

NOT DESIGNATED FOR PUBLICATION

No. 123,830

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ROBERT L. CAMPBELL JR.,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Opinion filed April 7, 2023.  
Affirmed.

*Jacob Nowak*, of Kansas Appellate Defender Office, for appellant.

*Julie A. Koon*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., SCHROEDER and GARDNER, JJ.

PER CURIAM: Robert Campbell Jr. appeals the summary denial of his pro se K.S.A. 2019 Supp. 60-1507 motion, arguing the district court erred by applying res judicata and by failing to consider the merits of his claim that he was not competent to represent himself at trial. Finding no error in the district court's summary denial of Campbell's 60-1507 motion, we affirm.

## *Factual and Procedural Background*

In November and December 2011, T.D. received phone calls from Robert Campbell Jr., which made her fear for her safety. T.D. reported the calls to the police, and Campbell was later convicted at a bench trial of stalking based on these phone calls. A panel of this court affirmed Campbell's conviction on appeal. See *State v. Campbell*, No. 114,396, 2016 WL 6651311, at \*8 (Kan. App. 2016) (unpublished opinion).

In April 2014, T.D. checked her business mailbox and found two letters from Campbell, listing his return address as Larned Correctional Facility. Seeing Campbell's name on the envelopes made T.D. nervous because Campbell had been ordered not to contact her. So T.D. contacted the police again.

One of the letters included only a short message telling T.D. to have a "wonderful year." T.D. feared that this message implied that she would see Campbell the next year. The other letter told T.D., "It will be very wise to take care of me while I'm in here. This is not a threat. It's not a demand. I'm asking you for a wise decision." Latent print examination of the letters showed a fingerprint on the first page of one of the letters, and the print examiner determined that the fingerprint was Campbell's.

The State then charged Campbell with one count of stalking under K.S.A. 2011 Supp. 21-5427(a)(2), (b)(2)(B). At his preliminary hearing, Campbell said he wanted to represent himself. In response, the district court extensively advised Campbell of his rights regarding self-representation and the "numerous dangers and disadvantages" of invoking such rights. The court told Campbell to discuss the decision with his attorney and to think about it over the weekend. The court told Campbell that it would revisit the issue the next Monday.

The district court also considered Campbell's pro se motion to remove his appointed counsel (Jama Mitchell). Campbell's motion claimed that Mitchell had a personal relationship with the victim's family. But Mitchell denied the allegation, and the district court denied the motion.

The following Monday, Campbell requested a competency evaluation for himself. The court granted the motion and briefly addressed Campbell's pending request to represent himself. It explained that Campbell's competency needed to be determined before it could rule on Campbell's self-representation motion: "I know [Campbell has] had . . . some competency issues in the past, so I think it probably is appropriate to make sure that we're okay with regard to that before we do much else."

COMCARE conducted Campbell's initial evaluation. The evaluator noted in his report that Campbell had had a brain tumor removed when he was six years old and had been prescribed medication for a seizure disorder since that surgery. Campbell was later diagnosed with epilepsy, received disability funds for it, and was never employed. But Campbell refused to comply with the test requirements, so the examiner found that he could not adequately determine Campbell's competency to stand trial.

The district court then ordered another competency evaluation at Larned State Hospital. The examiner there noted, "Campbell has an extensive psychiatric history that generally has been presented in actions that have led to arrest and incarceration." Campbell had been diagnosed with schizophrenia, causing auditory and visual hallucinations, and was taking at least six medications.

The evaluator diagnosed Campbell with: (1) "Schizophrenia, Multiple Episodes, Currently in Partial Remission"; (2) "Antisocial Personality Disorder with Borderline Features"; and (3) "Unspecified Paraphilic Disorder." The Larned evaluation also noted that Campbell refused to fully participate in the evaluation. Still, the evaluator concluded

that Campbell was competent to stand trial based on a combination of Campbell's past evaluations, his current presentation in his therapy assignments, and his conduct with hospital staff.

The district court held a hearing after the evaluation and found Campbell competent to stand trial, without objection.

A couple of days later, the district court addressed Campbell's request to represent himself. At this hearing, the district court thoroughly discussed the matter with Campbell, explaining the risks of self-representation. The district court discouraged Campbell from representing himself but told Campbell that he could waive his right to self-representation and have counsel appointed at any time. But the court clarified that if such a request came in the middle of trial, it would likely appoint counsel but would not delay trial. Campbell responded to several questions and made comments of his own during the court's explanation of his rights. By the end of that conversation, Campbell remained adamant that he wanted to represent himself. He also asked the court to remove Mitchell and not to appoint Mitchell as standby counsel. The court granted Campbell's request to represent himself without standby counsel.

Ten days later, Campbell asked the court to appoint standby counsel. Campbell told the district court that he still wanted to represent himself but wanted standby counsel to ensure an attorney would be ready to take over his case if he changed his mind about representing himself. The court explained that the decision to appoint standby counsel was discretionary and that such counsel would not represent him or "be working for [him]," so Campbell could not direct his attorney. The court also explained that it would likely choose Mitchell if it granted Campbell's request. Campbell objected to Mitchell's appointment, claiming he had sent a complaint letter to the disciplinary administrator about Mitchell's representation. The court responded that it would check with the judge who presided over the previous hearing before deciding.

At a pretrial hearing in April 2015, Campbell requested standby counsel again, arguing a right to counsel under the Sixth Amendment to the United States Constitution. The district court denied Campbell's request, finding that the Sixth Amendment contains no right to standby counsel.

This case was tried in April 2015. In the middle of Campbell's cross-examination of T.D., and right after losing more than one evidentiary motion, Campbell made yet another request for standby counsel. He added that he wanted "to waive [his] right to self-representation and request . . . counsel in [his] defense." While arguing his position, Campbell reminded the court of his mental diagnoses, claimed that he had not been given his medication while incarcerated, and said that he had been confused when he decided to represent himself.

The district court denied Campbell's request for several reasons. It found the effect of midtrial appointment of counsel would "disrupt and vitiate the trial" and could thus result in a mistrial. The district court also explained that the timing of Campbell's request was suspect:

"None of these matters were raised by Mr. Campbell in the pretrial motions. None of these issues have been raised, the competency issues, by Mr. Campbell until after his request for appointed counsel is denied, until after his request for admission and being able to question on Exhibit H has now been denied. The timing of his making the request for a competency evaluation only after those matters have been adversely decided against him is extremely suspect and probably more than coincidental."

The district court also found that Campbell had received several warnings about the risks of self-representation and had repeatedly chosen to represent himself. It then found that Campbell's conduct before and during trial showed he was competent to represent himself.

After finding that Campbell had been conducting himself on an acceptable level as a pro se litigant, the court denied his motion for a competency evaluation, found he understood the charge against him, and was more than able to assist and to make his own defense. Campbell clarified that he was not requesting a competency evaluation but was requesting counsel because of his mental disorders. The district court then denied Campbell's request for appointment of counsel and resumed trial.

### *Trial Testimony and Verdict*

The State presented testimony from T.D. and fingerprint examiners. This testimony showed that T.D. had not invited Campbell to write or contact her, that Campbell was legally prohibited from contacting T.D., and that Campbell's fingerprint had been found on one of the letters sent to T.D.

Campbell testified in his defense, denying that he had written the letters T.D. received. Campbell's theory of defense was that a fellow inmate, "Big Charlie," had written the letters and had told him that when T.D. sent the money the letters demanded, Campbell needed to give the money to him. Campbell also suggested that the State had failed to establish that the letters were in his handwriting. Campbell admitted that he had touched one of the pages, as the fingerprint evidence showed, but he had done so only after Big Charlie wrote the letter and handed it to him.

### *Conviction and Sentence*

The jury convicted Campbell as charged. Before sentencing Campbell, the district court granted his request to appoint counsel for sentencing. The district court first appointed Bradley Sylvester, but Campbell objected, alleging a conflict of interest. The district court ordered Campbell to undergo a third competency evaluation before later appointing Casey Cotton to represent him.

Before sentencing, Campbell filed several pro se motions, including one to set aside the jury's verdict. In that motion, Campbell claimed that the district court had violated his right to a fair trial by denying his request to appoint counsel midtrial. He claimed he had been unable to properly represent himself because he was mentally ill and unmedicated. Campbell argued that the district court had abused its discretion by denying his request to appoint counsel despite his "mental illness episodes of delusions, hallucinations, and hearing voices."

At the sentencing hearing, Cotton argued Campbell's motion to set aside the verdict. He challenged the district court's orders denying standby counsel and denying the appointment of counsel at trial. Cotton asserted that the court should have appointed counsel based on its previous advice that Campbell could waive his right to represent himself at "any time." And Cotton suggested that caselaw required the court to grant a defendant's request for an attorney, regardless of timing.

The district court denied Campbell's motion to set aside the jury's verdict, finding Campbell had steadfastly pursued his right of self-representation despite adequate warnings. The court also found that it had properly rejected Campbell's late request for counsel as an "attempted abuse of the system" based on Campbell's acts and the timing of his request. The court also found that Campbell's request could not be granted without improperly interrupting his jury trial.

At sentencing, the district court denied Campbell's motion for a downward departure and sentenced Campbell to 136 months in prison and 24 months' postrelease supervision.

### *Direct Appeal*

Campbell's direct appeal raised these issues:

- His conviction lacked sufficient evidence;
- he was denied the right to confront his accuser;
- the State failed to disclose exculpatory evidence; and
- the district court violated his substantive due process rights by denying his requests for standby counsel.

See *State v. Campbell*, No. 116,551, 2018 WL 1352541, at \*2 (Kan. App. 2018) (unpublished opinion).

On appeal, this court found no reversible error and affirmed Campbell's conviction. As for Campbell's due process claim, this court noted that Campbell had a competency evaluation, but it found no abuse of discretion in denying Campbell's request for standby counsel. It expressly found that Campbell knowingly and voluntarily waived his right to counsel:

"As noted above, Campbell does not have a constitutional right to hybrid representation, and the appointment of standby counsel is within the sound discretion of the trial court. See *Holmes*, 278 Kan. at 620; *Matzke*, 236 Kan. at 837. At the March 20, 2015 hearing, the district court thoroughly advised Campbell of the dangers and disadvantages he would face in proceeding with self-representation. Knowing these risks, Campbell knowingly and voluntarily waived his right to counsel and chose to proceed pro se. The court did not abuse its discretion in denying Campbell's requests for standby counsel, especially when it reiterated to Campbell on numerous occasions the dangers of proceeding pro se and that he would not be able to direct standby counsel how to proceed on his case." 2018 WL 1352541, at \*7.

This court also addressed Campbell's midtrial request to appoint counsel, finding it failed for lack of proper briefing, but also failed on the merits. It found that Campbell's change in position on self-representation would have materially disrupted the judicial



proceeding, and that the district court did not abuse its discretion in denying his request to change from acting pro se to being represented by counsel.

*K.S.A. 60-1507 Motion*

Campbell filed a timely, pro se 60-1507 motion. Campbell alleged that the district court violated his Sixth Amendment right to a fair trial because it "forced him to proceed with self-representation while . . . aware that he was suffering from a . . . history of the mental illness of paranoid schizophre[ni]a." Campbell also argued that he had not received a fair trial because the district court failed to take "judicial notice" of his history of mental illness or "take into consideration that he was not capable to attend jury trial."

Campbell argued that his long history of mental illness began after he had a brain tumor removed as a child, and that after his surgery he was diagnosed with paranoid schizophrenia, epileptic seizures, hallucinations, and anti-social personality disorder. In support, Campbell attached a 2011 discharge summary from Larned State Hospital which included those diagnoses, and a list of potential witnesses who could provide evidence.

Campbell also argued that after returning to the Sedgwick County Jail from his competency evaluation at Larned, he had received none of his prescribed medications for more than 45 days just before his trial. Campbell explained that the lack of medications caused hallucinations and paranoid episodes. In support, Campbell attached a copy of a "jail medical request form[]" that he filed the day after his jury trial, claiming he experienced memory loss and hallucinations during trial.

Campbell also attached copies of journal entries from previous criminal cases in which district court judges had noted his mental illness. Two of them commented that Campbell's "mental health issues are significant," and one recommended his placement in a mental health facility.

In response to Campbell's K.S.A. 60-1507 motion, the State argued that Campbell's claim about judicial notice asserted a trial error that should have been raised on direct appeal. And it argued that a person's mental status and history of mental illness are not universally known or a subject of generalized knowledge, so they are not properly subject to judicial notice. And in response to movant's Sixth Amendment claim that the district court had forced Campbell to represent himself even though it knew that he was suffering from paranoid schizophrenia, the State argued that this claim was barred by res judicata.

Later, the district court held a preliminary non-evidentiary hearing to consider Campbell's 60-1507 motion. The court adopted the arguments from the State's response and summarily denied the motion. The court found that Campbell had failed to allege facts sufficient to warrant an evidentiary hearing, that the doctrine of res judicata barred his claim because it could have been raised on direct appeal, and that the motion and records showed that he had no right to relief.

Campbell timely appeals.

*Did the District Court Err in Summarily Denying Campbell's K.S.A. 60-1507 Motion?*

Campbell challenges the district court's summary denial of his K.S.A. 60-1507 motion and asks us to remand for an evidentiary hearing on his claim that the district court erred by not appointing him counsel midtrial. Campbell first asserts that the district court improperly found this claim barred by res judicata because he did not raise this argument in his direct appeal.

As for the merits of his claim, Campbell argues that the district court committed reversible error by failing to take judicial notice of his history of mental illness when denying his request to appoint counsel midtrial after invoking his right to self-

representation. Campbell maintains that his 60-1507 motion shows that he suffered from a severe mental illness when he invoked his right to self-representation and when he tried to rescind that invocation mid-trial. He also claims that jail officials failed to give him his prescribed mental health medications for several weeks—around 45 days—before trial.

After a thorough review of the record, we affirm the district court's summary denial of Campbell's motion.

### *Standard of Review and Basic Legal Principles*

To be entitled to relief under K.S.A. 2019 Supp. 60-1507, the movant must establish by a preponderance of the evidence either: (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." K.S.A. 2019 Supp. 60-1507(b); see Supreme Court Rule 183(g) (2022 Kan. S. Ct. R. at 244).

A district court may summarily deny a 60-1507 motion when the motion, files, and case records conclusively show the movant is not entitled to relief. *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018). The district court did so here. Because this court has the same access to the motion, files, and records, we review that decision de novo. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018). Similarly, we have unlimited review of the applicability of res judicata. *State v. Robertson*, 298 Kan. 342, 344, 312 P.3d 361 (2013).

*The district court properly applied res judicata.*

Our Supreme Court has found that res judicata may be applied in a 60-1507 context. See *Drach v. Bruce*, 281 Kan. 1058, Syl. ¶ 14, 136 P.3d 390 (2006). The essence of the doctrine of res judicata is that once an issue is finally determined, it cannot be litigated again. *State v. Kingsley*, 299 Kan. 896, 901, 326 P.3d 1083 (2014). Besides promoting finality, the doctrine prevents confusion, piecemeal litigation, potentially incongruent outcomes, and judicial inefficiency. When, as here, a party has appealed from a conviction or sentence imposed, the judgment of the appellate court is res judicata as to all issues raised. In addition, issues that could have been raised are considered waived. *State v. Salary*, 309 Kan. 479, 482, 437 P.3d 953 (2019) (citing *Kingsley*, 299 Kan. at 901).

Kansas courts consider these four requirements when applying the doctrine of res judicata:

"(1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity in the quality of persons for or against whom claim is made.' We have also phrased these requirements as being, "(1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits." [Citations omitted.]" *State v. Bailey*, 315 Kan. 794, 799-800, 510 P.3d 1160 (2022).

We address these four requirements below.

1. *Same party*

Campbell does not dispute the district court's finding that he is the same party that directly appealed his conviction in *Campbell*, 2018 WL 1352541, at \*2. And the State is the same party that brought the case against him in district court.

## 2. *Same claim*

Campbell contends that he raises a different claim in this motion than he raised in the district court. Campbell tries to reframe the central premise of his claim here as a "substantive competency claim." He asks us to liberally construe his 60-1507 motion as raising a "substantive competency challenge . . . that alleges [he] was tried and convicted while . . . incompetent to represent himself at trial." See *State v. Woods*, 301 Kan. 852, 858, 348 P.3d 583 (2015); *State v. Kelly*, 291 Kan. 563, 565, 244 P.3d 639 (2010) ("Pro se pleadings are liberally construed, giving effect to the pleading's content rather than the labels and forms used to articulate the defendant's arguments.").

But our review of the record shows that each time Campbell challenged the district court's handling of his requests about representation, he argued that the district court violated his Sixth Amendment rights by allowing, and later "forc[ing]," him to represent himself at trial. In fact, when the district court misconstrued Campbell's midtrial request for counsel as a request for a competency evaluation (a substantive competency challenge), Campbell corrected the court and said that he was *not* requesting a competency evaluation. Our review of the record does not show that he raised at trial any claim that he was incompetent to represent himself.

More importantly, the comparison for res judicata purposes is not between claims in this motion and claims Campbell raised or could have raised in the district court, but between claims in this motion and claims he raised or could have raised on appeal. It is the decision of this court in Campbell's direct appeal that bars his repetitive claims here.

True, Campbell raises in this motion a different theory (substantive incompetence) for the same claim (violation of 6th Amendment right to counsel) he raised on appeal. And our decision on his direct appeal did not address his new theory. But Campbell still presents the same claim based on a different legal theory—one that is not distinct enough

to give rise to a new claim for purposes of res judicata. See *State v. McIntyre*, No. 117,787, 2018 WL 3321177, at \*2 (Kan. App. 2018) (unpublished opinion); *Midwest Crane & Rigging v. Schneider*, No. 113,725, 2016 WL 1391805, at \*5 (Kan. App. 2016) (unpublished opinion). The doctrine of res judicata bars a plaintiff from bringing the same claim under a different legal theory. See *Stanfield v. Osborne Industries, Inc.*, 263 Kan. 388, 402, 949 P.2d 602 (1997). Campbell is doing just that.

### 3. *Claims were or could have been raised*

On appeal, Campbell did not challenge the district court's midtrial denial of his request to appoint counsel. Rather, he focused on the district court's denial of his requests for standby counsel. Still, the *Campbell* panel recognized and addressed Campbell's midtrial request for appointment of counsel.

It noted that Campbell had waived that issue:

"We further note that on appeal Campbell does not raise the district court's denial of his midtrial request for appointed counsel, neither in the brief submitted by appellate counsel nor in his pro se supplemental brief. An issue not briefed is deemed to be waived or abandoned. See *State v. Williams*, 303 Kan. 750, 758, 368 P.3d 1065 (2016); Kansas Supreme Court Rule 6.02 (a)(5) (2018 Kan. S. Ct. R. 34)." 2018 WL 1352541, at \*7.

But it also found that the issue would have lacked merit even had it been properly raised:

"In any event, such claim would appear to be without merit. In an unpublished opinion by this court, it is persuasively noted:

'The right to counsel, however, is not a limitless one. As we have suggested, a criminal defendant may not change positions on self-representation in bad faith or in a way that materially disrupts judicial proceedings. See *John-Charles v. California*, 646 F.3d 1243, 1250 (9th Cir. 2011) (no error in denying defendant's request made in the middle of

trial to rescind waiver of counsel); *United States v. Leveto*, 540 F.3d 200, 207 (3d Cir. 2008) (suggesting no abuse of discretion in denying defendant's request for counsel on the day of trial after granting an earlier motion for self-representation.)' *State v. Rassel*, No. 107,336, 2013 WL 1688390, at \*3 (Kan. App. 2013) (unpublished opinion).

"Here, the district court held during trial that Campbell's request for appointed counsel was untimely and that it would have been especially disruptive and vitiate the trial. This change in position on self-representation would have materially disrupted the judicial proceedings. There was no error in denial of Campbell's request, and there was no abuse of discretion in denying his requests for appointment of standby counsel because those rulings were not arbitrary, fanciful, or unreasonable or based on an error of law or fact." 2018 WL 1352541, at \*7-8.

Because this decision on Campbell's direct appeal resolved the issue about his midtrial request for appointed counsel, it decided a claim that Campbell could have raised. That Campbell did not raise that claim on appeal matters not to our res judicata analysis.

And Campbell should have raised that claim, if at all, on appeal. As the State contends, Campbell's motion alleges a trial error, which should be raised on direct appeal and—absent a showing of "exceptional circumstances"—is generally not properly raised in a 60-1507 motion. See Supreme Court Rule 183(c)(3) (2022 Kan. S. Ct. R. at 243) (proceeding under K.S.A. 60-1507 should not generally be used to replace direct appeal involving mere trial errors); see also *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009) (finding defendant bears burden of proving "exceptional circumstances," i.e., "unusual events or intervening changes in the law"). Campbell has not shown why any of his new arguments about his representation or his competence could not have been raised on direct appeal. We thus find that he could have raised on direct appeal the issue about his midtrial request for appointed counsel.

#### 4. *Final judgment on the merits*

Campbell argues that he never received a final judgment on this claim in the district court.

To the contrary, the record shows that the district court finally determined the issue of representation he now raises and it sufficiently addressed the merits of that argument. The district court denied Campbell's midtrial request for counsel based in part on the inappropriate and suspect timing of Campbell's request and the negative effect it would have on the trial proceedings:

"You asserted the right to self-representation. You've represented yourself in motions pretrial. You've been representing yourself through the jury selection, through significant examination of the alleged victim in this case, on motions during the course of the trial.

"The timing, I think, is not appropriate for appointment of an attorney to you at this time simply because it would disrupt and vitiate the trial at this point. A mistrial would have to be declared. I can't conceive of any attorney that would be willing, let alone able to step in within a few minutes and take over active representation of you in this case. . . . So, as a practical matter, a mistrial would have to be declared and the trial started over again from scratch weeks, if not months down the road. The timing is not convenient.

"You've entered into this knowing that there were potential [pit]falls and risks. Now that you're realizing some of those [pit]falls and risks, you don't like what you've gotten yourself into. I'm sorry. I'm going to deny your request and the trial will continue with you representing yourself."

The district court also explained that Campbell had shown his ability to represent himself regardless of his mental illness, even considering Campbell's allegation that he had not been given his prescribed medications in jail:



"During the course of the proceedings, both pretrial and during the trial, I'll be the first to say that Mr. Campbell has been a challenge in certain ways, because of his lack of legal knowledge . . . of legal proceedings, rules, procedure, things like that. But despite his formal education in those matters and despite the irritations that that lack of knowledge in specific areas may have caused, he's nevertheless been very consistent and very straightforward and very methodical in his representation of himself.

"He obviously understands what the charge is. He understands the system in general. He's assisting in making his own defense. As a matter of fact, he's making his own defense. He's representing himself. I find that even if it exists that you have not been given medication that you should have been given, that notwithstanding that you have been exercising your rights. You have been conducting yourself on an acceptable level as a pro se litigant even in a criminal case, while not to the standard of an attorney, to an acceptable standard for a pro se litigant."

When considering Campbell's motion to set aside the jury's verdict at his sentencing hearing, the court expressed its belief that Campbell was "joking" when he asked for the appointment of counsel after adamantly invoking his right to self-representation, because Campbell had never raised his competency as an issue. And Campbell asked for counsel only after he lost a series of motions. So when Campbell claimed that he had decided to represent himself because his mental illnesses had prevented him from making a knowing decision, the district court found no factual basis to support that argument.

These rulings refute Campbell's argument that he did not receive a final judgment on the merits of the same issue he raises here. The district court definitively ruled on Campbell's midtrial request for appointment of counsel, and that ruling became a final decision under K.S.A. 2022 Supp. 60-2102(a)(4) when the district court determined all the issues in the case and entered judgment. That decision was affirmed on appeal and no petition for certiorari was filed. All four elements of res judicata are met.

After reviewing the substance of Campbell's arguments, we find no error in the district court's res judicata finding. Because Campbell's 60-1507 motion tries to relitigate an issue already resolved by an appellate court, we affirm the district court's summary denial of his 60-1507 motion based on res judicata. *Bailey*, 315 Kan. at 802.

Affirmed.

\* \* \*

ATCHESON, J., concurring: I agree both that Robert Campbell Jr. gets no relief on his motion for habeas corpus relief under K.S.A. 60-1507 and that the Sedgwick County District Court properly dismissed his request summarily. Because the majority discusses at length res judicata—a general rule of preclusion—as the legal basis for affirming the district court, I take this opportunity to explain why that has always seemed to me to be an unwieldy and unnecessary analytical approach. The more concise reason for denying claims like Campbell's rests in the limited scope of relief available in 60-1507 proceedings that serve as an extra layer of protection for those persons convicted of crimes and, thus, deprived of their liberty. Viable habeas corpus claims must be grounded in exceptional circumstances warranting review after the processes of the direct criminal prosecutions have run their course in both the district and appellate courts. Campbell has identified no recognized exceptional circumstances, and his 60-1507 motion fails at the outset for that reason. Accordingly, there is no need to step back and invoke res judicata or some other general preclusion doctrine to deny the motion or to affirm the denial here.

I recognize that this court and the Kansas Supreme Court have in recent years regularly stated that res judicata applies to 60-1507 motions to preclude the review of claims that were or could have been raised in the direct criminal case. See *State v. Bailey*, 315 Kan. 794, 801, 510 P.3d 1160 (2022) (noting application of res judicata); *Quinn v. State*, 62 Kan. App. 2d 640, 652, 522 P.3d 282 (2022) (applying res judicata); *Woods v.*

*State*, 52 Kan. App. 2d 958, 964-65, 379 P.3d 1134 (2016). But the notion appears to have snuck into Kansas law roughly 15 years ago more or less by accident and certainly without any considered analysis. See *Drach v. Bruce*, 281 Kan. 1058, Syl. ¶ 14, 136 P.3d 390 (2006). The application of res judicata to 60-1507 proceedings seems both superfluous and untidy. On the whole, we should try to avoid superfluousness and untidiness.[\*]

[\*] As I discuss, the syllabus point in *Drach* states that in 60-1507 proceedings, res judicata applies to issues litigated in a direct criminal appeal. 281 Kan. 1058, Syl. ¶ 14. But the text of the opinion contains no such statement, let alone a holding to that effect.

Habeas corpus, as codified in K.S.A. 60-1507, serves as a doublecheck on convictions by providing a means to litigate claimed flaws in a direct criminal case that both have evaded review and would, if proved, be serious enough to undermine confidence in the outcome of that case. Although denominated a motion in K.S.A. 60-1507, a habeas corpus action really is a form of civil proceeding bearing some similarities to suits governed by the rules of civil procedure in article 2 of chapter 60.

Defendants in criminal prosecutions receive myriad procedural protections designed to avert wrongful convictions, including the right to have a jury determine guilt beyond a reasonable doubt and to appellate review of a guilty verdict. A general presumption of regularity, therefore, attaches to the outcome of a direct criminal case. See *State v. Roberts*, 314 Kan. 316, 325, 498 P.3d 725 (2021). Accordingly, 60-1507 motions are limited to claims demonstrating "exceptional circumstances" warranting consideration notwithstanding the safeguards afforded defendants in direct criminal cases. See *Trotter v. State*, 288 Kan. 112, 127, 200 P.3d 1236 (2009); *Bledsoe v. State*, 283 Kan. 81, 88-89, 150 P.3d 868 (2007); *Pulliam v. State*, No. 124,239, 2022 WL 3018068, at \*3 (Kan. App. 2022) (unpublished opinion). Conversely, the appellate courts have long held that a habeas corpus proceeding cannot simply be used to raise claims that could have been litigated in a direct criminal appeal or were litigated and lost in a direct

appeal. See *Miles v. State*, 195 Kan. 516, 518, 407 P.2d 507 (1965); *Leigh v. Hudspeth*, 169 Kan. 652, 652-53, 219 P.2d 1074 (1950); *Levell v. Simpson*, 142 Kan. 892, 894, 52 P.2d 372 (1935); *Woods*, 52 Kan. App. 2d at 964. The principle has also been codified for decades in Kansas Supreme Court Rule 183(c)(3). See (2022 Kan. S. Ct. R. at 243); *Tucker v. State*, 11 Kan. App. 2d 51, 53, 711 P.2d 1343 (1986) (quoting Rule 183[c][3]); see also *Miles*, 195 Kan. at 518 (quoting equivalent language in predecessor rule).

In short, a habeas corpus proceeding is neither a substitute for a direct appeal in a criminal case nor the equivalent of a second direct appeal. That's an elemental limitation defining the cause of action available under K.S.A. 60-1507 and does not depend upon the invocation of an independent preclusion doctrine. Campbell's points fail because of the limited scope of permissible claims that may be brought in a 60-1507 proceeding. The majority acknowledges as much, essentially in passing, while painstakingly (and unnecessarily) going through and relying on the legal elements of *res judicata*. See slip op. at 15. Campbell did not outline any exceptional circumstances that would allow habeas corpus review in the first instance, and that alone undoes his 60-1507 motion.

Exceptional circumstances opening the 60-1507 door entail: (1) constitutionally ineffective legal representation in the direct criminal case; (2) newly discovered evidence of such a magnitude to call the conviction into question; or (3) a substantial change in a point of constitutional law likely altering the outcome of the criminal prosecution. *Bledsoe*, 283 Kan. at 88-89; *State v. Torrence*, No. 120,077, 2020 WL 6930802, at \*2 (Kan. App. 2020) (unpublished opinion). The second and third circumstances are unusual. Much more commonly, a convicted defendant will argue that his or her trial lawyer in the criminal case failed to raise or properly preserve a material issue or that the appellate lawyer failed to argue a preserved issue and the failure falls below the constitutional standard of adequate legal representation guaranteed in the Sixth Amendment to the United States Constitution. So constitutionally insufficient legal

representation creates an exceptional circumstance allowing the convicted defendant to then assert the otherwise defaulted issue in a 60-1507 motion.

By the same token, however, adequate legal representation or the absence of another extenuating circumstance excludes the issue from a habeas corpus proceeding for *that* reason—not because res judicata or another general preclusion rule imposes a bar. And that's why the district court could properly deny Campbell's motion summarily. In the direct criminal case, a defendant's lawyer will have identified and litigated specific issues and will have made reasoned strategic decisions not to raise other issues. Either choice satisfies the constitutional duty of adequate legal representation. See *Strickland v. Washington*, 466 U.S. 668, 687-88, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The notion of applying res judicata to 60-1507 motions seems to have crept into the Kansas halls of justice through the bathroom window. The *Drach* decision includes this syllabus point: "Res judicata, rather than the law of the case doctrine, applies to issues raised in a K.S.A. 60-1507 civil proceeding which have previously been resolved by a final appellate court order in his or her criminal proceeding." 281 Kan. 1058, Syl. ¶ 14. Syllabus points, which appear only in published appellate decisions, are considered binding statements of the controlling legal principles in the case. See K.S.A. 20-203 (syllabus of "the points of law decided in any case" shall be included with opinions of Supreme Court); see also *Northern Natural Gas Producing Co. v. McCoy*, 195 Kan. 133, 403 P.2d 128 (1965) (three-paragraph per curiam opinion reverses district court because "syllabus and . . . corresponding part" of earlier decision "controls . . . the present case"); *Green v. General Motors Corp.*, No. 119,044, 2022 WL 570692, at \*1 (Kan. App. 2022) (unpublished opinion); *Allied Mutual Ins. Co. v. McAuley*, No. 68,620, 1993 WL 13965917, at \*2 (Kan. App. 1993) (unpublished opinion) ("The syllabus is a summary of the points of law decided in the case and . . . may be cited as law."). But no corresponding portion of the *Drach* opinion supports the statement in syllabus ¶ 14.

The opinion recites the State's argument that res judicata should govern (and defeat) Roger Drach's 60-1507 motion and his lawyer's counter that the narrower preclusion doctrine of law of the case ought to apply (allowing the motion to go forward). The court rejected the application of law of the case because a 60-1507 motion functions as a civil action independent of the direct criminal case rather than as a continuation of it. 281 Kan. at 1079-80. But the court never went on to say, or even intimate, that res judicata ought to apply. Rather, the court denied Drach's claims because they could have been raised in his direct criminal appeal, citing both the principle that habeas corpus cannot substitute for an appeal and Supreme Court Rule 183(c)(3). 281 Kan. at 1080. So, the syllabus point began as a chimera and has taken on an independent life as precedent.

In *Drach*, the court noted the State's reliance on *State v. Neer*, 247 Kan. 137, 140-41, 795 P.2d 362 (1990), for the proposition that res judicata governs 60-1507 motions. 281 Kan. at 1079. But *Neer* is another phantom precedent for the proposition. Indeed, *Neer* wasn't a habeas corpus case at all, and the court never considered 60-1507 proceedings. Under the pre-guidelines sentencing regimen, a district court could modify a criminal sentence after 120 days—a device sometimes used to impose "shock time" on a first-time felon. See K.S.A. 21-4603(3) (Ensley 1988). The district court denied Edward Neer's motion to modify his sentence. On appeal from that denial, Neer challenged not only that ruling but also the legal basis for one of his convictions. The court found the latter issue to be precluded because Neer had already appealed and lost a challenge to his original sentence without disputing the underlying convictions. 247 Kan. at 140-41.

In stating the rule governing the second appeal in the direct criminal case, the court recognized: "Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived." 247 Kan. at 140-41. But the court did not suggest the rule extended beyond multiple appeals in the direct criminal case. And the court went on to

say, "Where a defendant's claim has not been raised at trial or on direct appeal, such a default prevents the defendant from raising the claim in a second appeal or a collateral proceeding." 247 Kan. at 141. That statement does nothing more than reiterate the well-recognized principle that a party must establish an exceptional circumstance in a 60-1507 proceeding as a threshold to considering a substantive claim never presented in the direct criminal case. Again, that's a matter of defining the initial scope of habeas corpus under K.S.A. 60-1507 and not of imposing a preclusion doctrine to defeat a claim otherwise within the defined scope.

In the run of 60-1507 cases—likely the vast majority of them—the outcome will be the same whether the courts rely on the established legal principles specific to habeas corpus or the accidental authority for using res judicata. But the extension of res judicata to 60-1507 motions should be a studied one. The fit between the two isn't especially clean absent some explanation.

In a typical chapter 60 action, res judicata is an affirmative defense that must be pleaded or it is waived. K.S.A. 2022 Supp. 60-208(c)(1)(N) (res judicata designated affirmative defense party "must affirmatively state"); *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 262, 261 P.3d 943 (2011) (failure to plead res judicata as affirmative defense results in waiver). Moreover, a district court should not rely on an affirmative defense a party has not asserted. *Frontier Ditch Co. v. Chief Engineer of Div. of Water Resources*, 237 Kan. 857, 864, 704 P.2d 12 (1985) (The district court improperly raised an affirmative defense on its own initiative—there, a statute of limitations bar—and committed error by doing so.); *Estate of Belden*, 46 Kan. App. 2d at 262. In summarily denying a 60-1507 motion, as happened here, the district court is statutorily confined to considering the motion and any relevant attachments and the record in the underlying criminal case. See K.S.A. 60-1507(b). There is no device to put a res judicata defense in front of the district court at that stage.

But the Kansas Supreme Court has recognized that the Kansas Code of Civil Procedure does not mechanically apply in its entirety to 60-1507 proceedings. See *Pabst v. State*, 287 Kan. 1, 23-24, 192 P.3d 630 (2008); see also Rule 183(a)(2) (2022 Kan. S. Ct. R. at 242) (rules of civil procedure govern 60-1507 motions "to the extent the rules are applicable"). So, the court could find that the procedural rules for affirmative defenses don't come into play under K.S.A. 60-1507; the court, however, has not. The whole exercise remains unnecessary—certainly in this case—given the accepted principles specific to 60-1507 proceedings. I would affirm the district court because Campbell has demonstrated no exceptional circumstances bringing his claims within the scope of K.S.A. 60-1507 and not because those claims are barred by res judicata. See *State v. Holley*, 315 Kan. 512, 520, 509 P.3d 542 (2022) (district court affirmed as right for wrong reason).