cross-petition or conditional cross-petition. Rule 8.03(d).
22. Reply to response.	14 days from response. Rule 8.03(e).

STEP	TIME
23. Additional copies of paper briefs, if any, originally filed with the Court of Appeals.	14 days after review is granted. Rule 8.03(i)(2).
24. Supplemental briefs for Supreme Court by either party.	30 days after review is granted. Rule 8.03(i)(3).
25. Responses to supplemental briefs.	30 days after supplemental briefs are filed. Rule 8.03(i)(3).
26. Reply to response brief.	14 days after response brief is filed. Rule 8.03(i)(3).

Briefing Checklist

This checklist is designed to help a brief writer comply with the Kansas Supreme Court Rules. It begins at the cover page and moves through the major sections of a brief. For an example of how an appellate brief looks in practice, please refer to the sample brief contained in this appendix. If you have questions, contact the appellate clerk's office at 785.296.3229 or appellateclerk@kscourts.org.

□ Is the cover page of the brief white? Rule 6.07(b)(1).

□ Does the following information appear on the cover of the brief? Rule 6.07(b)(2).

_____ The appellate court case number. Rule 6.07(b)(2)(A).

_____ The words IN THE COURT OF APPEALS OF THE STATE OF KANSAS or IN THE SUPREME COURT OF THE STATE OF KANSAS. Rule 6.07(b)(2)(B).

_____ The caption of the case as it appeared in the district court, except that a party must be identified not only as a plaintiff or defendant but also as an appellant or appellee. Rule 6.07(b)(2)(C).

_____ The title of the document, *e.g.*, "Brief of Appellant" or "Brief of Appellee," etc. Rule 6.07(b)(2)(D).

_____ The words "Appeal from the District Court of _____, County, Honorable _____ Judge, District Court Case No._____". Rule 6.07(b)(2)(E).

_____ The name, address, telephone number, fax number, e-mail address, and attorney registration number of one attorney for each party on whose behalf the brief is submitted. An attorney may be shown as being of a named firm. Additional attorneys joining in the brief must not be shown on the cover but may be added at the conclusion of the brief. Rule 6.07(b)(2)(F).

_____ The words "oral argument" printed on the lower right portion of the brief cover, followed by the desired amount of time, if additional time for oral argument is requested. Rule 6.07(b)(2)(G).

_____ If the brief contains an issue that calls into doubt the validity of any Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or any provision of federal law then the words "Served on the attorney general as required by K.S.A. 75-764" must be included on the front page of the brief in bold, 12-point font. Rule 11.01(b).

□ Is the text printed in a conventional style font not smaller than 12 point with no more than 12 characters per inch? Rule 6.07(a)(1).

□ Is the text double-spaced, except block quotations and footnotes? Rule 6.07(a)(1).

□ Is only one side of the paper used? Rule 6.07(a)(3).

□ Is the length of the brief, excluding the cover, table of contents, appendix, and certificate of service, within the page limitation allowed? Rule 6.07(c).

- □ Does the brief contain a table of contents that includes page references to each division and subdivision in the brief, including each issue presented, and the authorities relied on in support of each issue? Rule 6.02(a)(1).
- □ Does the brief contain a brief statement of the nature of the case, *e.g.*, whether it is a personal injury suit, injunction, quiet title, etc., and a brief statement of the nature of the judgment or order from which the appeal was taken? Rule 6.02(a)(2).
- □ Does the brief contain a brief statement, without elaboration, of the issues to be decided in the appeal? Rule 6.02(a)(3).
- □ Does the brief contain a concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal? Rule 6.02(a)(4).
- □ Are the facts keyed to the record on appeal by volume and page number? Rule 6.02(a)(4).
- □ Have the parties been referred to in the body of the brief by their status in the district court, *e.g.*, plaintiff, defendant, etc., or by name? Rule 6.08.
- □ If the appeal involves a child, the victim of a sex crime, or a juror or venire member, have their identities been protected by using initials only or given name and last initial? Rule 7.043.
- □ Does each issue begin with citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal (volume and page number) where the issue was raised and ruled on? Rule 6.02(a)(5).
- □ Does the appendix, if one is included, consist only of limited extracts from the record on appeal and/or copies of unpublished opinions cited for persuasive authority? Rule 6.02(b); 7.04(g)(2)(C).

- □ Does the brief cite an unpublished opinion? If so, a copy of the opinion must be attached. Rule 7.04(g)(2)(C).
- □ Is there a certificate of service included as the last page of the brief? Rule 1.11(c).
- □ Have the brief and certificate of service been signed? If the signature is electronic, is it preceded by "/s/"? Rule 1.12.
- □ Is this a CINC case? If so, does the brief include a verification by the appellant? K.S.A. 38-2273(e).
- □ Has a copy of the brief been served on all parties? Rule 1.11(a); K.S.A. 60-205.
- □ If this is a criminal or postconviction case, has a copy of the brief been served on the attorney general? K.S.A. 75-768.
- □ Is this a case where one of the issues contained in the brief contests or calls into doubt the validity of any Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or any provision of federal law? If so, then the party filing the brief must serve a copy of the brief (along with a separate notice under Rule 11.01[c]) on the attorney general under K.S.A. 75-764. See Rule 11.01(a).

Petition for Review Checklist

This checklist is designed to help a party draft a petition for review that complies with the Supreme Court Rules. It covers the major sections of a petition for review. For an example, please refer to the sample petition for review contained in this appendix. If you have questions, contact the appellate clerk's office at 785.296.3229 or appellateclerk@kscourts.org.

- □ Is the petition for review filed no later than 30 days after the date of the Court of Appeals' decision? The 30-day period for filing a petition for review is jurisdictional and cannot be extended. Rule 8.03(b)(1). Filing a motion for rehearing or modification in the Court of Appeals does not toll the deadline for filing a petition for review.
- □ Does the format of the petition for review comply with the applicable provisions of Rule 6.07? Rule 8.03(b)(3). (See the Briefing Checklist, §12.38, *supra*, for the key requirements under Rule 6.07.)
- □ Is the length of the petition for review, exclusive of the cover, table of contents, appendix, and certificate of service, 15 pages or less? Rule 8.03(b)(3).
- □ If the petition for review is filed in a case expedited by the Court of Appeals or expedited by statute, is it titled "Expedited Petition for Review"? Rule 8.03(b)(4).
- □ Does the petition for review contain a prayer for review clearly stating the nature of the relief sought and why review is warranted? Rule 8.03(b)(6)(A).
- □ Does the petition for review state the date of the Court of Appeals decision the party is asking the Supreme Court to review? Rule 8.03(b)(6)(B).
- □ Does the petition for review contain a statement of issues the petitioner wishes to be decided by the Supreme Court? The statement of the issues must be tailored to address why review is warranted; it should not merely be identical

to the statement of the issues contained in the party's Court of Appeals brief. Rule 8.03(b)(6)(C).

- □ Does the petition for review contain a short statement of relevant facts keyed to the record or a statement that the facts provided in the Court of Appeals decision are correct? Rule 8.03(b)(6)(D).
- □ Does the petition for review contain a short argument, including appropriate authority, stating for each issue why review is warranted? Rule 8.03(b)(6)(E). Supreme Court Rule 8.08(b)(6)(E) provides a nonexhaustive list of reasons for review by the Supreme Court. Failure to include an argument showing how the Court of Appeals erred or why review is warranted may result in denial of a petition for review. Rule 8.03(b)(6)(E).
- □ Does the petition for review include an appendix containing the Court of Appeals decision? Rule 8.03(b)(6)(F).
- □ Is there a certificate of service included as the last page of the brief? Rule 1.11(c).
- □ Has the brief and certificate of service been signed? Rule 1.12.
- □ Has a copy of the petition for review been served on all parties? Rule 1.11(a); K.S.A. 60-205.
- □ Is this a case where one of the issues contests or calls into doubt the validity of any Kansas statute or constitutional provision on the grounds that the law violates the state constitution, federal constitution, or any provision of federal law?
    - o If so, the party filing the petition for review must serve a copy of the petition for review (along with a separate notice under Rule 11.01[c]) on the attorney general under K.S.A. 75-764 if the party did not satisfy these requirements before the Court of Appeals. Rule 11.01(a).
    - o The party filing the petition for review must also include these words in bold, 12-point font under

the case caption on the first page: “Served on the attorney general as required by K.S.A. 75-764.” Rule 11.01(b).

□ If the appeal involves a child, the victim of a sex crime, or a juror or venire member, has the individual’s identity been protected by using initials only or given name and last initial? Rule 7.043.

No. 00-00000-A

_____

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

_____

STATE OF KANSAS
Plaintiff-Appellee

vs.

JOHN DOE
Defendant-Appellant

_____

BRIEF OF APPELLANT

_____

Appeal from the District Court of XXXXX County, Kansas
Honorable XXXX XXXX, Judge
District Court Case No. 00-CR-000

_____

Attorney Name, Bar Number
Name of Firm or Agency
Firm Address
City, State, Zip
Firm Phone Number
Firm Fax Number
Firm/ Attorney Service Email
Attorney for the Appellant

Oral Argument: 15 minutes

Notice to the Attorney General Pursuant to K.S.A. 2016 Supp. 75-764

Table of Contents

Nature of the Case

A jury convicted John Doe of attempted second degree murder, aggravated assault of a law enforcement officer, and criminal threat. Subsequently, the district court imposed a 102 month prison sentence. This is an appeal from Mr. Doe's convictions.

Statement of the Issues

Issue I: The district court erred by admitting evidence indicating that Mr. Doe had a prior taser-altercation with law enforcement.

Issue II: The district court erred by not instructing the jury on lesser-included offenses of attempted voluntary manslaughter.

Issue III: The reckless form of criminal threat is unconstitutionally overbroad because the true threat exception to the First Amendment only extends to intentional threats.

Statement of Facts

On February 20, 2015, the State charged John Doe with two counts of attempted second degree murder. (R. I 39-40). Subsequently, the State added two alternative charges of aggravated assault of a law enforcement officer and a charge of criminal threat. (R. I, 364-65). On September 12, 2016, Mr. Doe went to trial on those charges. (R. XVII, 1).

Mr. Doe walks home from Walmart.

On January 31, 2015, Mr. Doe was walking with a pronounced limp. (R. XX, 61, 69, 94). A few days prior, he sustained a knee injury that required a

visit to a doctor. (R. XX, 69, 99; XXII, 114). To get around, Mr. Doe was using an axe handle as a cane. (R. XX, 69, 93, 99).

That evening, Mr. Doe's neighbors, Brenda and Bob, drove Mr. Doe to Walmart. (R. XX, 88). At Walmart, Mr. Doe became separated from his neighbors. (R. XX, 89). Eventually, Brenda and Bob drove back to their apartment, without Mr. Doe. (R. XX, 89).

After Brenda and Bob drove away, Mr. Doe began a one mile trek back to his apartment. (R. XX, 38, 78). Outside, it was near freezing and drizzling. (R. XVIII, 131-32; XIX, 147; XX, 91).

On the way back home, Mr. Doe stopped at multiple businesses, including a Dollar Store. (R. XX, 60). There, he purchased a bottle of Gatorade. (R. XX, 60). Subsequently, Mr. Doe seems to have mixed liquor into his Gatorade. (R. XXII, 52-53). During his walk home, he called Brenda and left a voicemail message saying,

> "Bitch, if I'm going to be on the streets, then you're going to be on the streets because I'm going to burn your shit up. Then I'm going to be back tomorrow and you ain't going to like what I'm bringing for you." (R. VIII, 84.)

By the time Mr. Doe got to his apartment, he was scared, agitated, and intoxicated. (R. XX, 92, 169-70, 203; XXII, 7).

Counsel pauses to note facts not in trial evidence.

Mr. Doe suffers from schizoaffective disorder. (R. III, 15). This mental illness causes him to have paranoid and delusional thoughts. (R. III, 14). This, in turn, resulted in authorities committing Mr. Doe to State Hospital 34 times prior to charges being filed in this case. (R. III, 9, 71-72). Because trial counsel elected not pursue a mental disease or defect defense, evidence of Mr. Doe's mental illness did not make its way into trial evidence. (R. XIV, 13-14).

Sadly, Mr. Doe believed that he was on the verge of inventing a perpetual energy motor. (R. I, 506; III, 77; XXIII, 63, 74-75). He also believed that businessmen, who profit by selling energy, were plotting against him. (R. III, 77; XXIII, 63-64). As Mr. Doe walked home from Walmart, he thought that he was being followed by businessmen who wished to harm him. (R. VII, 18; XXIII, 63-64).

Mr. Doe encounters Officer White and Sergeant Blue.

Around the time that Mr. Doe got back to his apartment complex, one of his neighbors called police to make a noise complaint. (R. XVIII, 142). Officer White and Sergeant Blue separately responded to that call. (R. X IX, 7-8, 139-40).

Officer White arrived on the scene first. (R. XIX, 22, 181). When he got there, Mr. Doe was outside, holding his axe handle over his shoulder. (R. XIX, 22). Officer White perceived Mr. Doe to be holding a baseball bat. (R. XIX,

24).

When Officer White approached Mr. Doe, Mr. Doe commented that people were chasing him. (R. XIX, 26). In response, Officer White asked Mr. Doe to put his bat down, so that they could talk. (R. XIX, 27-28). When making that request, Officer White explicitly stated that he was a police officer. (R. XIX, 28).

Mr. Doe did not put down his axe handle. (R. XIX, 28). Instead, he stated that he would put his axe handle down in his apartment. (R. XIX, 79-80). Officer Hite indicated that this course of action would be acceptable, after another officer arrived on the scene. (R. XIX, 79-80).

Shortly thereafter, Sergeant Blue arrived on the scene. (R. XIX, 150). Sergeant Blue was unaware that Officer White had just informed Mr. Doe that he could put down his bat (which was actually an axe handle) in his apartment. (R. XIX, 191).

Sergeant Blue reported that Mr. Doe was holding a stick *and* a knife when he arrived on the scene. (R. XIX, 151). This claim conflicted with an observation from Officer White that Mr. Doe had a sheathed knife *on his waistband*. (R. XIX, 107). At any rate, Sergeant Blue began ordering Mr. White to put his weapons down. (R. XIX, 158).

Mr. White did not comply with Sergeant Blue's requests, and, instead, walked toward his apartment. (R. XIX, 33, 159). This noncompliance

prompted Sergeant Blue to unholster his Taser, and Officer White to unholster his service pistol. (R. XIX, 34, 156).

Mr. Doe is tased and shot by law enforcement.

When Mr. Doe reached the front door of his apartment, Sergeant Blue fired his Taser. (R. XIX, 160). One Taser barb lodged in Mr. Doe's jaw. (R. XX, 201). The other planted in his jacket. (R. XX, 202). According to Sergeant Blue, he gave no warning prior to firing his Taser. (R. XIX, 200-02). And, according to Officer White, Mr. Doe had not made any aggressive movements toward law enforcement, prior to his tasing. (R. XIX, 84-85).

The Taser did not, initially, work. (R. XIX, 161-62). But, after a few moments, 50,000 volts of electricity ran through Mr. Doe's body. (R. XIX, 214). Law enforcement testimony indicated this would have been extraordinarily painful. (R. XVIII, 117).

After Mr. Doe fell to the ground, Sergeant Blue approached, to make an arrest. (R. XIX, 162). But, when Sergeant Blue came near, Mr. Doe stood up, and made a slashing motion with his knife. (R. XIX, 162). Then, Mr. Doe walked toward Sergeant Blue with an axe handle in one hand, and a knife in the other. (R. XIX, 162).

Sergeant Blue started backpedaling, and tried (unsuccessfully) to continue shocking Mr. Doe with his Taser. (R. XIX, 165-66). When Mr. Doe got to within five feet of Sergeant Blue, Sergeant Blue ordered Officer White

to shoot. (R. XIX, 167-68). Officer White, subsequently, shot toward Mr. Doe. (R. XIX, 40-41).

Officer White's shot caused Mr. Doe to spin, and fall to the ground. (R. XIX, 42). As Mr. Doe fell, his knife flew from his hand. (R. XIX, 42-43). This reaction led Officer White to assume that Mr. Doe had been hit by a bullet. (R. XIX, 42). This assumption was incorrect.

The bullet fired toward Mr. Doe actually hit a Gatorade bottle tucked beneath his arm. (R. XIX, 188-89; XXII, 52-53). The force of that impact brought Mr. Doe to the ground, but did not cause serious injury. (R. XIX, 43).

When Officer White approached Mr. Doe to render aid, Mr. Doe stood up. (R. XIX, 43). Then, Mr. Doe ran toward Officer White, while swinging his axe handle. (R. XIX, 43-44). While approaching Officer White, Mr. Doe reportedly stated, "I'm going to fucking kill you." (R. XIX, 44). After Mr. Doe made this comment, Officer White shot him in the chest. (R. XIX, 45).

This time, a bullet passed through Mr. Doe's body, causing a life-threatening injury. (R. XX, 165-66, 173). After a lengthy hospital stay, Mr. Doe survived. (R. XXII, 115).

Trial Proceedings

Prior to trial, the State filed K.S.A. 60-455 motions seeking permission to admit evidence of three prior occasions when Mr. Doe became involved in violent altercations with law enforcement. (R. I, 231, 242, 249). None of these

three incidents resulted in a criminal conviction. In the first case (involving Utopia City police officers), Mr. Doe was admitted to State Hospital, apparently, in lieu of criminal prosecution. (R. XIII, 68-69). In the second case (involving Cowboy County officers), Mr. Doe was found not guilty of criminal charges due to mental disease or defect. (R. XIII, 79). In the third case (involving Faraway County and State Highway Patrol officers), criminal charges were never filed. (R. XIII, 93-94).

Following litigation, the State decided not to seek admission of the first two altercations that Mr. Doe had had with law enforcement officers. (R. XIV, 4). Because those cases concluded with Mr. Doe's admission to State Hospital, the State feared that evidence of those cases would open the door for Mr. Doe to put on evidence of his mental illnesses. (R. XIII, 107-10).

With regard to evidence of Mr. Doe's third altercation with law enforcement, the district court ruled that the evidence would be, preliminarily, inadmissible at trial. (R. XIII, 18). The court noted that Mr. Doe could develop a trial defense which would make the evidence admissible. (R. XIII, 17-18).

The week proceeding trial, the State moved to put on limited evidence of Mr. Doe's prior altercation with Faraway County officers. (R. I, 380). Particularly, the State sought to introduce evidence that Mr. Doe had told Officer White and Sergeant Blue, prior to being tased, that Faraway County

officers would have already tackled and/or tased him. (R. I, 381; XVIII, 33).

The State proffered that evidence of this comment was relevant, because it demonstrated that Mr. Doe knew that Officer White and Sergeant Blue were law enforcement officers. (R. I, 380). The State also, asserted (vaguely) that the evidence was relevant to prove Mr. Doe's "state of mind." (R. I, 380).

At trial, the district court agreed with the State's argument that the evidence was relevant to establish Mr. Doe's "knowledge that he was dealing with law enforcement officers." (R. XVIII, 34). Thus, over defense counsel's K.S.A. 60-455 objection, the court ruled that evidence of the comment would be admissible at trial. (R. XVIII, 34-35).

Subsequently, Officer White testified that Mr. Doe made the following comments to him, prior to his tasing:

> If you were Faraway County, you would have tackled me by now […]
>
> Faraway County would have tased me already.
> (R. XIX, 28, 35).

Additionally, Sergeant Blue testified that Mr. Doe commented that, in Faraway County, "it would take about six to eight cops to tackle him." (R. XIX, 154).

This testimony prompted contemporaneous objections from trial counsel. (R. XIX, 28, 35, 153). Those objections were all overruled. (R. XIX,

28, 35, 153).

Also at trial, the jury was instructed with a criminal threat instruction that provided alternative means for committing criminal threat, including reckless criminal threat. (R. I, 80; R. XIX, 564).

Verdict and Sentencing

Following the presentation of evidence, a jury acquitted Mr. Doe of attempting to murder Sergeant Blue, but convicted him of attempting to murder Officer White and of criminal threat against Brenda. (R. XXII, 196-97). The jury also convicted Mr. Doe of assaulting Sergeant Blue with a deadly weapon. (R. XXII, 196-97).

At sentencing, the district judge expressed sympathy for Mr. Doe, but felt it necessary to impose a 102 month prison sentence. (R. XXIII, 78, 81-82). Mr. Doe subsequently appealed his convictions. (R. I, 552).

Arguments and Authorities

Issue I: The district court erred by admitting evidence indicating that Mr. Doe had had a prior Taser-altercation with law enforcement.

Introduction

At trial, the State admitted evidence indicating that Mr. Doe had previously been involved in a Taser altercation with Faraway County law enforcement officers. Since evidence of that altercation only served to prove criminal propensity, it should have been excluded by the district court.

Because it wasn't, this Court must reverse Mr. Doe's convictions, and remand this case for a new trial.

Preservation

Prior to trial, the State filed K.S.A. 60-455 motions seeking permission to admit evidence of three prior occasions when Mr. Doe became involved in violent altercations with law enforcement. (R. I, 231, 242, 249). The district court ruled that the evidence would be, preliminarily, inadmissible at trial. (R. XIII, 18).

When the issue came up at trial, the district court agreed with the State's argument that the evidence was relevant to establish Mr. Doe's "knowledge that he was dealing with law enforcement officers." (R. XVIII, 34). Thus, over defense counsel's K.S.A. 60-455 objection, the court ruled that evidence of the comment would be admissible at trial. (R. XVIII, 34-35).

Subsequently, Officer White testified that Mr. Doe made the following comments to him, prior to his tasing:

> If you were Faraway County, you would have tackled me by now […]
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> (R. XIX, 28, 35).

Additionally, Sergeant Blue testified that Mr. Doe commented that, in Faraway County, "it would take about six to eight cops to tackle him." (R. XIX, 154).

This testimony prompted contemporaneous objections from trial counsel. (R. XIX, 28, 35, 153). Those objections were all overruled. (R. XIX, 28, 35, 153). Trial counsel's contemporaneous objections to the admission of K.S.A. 60-455 evidence have preserved this issue for appeal.

Standard of Review

When reviewing the admissibility of K.S.A. 60-455 evidence, an appellate court applies a three-part test: (1) a court exercised unlimited review to determine whether the fact to be proven is material – *i.e.*, whether it has real bearing on the case; (2) a court uses an abuse of discretion standard to determine whether a material fact is disputed and, if so, whether evidence is relevant to prove the disputed fact; and (3) a court uses an abuse of discretion standard to determine whether the probative value of the evidence outweighs the potential for undue prejudice against a defendant. *State v. Torres*, 294 Kan. 135, 139-40 (2012).

Analysis

K.S.A. 60-455 provides that (in non-sex offense cases) evidence of prior crimes is inadmissible to prove criminal propensity. However, prior crime evidence may be admissible to prove some other relevant fact, provided that the fact is in dispute. *State v. Boggs*, 287 Kan. 298, 305 (2008). Pure propensity evidence is not allowed as it might cause a jury to conclude that a defendant deserves punishment, even though the State has not established

guilt, in the case at hand, beyond a reasonable doubt. See *Boggs*, 287 Kan. at Syl. ¶ 2.

In this case, the State admitted evidence that Mr. Doe made the following comments to police officers, prior to his tasing:

> If you were Faraway County, you would have tackled me by now […]
>
> Faraway County would have tased me already.
>
> [In Faraway County], it would take about six to eight cops to tackle [me]. (R. XIX, 28, 35, 154).

Evidence of these comments was admitted, through K.S.A. 60-455, on the theory that they were relevant to show that Mr. Doe knew that Officer White and Sergeant Blue were law enforcement officers. (R. XVIII, 34; XXII, 133). There are two problems with that theory.

First, according to trial testimony, Officer White and Sergeant Blue were both wearing police uniforms when they interacted with Mr. Doe. (R. XIX, 14-16, 142-43). And Officer White explicitly told Mr. Doe that he was a police officer. (R. XIX, 28). Thus, trial evidence didn't lend itself to a finding that Mr. Doe had no idea that he was interacting with police officers. For that reason, defense counsel did not entertain that possibility in opening and closing statements. (R. XVIII, 26-32; XXII, 173-191). Since Mr. Doe's knowledge wasn't in dispute, K.S.A. 60-455 precluded the State from proving that fact with evidence of prior criminal conduct. *Boggs*, 287 Kan. at 315-16.

Second, the State didn't need to prove that Mr. Doe knew that Officer White or Sergeant Blue were police officers to secure attempted murder or aggravated assault on a law enforcement officer convictions. K.S.A. 21-5403(a)(1) criminalizes the intentional killing of any person, whether they are a civilian or a police officer. And, according to our Supreme Court, an offender needn't have actual knowledge that he or she is assaulting a police officer to be guilty of assault of a law enforcement officer. All that need be proven is that an offender knowing assaulted someone who happened to be a uniformed law enforcement officer. *State v. Wood*, 235 Kan. 915, Syl. ¶ 8 (1984).

In sum, the jury's verdict, in no way, turned upon whether Mr. Doe had a previous Taser-altercation with Faraway County law enforcement officers. Evidence of that altercation only served to prove criminal propensity. Since propensity evidence is inadmissible, this Court should find that the district court erred.

Harmless Error

Since a trial error implicated Mr. Doe's statutory rights, the State must show that there is no reasonable probability the error affected the outcome of trial. Unless the State can do that, this Court must reverse Mr. Doe's convictions. *State v. McCullough*, 293 Kan. 970, Syl. ¶ 9 (2012).

For two reasons, the State cannot establish harmless error. First, the evidence against Mr. Doe was not overwhelming, particularly on the State's

attempted murder charges. Indeed, the jury actually acquitted Mr. Doe of attempting to murder Sergeant Blue. And, while Mr. Doe reportedly stated that he intended to kill Officer White, this comment was an excited utterance made by a man who had just been shocked and shot at by police officers. It seems quite possible that Mr. Doe was speaking angrily, rather than literally, when he expressed an intent to kill Officer White.

Second, the error in this case was extremely prejudicial. It is significant that the district court did not err by admitting evidence of general criminal propensity. Rather, the court erred by admitting evidence that Mr. Doe had previously been involved in the same behavior which led to charges being filed in this case. This information may have prompted the jury to convict Mr. Doe of attempted murder, simply because he had a propensity of becoming involved in dangerous altercations with law enforcement. See *Boggs*, 287 Kan. at Syl. ¶ 2 (noting that propensity evidence might cause a jury to conclude that a defendant deserves punishment, even though the State has not established guilt, in the case at hand, beyond a reasonable doubt).

Conclusion

The district court erred by admitting propensity evidence. Since that error may have affected the jury's verdict, this Court must reverse Mr. Doe's convictions, and remand this case for a new trial.

Issue II: The district court erred by not instructing the jury on lesser-included offenses of attempted voluntary manslaughter.

Introduction

Trial evidence strongly indicated that Mr. Doe honestly, but unreasonably, believed that deadly force was necessary to protect himself from great bodily harm. Thus, the district court erred by not instructing the jury on lesser included offenses of attempted voluntary manslaughter. Since that error very likely affected the jury's verdict, this Court must reverse Mr. Doe's attempted murder conviction.

Standard of Review and Preservation

At trial, Mr. Doe did not request a lesser included offense instruction for attempted voluntary manslaughter. (R. XXII, 126-27). Even when a defendant does not object to the omission of a jury instruction, an appellate court may review the omission for clear error. *State v. Fisher*, 304 Kan. 242, 257, 260 (2016).

When reviewing for clear error, appellate court first decides whether an omission was, actually, error. That review is without limit. If the omission was error, an appellate court reviews the entire record and determines whether it is firmly convinced that the jury would have reached a different verdict had the error not occurred. *State v. Knox*, 301 Kan. 671, 680 (2015).

Analysis

Mr. Doe contends that the district court erred by not instructing the jury on lesser included offenses of attempted imperfect self-defense voluntary manslaughter. See K.S.A. 21-5404(a)(2). To determine whether this claim is correct, this Court must answer two questions: (1) Is attempted voluntary manslaughter a lesser included offense of attempted second degree murder? and (2) Did trial evidence permit a rational jury to convict Mr. Doe of attempted voluntary manslaughter? *Fisher*, 304 Kan. at 257-58.

Attempted Voluntary Manslaughter Is A Lesser Included Offense of Attempted Second Degree Murder.

The answer to this Court's first inquiry is controlled by Supreme Court precedent. Attempted voluntary manslaughter is a lesser included offense of attempted second-degree murder. *Fisher*, 304 Kan. at 257-58.

Trial Evidence Permitted Rational Jurors to Convict Mr. Doe of Attempted Voluntary Manslaughter.

To convict Mr. Doe of attempted voluntary manslaughter, jurors needed to have found it reasonably possible that Mr. Doe honestly, but unreasonably, believed that circumstances surrounding his interaction with Officer White and Sergeant Blue were ones which legally justified the use of deadly force. *State v. Roeder*, 300 Kan. 901, 923-26 (2014); see also, K.S.A. 21-5108(b) ("When there is a reasonable doubt as to which of two or more degrees of a crime the defendant is guilty, the defendant shall be convicted of the lowest

degree only"). Essentially, Mr. Doe had to establish the subjective belief prong of a self-defense claim.

It is notable that the district court, in this case, saw fit to instruct the jury on self-defense. (R. I, 419). If it was appropriate to instruct on self-defense, it was also, as a matter of logic, appropriate to instruct on imperfect self-defense voluntary manslaughter.

Admittedly, an appellate court can solely rely upon a district court's decision to instruct on self-defense when considering the factual propriety of a voluntary manslaughter instruction. *State v. Nelson*, 291 Kan. 475, 481-82 (2010). But, in this case, trial evidence was clearly sufficient to support an attempted voluntary manslaughter conviction.

To recap trial evidence (in the light most favorable to the defense), Mr. Doe refused to obey an order from police to put down an axe handle that he had been using as a cane. Instead of putting down his axe handle, Mr. Doe walked to his apartment, without making any aggressive movements toward law enforcement. Upon reaching his apartment, police, without warning, shot a Taser barb into his jaw. Subsequently, 50,000 volts of electricity brought Mr. Doe to the ground.

Before his encounter with law enforcement, Mr. Doe was scared, agitated, and intoxicated. After police shocked, and shot at Mr. Doe, he was likely incapable of reasonable decision-making. Thus, jurors could have

concluded that Mr. Doe honestly, but unreasonably, believed that use of deadly force was necessary to protect himself from imminent great bodily harm. For that reason, the district court erred by not instructing the jury on attempted voluntary manslaughter.

Clear Error

At sentencing, when considering a departure motion, the district court commented:

> Mr. Doe's request for depature relies in part upon that Mr. Doe invited the officers or at least Officer White to come into the apartment and talk; that he made no aggressive movements; that he was tased without warning. Mr. Doe has spoken at [ ] length about that this afternoon. **And I really don't question Mr. Doe's perception as to that, and that that is his belief**, but I would suggest that the record of jury trial that lasted approximately a week reflects differently […] I think the record reflects that the police officers acted with restraint. (R. XXIII, 77) (emphasis added).

To paraphrase, Mr. Doe's judge believed that Mr. Doe honestly, but unreasonably, perceived himself as having been attacked by police, without any provocation. If the judge felt that way, it is likely that jurors felt similarly. And, if properly instructed jurors felt that way, they would have convicted Mr. Doe of attempted voluntary manslaughter, rather than attempted murder.

In sum, this Court can have confidence that the jury's verdict would have been different, had instructional error not happened. Thus, Mr. Doe has established clear error, which warrants remedy from this Court.

Conclusion

The district court erred by not instructing on attempted voluntary manslaughter as a lesser included offense of both of the State's attempted murder charges. The jury's acquittal on one attempted murder charge makes the court's error partially harmless. Thus, Mr. Doe asks this Court to reverse his attempted murder conviction, affirm his aggravated assault of a law enforcement officer conviction, and remand his case for a new trial.

Issue III: The reckless form of criminal threat is unconstitutionally overbroad because the true threat exception to the First Amendment only extends to intentional threats.

Introduction

The reckless form of criminal threat under K.S.A. 21-5415 is unconstitutionally overbroad because it criminalizes protected speech under the First Amendment. Particularly, only "true threats" go beyond the First Amendment's protection and those threats require intent. Because Mr. Doe was convicted under an alternative means instruction that included reckless threat, this Court must now reverse Mr. Doe's conviction under the constitutionally overbroad statute.

Preservation and Jurisdiction

Mr. Doe did not assert an argument that the statute was unconstitutionally overbroad at the district court. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). However, Kansas Courts have recognized three main exceptions to this rule:

> "Despite the general rule, appellate courts may consider constitutional issues raised for the first time on appeal if the issue falls within one of three recognized exceptions: (1) The newly asserted claim involves only a question of law arising on proved 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. *State v. Spotts,* 288 Kan. 650, 652, 206 P.3d 510 (2009)." *State v. Dukes,* 290 Kan. 485, 488, 231 P.3d 558 (2010).

Here, Mr. Doe's overbreadth challenge argues the reckless criminal threat statute violates the First Amendment's protection of speech, a fundamental right. Resolving the issue is also necessary to serve the ends of justice in order to assure that the protected right to speech is preserved. Finally, this is solely a legal question based on the statutory language and Constitutional law. Thus, this court may review the issue for the first time on appeal.

In addition, a defendant has standing to bring an overbreadth challenge based on First Amendment rights, even when that defendant is

only asserting the rights of third parties. *State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400 (2014).

Standard of Review

"Whether a statute is unconstitutionally vague or overbroad is a question of law over which this court has unlimited review." *State v. Whitesell*, 270 Kan. 259, 268, 13 P.3d 887 (2000).

Analysis

Kansas' reckless threat statute is unconstitutionally overbroad because it goes beyond the true threat exception to the First Amendment, which applies to intentional threats, and criminalizes protected speech. Several general rules apply to challenges to the constitutionality of a statute requiring the reviewing court to: 1) presume the law is constitutional; 2) resolve all doubts in favor of validating the law; 3) uphold the law if there is a reasonable way to do so; and 4) strike down the law only if it clearly appears to be unconstitutional. *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 544, 316 P.3d 707 (2013). The burden rests on the party bringing the challenge to show the law is unconstitutional. *City of Lincoln Ctr.* 298 Kan. at 544.

"[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected." *Dissmeyer v. State*, 292 Kan. 37, Syl. ¶ 2, 249 P.3d 444 (2011). "A successful overbreadth challenge can thus be

made only when 1) the protected activity is a significant part of the law's target, and 2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications." *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091, 1099 (1982). Further, "An overbreadth challenge will be successful if the challenged statute trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep." *State v. Whitesell*, 270 Kan. 259, 271, 13 P.3d 887 (2000) (quoting *Staley v. Jones*, 108 F. Supp. 2d 777, 786 (W.D. Mich. 2000), *rev'd,* 239 F.3d 769 (6th Cir. 2001)).

Federal and Kansas Courts have long recognized that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection." *Smith v. Martens*, 279 Kan. 242, 254, 106 P.3d 28 (2005). In line with that reasoning, the Court has recognized an exception to the First Amendment's protection for "true threats." *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

Watts involved a prosecution for threatening the president based on the defendant's statements at a draft-protest rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Court concluded that the remark was not a true threat, and therefore protected speech, based on its context, such as the fact that it was made at a political

rally and that the crowd responded with laughter. *Watts* 394 U.S. at 708. The Court referenced, but declined to resolve, a question of whether willfulness was a requirement for true threats. *Watts* 394 U.S. at 708.

The Court again addressed the true threats doctrine in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), where the Court discussed Virginia's ban on intimidating cross burning, which provided that the burning of a cross in a public place was *prima facie* evidence of an intent to intimidate. The Court described the true threat exception as allowing the criminalization of intentional threats:

> " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States, supra,* at 708, 89 S.Ct. 1399 ('political hyberbole' is not a true threat); *R.A.V. v. City of St. Paul,* 505 377 (1992). The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 359–60.

Thus, the Court noted that "A ban on cross burning carried out *with the intent* to intimidate" is consistent with the First Amendment exception for true threats. *Black*, 538 U.S. at 363 (Emphasis added).

A plurality of the Court then went on to conclude that the prima facie evidence provision does not does not comport with the First Amendment's protection of speech. The plurality noted a chilling effect on protected speech and that "It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings." *Black*, 538 U.S. at 366. Thus, the Court established that intent was a sufficient standard to meet the "true threat" exception to the First Amendment, and the plurality concluded that a pure objective standard based on the expressive conduct was insufficient. This left unresolved, however, whether lower standards would suffice.

The Court was again set to resolve whether a negligent threat standard could pass First Amendment muster in *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), but instead resolved the issue based on the statutory language rather than the Constitutional question. The Court determined that the Federal threat statute, which did not include a mental culpability element, still required some level of mental culpability and noted "[t]here is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis*, 135 S. Ct. at 2012. The Court declined, however, to address

whether a reckless standard would be sufficient to comply with the statute or the First Amendment's protections because the parties had not briefed the issue. *Elonis*, 135 S. Ct. at 2012; See also *Elonis*, 135 S. Ct. at 2016 (Alito, J. Concurring in part dissenting in part.) (Stating that he would find that a reckless culpability standard would satisfy the statute and the First Amendment.); *Elonis*, 135 S. Ct. at 2027(Thomas, J., Dissenting) (Arguing "general intent" standard is sufficient). Thus, the Court left unresolved whether a reckless culpability level is sufficient to be a "true threat" and be beyond the First Amendment's protections.

Kansas Courts last addressed an overbreadth challenge to the reckless form of the criminal threat statute two years before *Virginia v. Black* in *State v. Cope*, 29 Kan. App. 2d 481, 484, 29 P.3d 974 (2001) (Reversed on other grounds in *State v. Cope*, 273 Kan. 642, 44 P.3d 1224 (2002)). That case involved an earlier form of the current law that criminalized a threat to "[c]ommit violence communicated with intent to terrorize another, or to cause the evacuation of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such terror or evacuation." *Cope*, 29 Kan. App. 2d at 483; K.S.A. 21-3419. This Court briefly compared the terroristic threat statute with other laws that had been found overbroad, such as a law banning the display of films not rated by the MPAA, concluding the law is not overbroad in comparison. *Cope*, 29 Kan. App. 2d at 484.

The holding in *Cope* is now called into question because of the statutory changes to the threat law and the Court's comments in *Virginia v. Black* indicating that intent is required for the true threat exception. First, the former terroristic threat law has since been amended to criminalize any threat to "[c]ommit violence communicated with intent to place another in fear, . . . or in reckless disregard of the risk of causing such fear[.]" K.S.A. 21-5415. In particular, the law no longer requires a threat that would "terrorize" but only one that could cause "fear." Thus, the category of speech covered by the statute has broadened because it requires a lower threshold, *i.e.* that the speech be done in a reckless disregard to the risk of causing fear, rather than a risk of terrorizing. See *Cope*, 29 Kan. App. 2d at, 486 ("'terrorize' means to reduce to terror by violence or threats; and 'terror' means an extreme fear or fear that agitates the body and mind.") More speech is targeted by the current law than the prior version.

Second, *Virginia v. Black* indicated that intent is a requirement for threat when noting "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death." 538 U.S. at, 359–60 (emphasis added). While the Court has since declined to expressly determine whether recklessness is a sufficient standard to bypass the First Amendment, the language in *Black* indicates that intent

is necessary. Further, several courts have already reached that conclusion relying on *Black*. See *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (Concluding that between the *Black* plurality and concurring opinions, "eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction."); *O'Brien v. Borowski*, 461 Mass. 415, 426, 961 N.E.2d 547 (2012) *abrogated on other grounds by Seney v. Morhy*, 467 Mass. 58, 3 N.E.3d 577 (2014) (Describing "true threat" exception as requiring intent under *Black* and *Cassel*.); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011) ("Without a finding that his statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat."). Thus, there are grounds to revise the holding in *Cope* because of the indication in *Black* that intent to cause fear is necessary for true threats.

Looking to the text of the Kansas law indicates it violates the same First Amendment concerns at issue in *Black*. The law criminalizes threats to commit violence communicated in reckless disregard of the risk of causing fear in another. K.S.A. 21-5415. Reckless acts are defined as "when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable

person would exercise in the situation." K.S.A. 21-5202 (j). Thus, the law criminalizes speech in which the speaker is conscious of a risk of causing fear from their speech, yet continues anyway, and that speech risk is considered a gross deviation from the standard of care of a reasonable person. That law encompasses a broad range of politically or socially distasteful statements that are still protected by the First Amendment.

As an example, one of the two cross burnings discussed in *Black* involved the burning of a cross on private property within the view of a public roadway and other houses, where locals had stopped to watch. *Black*, 538 U.S. at 349-50. Given the long history of the violence associated with cross burnings, See *Black*, 538 U.S. at 352-57, the perpetrators of that cross burning would necessarily be conscious of the risk that their actions would recognized as a threat to commit violence causing fear, and those actions are a gross deviation from the standard of care exercised by a reasonable person. Thus, the cross burnings would be reckless threats under Kansas law, even though it was protected political speech done on private property. The reckless threat law, like the prima facie intent element in *Black*, goes too far in criminalizing protected, if distasteful, speech. Because the Kansas reckless threat law criminalizes protected speech by going beyond the recognized First Amendment exception for intentional threats, it is constitutionally overbroad in violation of the First Amendment.

Conclusion

Because Mr. Doe was convicted under an alternative means instruction that included reckless threat, this Court must now vacate Mr. Doe's conviction under the constitutionally overbroad statute.

Conclusion

Mr. Doe respectfully asks this Court to reverse his convictions, and remand his case for a new trial.

Respectfully submitted,

/s/ Attorney Electronic Signature
Attorney Name, Bar Number
Name of Firm or Agency
Address
City, State, ZIP
Telephone Number
Fax Number
Email Service Address
Attorney for Appellant

Certificate of Service

I hereby certify that the above and foregoing Appellant's brief was served on the XXXXX County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and Name of AG, Attorney General, at ksagappealsoffice@ag.ks.gov, on the DAY of XXXXX Month, YEAR.

/s/ Attorney Electronic Signature
Attorney Name, Bar Number

No. 00-000000-A

_____

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

_____

STATE OF KANSAS
Plaintiff-Appellee

vs.

JOHN DOE
Defendant-Appellant

_____

PETITION FOR REVIEW OF THE APPELLANT

_____

Appeal from the Kansas Court of Appeals Opinion
dated MONTH DAY, YEAR.
An appeal from the District Court of XXXXX County, Kansas
Honorable XXXX XXXX, Judge
District Court Case No. 00-CR-000

_____

Attorney Name, Bar Number
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Notice to the Attorney General Pursuant to K.S.A. 2016 Supp. 75-764

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Prayer for Review

John Doe respectfully asks this Court to review and reverse rulings of the Court of Appeals which resulted in the affirmation of his attempted second-degree murder, aggravated assault of a law enforcement officer, and criminal threat convictions. Review of this case is appropriate for four primary reasons.

First, review would allow this Court to consider the extent to which evidence must suggest the commission of a prior crime, before it implicates K.S.A. 60-455. The Court of Appeals' greatly underestimated the jury's ability to make a logical inference of prior criminal activity from evidence that does not conclusively establish that fact. For this reason, Mr. Doe believes the Court of Appeals decision reached an incorrect result and a clarification of that case law is needed.

Second, review of this case is warranted to reiterate that, when considering the propriety of non-instruction on a lesser included offense, courts must review trial evidence in the light most favorable to a verdict on the lesser included offense. Although the Court of Appeals, in this case, purported to do this, its analysis affirming the propriety of non-instruction on a lesser slanted trial evidence in the State's favor improperly. For this reason, Mr. Doe believes the Court of Appeals decision reached an incorrect result and a clarification of that case law is needed.

Third, review of this case is necessary to clarify that a defendant needn't satisfy the objective reasonability prong of a meritorious self-defense claim to be convicted of imperfect self-defense voluntary manslaughter. In this case, the Court of Appeals affirmed non-instruction on attempted voluntary manslaughter because trial evidence did not support a finding that it was objectively reasonable for Mr. Doe to feel that he needed to act in self-defense. That affirmation was obviously flawed, as the objective *unreasonability* of an offender's beliefs is a necessary element imperfect self-defense voluntary manslaughter. For this reason, Mr. Doe believes the Court of Appeals decision reached an incorrect result and a clarification of that case law is needed.

Finally, review of this case is necessary because it presents an issue of first impression regarding the intersection between the fundamental right to free speech under the First Amendment and Kansas' criminal threat statute, and the Court of Appeals reached an incorrect decision in this case that results in the failure to protect that free speech right.

Date of Decision

Month, Date, Year.

Statement of Issues

Issue I: The Court of Appeals erred by holding that evidence of a prior, violent altercation with law enforcement did not implicate K.S.A. 60-455.

Issue II: The Court of Appeals erred by viewing trial evidence in the State's favor on its way to affirming non-instruction on a lesser included offense. The Court of Appeals also erred by holding that evidence establishing an element of an attempted voluntary manslaughter offense required non-instruction on that crime.

Issue III: The Court of Appeals erred in finding the reckless form of criminal threat was not overbroad under the First Amendment because the "true threats" exception only extends to threats made with the intent to cause fear.

Statement of Facts

Except as otherwise stated below, Mr. Doe incorporates the facts from the Court of Appeals' opinion pursuant to Rule 8.03(b)(6)(C).

Arguments and Authority

Issue I: The Court of Appeals erred by holding that evidence of a prior, violent altercation with law enforcement did not implicate K.S.A. 60-455.

Review of this issue would allow this Court to clarify the extent to which evidence must suggest the commission of a prior crime, before it qualifies as "evidence that a person committed a crime or civil wrong on a specified occasion" within the meaning of K.S.A. 60-455.

K.S.A. 60-455(a) provides:

> [E]vidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.

In this case, over a K.S.A. 60-455 objection, the district court permitted testimony that Mr. Doe made the following comments during his interaction with Officer White and Sergeant Blue:

- "If you were Faraway County [law enforcement], you would have tackled me by now."
- "Faraway County would have tased me already."
- "If it was Faraway County, it would take about six to eight cops to tackle [me]."

In its opinion, the Court of Appeals panel provided a procedural history demonstrating that Mr. Doe's comments related to a prior, violent altercation with law enforcement officers. *State v. Doe*, No. XXX, XXX, slip op. at 4-5 (Kan. App. July 2, 2018) (unpublished opinion). But, in its substantive analysis of a K.S.A. 60-455 claim, the panel asserted that, within the context of trial evidence, Mr. Doe's comments did not qualify as evidence of a prior crime. The panel reasoned:

> First, the statements only provide Doe's opinion about Faraway County law enforcement; nothing in these statements refer to an interaction between Doe and Faraway County law enforcement. And even if the statements did establish Doe had personal experience interacting with Faraway County law enforcement in the past, prior interaction with law enforcement falls far short of evidence that he committed a crime or civil wrong on a specified occasion. *Doe*, No. XXX,XXX, slip op. at 6.

It is notable that the panel provided no citations to legal authority when explaining why Mr. Doe's comments were not specific enough to

constitute evidence of a prior crime. This is not surprising, since there is scant case law touching on how definite evidence of prior crime must be before it qualifies as K.S.A. 60-455 evidence. By granting review of this case, this Court could offer lower courts guidance on this issue.

Mr. Doe agrees that his comments did not *establish* prior criminal conduct. But K.S.A. 60-455(a) does not purport to bar "proof" of certain prior criminal conduct. Rather, it bars "evidence" of certain prior criminal conduct.

K.S.A. 60-401(a) defines evidence as:

> [T]he means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

Upon learning that Mr. Doe told the police officers about what would happen if he was confronted in a similar manner by Faraway County law enforcement officers, jurors doubtlessly inferred that Mr. Doe had been involved in a prior, violent altercation with Faraway County law enforcement. The panel erred by concluding that Mr. Doe's comments were not *evidence* of a prior crime, implicating K.S.A. 60-455.

On appeal, Mr. Doe also took issue with the district court's K.S.A. 60-455 ruling. See Appellant's Brief at 7-14. But the Court of Appeals panel affirmed the district court by holding that Mr. Doe's comments did not actually qualify as K.S.A. 60-455 evidence. *Doe*, No. XXX,XXX slip op. at 6.

Thus this case presents an issue which was argued to the district court and the Court of Appeals, but was not decided by the Court of Appeals. Mr. Doe would like this Court to review the merits of the district court's K.S.A. 60-455 ruling and therefore now address the district court's ruling in this petition. See Sup. Ct. Rule 8.03(b)(6)(C)(ii).

K.S.A. 60-455 provides that (in non-sex offense cases) evidence of prior crimes is inadmissible to prove criminal propensity. But prior crime evidence may be admissible to prove some other relevant fact, provided that the fact is in dispute. *State v. Boggs*, 287 Kan. 298, 305 (2008). In this case, the State admitted evidence that Mr. Doe made comments that were admitted through K.S.A. 60-455 on the theory that they were relevant to show that Mr. Doe knew that Officer White and Sergeant Blue were law enforcement officers. (R. XVIII, 34; XXII, 133). There are two problems with that theory.

First, according to trial testimony, Officer White and Sergeant Blue were both wearing police uniforms when they interacted with Mr. Doe. (R. XIX, 14-16, 142-43). And Officer White explicitly told Mr. Doe that he was a police officer. (R. XIX, 28). Since Mr. Doe's knowledge wasn't in dispute, K.S.A. 60-455 precluded the State from proving that fact with evidence of prior criminal conduct. *Boggs*, 287 Kan. at 315-16.

Second, the State didn't need to prove that Mr. Doe knew that Officer White or Sergeant Blue were police officers to secure attempted murder or

aggravated assault on a law enforcement officer convictions. K.S.A. 21-5403(a)(1) criminalizes the intentional killing of any person, whether they are a civilian or a police officer. An offender needn't have actual knowledge that he or she is assaulting a police officer to be guilty of assault of a law enforcement officer. *State v. Wood*, 235 Kan. 915, Syl. ¶ 8 (1984).

In sum, the jury's verdict, in no way, turned upon whether Mr. Doe had a prior altercation with Faraway County law enforcement officers. Evidence of that altercation only served to prove criminal propensity. Thus, the district court erred by admitting evidence of that altercation. Accordingly, this Court should reverse his convictions in this case and remand his case for a new trial.

Issue II: The Court of Appeals erred by viewing trial evidence in the State's favor on its way to affirming non-instruction on a lesser included offense. The Court of Appeals also erred by holding that evidence establishing an element of an attempted voluntary manslaughter offense required non-instruction on that crime.

Review would allow this Court to reiterate that courts must resolve conflicting trial evidence in favor of a conviction on a lesser included offense when considering whether a district court erred by not instructing on a lesser included offense. Furthermore, this Court should grant review to clarify that imperfect self-defense voluntary manslaughter occurs when an offender *cannot* establish the objective reasonability prong of a self-defense claim.

When affirming the district court's non-instruction on attempted voluntary manslaughter as a lesser included offense of attempted second-degree murder, the Court of Appeals panel asserted that trial evidence did not support a finding that Mr. Doe subjectively believed that circumstances existed which would have permitted for the lawful exercise of self-defense. The Court of Appeals recitation of evidence is flawed because cuts disputed trial evidence in the State's favor.

For example, at trial, it wasn't at all clear that Mr. Doe was holding a knife – which he was ordered to drop – prior to being tased by police. Sergeant Blue testified that Mr. Doe was defiantly holding a knife prior to his tasing. (R. XIX, 151). But Officer White testified that Mr. Doe had a sheathed knife *on his waistband* until Sergeant Blue shot him in the head with a Taser gun. (R. XIX, 107).

As a second example, it also wasn't clear from trial evidence whether police warned Mr. Doe that he would be tased if he continued walking toward his apartment. Again, there is conflicting testimony on that point. Officer White testified that Sergeant Blue said "Taser, Taser, Taser" slightly before shooting Mr. Doe in the head with a Taser gun. (R. XIX, 35). But Sergeant Blue testified that he gave no such warning. (R. XIX, 200-02). Again, the panel's summarization of trial evidence resolved an evidentiary conflict in the prosecution's favor.

Had Mr. Doe raised a sufficiency of the evidence issue in his appeal, it would have been appropriate for the panel to resolve conflicting trial evidence in the State's favor. *State v. Woods*, 301 Kan. 852, Syl. ¶ 12 (2015). But, since Mr. Doe took issue with non-instruction on a lesser included offense, the panel should have resolved all evidentiary conflicts in favor of supporting an attempted voluntary manslaughter conviction. *State v. McLinn*, 307 Kan. 307, Syl. ¶ 3 (2018). This means that panel should have assumed, contrary to what it did, that police, without warning, tased a man who was not holding an inherently deadly weapon.

The panel's analysis is not only flawed in its recitation of facts. It is also flawed in the inferences which it draws from facts. For example, the panel assumed that Mr. Doe intentionally disregarded warnings from police officers not to enter his apartment. *Doe*, No. XXX,XXX, slip op. at 9. When making this inference, the panel didn't mention that Mr. Doe was mentally agitated and extremely drunk when he was interacting with law enforcement. (R. XX, 92, 169-70, 203; XXII, 7). Consideration of those facts supports an inference that Mr. Doe simply wasn't tracking with what police were telling him to do. When reading the evidence as counsel has argued above, a rational factfinder could have found that Mr. Doe *subjectively* believed that police were inflicting great bodily harm upon him for no legitimate reason. Thus, the panel was wrong to affirm the district court's

non-instruction on that lesser included offense of attempted second-degree murder.

Furthermore, in its opinion, the panel asserted that it would have been wrong for the district court to instruct on attempted voluntary manslaughter, because a reasonable person in Mr. Doe's shoes wouldn't have perceived circumstances as permitting for lawful self-defense. *Doe*, No. XXX,XXX, slip op. at 10. This reasoning is flawed for one simple reason. Imperfect self-defense voluntary manslaughter elementally requires an offender to have an honest *but unreasonable* belief that circumstances exist which would permit one to act in lawful self-defense. *State v. Fisher*, 304 Kan. 242, 258 (2016); see also, K.S.A. 21-5404(a)(2). Essentially, the panel found that evidence establishing an element of a crime precludes a district court from giving a lesser include offense instruction for that crime. This holding is illogical, and should not stand. If proof satisfying an element of imperfect self-defense voluntary manslaughter really precludes a defendant from being guilty of that crime, it would be literally impossible for anyone to ever be guilty of imperfect self-defense voluntary manslaughter. This Court should grant review, and disapprove of the panel's analysis.

Issue III: The Court of Appeals erred in finding the reckless form of criminal threat was not overbroad under the First Amendment because the "true threats" exception only extends to threats made with the intent to cause fear.

Review would allow this Court to address, for the first time, whether Kansas' criminalization of threats done without the specific intent to cause fear, *i.e.*, reckless threat, is overbroad in violation of the First Amendment's protections of speech.

"[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected." *Dissmeyer v. State*, 292 Kan. 37, Syl. ¶ 2, 249 P.3d 444 (2011). Resolving this overbreadth challenge requires determining if the reckless threat statute criminalizes protected speech or only "true threats," a recognized exception to the First Amendment's protection of speech. *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). However, what is a "true threat" remains poorly defined. Key to this case is the unresolved question of what *mens rea* is required for a "true threat" following the Court's plurality opinion in *Virginia v. Black*, 538 U.S. 343, 363, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

On appeal to the Court of Appeals, Mr. Doe argued that, consistent with *Black*'s holding, a true threat requires subject intent, meaning a threat to commit violence made "*with the intent* to intimidate[.]" 538 U.S. at 363. Therefore, the statute is unconstitutionally overbroad as a threat to commit violence made with reckless disregard to the risk of causing fear, as under K.S.A. 21-5415(a)(1), is not a true threat, but protected speech. (Appellant's Brief, 10-19.) However, the Court of Appeals panel found *Black*'s use of

"intent" means only a *mens rea* greater than negligence, and reckless disregard meets that requirement. *Doe,* No. XXX,XXX, slip opinion at 4-5. This Court should now grant review of this issue because it presents an issue of first impression regarding the fundamental right to free speech under the First Amendment, and the Court of Appeals reached an incorrect conclusion that fails to protect that right.

What *mens rea* is necessary for a "true threat" under the First Amendment following *Black*, is a matter of great debate. Some courts have engaged in extensive analysis of the various concurring opinions in *Black,* finding it held that a true threat occurs "only if the defendant *intended* the recipient of the threat to feel threatened." *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014); See also *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (Reaching the same conclusion). Still, other courts interpret *Black* differently, or find it unclear, and apply either objective, reasonable person-type standards, or recklessness. See, *e.g.*, *State v. Trey M.*, 186 Wash. 2d 884, 901, 383 P.3d 474 (2016) pet. for cert. docketed, January 26, 2017 (Finding an objective, negligence style standard for "true threats"); *Major v. State*, 800 S.E.2d 348 (Ga. 2017) (Recklessness is sufficient).

In Kansas the matter is an unresolved, as the panel noted this was the first case applying *Black* to the reckless disregard provision of K.S.A. 21-5415(a)(1). *Doe,* XXX,XXX, slip opinion at 4-5; See also *State v. White*, 53

Kan. App. 2d 44, 57-59, 384 P.3d 13 (2016) (Applying *Black* to intentional threats). In sum, there is a split of persuasive authority and no prior Kansas cases addressing the issue since *Black*. Mr. Doe contends that this Court should follow the well-reasoned opinions of the 9th and 10th circuits in *Cassel* and *Heineman* to conclude that *Black* requires an intent to cause fear. *Cassel*, 408 F.3d 622; *Heineman*, 767 F.3d 970. Moreover, even if *Black* is not clear, a specific-intent standard is still necessary to protect the right to free speech.

This Court should further grant review of the issue because the Court of Appeals relied upon several analytical errors in reaching an incorrect conclusion. First, the panel incorrectly stated that reckless threat law does not encompass politically or socially distasteful statements protected by the First Amendment "because the law criminalizes only statements that are threats to commit an act of violence, not statements expressing 'distasteful' ideas." *Doe*, XXX,XXX, slip opinion at 3; See K.S.A. 21-5415(a)(1). This was faulty reasoning, assuming threats to commit violence are wholly exclusive from protected speech. However, the true threat standard has always functioned as the dividing line in determining which threats to commit violence are protected speech and which are not.

For example, the defendant in *Watts*, 394 U.S. at 706, made a threat to commit violence when he said at a political rally, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." However, that threat

to commit violence was not a "true threat" subject to criminalization, but protected "political hyperbole[.]" *Watts*, 394 U.S. at 708. Likewise, the Court later noted that true threats require that a speaker communicates "a *serious* expression of an intent to commit an act of unlawful violence[.]" *Black*, 538 U.S. at 359–60 (Emphasis added). In contrast, the plain language of K.S.A. 21-5415(a)(1) contains no limitation to *serious* threats to commit violence, and Kansas courts are directed not to add something to the statute when the meaning is plain. *State v. Ruiz-Reyes*, 285 Kan. 650, 653, 175 P.3d 849 (2008).

The panel incorrectly found that Kansas' reckless *mens rea* is sufficient culpability to make a statement a "true threat" under the First Amendment. *Doe*, XXX,XXX, slip opinion at 4-5. As discussed above, , Mr. Doe contends that *Cassel* and *Heineman* reach the correct conclusion on this question. *Cassel*, 408 F.3d 622; *Heineman*, 767 F.3d 970. Moreover, consideration of types of speech limited under a law criminalizing a threat to commit violence communicated in reckless disregard of the risk of causing fear, reveals that protected activity is a significant part of the law's target, and the reckless culpability level simply does not go far enough to protect speech. K.S.A. 21-5415(a)(1).

As an example, consider again the statement in *Watt*. This statement is clearly a threat to commit violence as it communicated an intent to inflict harm upon the president. See K.S.A. 21-5111(ff) (defining "threat"). The

question then is whether the threat made with "reckless disregard" to the risk of causing fear, *i.e.*, was the speaker aware of a risk of causing fear from their speech, yet continues anyway, and doing so was a gross deviation from the reasonable person standard. K.S.A. 21-5202(j). The answer to this question is also yes. However, the Court in *Watts* recognized the inherent value in free political speech, even when that speech is violent, and found the defendant's conviction violated the First Amendment. 394 U.S. 705. That statement, in that context, however, would be a reckless threat under the Kansas law and that protected speech would be criminalized.

The reckless criminal threat statute criminalizes a broad range of politically or socially distasteful statements protected by the First Amendment. In contrast, the panel's conclusion that reckless culpability is sufficient gives no consideration to the chilling effect the law has on speech. *Doe*, XXX,XXX, slip opinion, at 5. Thus, in order to adequately protect that right to free speech, this Court should grant review of this case and find the reckless form of the criminal threat overbroad. See, *e.g.*, *Heineman*, 767 F.3d 970; *Cassel*, 408 F.3d 622.

Conclusion

Mr. Doe respectfully asks this Court to reverse the Court of Appeals opinion, vacate his convictions, and remand his case to the district court for further proceedings in accordance with the above argued issues.

Respectfully submitted,

/s/ Attorney Electronic Signature
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Memorandum Opinion

COURT OF APPEALS OPINION ATTACHED HERE

Certificate of Service

I hereby certify that the above and foregoing Appellant's petition was served on the XXXXX County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and NAME OF ATTORNEY GENERAL, Attorney General, at ksagappealsoffice@ag.ks.gov, on the DAY of MONTH, YEAR.

/s/ Attorney Electronic Signature
Attorney Name, Bar Number