NOT DESIGNATED FOR PUBLICATION

No. 115,904

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KEDRIN D. LITTLEJOHN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed June 30, 2017. Reversed and remanded with directions.

Krystle M. S. Dalke and *Michael P. Whalen*, of Law Office of Michael P. Whalen, of Wichita, for appellant.

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

Before ARNOLD-BURGER, C.J., HILL, J., and HEBERT, S.J.

Per Curiam: Supreme Court Rule 183(d) (2017 Kan. S. Ct. R. 223) requires a court to dismiss a K.S.A. 60-1507 motion as successive if (1) "the ground for relief was determined adversely to the movant on a prior motion; (2) the prior determination was on the merits; and (3) justice would not be served by reaching the merits of the subsequent motion." Supreme Court Rule 183(i) states that if a case proceeds to an evidentiary hearing, the movant has a right to counsel.

The district court dismissed Kedrin D. Littlejohn's second K.S.A. 60-1507 motion as successive. Littlejohn appealed. Littlejohn argues that the district court should have appointed him counsel, but because Littlejohn's motion did not proceed to an evidentiary hearing the district court had no duty to appoint counsel. Littlejohn also argues that the court erred in dismissing his K.S.A. 60-1507 motion as successive, as the ends of justice require an evidentiary hearing on his claims. Because Littlejohn's K.S.A. 60-1507 motion raises a colorable claim of ineffective assistance of counsel, the district court's decision is reversed as it relates to that claim. The case is remanded for an evidentiary hearing at which Littlejohn is to have the benefit of counsel.

FACTUAL AND PROCEDURAL HISTORY

This case arises on an appeal from the dismissal of a K.S.A. 60-1507 motion. The facts of the underlying case are available in *State v. Littlejohn*, 298 Kan. 632, 316 P.3d 136 (2014). A summary of the facts is as follows.

In May 2008, Littlejohn and Shannon Bogguess went to Jim Collins' automobile business. They confronted Collins, and Bogguess shot Collins in the leg. The men then put Collins in a Hummer that was at the business with the intent of taking Collins to an ATM and forcing him to withdraw money. As they were driving down St. Francis Street in Wichita, Collins jumped out of the Hummer. The men attempted to get Collins back in the Hummer, but when onlookers started yelling at them Littlejohn ran back to the Hummer and got into the front passenger seat. A few moments later, Bogguess ran back to the Hummer. Bogguess then walked back to Collins and shot him in the neck/shoulder area. Bogguess got back in the Hummer and drove down the street. An onlooker, Jeremy Linot, ran into the street to help Collins, but Linot noticed that the Hummer had turned around and was speeding back towards them. Linot tried to drag Collins out of the street, but Linot had to abandon his efforts to dodge the Hummer. Bogguess drove the Hummer over Collins, and Collins was pronounced dead shortly thereafter.

Bogguess parked the Hummer in an alleyway. Littlejohn and Bogguess ran past a nearby McDonalds. Littlejohn then realized that he left his cell phone in the Hummer. Littlejohn went back to the Hummer, which by that time had been secured by the police. Littlejohn approached Officer John Duff and told him that the people in the Hummer had robbed him of his cell phone and forced him into the Hummer. Littlejohn gave a fake name. The police took Littlejohn to city hall for questioning. There, Littlejohn revealed his true name. The police also noticed blood on Littlejohn's shoes. They matched the blood to Collins and the shoes to bloody footprints found at Collins' business. After hearing that he was tied to the crime scene, Littlejohn "admitted to participating in the crimes." 298 Kan. at 637-38.

Littlejohn told detectives that Bogguess "told Littlejohn that Collins had a lot of money and that Littlejohn could get $10,000 for participating in the robbery." 298 Kan. at 638. Littlejohn said that his role in the robbery was to hold a gun on Collins. In Collins' business, Bogguess took the gun from Littlejohn and shot Collins. When Collins jumped out of the Hummer, "Littlejohn said that he gave the gun to Bogguess or Bogguess took possession of the gun." 298 Kan. at 639. At trial, Littlejohn testified to a different version of the facts. Littlejohn testified that he met Bogguess a couple of weeks before the robbery and that Bogguess had told Littlejohn about a job opportunity at Collins' business. Littlejohn said he went to Collins' business the morning of the robbery with the intent of getting a job, but when he arrived Bogguess "forced him at gunpoint to participate in the robbery and kidnapping of Collins and that Bogguess acted alone in killing Collins." 298 Kan. at 641.

In 2010, the jury convicted Kedrin D. Littlejohn of first-degree murder (felony murder), aggravated robbery, aggravated kidnapping, and aggravated assault. Littlejohn was sentenced to life in prison for felony murder. Based on his criminal history score of "G", Littlejohn was sentenced to an additional 277 months for the other crimes. Littlejohn

appealed, and the Kansas Supreme Court affirmed his convictions on January 17, 2014. 298 Kan. 632.

Littlejohn filed a K.S.A. 60-1507 motion in June 2014. He alleged that "trial counsel was ineffective and that the trial court erred in instructing the jury and in denying a motion to suppress." The district court denied this motion on the basis that the claims were conclusory in July 2014. Littlejohn appealed in October 2014, but voluntarily withdrew his appeal in December 2014.

Littlejohn filed a second K.S.A. 60-1507 motion in January 2015. He acknowledged that it was his second motion, but argued that it should not be dismissed as successive because his claim for "ineffective assistance of counsel is considered an 'exceptional circumstance' excusing the failure to present" certain constitutional claims in his first K.S.A. 60-1507 motion. The State filed a reply in November 2015. The State argued that the district court should deny Littlejohn's motion as successive because "[h]is claims of ineffective assistance of counsel were claims that [Littlejohn] would have been aware of when he filed his first motion" and because Littlejohn failed to establish exceptional circumstances, such as an unusual event or intervening change in the law, that would have prevented him from raising his claims in his first K.S.A. 60-1507 motion. The State did not address the merits of Littlejohn's motion.

The district court summarily denied Littlejohn's second K.S.A. 60-1507 motion in November 2015. The district court agreed with the State that Littlejohn's claim of ineffective assistance of counsel did not "establish the necessary exceptional circumstance to allow the successive filing" and that Littlejohn did "not present any reasons to establish an unusual event or intervening change in the law that prevented him from raising his claims in his first K.S.A. 60-1507 motion."

Littlejohn appealed.

ANALYSIS

Because Littlejohn's claim was summarily dismissed, the district court did not err by failing to appoint counsel.

Littlejohn's first argument on appeal is "that the district court violated his due process rights when it actively sought out a written response from the State's attorney, but failed to appoint counsel for Mr. Littlejohn." He argues that he was entitled to appointment of counsel pursuant to Supreme Court Rule 183, which provides procedures for K.S.A. 60-1507 motions. Supreme Court Rule 183(i) (2017 Kan. S. Ct. R. 224) states: "Right to counsel. If a motion to vacate, set aside, or correct a sentence presents a substantial question of law or triable issue of fact, the court must appoint counsel to represent an indigent movant."

This court exercises unlimited review over Littlejohn's due process claim. *State v. Robinson*, 281 Kan. 538, 540, 132 P.3d 934 (2006).

Littlejohn cites three cases to support his argument. He begins by citing *Alford v. State*, 42 Kan. App. 2d 392, 401-04, 212 P.3d 250 (2009), for its discussion of *State v. Hemphill*, 286 Kan. 583, 186 P.3d 777 (2008). In *Hemphill*, the Kansas Supreme Court emphasized its "previous holdings that even though a court need not automatically hold a hearing or appoint counsel in all post-conviction matters, when a hearing is held 'at which the State will be represented, then due process of law does require that the defendant be represented . . . .' [Citations omitted.]" 286 Kan. at 596. Littlejohn also cites *Stevenson v. State*, No. 96,082, 2007 WL 438745 (Kan. App. 2007) (unpublished opinion), a case in which this court reversed the denial of a K.S.A. 60-1507 motion because the movant had not been appointed counsel before the district court held a hearing on his motion. Finally, Littlejohn cites *Oliver v. State*, No. 113,035, 2016 WL 1391757 (Kan. App. 2016) (unpublished opinion). In *Oliver*, the record was unclear as to whether the district court

had held a hearing on the movant's K.S.A. 60-1507 motion, so this court remanded the case to determine whether a hearing had occurred. This court said that if a hearing had occurred, the district court was required to appoint counsel for the movant. 2016 WL 1391757, at *4.

Littlejohn asserts that the district court's receipt of the State's response to Littlejohn's K.S.A. 60-1507 motion, which he made pro se, "had the same effect as a preliminary hearing in district court where the State was represented, yet no counsel was appointed to represent Mr. Littlejohn." In *State v. Roberts*, No. 114,726, 2016 WL 6829472 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* December 19, 2016, a 1507 movant made the same argument that Littlejohn makes now. In *Roberts*, the movant argued "that a trial court receiving a formal written response from the State before making a ruling on a motion has the same effect as holding a hearing." 2016 WL 6829472, at *5. Like Littlejohn, the movant cited *Alford* for its discussion of *Hemphill*, *Stevenson*, and *Oliver*. See *Roberts*, 2016 WL 6829472, at *4-5. This court rejected the movant's claim, because there was no evidence that the district had held a hearing on his K.S.A. 60-1507 motion. This court stated:

> "In conclusion, Supreme Court Rule 183(i) and Kansas caselaw make it perfectly clear that if a hearing is held on a postconviction motion and the State appears through counsel, then due process of law requires that the movant be represented. [Citations omitted.] Here, Roberts would have this court equate the State's written response to a movant's K.S.A. 60-1507 motion with a formal hearing. The circumstances surrounding Roberts' case do not support this assertion. Thus, we determine that Roberts was not denied due process of law when he was not provided with counsel after the State filed a response to his K.S.A. 60-1507 motion." 2016 WL 6829472, at *5.

We agree with the reasoning of the *Roberts* panel of this court. Here, like in *Roberts*, there was no hearing on Littlejohn's K.S.A. 60-1507 motion. The district court

summarily denied the motion. Thus, Littlejohn was not entitled to appointment of counsel and his due process rights were not violated.

The district court erred by denying Littlejohn's motion as successive.

Littlejohn's second argument is that the district court erred by denying his petition as successive. The district court dismissed Littlejohn's claim on the basis that Littlejohn did not prove exceptional circumstances warranting review of his successive K.S.A. 60-1507 motion. Littlejohn asserts that his claim for ineffective assistance of counsel presents an exceptional circumstance warranting review.

When the district court summarily denies a K.S.A. 60-1507 motion, an appellate court conducts de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

K.S.A. 60-1507(c) says that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." "The meaning of 'similar relief' is stated in [Supreme Court] Rule 183(d)." *Griffin v. State*, No. 98,222, 2008 WL 4291516, at *4 (Kan. App. 2008) (unpublished opinion). Supreme Court Rule 183 (2017 Kan. S. Ct. R. 223) states:

> "(d) Successive Motions. A sentencing court may not consider a second or successive motion for relief by the same movant when:
>
> (1) the ground for relief was determined adversely to the movant on a prior motion;
>
> (2) the prior determination was on the merits; and
>
> (3) justice would not be served by reaching the merits of the subsequent motion."

In dismissing Littlejohn's second K.S.A. 60-1507 motion, the district court held:

> "The court is not required to entertain a second or successive motion for similar relief filed by the same prisoner absent a showing that constitutional rights are affected and that exceptional circumstances excuse movant from being aware of all of his alleged errors at the time of his previous motion. K.S.A. 60-1507(c); *State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011); *Dunlap v. State*, 221 Kan. 268, 270, 559 P.3d 788 (1977)."

In *Kelly*, which is one of the cases that the district court relied upon, the Kansas Supreme Court said that "[a]bsent a showing of exceptional circumstances, a second or successive K.S.A. 60-1507 motion is an abuse of remedy." 291 Kan. 868, Syl. ¶ 2. However, the idea that a K.S.A. 60-1507 movant be required to show exceptional circumstances warranting review of a successive motion blends two separate procedural rules: Supreme Court Rule 183(c)(3) and (d).

Supreme Court Rule 183(d) on successive motions does not contain an exceptional circumstances requirement. "Exceptional circumstances" are only discussed in Supreme Court Rule 183(c)(3) (2017 Kan. S. Ct. R. 223), which states:

> "A proceeding under K.S.A. 60-1507 ordinarily may not be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors must be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided exceptional circumstances excuse the failure to appeal."

Supreme Court Rule 183(c)(3) has been interpreted to require K.S.A. 60-1507 movants to show exceptional circumstances that would excuse their failure to raise issues not only on direct appeal, but also in prior K.S.A. 60-1507 motions. *Walker v. State*, 216 Kan. 1, 3, 530 P.2d 1235 (1975) ("[W]e are unable to find any evidence to support petitioner's naked allegation of unusual or exceptional circumstances which would excuse his failure to raise the issue prior to his second 1507 motion."). Exceptional circumstances are "unusual events or intervening changes in the law which prevent a movant from

reasonably being able to raise all of the trial errors in the first postconviction proceeding." *Kelly*, 291 Kan. 868, Syl. ¶ 2.

Here, most of the claims that Littlejohn raised in his second K.S.A. 60-1507 motion could have been raised on direct appeal. Littlejohn fails to allege exceptional circumstances that prevented him from raising the claims at that time. Thus, those claims were properly dismissed. However, Littlejohn could not raise his ineffective assistance of counsel claims on direct appeal. *State v. Van Cleave*, 239 Kan. 117, 119, 716 P.2d 580 (1986) ("An allegation of ineffective assistance of counsel will not be considered for the first time on appeal."). Littlejohn raised ineffective assistance of counsel issues in his first and second K.S.A. 60-1507 motions. It was error for the district court to hold that Littlejohn failed to meet the exceptional circumstances requirement. Littlejohn could not raise ineffective assistance of counsel on direct appeal—the caselaw prohibiting such claims provides the exceptional circumstance that prevented him from raising the claim. Littlejohn should not be required to show that exceptional circumstances prevented him from raising the issue in his first K.S.A. 60-1507 motion because he did in fact raise the issue in his first motion. The true issue here is whether Littlejohn's second attempt to raise ineffective assistance of counsel should be barred by the successive motion rule.

The first part of the successive motion rule bars Littlejohn's claims if the ground for relief was determined adversely to him in his prior motion. Supreme Court Rule 183(d)(1). The district court denied the ineffective assistance of counsel claims raised in Littlejohn's first motion, so that part of the test is satisfied. The second part of the rule bars Littlejohn's claims if the prior determination was on the merits. Supreme Court Rule 183(d)(2). The district court dismissed his first motion on the grounds that the claims were conclusory. While the district court did not get into the substance of the motion, the ruling was on the merits insofar as the case was not dismissed pursuant to some procedural bar. The final part of the rule bars Littlejohn's claim if "justice would not be served by reaching the merits of the subsequent motion." Supreme Court Rule 183(d)(3)

(2017 Kan. S. Ct. R. 223). Littlejohn argues that justice would be served by considering his claims.

Littlejohn relies on *Saleem v. State*, No. 94,945, 2006 WL 3353769 (Kan. App. 2006) (unpublished opinion) (*Saleem III*)—a case that also addressed a successive K.S.A. 60-1507 motion—to support his position. To explain the applicability of *Saleem III*, we must first examine the factual and procedural posture of the underlying criminal case, *State v. Saleem*, 267 Kan. 100, 977 P.2d 921 (1999) (*Saleem I*).

Rah-Mann Saleem was at a party where everybody was drinking when he got into an argument with Todd Schmidt. After some shoving and pushing, Saleem fell or was pushed to the ground. He pulled out a gun and shot Schmidt four times, resulting in Schmidt's death. During the trial, the prosecution played a taped interview of a witness in front of the jury. The officer conducting the interview suggested that this was not the first time Saleem had shot someone. Defense counsel did not make a contemporaneous objection, but later moved for mistrial. The district court did not grant a mistrial because defense counsel had viewed the video before it was played and there was no evidence that the prosecution was trying to improperly introduce the statement into the trial. Also during the trial, the State advanced a theory that Saleem had committed first-degree premeditated murder. The only defense Saleem's counsel raised was self-defense. Saleem was convicted of first-degree murder, which was affirmed in *Saleem I*. 267 Kan. at 115.

Next, Saleem filed a pro se K.S.A. 60-1507 motion alleging, among other things, ineffective assistance of counsel. *Saleem v. State*, No. 86,632, unpublished opinion filed March 22, 2002 (*Saleem II*). In affirming the district court's decision summarily denying Saleem's claims, this court found the claims were without merit, did not sufficiently state a factual basis for consideration, and were conclusory in nature. *Saleem II*, slip op. at 10-11.

Saleem then filed a second K.S.A. 60-1507 motion (with the assistance of counsel), again alleging ineffective assistance of counsel. He argued that the district court should entertain his successive motion because "significant issues had not previously been argued and the court's previous summary dismissal was inappropriate." *Saleem III*, 2006 WL 3353769, at *4. First, the district court noted that Saleem's motion was filed outside of the 1-year statutory limit for bringing K.S.A. 60-1507 claims. But the 1-year limit can be extended upon a showing of manifest injustice. K.S.A. 60-1507(f). The court decided that because Saleem had filed his first K.S.A. 60-1507 motion pro se, it would '"entertain the successive motion from [Saleem] to serve the ends of justice for the limited purpose of considering the grounds not previously raised by [Saleem]."' 2006 WL 3353769, at *9. The court then addressed Saleem's claim that his counsel was ineffective for failing to review the videotape. But, the court dismissed the claim as an abuse of remedy because the issue had previously been decided adversely to Saleem and he showed no exceptional circumstances warranting review of the claim. The court added that '"it [was] unlikely that the defense attorney's failure to ask for the statement to be redacted amounted to ineffective assistance of counsel."' *Saleem III*, 2006 WL 3353769, at *9. Ultimately, the district court denied Saleem's second K.S.A. 60-1507 motion and Saleem appealed.

In reversing the district court, the Court of Appeals expressed concern that the district had found manifest injustice to allow an untimely filing, but then found there were not exceptional circumstances to consider the merits of a successive filing.

The court went on to say:

> "All of this leaves us in an unsatisfactory position in considering this appeal, as we see several colorable and actionable arguments justifying an evidentiary hearing on the ineffective assistance of counsel issue, limited comments on the actual merits of the issue while stating that a determination on the merits is not being made, and conflicting

findings on the existence of manifest injustice and exceptional circumstances." *Saleem III*, 2006 WL 3353769, at *10.

The court then addressed whether Saleem's claims should be dismissed as successive. The court said, "[h]aving found 'manifest injustice' to extend the period of the filing herein, it is logical that we should also find that the ends of justice would be served by reaching the merits of Saleem's present application." *Saleem III*, 2006 WL 3353769, at *11. The court explained that such a result was "not easily reached for our reported decisions have long held that exceptional circumstances must be shown which would warrant consideration of a successive 60-1507 motion." *Saleem III*, 2006 WL 3353769, at *12. The court found no intervening changes in the law that would create exceptional circumstances. The most significant consideration, the court held, was "the directions of Supreme Court Rule 183(d)(3) that in considering successive motions, the sentencing court shall not do so where 'the ends of justice would not be served by reaching the merits of the subsequent application.'" *Saleem III*, 2006 WL 3353769, at *13. The court could not "justify relentless, unyielding, and unremitting application of the successive motion rule when [its] sense of justice require[d] that a colorable and actionable claim be heard on its merits." *Saleem III*, 2006 WL 3353769, at *13. The court reversed and remanded for a hearing on the ineffective assistance of counsel claims without expressing an opinion on the merits of the claims. *Saleem III*, 2006 WL 3353769, at *13-14. On remand, the district court granted Saleem a new trial due to ineffective assistance of counsel. *Saleem v. State*, No. 101,629, 2010 WL 3488701, at *3-6 (Kan. App. 2010) (unpublished opinion) (*Saleem IV*).

We agree that Littlejohn's case shares similarities with Saleem's case. Littlejohn's first K.S.A. 60-1507 motion was pro se and raised his ineffective assistance of counsel claims. The district court dismissed Littlejohn's first motion as conclusory. Saleem also proceeded pro se in his first K.S.A. 60-1507 motion and "raise[d] an ineffective assistance of counsel issue but not on a factual basis which would require a hearing on

the appointment of counsel under the provisions of K.S.A. 22-4506." *Saleem III*, 2006 WL 3353769, at *12. Like Littlejohn, Saleem could point to no unusual events or intervening changes in the law that prevented his claim from proceeding earlier. The deciding factor in *Saleem* was that Saleem made colorable claims, and Supreme Court Rule 183(d)(3) (2017 Kan. S. Ct. R. 223) says that the successive motion bar only applies when "justice would not be served by reaching the merits of the subsequent motion." Thus, the issue is determining whether justice requires reaching the merits of Littlejohn's motion. To do that, we must determine if he asserts any colorable claims.

A colorable claim is "[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law." Black's Law Dictionary 302 (10th ed. 2014). It is a claim that appears to be "true, valid, or right." Black's Law Dictionary 322 (10th ed. 2014); see also *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (court must consider whether a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to habeas relief); *Earp v. Ornoski*, 431 F.3d 1158, 1170 (9th Cir. 2005) (asserting that a colorable claim is a relatively "low bar"); *Pizzuto v. Blades*, No. 1:05-CV-516-BLW, 2010 WL 4008273, at *1 (D. Idaho 2010) (to establish a colorable claim, petitioner must allege specific facts that, if proven to be true, would establish that he is entitled to relief, citing *Landrigan*); *State v. Wooden*, 478 S.W.3d 585, 592 (Tenn. 2015) ("'colorable claim is a claim, in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief'").

Littlejohn lists four grounds for ineffective assistance of counsel in his K.S.A. 60-1507 motion. First, he argues that his convictions are multiplicitous because they all arose from a single statute—the aiding and abetting statute. "Multiplicity exists when the State uses 'a single wrongful act as the basis for multiple charges.' [Citation omitted.] Charges are not multiplicitous if each charge requires proof of a fact not required in proving the other." *State v. Howard*, 243 Kan. 699, 703, 763 P.2d 607 (1988). Each of

Littlejohn's crimes of conviction required proof of a fact not required in proving the other. Justice does not require reaching the merits of the issue because there is no multiplicity violation.

Littlejohn also argues his counsel was ineffective for failing to request a lesser included offense instruction on the aggravated kidnapping charge. Littlejohn notes that the evidence showed that he only held Collins down and that Littlejohn did not inflict bodily harm on Collins. However, Bogguess shot Collins, and that certainly constitutes bodily harm. Because the State was using an aiding and abetting theory, Littlejohn can be found guilty of aggravated kidnapping because he aided Bogguess even if Littlejohn did not commit the conduct constituting the crime. K.S.A. 2016 Supp. 21-5210. Justice does not require reaching the merits of this issue.

Littlejohn's final two arguments are that his counsel was ineffective for failing to use Littlejohn's mental defect as a defense and for failing to request a jury instruction on mental defect. Littlejohn claims that his mental retardation would negate the intent elements of the crimes of which he was convicted. If Littlejohn alleges specific facts that if proven to be true would establish that he is entitled to relief on this basis, it would qualify as a colorable claim and be allowed under Supreme Court Rule 183(d)(3) even if successive. So we next turn to the specific facts alleged by Littlejohn to support his claim.

In support of his argument, Littlejohn attached a psychological evaluation report to his K.S.A. 60-1507 motion. The evaluation was completed when Littlejohn was 16 years old—2 years before the events leading to his convictions. The report states that Littlejohn had a Full Scale IQ of 49, which is considered moderate mental retardation. The report concluded that Littlejohn "has had significant intellectual and academic difficulties" and that he "tests out lower intellectually than would be implied by his conversation . . . ."

Kansas allows a defendant to put on evidence that would show the defendant was unable to form the *mens rea* required for the charged crime. "It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense." K.S.A. 2016 Supp. 21-5209. If Littlejohn's attorney had presented evidence that Littlejohn lacked the ability to form the *mens rea* for his crimes, then Littlejohn may not have been convicted. Ineffective assistance of counsel could occur if Littlejohn's attorney had such evidence and did not present it to the court and jury. See *Beckford v. State*, No. 108,693, 2013 WL 5870047, at *4 (Kan. App. 2013) (unpublished opinion) (*Beckford II*) ("If defense counsel had properly investigated this issue, and if that investigation had revealed evidence to support a valid mental capacity defense, then counsel's failure to conduct a proper investigation would have been ineffective assistance of counsel.").

Littlejohn's counsel at the trial, Quentin Pittman, did not present evidence of Littlejohn's mental capacity to the jury. Pittman's strategy at trial was to focus on inconsistencies in the evidence and to argue that Littlejohn was a victim, not a perpetrator, of the crimes committed. However, information on Littlejohn's mental capacity was presented before his trial. Before trial, the district court ordered Littlejohn to undergo a competency evaluation. At that time, Littlejohn was represented by Kevin Loeffler. The competency evaluation report stated: "[P]lease note it may be helpful to have IQ testing completed on Mr. Littlejohn to better understand his level of intellectual functioning." The report said that despite the fact that Littlejohn's "most recent IQ testing indicates he is mentally retarded," he was competent to stand trial. Loeffler disagreed that Littlejohn was competent to stand trial, noting that the report "says he's competent, but then it qualifies that with that he's competent if he's able to develop a rapport and . . . have trust in his attorney." Loeffler did not believe that Littlejohn trusted him. Loeffler asked the court to undergo further competency evaluation and "get an IQ evaluation at

the same time." The district court did not directly address Loeffler's requests, but found that Littlejohn was competent to stand trial based on the report.

Several months later, at a pretrial motions hearing, the subject of Littlejohn's mental capacity was raised again. At that time, Pittman was representing Littlejohn. One of Littlejohn's prior attorneys had filed a motion to suppress statements that Littlejohn made to the police on the basis that Littlejohn had not knowingly or intelligently waived his *Miranda* rights. Pittman called a psychologist, Dr. Mitchell Flesher, as a witness to present evidence on Littlejohn's mental condition. Dr. Flesher testified that Littlejohn's reading skills were at a third grade level, which is in the first percentile of his age group. Dr. Flesher explained that testing in the first percentile means that in a group of 100 people in the same age category as Littlejohn, "he would be basically the lowest one or two scores in that group . . . ." Littlejohn performed at a fourth grade level in spelling and arithmetic. Dr. Flesher tested Littlejohn's Full Scale IQ, which is an overall IQ score, at 71. This score is in the third percentile, meaning that "it's in the lower 1, 2, 3 or 4 among . . . a hundred people that are administered that test in that age range." Dr. Flesher concluded that "someone who scores a 71 may be categorized as mentally retarded, even though the formal range for that is considered below 70," because the tests leave room for error of measurement. Dr. Flesher also testified that just because someone is mentally retarded does not preclude the person from understanding and waiving his or her *Miranda* rights. The district court denied the motion to suppress, noting that Littlejohn was "not as intelligent as measured by Dr. Flesher as other people. But in and of itself that's not a factor that would invalidate or make involuntary his statements."

This case shares similarities with *Beckford II*. Laroy Beckford approached a hotel alone around midnight and rang the buzzer. When the clerk buzzed him in, two other men also entered the hotel. One of the men had a gun, and he told the clerk to give him money. The men left with $175. Before his trial, Beckford was committed to a state

hospital for a competence and sanity evaluation. Beckford was initially found incompetent to stand trial, but after reassessing Beckford 9 months later, the court found that he was competent to proceed. A jury found Beckford guilty of aiding and abetting in the aggravated robbery. The Kansas Court of Appeals affirmed his conviction. *State v. Beckford*, No. 100,077, 2009 WL 401003 (Kan. App. 2009) (unpublished opinion) (*Beckford I*). Beckford then filed a K.S.A. 60-1507 motion alleging, in part, that his trial attorney "should have requested additional mental health evaluations and conducted a further investigation into his mental capacity . . . ." *Beckford II*, 2013 WL 5870047, at *1. Beckford claimed that he suffered from "'mild mental retardation.'" *Beckford II*, 2013 WL 5870047, at *3. The district court denied Beckford's claim as conclusory and speculative.

Beckford appealed the denial of his K.S.A. 60-1507 motion and the Court of Appeals reversed. Beckford argued "that his trial attorney should have evaluated him for more than just competency because 'diminished capacity' was a viable defense." *Beckford II*, 2013 WL 5870047, at *3. The State argued "that there was no reason for Beckford's attorney to investigate Beckford's mental status since his defense theory was based on his denial of being involved in the crime." *Beckford II*, 2013 WL 5870047, at *3. The Court of Appeals noted that Beckford had several attorneys throughout his trial. While Beckford's trial counsel was not the attorney of record when Beckford's competency and sanity evaluation was completed, she was aware of the evaluations. However, Beckford's trial counsel "admitted that she had not investigated these records regarding Beckford's mental retardation, despite the fact that Beckford raised the issue many times with her." *Beckford II*, 2013 WL 5870047, at *3. The Court of Appeals reversed the district court's summary dismissal of Beckford's K.S.A. 60-1507 motion, concluding:

> "In this case, it is unclear why Beckford's counsel did not further investigate Beckford's mental state in order to determine whether a viable mental capacity defense existed. If defense counsel had properly investigated this issue, and if that investigation had revealed evidence to support a valid mental capacity defense, then counsel's failure to

> conduct a proper investigation would have been ineffective assistance of counsel. Moreover, based upon the evidence presented at trial, there is a reasonable probability that a valid mental capacity defense would have affected the outcome. An evidentiary hearing is warranted on this issue." *Beckford II*, 2013 WL 5870047, at *4.

Here, like in *Beckford II*, there is evidence that Littlejohn is mentally retarded. His first IQ test placed him in the moderate mental retardation category. Dr. Flesher's IQ test placed Littlejohn on the outside border of mild mental retardation. Littlejohn's trial attorney was aware of this, as he was the one who elicited testimony from Dr. Flesher and argued the motion to suppress. There is no evidence here as to why Pittman did not pursue the mental capacity defense.

If Littlejohn's trial counsel had pursued the mental defect defense there is a chance that the jury may not have convicted Littlejohn on all charges. Littlejohn's convictions for aggravated robbery, aggravated kidnapping, and aggravated assault were obtained under an aiding and abetting theory. Aiding and abetting means that a person is liable for the crimes of another if he or she "advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime." K.S.A. 2016 Supp. 21-5210(a). One who aids and abets "is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended." K.S.A. 2016 Supp. 21-2510(b). In order to be liable for the crimes of another under an aiding and abetting theory, the person must act "with the mental culpability required for the commission" of the intended crimes. K.S.A. 2016 Supp. 21-5210(a).

The State argued that aggravated assault was reasonably foreseeable as a probable consequence of committing the other crimes. Having a mental defect may affect what is "reasonably foreseeable" for the purposes of aiding and abetting. The State argued that Littlejohn intentionally aided Bogguess with the kidnapping and robbery. The felony

murder charge was predicated upon the convictions for aggravated robbery and aggravated kidnapping. If Littlejohn's counsel had presented evidence of Littlejohn's mental defect, there is a chance the jury might have found that Littlejohn did not intend to cause bodily harm (which is what made the crimes aggravated), or that Littlejohn did not have the intent to commit the crimes at all.

Littlejohn is facing a very serious sentence—life plus 277 months. If there was evidence that Littlejohn was mentally retarded, even if the evidence showed that he was just mildly mentally retarded like in *Beckford*, then justice would be served by reaching the merits of Littlejohn's claim. Supreme Court Rule 183(d)(3) (2017 Kan. S. Ct. R. 223) states that the prohibition on considering successive motions only applies when "justice would not be served by reaching the merits of the subsequent motion." Littlejohn has succeeded in alleging specific facts that if proven to be true, would establish that he is entitled to relief on the basis that his counsel was ineffective. Accordingly, he has pled a colorable claim. Thus, like in *Saleem*, the district court erred by dismissing the motion as successive. This issue warrants at least an evidentiary hearing, at which Littlejohn should have the benefit of counsel pursuant to Supreme Court Rule 183(i). The district court is affirmed as to the other claims in Littlejohn's K.S.A. 60-1507 motion. Many of the claims could have been raised on direct appeal, and Littlejohn fails to show that exceptional circumstances prevented him from raising them earlier. The other ineffective assistance of counsel claims are unpersuasive, and the ends of justice do not require an evidentiary hearing on them.

We reverse and remand for a hearing on the issue of whether counsel was ineffective for failing to investigate Littlejohn's mental capacity defense. In doing so, we specifically express no opinion on the merits of such contentions.

Reversed and remanded with directions.