NOT DESIGNATED FOR PUBLICATION

No. 113,746

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

JOHNATHAN L. RIFFE,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed March 11, 2016. Sentence vacated and case remanded with directions.

Stephen D. Maxwell, senior assistant district attorney, *Keith E. Schroeder*, district attorney, and *Derek* Schmidt, attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

Before MALONE, C.J., PIERRON, J., and WALKER, S.J.

Per Curiam: Johnathan Riffe was convicted of aggravated sexual battery and sentenced to 47 months of imprisonment and 24 months of postrelease supervision on September 30, 2011. On September 17, 2014, the State filed a motion to correct an illegal sentence, claiming Riffe should have been sentenced to lifetime postrelease supervision under K.S.A. 22-3717(d)(1)(G). Riffe responded by challenging K.S.A. 22-3717(d)(1)(G) as unconstitutional under the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights. After a hearing on the issue, the district court found lifetime postrelease supervision was unconstitutional as applied to Riffe and

sentenced him to 10 years' postrelease supervision. The basis for the 10-year supervision was not given. The State appeals the court's finding as to the constitutionality of lifetime postrelease supervision as applied to Riffe and Riffe's new sentence. We vacate the sentence and remand for resentencing.

On the night of October 30, 2010, 23-year-old C.H. went to a Halloween party at a bar in Hutchinson. She was wearing a "Mafia girl" costume which consisted of a jacket, a miniskirt, black underwear, thigh high stockings, bootie socks, and high heels. C.H. went to the party with her friends, Ashley Schroeder and Chasta Hoss, and Chasta's boyfriend, Travis Randol. Randol drove the women to the bar, and Randol planned to drive everyone home at the end of the evening.

Johnathan Riffe was also at the bar that evening. Riffe was a 39-year-old pipefitter from Houston, Texas. He had come to Kansas in early October to work at a chemical refinery in McPherson and had been staying at a motel in Hutchinson.

Around 12 or 12:30 a.m., C.H. decided she wanted to go home, but she was unable to find her friends. C.H. had been speaking with other men in the bar that night, including Riffe and some of his coworkers. C.H. began telling other people in the bar she wished to go home, and Riffe offered her a ride.

C.H. testified at trial that she and Riffe went outside, got into his truck, and left the parking lot. C.H. gave Riffe directions to her home. While in the truck, C.H. removed her shoes and stockings because her feet hurt. At some point, Riffe stopped following C.H.'s directions. According to C.H., she told Riffe he was going the wrong way, but he responded by getting quiet and grabbing her hair. She began fighting back in an attempt to get free. Riffe pulled into the empty parking lot. Grabbing C.H.'s hair and arm, Riffe pulled her out of the truck through the driver's side door. He ripped off her skirt and shirt as she continued to fight him. Riffe took C.H. to the back of the truck. She was naked

except for her bra. Riffe tried to choke C.H. while she scratched at his neck and stomach. He then bent her over the tailgate and began slamming her head on both sides and trying to pin her body against the truck with his body. At this point, Riffe's pants were down but his underwear was still up. C.H. was eventually able to kick Riffe and escape. She began running through a field toward a place with bright lights that appeared to be open. As she was running, Riffe was driving back and forth and appeared to be looking for her. Every time she saw the headlights from his truck, C.H. would drop to the ground until they were gone. She eventually made it to a Comfort Inn wearing only her bra.

Riffe testified at trial he had been talking to C.H. earlier in the evening at the bar. Later, she approached him and said something about being ready to get out of the bar with Riffe, but she did not say anything about wanting to go home. Riffe had gotten a key to his coworker's room at the Ramada Inn, and he took C.H. there first. He tried to open the door, but his coworker had already returned to the room and locked it from the inside. He and C.H. returned to his truck, and he began driving to C.H.'s house following her directions. According to Riffe, C.H. started taking off her shoes and stockings as they left the parking lot. By the time they stopped at the first red light, C.H. was taking off her skirt and underwear. After a couple more blocks, Riffe turned into the parking lot so he could urinate.

Riffe returned to the truck. As he opened the passenger side door, C.H. fell out of the truck. Riffe testified he realized at this point that C.H. was extremely intoxicated, and he decided to get her dressed again. He helped her onto the tailgate of the truck. He got her skirt and underwear from the floorboard of the passenger side of his truck and returned to the tailgate. By the time he returned, C.H. had become upset. Riffe attempted to calm her down, but she began swatting at him. She stood up in the back of the truck, and Riffe grabbed her jacket, trying to get her to sit back down. C.H. took the jacket off and jumped over the side of the truck. Riffe sat down momentarily on the tailgate. When he went to check on C.H., she was gone. After calling her name a few times, Riffe got in

his truck and began searching for her. After failing to find C.H., Riffe returned to the bar. He had a couple of drinks and asked around if anyone knew C.H. After the bar closed, Riffe drove around to the back of the Ramada Inn. After parking his truck, a police officer approached Riffe and began questioning him about the incident.

During the investigation immediately following the incident, Hutchinson Police Officer Chad Agnew found red areas around C.H.'s neck and marks on her stomach and on her side along her pant line. He also felt bumps along her hairline. Officer Agnew also found a scratch on Riffe's neck that was bleeding as well as scratches on his lower stomach and a bruise on his side. During a physical examination conducted 24 hours later, a doctor found bumps on both sides of C.H.'s head above her ears and greenish bruises on both sides of her hips.

The evening of the incident, Hutchinson Police Officer Robert Winslow found a miniskirt, a pair of black underwear, and a sock in the parking lot. Officer Winslow also saw a pair of high heels and stockings on the passenger seat of Riffe's truck. During a search of the truck, Officer Agnew found a jacket believed to be part of C.H.'s Halloween costume wadded up under the driver's seat. He also found a single strand of blonde hair in the truck, consistent with C.H.'s hair color. He did not see any blood inside the truck, nor did he see blood or dents on the tailgate.

Riffe was charged with aggravated kidnapping, attempted rape, and aggravated sexual battery. The case went to trial in August 2011. The jury acquitted Riffe of aggravated kidnapping and attempted rape but convicted him of aggravated sexual battery. On September 30, 2011, the district court sentenced Riffe to 47 months imprisonment and 24 months' postrelease supervision. At the time of the offense and sentencing, however, K.S.A. 22-3717(d)(1)(G) required mandatory lifetime postrelease supervision for anyone convicted of aggravated sexual battery. On August 28, 2014, the Kansas Department of Corrections Sentence Computation Unit notified the State and defense counsel that Riffe's sentence was incorrect, and the court should have sentenced

Riffe to lifetime postrelease supervision. The State filed a motion to correct an illegal sentence on September 17, 2014. Defense counsel filed a motion challenging the constitutionality of lifetime postrelease supervision as applied to Riffe under the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights. The State filed a response to Riffe's motion, and Riffe filed a supplemental brief along with Defendant's Exhibits A1 and A2, which listed statutes imposing mandatory lifetime postrelease supervision for sex crimes in other states.

The district court held a hearing on the issue on April 27, 2015. Neither party presented evidence at the hearing, although Riffe referenced Defendant's Exhibits A1 and A2. The court found lifetime postrelease supervision was unconstitutional as applied to Riffe. The court reached its conclusion by applying the factors found in *State v. Freeman*, 223 Kan. 362, 367, 574 P.2d 950 (1978):

> "1. The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;
>
> "2. A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and
>
> "3. A comparison of the penalty with punishments in other jurisdictions for the same offense."

The court found the first *Freeman* factor weighed in Riffe's favor, but the second and third factors did not. At the hearing, the court did not make any factual findings as to any of the factors. The court resentenced Riffe to 10 years' postrelease supervision. The State asked the court to expand on its reasoning in case of an appeal, and the court said it would make a written finding of facts. The State filed a notice of appeal on May 5, 2015.

The court filed a "Findings of Fact" on May 13, 2015, finding that lifetime postrelease supervision was unconstitutional as applied to Riffe using the rationale in *State v. Proctor*, 47 Kan. App. 2d 889, 280 P.3d 839 (2012), *rev. granted, case remanded* June 19, 2013 (*Proctor I*). All of the factual findings related to the first *Freeman* factor. The second and third *Freeman* factors were not explicitly addressed.

Riffe first argues the State has not stated why its "sole issue on appeal" is properly before the appellate court, so we should decline review. In support of his first argument, Riffe cites *State v. Godfrey*, 301 Kan. 1041, 350 P.3d 1068 (2015). In *Godfrey*, the Kansas Supreme Court held constitutional issues generally cannot be raised for the first time on appeal. 301 Kan. at 1043. If they are, appellants must strictly comply with Kansas Supreme Court Rule 6.02(a)(5) (2015 Kan. Ct. R. Annot. 41), which requires litigants to explain why an issue is properly before the court when it has not been raised below. 301 Kan. at 1043. In the present case, the State is not raising a constitutional issue for the first time on appeal; the State is appealing the district court's decision that lifetime postrelease supervision as imposed under K.S.A. 22-3717(d)(1)(G) is unconstitutional as applied to Riffe. Riffe raised this issue at the district court level, and the State responded.

Riffe does not clarify which of the State's issues is not properly before the court in making this argument. Based on later arguments in his brief, Riffe is presumably referring to the State's failure to object to inadequate factual findings at the district court level. None of the appellate cases in which a litigant failed to object to inadequate findings at the district court level cite *Godfrey* or Rule 6.02(a)(5). Thus, the State's issue does not appear to be precluded from appellate review because of failure to comply with *Godfrey* and Rule 6.02(a)(5). Rather, if the State has failed to object to inadequate factual findings at the district court level, we must presume the necessary factual findings were made to support any of the district court's legal conclusions.

The State's failure to object to inadequate factual findings at the district court level may also have other implications for appellate review not directly addressed by Riffe. Under Kansas Supreme Court Rule 165 (2015 Kan. Ct. R. Annot. 257), district court judges have the primary responsibility for creating a record of factual findings and legal conclusions for appellate review. *State v. Seward*, 289 Kan. 715, 720, 217 P.3d 443 (2009). The *Seward* court has also held, however, that a litigant who wishes to appeal a district court ruling has a duty to ensure any findings and conclusions by a district judge are sufficient to enable appellate review, even if this means filing a motion to invoke the judge's duty under Rule 165. 289 Kan. at 721. Appellate courts have declined to review constitutional challenges to sentencing statutes when the appellant failed to take the steps necessary to ensure a sufficient record for review. See *State v. Reed*, 50 Kan. App. 2d 1133, 1139, 336 P.3d 912 (2014); *State v. Graham*, Nos. 101,717, 103,809, 2013 WL 309259 (Kan. 2013) (unpublished opinion).

Here, the district court did not make any significant factual findings at the hearing. The court ruled that the first *Freeman* factor did weigh in Riffe's favor and the second and third factors did not. There was little to no analysis explaining these legal conclusions. At the hearing, the State asked, "Anticipating that there might be an appeal, judge, could the court expand on its reasoning on the . . . ." The court cut off the State and announced it would make written findings of fact. The court later filed findings of fact, but the facts appeared only to relate to the first *Freeman* factor. The court never made factual findings as to the second or third factors nor did it explain its legal analysis of these factors. After the written findings of fact were filed, the State did not object at the district court level to inadequate findings or move the court to make more sufficient factual findings and legal conclusions as to all three *Freeman* factors. Therefore, in the record on appeal there are no factual findings as to the second and third *Freeman* factors and only summary legal conclusions. Further, the State took no action after the factual findings were filed to invoke the court's duty to make sufficient findings and conclusions to enable appellate review.

The district court did make factual findings as to the first *Freeman* factor and at least stated its conclusions for the second and third *Freeman* factors. Appellate review may therefore still be possible in this case. Kansas appellate courts have noted the first *Freeman* factor is "inherently factual, requiring examination of the facts of the crime and the particular characteristics of the defendant." *State v. Ortega-Cadelan*, 287 Kan. 157, 161, 194 P.3d 1195 (2008). The second and third *Freeman* factors, however, are "legal determinations." 287 Kan. at 161. The Kansas Supreme Court has reviewed a case where the district court failed to address the second *Freeman* factor but considered the first and third. See *State v. Britt*, 295 Kan. 1018, 1032, 287 P.3d 905 (2012). Both the Kansas Supreme Court and the Court of Appeals have also reviewed constitutional challenges to lifetime postrelease supervision when the paucity of factual findings was primarily due to the litigant's failure to present evidence to the district court. See *State v. Rogers*, 297 Kan. 83, 90-91, 298 P.3d 325 (2013) (reviewed decision of district court which made findings of fact based on defendant's presentence investigation report when defendant provided no evidence of his own); *State v. Baber*, 44 Kan. App. 2d 748, 751-53, 240 P.3d 980 (2010) (reviewed decision of district court which made findings of fact as to all of what little evidence defendant had presented). In the present case, neither the State nor Riffe presented evidence to the district court other than Riffe's lists of state statutes imposing lifetime postrelease supervision for sex offenses. The district court made a number of findings as to the fact-intensive first *Freeman* factor. Because the second and third factors are primarily legal determinations, however, the court's failure to make findings is less damaging. Also, the State arguably fulfilled its duty to create a sufficient record by asking the court to explain its findings and conclusions. Therefore, the State fulfilled its duty to try to create a sufficient record for appellate review since a number of factual findings were made as to the first *Freeman* factor and legal conclusions were made as to all three factors.

The State argues the district court's factual findings as to the first *Freeman* factor were not supported by substantial competent evidence because neither party presented evidence at the hearing. Because the factual findings were not supported by substantial competent evidence, the district court's legal conclusion drawn from these facts was in error. The State further argues the district court did not make any factual findings as to the second and third *Freeman* factors. The district court merely summarily concluded the second and third *Freeman* factor did not apply in Riffe's favor. Because Kansas law requires district courts to consider all three *Freeman* factors, the district court's conclusions as to these factors were also in error.

Riffe argues, however, the State did not object to inadequate fact findings at the district court level, so we must presume adequate factual findings were made in Riffe's favor. In addition, Riffe contends substantial competent evidence supported the district court's findings as to the first *Freeman* factor. Riffe argues the State failed to adequately brief its argument regarding the second and third *Freeman* factors, so it has abandoned those issues and we must find in his favor. Finally, Riffe argues both the second and third *Freeman* factors weigh in his favor.

Section 9 Kansas Bill of Rights Analysis

In deciding whether a sentence is cruel and unusual under Section 9 of the Kansas Constitution Bill of Rights, a district court must make both factual and legal determinations. *State v. Mossman*, 294 Kan. 901, 906, 281 P.3d 153, 158 (2012). On appeal, the court applies a bifurcated standard of review to the district court's decision. 294 Kan. at 906. Without reweighing the evidence, the appellate court reviews the district court's factual findings for substantial competent evidence. *State v. Funk*, 301 Kan. 925, 933, 349 P.3d 1230 (2015). If the district court's factual findings are supported by substantial competent evidence, the appellate court then considers de novo any legal conclusions drawn from those findings. 301 Kan. at 933.

Section 9 prohibits the State from imposing cruel and unusual punishment on persons convicted of crimes. This prohibition includes any punishment that "although not cruel or unusual in its method . . . [is] so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *Freeman*, 223 Kan. at 367. In analyzing whether a sentence is cruel and unusual under this provision, the court must consider all three *Freeman* factors in its analysis. *Mossman*, 294 Kan. at 908. No one factor controls, but a single factor may weigh so heavily it directs the final outcome. 294 Kan. at 908. Both district courts and appellate courts must presume a statute is constitutional, and they should resolve any doubts in favor of constitutionality. 294 Kan. at 906-09.

Riffe first argues the State failed to object to inadequate fact findings at the district court level, therefore we must presume adequate factual findings were made in his favor. In support of this argument, Riffe cites *State v. Gaither*, 283 Kan. 671, 685-86, 156 P.3d 602 (2007), where the court held that when a party does not object to the lack of factual findings before the district court, an appellate court presumes the district court made the factual findings necessary to support its decision. 283 Kan. at 686. Here, the district court found the first *Freeman* factor weighed in Riffe's favor, but the second and third factors weighed in the State's favor. The court made some factual findings as to the first factor but none as to the second and third. Neither party objected to a lack of factual findings. Applying the rule in *Gaither*, we must presume not that the district court made adequate factual findings in Riffe's favor; rather, we should presume the court made the necessary factual findings to support its decisions that the second and third *Freeman* factors favored the State.

First Freeman *Factor*

The State argues no substantial competent evidence supports the district court's factual findings regarding the first *Freeman* factor. Because neither party presented evidence at the hearing, the State argues the court's findings are not supported by the record. Riffe argues the court's factual findings are supported by substantial competent evidence as contained in the case files and records.

As noted above, the first *Freeman* factor is inherently factual and requires the district court to find facts about the nature of the offense and the character of the defendant. *Ortega-Cadelan*, 287 Kan. at 161. Appellate courts must determine whether substantial competent evidence supports these factual findings. *Funk*, 301 Kan. at 933. Substantial evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. *State v. May*, 293 Kan. 858, 862, 269 P.3d 1260 (2012).

Despite the fact that neither the State nor Riffe presented any evidence to support their arguments at the hearing on their motions, the case record does support the district court's factual findings as to the first *Freeman* factor. The court found that Riffe was convicted of aggravated sexual battery but was acquitted of aggravated kidnapping and attempted rape. This information was included in the verdict forms from Riffe's trial. The court noted it imposed the aggravated sentence and denied motions for durational and dispositional departure. This information was in the journal entry of judgement and the sentencing hearing. The court found Riffe's criminal history consisted of two 22-year-old convictions, one for burglary, and one for drugs. If not for these convictions, Riffe would have been in a border box for sentencing purposes. Riffe had no other adult felony convictions aside from the present case. This information was included in Riffe's presentence investigation report and sentencing hearing. The court also noted Riffe was 39 years old. He was single at the time of the incident but had later married before the

trial. Riffe testified to this information at trial. The court also found Riffe was raising two sons from a prior marriage and had a good working history. This information was included in the sentencing hearing. The court found at the time of the offense Riffe was working out of state and was at a bar. This information was presented at the jury trial. The State did not object to any of this information, either when it originally entered the record or at the hearing on Riffe's constitutional challenge. A reasonable person could conclude this evidence was adequate to support the court's findings because it was either entered into evidence or included in the record without objection from the State. The only unsupported fact findings are that Riffe had no problems in prison or on postrelease, and that the primary goal of lifetime postrelease supervision for sex crimes is to prevent recidivism. Thus, substantial competent evidence supports all the court's findings, except its findings as to Riffe's conduct in prison and on postrelease, and the purposes of lifetime postrelease supervision.

The next step in the appellate court's analysis is whether these factual findings support the district court's legal conclusions. An appellate court reviews the district court's legal conclusions de novo. *Funk*, 301 Kan. at 933. Under the first *Freeman* factor, courts must consider the nature of the offense and the character of the offender with particular regard to the degree of danger present to society. 223 Kan. at 367. The district court made very few factual findings as to the nature of the offense. The court found Riffe was convicted of aggravated sexual battery, and the court imposed the aggravated sentence, rejecting motions for both durational and dispositional departures. The court also noted at the hearing this was "a case of safety of the community." These findings suggest the offense presented a fairly high degree of danger to society. The district court did make a number of findings regarding Riffe's character. The court noted the crime occurred while Riffe was single, working out-of-state, and at a bar. This suggested the crime was motivated by situational factors and not a criminal predisposition. The court found Riffe was not a repeat sex offender and had only two prior felony convictions and these were from when he was 18 years old. At the time of the trial, Riffe was married,

caring for his two sons from a previous marriage, and employed. This suggests Riffe was not as likely to repeat the offense, because he had no felony convictions in the last 22 years and had been acting responsibly. The court noted the main penological purpose of lifetime postrelease for sex offenders is to prevent recidivism. While this was not supported by anything in the record, it is consistent with what Kansas courts have said about lifetime postrelease supervision. See *Funk*, 301 Kan. at 939; *Mossman*, 294 Kan. at 911. The court does not appear to have made any factual findings regarding Riffe's culpability or the violent or nonviolent nature of the offense. Because the factual findings demonstrated Riffe's chance of recidivism was low and the court made few factual findings as to the nature of the offense, Riffe's character may have outweighed evidence of any public safety issue. Therefore, this factor may have weighed in Riffe's favor.

The district court's factual findings, however, do not seem to entirely support its legal conclusion. All of the court's fact findings were based on information in the record before or at the time of sentencing. At the time of sentencing, however, the court found Riffe presented a significant enough threat to public safety that it sentenced Riffe to the aggravated prison term. Where we have found the first *Freeman* factor weighed in favor of a defendant, the defendant was originally sentenced to probation, and this "weigh[ed] heavily in the calculation." *State v. Proctor*, No. 104,697, 2013 WL 6726286, at *4 (Kan. App. 2013) (*Proctor II*) (unpublished opinion); see also *Funk*, 301 Kan. at 936, 940 (finding first *Freeman* factor did not heavily favor defendant, but noting the district court's determination to sentence him to probation "might be seen to add to the circumstances weighing in [his] favor"). In the present case, the district court not only did not sentence Riffe to probation, it imposed the aggravated prison term. In its fact findings, the district court noted that without his two prior convictions from 22 years before, Riffe would have been in a border box. Perhaps this is to suggest he posed less of a threat to public safety. At the resentencing hearing, however, the court said even if Riffe had been in the border box, it would have sentenced him to prison anyway. The court's own actions in sentencing Riffe counter its conclusion that his character

demonstrated he did not pose a significant enough threat to public safety to warrant lifetime postrelease supervision.

In reaching its conclusion that lifetime postrelease supervision was unconstitutional, the district court also stated it had relied on the rationale in *Proctor I*. The *Proctor I* court found that lifetime postrelease supervision was unconstitutional as applied to the defendant under the United State Constitution and the Kansas Constitution. *Proctor II*, 2013 WL 6726286, at *1. *Proctor I* was summarily reversed by the Kansas Supreme Court and remanded for reconsideration in light of its recent decisions in *Mossman* and *Cameron*. *Proctor II*, 2013 WL 6726286, at *1. The Court of Appeals issued a new opinion reaching the same result, incorporating its reasoning from *Proctor I*. *Proctor II*, 2013 WL 6726286, at *1. In *Proctor I* and *II*, the court reasoned "the punishment exacted if Proctor were placed on lifetime postrelease supervision and then revoked for a nonperson felony conviction would be grossly disproportionate to the triggering offense and to the whole of his criminal history." *Proctor I*, 47 Kan. App. 2d at 860; *Proctor II*, 2013 WL 6726286, at *4-7.

As the *Proctor I* court found regarding Proctor, here, the district court found Riffe was not "a repeat sex offender or incorrigible recidivist." 47 Kan. App. 2d at 924. But the facts of Proctor's case are distinguishable from Riffe's for a number of reasons. Proctor was only 19 years old at the time he entered his plea, and the offense had occurred the previous year. Proctor himself was a victim of sexual abuse but had never received counseling. Evidence indicated he would significantly benefit from a sex offender treatment program. Proctor also had no prior criminal history and was only sentenced to probation. The *Proctor II* court distinguished Proctor's circumstances from prior cases by noting those defendants had been older at the time of their offenses and had not been victims of sexual abuse. 2013 WL 6726286, at *5 (distinguishing *Mossman*, 294 Kan. 901, and *Cameron*, 294 Kan. 884). The court also specifically noted the "circumstances would be different" if Proctor had a prior criminal history. 2013 WL 6726286, at *5.

None of the factors the court relied on in reaching its decision in *Proctor I* and *II* were present in Riffe's case. Riffe was 39 years old at the time of the offense. He had a prior criminal history. No one presented evidence that he had ever been a victim of sexual abuse or that he would benefit from a sex offender treatment program. In addition, he had been sentenced to the aggravated prison sentence. Admittedly, this was Riffe's first sex offense and his prior felony convictions were over 2 decades old. The *Proctor II* court said, however, that the calculation of the first *Freeman* factor would have been different had the defendant had a prior criminal history. Furthermore, Kansas courts have found lifetime postrelease supervision for sex offenses constitutional even when defendants were able to demonstrate they were not repeat sex offenders or had a lowered risk of recidivism. See *Mossman*, 294 Kan. at 911 (finding defendant's lack of criminal history and low risk of recidivism score did not outweigh other facts such as lack of impulse control); see also *Smith*, 2013 WL 517607 (finding defendant's lack of prior sex offenses did not demonstrate first *Freeman* factor weighed in his favor).

Even if some evidence does suggest Riffe may not be a repeat sex offender or at a high risk of recidivism, it does not appear to be overwhelming, as was the case in *Proctor I* and *II*. At best, it is enough to raise some doubt as to the constitutionality of lifetime postrelease supervision. However, we are required to presume lifetime postrelease supervision is constitutional. The evidence in Riffe's case does not appear to be sufficient to overcome this presumption. We are therefore required to resolve any doubts in favor of constitutionality.

While substantial competent evidence may have supported the district court's factual findings as to the first *Freeman* factor, these findings do not support the court's legal conclusion that the first *Freeman* factor weighed in Riffe's favor. The findings at best raise only doubts as to the constitutionality of lifetime postrelease supervision, and thus the first *Freeman* factor weighs in favor of the State. Therefore, the district court's legal conclusion as to the first factor is reversed.

Second Freeman *Factor*

The second *Freeman* factor requires courts to compare the punishment for the crime of conviction with punishments for more serious offenses in Kansas. *Freeman*, 223 Kan. at 367. If more serious offenses are punished less severely, this suggests the present punishment may be constitutionally disproportionate to the crime of conviction. 223 Kan. at 367. As previously noted, the district court did not make any factual findings as to the second *Freeman* factor. This factor is primarily a legal determination, though, so analysis of the issue may still be possible. See *Ortega-Cadelan*, 287 Kan. at 161. Because neither party presented evidence on this issue or objected to a lack of factual findings, we presume the district court made the necessary findings to support its legal conclusion.

The district court found that the second *Freeman* factor did not weigh in Riffe's favor, and this conclusion is consistent with Kansas caselaw. The Kansas Supreme Court has held lifetime postrelease supervision for sexually violent offenses is not constitutionally disproportionate in terms of length of sentence when compared with more serious offenses. See *Mossman,* 294 Kan. at 912-17; *State v. Cameron*, 294 Kan. 884, 892-93, 281 P.3d 143 (2012). The Court of Appeals has similarly found lifetime postrelease supervision for aggravated sexual battery was not constitutionally disproportionate compared to the punishment for more serious offenses. *State v. Lazo-Gaitam*, No. 103,818, 2013 WL 678205, at *4 (Kan. App. 2013); *State v. Smith*, No. 105,525, 2013 WL 517607, at *3 (Kan. App. 2013).

Riffe argues the second *Freeman* factor should still weigh in his favor. First, he contends there are other offenses in Kansas, including second-degree murder, which are more serious than aggravated sexual battery but carry a shorter postrelease supervision term. The Kansas Supreme Court has noted that courts cannot solely consider postrelease supervision when comparing punishments for the crime of conviction and more serious

crimes. *Funk*, 301 Kan. at 941; *Mossman*, 294 Kan. at 913. Furthermore, the Kansas Supreme Court has also already found the sentence for sex crimes is not constitutionally disproportionate to the sentence for second-degree murder. *Funk*, 301 Kan. at 941-42; *Mossman*, 294 Kan. at 916-17. Because Riffe relies solely on the length of postrelease supervision in making this argument, his argument fails.

Next, Riffe argues lifetime postrelease supervision is constitutionally disproportionate because it creates a gross discrepancy in sentencing dependent on the order in which offenses occur. In making this argument, Riffe relies on *Proctor II* where the court noted that the Kansas Supreme Court had previously addressed the issue of length of sentence in reaching its conclusion that lifetime postrelease supervision for sex offenses was not constitutionally disproportionate to punishments for more serious offenses. 2013 WL 6726286, at *6-7 (citing *Mossman*, 294 Kan. 901), *Cameron*, 294 Kan. 884). According to the *Proctor II* court, the Kansas Supreme Court had not addressed the consequences of a second felony conviction while on lifetime postrelease supervision. 2013 WL 6726286, at *7. Focusing on this aspect of lifetime postrelease supervision, the court found lifetime postrelease supervision constitutionally disproportionate. 2013 WL 6726286, at *6-8. As Riffe explains,

> "Here, if a defendant was charged and convicted of a severity level 9 felony theft, and then charged with an indecent liberties offense, he would face a presumptive 41 month prison sentence. Conversely, if a defendant were charged and convicted of an indecent liberties offense, and then charged with a theft, he would face life without the possibility of parole."

See also 2013 WL 6726286, at *7 (noting the disparity in sentencing based on order of offenses was "decidedly eccentric"). The Kansas Supreme Court does not appear to have directly addressed this argument. It has noted, however, it will not consider what might happen if a defendant commits a subsequent felony when analyzing whether lifetime postrelease supervision is unconstitutional as a punishment for sex offenses. *Funk*, 301

Kan. at 938 (citing *Mossman*, 294 Kan. at 915-16). Given that Kansas appellate courts have regularly found the second *Freeman* factor weighs in favor of the State and *Proctor II* is of uncertain precedential value, the district court's determination that the second *Freeman* factor weighs in favor of the State is affirmed.

Third Freeman *Factor*

The third *Freeman* factor requires courts to compare the punishment in the present case with the punishment for the same offense in other jurisdictions. 223 Kan. at 367. Like the second *Freeman* factor, the third factor is primarily a legal determination. *Ortega-Cadelan*, 287 Kan. at 161. Riffe presented some evidence on this issue, but neither party objected to a lack of factual findings. Thus, we presume the district court made the necessary findings to support its legal conclusion.

The district court found the third *Freeman* factor did not apply in Riffe's favor. That legal conclusion is consistent with Kansas law. Numerous cases have held Kansas' lifetime postrelease supervision scheme for sex offenses is not an outlier for constitutional purposes when compared to other jurisdictions. See, *e.g.*, *Mossman*, 294 Kan. at 920-21; *Cameron*, 294 Kan. at 894-95. Even *Proctor II* found lifetime postrelease supervision for sex offenses was not exceptional as compared to other jurisdictions. 2013 WL 6726286, at *7.

For the first time on appeal, Riffe argues lifetime postrelease supervision for aggravated sexual battery (as opposed to sex crimes in general) is disproportionate to punishments in other states. Riffe claims only Kansas imposes lifetime postrelease supervision for aggravated sexual battery without the possibility of discharge. Riffe notes other states have lifetime postrelease supervision for sexual touchings. Aggravated sexual battery in Kansas, however, does not require a touching to be sexual in nature, so it is not the same as a "sexual touching" for purposes of comparison.

Riffe's argument does not appear to be supported by any factual findings. Since the district court determined this factor did not weigh in Riffe's favor, we presume it made only those factual findings necessary to support the conclusion Kansas' postrelease supervision scheme for sex crimes is not disproportionate to the scheme in other states. Riffe submitted evidence along with his supplemental brief about postrelease supervision for sex crimes, but he did not present evidence specifically related to aggravated sexual battery. Furthermore, Riffe does not cite to the record or any statutes in support of his argument.

Even if there were factual findings to support this argument, however, the argument would likely fail. The Kansas sexual battery and aggravated sexual battery statutes require a touching "with the intent to arouse or satisfy the sexual desires of the offender or another." K.S.A. 21-3517(a); K.S.A. 21-3518(a). Other states variously define sexual battery as nonconsensual touching of genitals, nonconsensual touching with sexual intent, and nonconsensual penetration. See, *e.g.*, Cal. Penal Code § 243.4 (West 2014); Fla. Stat. § 794.011 (2009); Ind. Code § 35-42-4-8 (2014); Tenn. Code Ann. § 39-13-505(2014). Given these crimes have the same title and generally cover the same conduct, they can probably be considered the same offense for the purposes of the third *Freeman* factor. See *State v. Seward*, 296 Kan. 979, 989, 297 P.3d 272 (2013) (noting that in arguing the same offense was handled differently in other jurisdictions, defendant had not focused on rape and aggravated criminal sodomy committed by an adult against a child younger than 14 [his crime of conviction] or the conduct underlying such charges). Additionally, even if Kansas has the strictest postrelease supervision scheme for aggravated sexual battery, nothing in Riffe's argument suggests it is an extreme outlier for constitutional purposes. See *Mossman*, 294 Kan. at 920 (noting that although "only a handful of states impose a punishment as absolute as Kansas' requirement, . . . Kansas is not alone in imposing mandatory lifetime postrelease supervision").

The district court's determination that the third *Freeman* factor weighed in favor of the State was consistent with Kansas law. In addition, Riffe has not presented a successful legal challenge on this issue. Therefore, the district court's conclusion as to the third *Freeman* factor is affirmed.

The district court found the second and third *Freeman* factors in favor of the State, and these conclusions are affirmed. The district court only found the first *Freeman* factor applied in Riffe's favor. Based on this analysis, however, the first factor also applied in the State's favor. Thus, under the *Freeman* analysis of § 9 of the Kansas Constitution Bill of Rights, lifetime postrelease supervision as applied to Riffe is constitutional, and the district court's decision is reversed.

Eighth Amendment Analysis

The district court did not address the Eighth Amendment to the United States Constitution in reaching its decision that lifetime postrelease supervision was unconstitutional as applied to Riffe. The State did not address the Eighth Amendment in its brief. Riffe argues only that the Eighth Amendment case-specific analysis is essentially the same as the § 9 *Freeman* analysis.

The Eighth Amendment prohibits imposing cruel and unusual punishment. The Fourteenth Amendment to the United States Constitution extended the protections of the Eighth Amendment to the states. See *Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). The United States Supreme Court has held the Eighth Amendment does not require strict proportionality between a crime and a sentence, but it does forbid a sentence that is grossly disproportionate to a crime. *State v. Woodard*, 294 Kan. 717, 720-21, 280 P.3d 203 (2012) (citing *Ewing v. California*, 538 U.S. 11, 20-21, 123 S. Ct. 1179, 155 L. Ed. 2d 108 [2003]). An Eighth Amendment challenge to a term-

of-years sentence as cruel and unusual due to gross disproportionality may be on either a case-specific or categorical basis. *Woodard*, 294 Kan. at 720-21.

In analyzing a case-specific Eighth Amendment challenge, courts will first compare the gravity of the offense with the severity of the sentence. *State v. Ross*, 295 Kan. 424, 428-29, 284 P.3d 309 (2012). In doing so, courts may consider the defendant's mental state and motive in committing the crime, the actual harm caused to the victim or to society by the defendant's conduct, the defendant's prior criminal history, and the defendant's propensity for violence. 295 Kan. at 429. In the rare instance that a case passes this threshold determination of gross disproportionality, courts then compare the defendant's sentence with sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. 295 Kan. at 429. If this comparison supports the court's initial determination that the sentence is grossly disproportionate to the crime, then the sentence is cruel and unusual. 295 Kan. at 429.

Kansas courts have recognized that an analysis under the *Freeman* factors for a § 9 challenge applies to a case-specific Eighth Amendment challenge. See *Ross*, 295 Kan. at 429 (noting "[o]ur analysis under the *Freeman* factors for the Kansas constitutional challenge applies with equal force to the first of the classifications for an Eighth Amendment challenge"). As noted above, the *Freeman* factor analysis suggests lifetime postrelease supervision is not unconstitutional as applied to Riffe. Riffe was convicted of aggravated sexual battery, and the district court found the circumstances warranted imposing the aggravated prison term. While Riffe's criminal history was not extensive, he did have two prior felonies. Riffe's sentence does not meet the threshold determination of gross disproportionality and thus does not constitute cruel and unusual punishment under the Eighth Amendment.

We next address the question of whether the district court's imposition of a 10-year term of postrelease supervision is authorized by statute and supported by substantial and compelling reasons for departure.

Riffe argues this issue is not properly before us. According to Riffe, the State raises the issue that a 10-year period of postrelease supervision is not authorized by statute for the first time on appeal. Because issues not raised before the district court cannot generally be raised for the first time on appeal, Riffe argues this court should deny review of this issue.

Whether appellate jurisdiction exists is a question of law subject to de novo review. *State v. Looney*, 299 Kan. 903, 906, 327 P.3d 425 (2014). Kansas appellate courts may hear a challenge to an illegal sentence for the first time on appeal because courts may correct an illegal sentence at any time. *State v. Kelly*, 298 Kan. 965, 975, 318 P.3d 987 (2014). Kansas courts may also move *sua sponte* to correct an illegal sentence. See *State v. Anthony*, 273 Kan. at 730 (finding appellate court has authority to correct illegal sentence *sua sponte*). Thus, this issue is properly before us.

The State argues a 10-year period of postrelease supervision is not authorized by K.S.A. 22-3717, and lifetime postrelease supervision under K.S.A. 22-3717(d)(1)(G) is not subject to departure. Additionally, if it were subject to departure, the district court failed to specifically state substantial and compelling reasons on the record for the downward departure. Riffe does not argue that the 10-year period of postrelease supervision is legal. Rather, he argues he should be resentenced to his original 24-month period of postrelease supervision. He also contends the district court could depart up to 60 months if it found substantial and compelling reasons to do so under K.S.A. 22-3717(d)(1)(D)(i).

Analysis of this issue depends on whether K.S.A. 2010 Supp. 22-3717(d)(1)(G) is found unconstitutional as applied to Riffe, but the outcome is the same. If the provision is found to be constitutional, the 10-year term of postrelease supervision is most likely an illegal sentence. If the provision is found unconstitutional, the 10-year term appears to be an unauthorized upward departure without findings of substantial and compelling reasons for the departure. Either way, the sentence is illegal.

If K.S.A. 22-3717(d)(1)(G) is found constitutional as applied to Riffe, the court's downward durational departure is not authorized by statute and thus constitutes an illegal sentence. Whether a sentence is illegal is a question of law over which an appellate court has unlimited review. *State v. Taylor*, 299 Kan. 5, 8, 319 P.3d 1256 (2013). A sentence is illegal when: (1) a court imposes it without jurisdiction; (2) it does not conform to statutory provisions; or (3) it is ambiguous as to the time and manner in which it is to be served. *State v. Johnson*, 269 Kan. 594, 600, 7 P.3d 294 (2000). K.S.A. 22-3717(d)(1)(G) provides: "Except as provided in subsection (u), persons convicted of a sexually violent crime committed on or after July 1, 2006, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life." K.S.A. 22-3717(u) provides lifetime parole after a mandatory prison term of 25 or 40 years for certain sex crimes, not including aggravated sexual battery. K.S.A. 22-3717(d)(2) defines aggravated sexual battery as a sexually violent crime. There are no provisions in K.S.A. 22-3717 which appear to allow for a downward durational departure with regard to K.S.A. 22-3717(d)(1)(G). As such, the court's imposition of a 10-year term of postrelease supervision is not authorized by law. Because the sentence is not authorized by law, the sentence is illegal. The case is remanded, and Riffe must be resentenced in conformity with the provisions of K.S.A. 22-3717(d)(1)(G).

If K.S.A. 22-3717(d)(1)(G) would be found unconstitutional as applied to Riffe, the 10-year term of postrelease supervision is most likely still an illegal sentence and constitutes a departure sentence without findings of substantial and compelling reasons

for the departure. When a court has declared the basis of a sentence unconstitutional, there is no statutory authority to impose that sentence. See *State v. Cullen*, 275 Kan. 56, 59, 60 P.3d 933 (2003) (citing *State v. Boswell*, 30 Kan. App. 2d 9, 43, 37 P.3d 40 [2001]). Because the district court found K.S.A. 22-3717(d)(1)(G) unconstitutional as applied to Riffe, it had no authority to impose lifetime postrelease supervision.

Nevertheless, as Riffe argues, K.S.A. 22-3717 still authorizes a term of postrelease supervision which could possibly be applicable to him. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12 (2014). The relevant provisions of K.S.A. 22-3717 read:

> "(d)(1) Persons sentenced for crimes, other than off-grid crimes, committed on or after July 1, 1993, or persons subject to subparagraph (G), will not be eligible for parole, but will be released to a mandatory period of postrelease supervision upon completion of the prison portion of their sentence as follows:
>
> . . . .
>
> (B) Except as provided in subparagraphs (D) and (E), persons sentenced for nondrug severity levels 5 and 6 crimes and drug severity level 3 crimes must serve 24 months, plus the amount of good time and program credit earned and retained pursuant to K.S.A. 21–4722, and amendments thereto, on postrelease supervision.
>
> . . . .
>
> (D)(i) The sentencing judge shall impose the postrelease supervision period provided in subparagraph (d)(1)(A), (d)(1)(B) or (d)(1)(C), unless the judge finds substantial and compelling reasons to impose a departure based upon a finding that the current crime of conviction was sexually motivated. In that event, departure may be imposed to extend the postrelease supervision to a period of up to 60 months.
>
> (ii) If the sentencing judge departs from the presumptive postrelease supervision period, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure. Departures in this section are subject to appeal pursuant to K.S.A. 21–4721, and amendments thereto."

Riffe was convicted of aggravated sexual battery, a nondrug severity level 5 crime that is defined as sexually violent under K.S.A. 22-3717. Since Riffe is no longer subject

to subparagraph (G), a plain reading of the statute suggests Riffe could be sentenced to 24 months' postrelease supervision under K.S.A. 22-3717(d)(1)(D). He could also be subject to a possible upward departure to a term of 60 months' imprisonment if the district court finds substantial and compelling reasons based on the sexual motivation of the crime under K.S.A. 22-3717(d)(1)(D)(i) and (ii). Under this reading of the law, however, the district court's 10-year term was a significant upward departure not authorized by statute.

Furthermore, the district court does not appear to have made the necessary findings to support a departure as required by K.S.A. 22-3717(d)(1)(D)(i) and (ii). The decision whether to depart from a sentence generally lies within the discretion of the district court. *State v. Jackson*, 297 Kan. 110, 112, 298 P.3d 344 (2013). Whether a district court complied with a statute in making a departure, however, may require interpretation of a sentencing statute. In such cases, an appellate court has unlimited review. 297 Kan. at 112.

This statute suggests that the district court needed to find that the crime of conviction was sexually motivated, but the district court did not do so. Previous appellate court cases have held a finding that a crime was sexually motivated, absent any other reason, was sufficient to support a departure under previous versions of this law. See *State v. Anthony*, 273 Kan. 726, 729, 45 P.3d 852 (2002) (district court's "nature of the offense" finding was sufficient to comply with provision allowing durational postrelease supervision departure upon finding crime of conviction was sexually violent or sexually motivated); *State v. Atkinson*, 21 Kan. App. 2d 276, 279, 898 P.2d 1179 (1995) (district court's finding that crime of conviction was sexually violent or sexually motivated sufficient to justify durational postrelease supervision departure under current statute). While aggravated sexual battery is defined as a sexually violent offense under this statute, a finding that the crime of conviction is sexually violent will no longer support an upward departure under the current statute. At a minimum, the court needed to find Riffe's crime

of conviction was sexually motivated. In this case, the court did not make such a finding. Although it would seem obvious that it was, a finding of such is required.

More important, the district court does not appear to have made any other findings to support its departure sentence. During sentencing, the court mentioned it was a "case of safety of the community." Then, after finding the first *Freeman* factor applied in Riffe's favor, the court imposed a 10-year postrelease supervision term. The court noted this reflected the seriousness of the offense but was not excessive given Riffe was convicted of only aggravated sexual battery. The court made no reference to departure sentencing nor did it state substantial or compelling reasons justifying the departure. Even if K.S.A. 22-3717 authorized departure sentencing, the court failed to comply with departure sentencing requirements because the court did not state on the record at the time of sentencing substantial and compelling reasons justifying the departure.

For the above stated reasons, the sentence is vacated and the case is remanded with directions for the district court to grant the State's motion to correct illegal sentence and to impose a sentence of lifetime postrelease supervision.