NOT DESIGNATED FOR PUBLICATION

No. 114,971

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DAVID A. NOYCE,
*Appellant*,

v.

STATE OF KANSAS,
*Appellee*.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed July 21, 2017. Affirmed in part, reversed in part, and remanded.

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

*Lance J. Gillett*, assistant district attorney, *Marc Bennett*, district attorney and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., BUSER, J., and WALKER, S.J.

BUSER, J.: In this habeas corpus proceeding, David A. Noyce challenges the district court's summary denial of his K.S.A. 60-1507 motion on two grounds. First, Noyce alleges the district court's procedural handling of the motion violated his due process rights. Second, Noyce contends the district court committed reversible error when it found the motion was time-barred under K.S.A. 60-1507(f) and Noyce failed to show manifest injustice to merit an extension for filing. Upon our review of the appellate

briefs and record on appeal, we affirm in part, reverse in part, and remand for an evidentiary hearing.

## FACTUAL AND PROCEDURAL BACKGROUND

On September 17, 1998, Noyce was charged with killing his wife, Dalene M. Noyce, and his son, Clifford J. Noyce, by setting fire to a residence. Prior to trial, on February 11, 1999, Noyce pled guilty to capital murder, premeditated first-degree murder and aggravated arson in return for the State's agreement not to pursue the death penalty. On March 5, 1999, the district court imposed two consecutive hard 40 life sentences for Noyce's murder convictions and a consecutive 51-month sentence for the aggravated arson conviction. Noyce did not appeal his convictions and sentences.

Almost 15 years later, on November 27, 2013, Noyce filed a pro se motion to correct an illegal sentence under K.S.A. 22-3504, claiming his murder convictions were multiplicitous. In particular, Noyce claimed multiplicity because his first-degree murder conviction arose from Clifford's death and his capital murder conviction arose from killing both Dalene and Clifford as part of the same act or transaction. As a result, Noyce contended the sentence he received for first-degree murder should be vacated. The district court denied Noyce's motion, and the defendant appealed to our Supreme Court.

In an opinion filed on February 27, 2015, our Supreme Court affirmed the denial of Noyce's motion, concluding that a multiplicity claim may not be raised in a motion to correct illegal sentence because it is an attack on the defendant's conviction rather than the sentence. *State v. Noyce*, 301 Kan. 408, 410-11, 343 P.3d 105 (2015). The court also rejected Noyce's new claim that his sentence was unconstitutional because the issue may not be raised for the first time on appeal, and the statutory definition of an illegal sentence does not include a claim that the sentence is unconstitutional. 301 Kan. at 410.

Importantly, in reaching its decision, our Supreme Court made the following findings:

> "In addition, Noyce's challenge cannot be saved by construing it under K.S.A. 60-1507. To begin with, Noyce expressly stated in his brief that he was not arguing his motion under K.S.A. 60-1507. Secondly, the motion was filed more than 15 years after the final order in this case. See K.S.A. 60-1507(f)(2) (time limitation on K.S.A. 60-1507 motion can be extended to prevent manifest injustice); *State v. Holt*, 298 Kan. 469, 480, 313 P.3d 826 (2013) (movant has duty to provide specific factual foundation to support claim of manifest injustice). Noyce has not demonstrated manifest injustice to the district court in order to properly bring a 1507 motion. For these reasons, this court rejected a recent motion to convert Noyce's pleading to a 1507 motion.
>
> "Finally, we reject Noyce's most recent motion for remand for a hearing under *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986). A *Van Cleave* hearing arises as a matter of appellate court discretion to remand ineffective assistance of counsel allegations after sufficient showing in a direct appeal as an alternative to the remedy afforded through K.S.A. 60-1507. . . . His case is not in that procedural posture." 301 Kan. at 410.

Shortly after this decision, on April 13, 2015, Noyce filed a pro se K.S.A. 60-1507 motion—which is the subject of this appeal—alleging that his murder convictions should be "vacate[d] with prejudice" because his murder convictions were multiplicitous, and he received ineffective assistance of counsel.

In the motion, Noyce contended that following the opinion of the United States Supreme Court in *Astorga v. Kansas*, 570 U.S. ___, 133 S. Ct. 2877, 186 L. Ed. 2d 902 (2013), he discovered that his "sentence was unconstitutional." Moreover, Noyce alleged that his trial attorney, Ron Evans, chief attorney of the State of Kansas Death Penalty Defense Unit, provided him with deficient representation because although Evans filed "multiplicity motions" on behalf of the defendant he represented in *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan.

773, 375 P.3d 332 (2016), he failed to file such a motion or inform Noyce that he would be pleading to multiplicitous charges.

Noyce also complained that Evans failed to adequately represent him because he (1) rejected the defense Kurt Kerns, his second chair attorney, had planned to pursue—a defense focused upon "the State['s] . . . deliberate[ ] violat[ion of his] rights from the beginning," in favor of a "psychological defense in which the defense would concede guilt"; (2) failed to move for a suppression of his confession even though his incriminating statements were made in exchange for a reduced sentence and "[b]y the time [he] gave [the] confession he had been awake for 2 1/2 days and without food for 2 days"; (3) neglected to raise "a defense of Double Jeopardy"; (4) "ignored two obvious defenses"; (5) wrongly informed him that he "could not appeal the plea"; (6) refused to hire a forensic expert to refute the State's preliminary forensic report; (7) declined to add Donald Oliphant, his insurance agent, to the witness list even though Oliphant would have testified that "the victim was the beneficiary of a sizable payout on life insurance if [he] had perished in the fire"; (8) called him a liar and indicated that he would "only use evidence gathered by the State"; (9) deprived him of the opportunity to review discovery documents; (10) neglected to pursue exculpatory evidence, which "included the fire extinguisher [he] used in the bedroom where the fire started and witness reports that saw [him] using a garden hose on the fire"; (11) "failed to file any motions regarding a [K.S.A.] 22-2901 violation committed by the State for the sole purpose of allowing the police and jail staff to continue their illegal hijinks against [him];" (12) did not challenge the district judge's refusal to allow him to attend hearings; and (13) failed to raise an allegation of prosecutorial misconduct despite the prosecutor's decision to use a coerced confession and to misstate the law in the plea agreement regarding his ability to appeal his pleas.

In particular, Noyce maintained he was prejudiced by Evans' ineffectiveness because it led him to enter "an unknowing plea (only to save his life)" and, as a result, he received an illegal multiplicitous sentence. Noyce explained:

> "If counsel had given [him] the correct law regarding the sentence and its illegality, [he] would not have authorized Evans to offer that plea. He would've instructed counsel for another proposal or sent counsel to negotiate. If counsel would not have stated his strategy of concession and instead fought the case as he should have [he] would've gone to trial where [he] stood a decent chance of winning at trial or after an appeal. Without the coerced confessions and in possession of exculpatory evidence, it was a reasonable probability for success."

While Noyce conceded that the issues he was raising in his K.S.A. 60-1507 motion should have been "dealt with in a direct appeal," he claimed that "an extenuating circumstance . . . prevented [him] from appealing back in 1999," *i.e.*, he wrongly believed that "he could not appeal a plea bargain" based on false information he received from Evans, the wording of the plea agreement, and the district judge that accepted his pleas. In his K.S.A. 60-1507 motion Noyce acknowledged that the first hearing on his K.S.A. 60-1507 motion was de novo and did not require the appointment of an attorney but he asked the court to appoint one to assist him in obtaining evidence when a hearing was granted.

On June 1, 2015, Noyce filed a motion for summary judgment because "the State [had] failed to reply to [his] motion for habeas corpus under [K.S.A.] 60-1507 within thirty (30) business days." Twenty-four days later, the district judge sent an email request to the prosecutor requesting a response from the State.

On October 27, 2015, the State filed its written response, contending the district court should summarily deny Noyce's K.S.A. 60-1507 motion because his claims were untimely under K.S.A. 60-1507(f)(1), and similar to *State v. Kingsley*, 299 Kan. 896, 326

P.3d 1083 (2014), Noyce had "not acknowledged the one-year time limit, [had] not requested an extension under the manifest injustice exception to that limitation, and [had] not provided any persuasive reasons or circumstances that prevented him from filing his motion within one year of the time limit." The State also argued that none of Noyce's claims presented substantial issues of fact or law, and Noyce had not presented a "compelling or colorable claim of actual innocence." Finally, the State asserted that by pleading guilty, Noyce "waived any nonjurisdictional defenses and objections based upon the institution of the prosecution or defects in the charging document."

On November 5, 2015, the district court issued an order summarily denying Noyce's K.S.A. 60-1507 motion because it was untimely filed. The district judge explained:

> "A . . . K.S.A. 60-1507 motion can also be summarily denied when a movant has not acknowledged the time bar, has not requested an extension, and has not explained the reason for the delayed filing. See *State v. Kingsley*, 299 Kan. 896, 900, 326 P.3d 1083, 1087 (2014) (Kingsley failed to meet burden because he did not acknowledge the time limit, did not request an extension under the manifest injustice exception, and did not explain the 19-year delay).
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> "The court finds that there has [been] no presentation of manifest injustice to overcome the applicable time bar."

Noyce timely appeals.

## DID THE DISTRICT COURT VIOLATE NOYCE'S DUE PROCESS RIGHTS?

On appeal, Noyce contends the district court violated his due process rights when it denied his K.S.A. 60-1507 motion because, despite the fact that the State was represented by a prosecutor who prepared a written response for the district court's consideration, the court failed to appoint counsel to assist Noyce in the proceedings. The

determination of whether due process has been properly afforded is a question of law over which appellate courts exercise unlimited review. *In re Care & Treatment of Sykes*, 303 Kan. 820, 823, 367 P.3d 1244 (2016).

"The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Moody*, 282 Kan. 181, 188, 144 P.3d 612 (2006). Our Supreme Court has clarified that a district court has three options when it is presented with a K.S.A. 60-1507 motion:

> "'(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citation omitted.]" *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

There is no constitutional right to counsel in a K.S.A. 60-1507 proceeding because such actions are civil, rather than criminal, in nature. *Brown v. State*, 278 Kan. 481, 483, 101 P.3d 1201 (2004) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 [1987]). Movants do, however, enjoy a conditional right to counsel under K.S.A. 22-4506(b) "'[i]f the court finds that the petition or motion presents substantial questions of law or triable issues of fact and if the petitioner or movant has been or is thereafter determined to be an indigent person.'" *Robertson v. State*, 288 Kan. 217, 228, 201 P.3d 691 (2009).

In *State v. Nunn*, 247 Kan. 576, Syl. ¶ 8, 802 P.2d 547 (1990), our Supreme Court held that "[a] defendant should be represented by counsel, or should be present in person if pro se, at post-conviction motions in which there is a hearing at which the State is

represented by counsel." In other words, "when a hearing is held 'at which the State will be represented, then due process of law does require that the defendant be represented unless the defendant waives the right to counsel.' [Citations omitted.]" *State v. Hemphill*, 286 Kan. 583, 596, 186 P.3d 777 (2008).

In the present case, the district court summarily dismissed the K.S.A. 60-1507 motion without a hearing because it was untimely. On appeal, Noyce acknowledges, "[t]here is no reference to a hearing in the Final Order or Record of Actions." Indeed, the final order does not reference a hearing but does state, "[*a*]*fter reviewing the pleadings filed in this matter* the court denies this motion." (Emphasis added.) While Noyce does not claim there was a hearing on his K.S.A. 60-1507 motion in the district court, he argues:

> "[T]he district court requested the State to file a response ex parte and without appointment of counsel. Then, after receiving a written response from the State's attorney, it issued a Final Order denying Mr. Noyce's claims as untimely. Furthermore, the district court did not allow sufficient time for Mr. Noyce to file a reply to the State's response. Mr. Noyce asserts that this procedure *had the same effect as a hearing* [*wherein*] *the district court* [*and*] *the State was represented, yet no counsel was appointed to represent Mr. Noyce*." (Emphasis added.)

Although Noyce candidly concedes that a district court is not required to hold a hearing or appoint counsel upon receipt of a K.S.A. 60-1507 motion, he argues that the factual circumstances present in this case are analogous to the facts in *Oliver v. State*, No. 113,035, 2016 WL 1391757 (Kan. App. 2016) (unpublished opinion) and *Stevenson v. State*, No. 96,082, 2007 WL 438745 (Kan. App. 2007) (unpublished opinion), wherein our court applied the Supreme Court's holding in *Nunn* to K.S.A. 60-1507 proceedings.

In our view, neither *Oliver* nor *Stevenson* provide legal support for Noyce's due process claim. In *Stevenson*, the movant filed a K.S.A. 60-1507 motion over 1 year after

his sentencing. 2007 WL 438745, *1. Upon receipt of the motion, the district court held a hearing at which the State was represented by counsel but Stevenson was neither present nor represented. The district court dismissed the motion. On appeal, our court reversed and remanded for a hearing with Stevenson either personally present or represented by counsel. 2007 WL 438745, *2-3. *Stevenson* represents our court's faithful adherence to *Nunn*'s precedent. However, the facts of Stevenson are wholly inapplicable to this case wherein the district court ruled summarily without a hearing.

In *Oliver*, the movant filed a pro se K.S.A. 60-1507 motion. The district court asked the State to prepare an order denying the motion because it was not filed within the 1-year time period established in K.S.A. 60-1507(f)(1). The district court's journal entry, however, indicated that on August 18, 2014, a hearing was held on the motion with the State being represented by named counsel while Oliver was not present or represented by counsel.

On appeal, Oliver claimed this procedure violated his due process rights. The State, on the other hand, insisted that due process was afforded under the circumstances because no hearing actually occurred and the journal entry was inaccurate. After discussing *Nunn* and *Stevenson*, our court found: "If there was a hearing, then, according to *Nunn*, counsel should have been appointed for Oliver. If there was no hearing, then the record must be clarified." *Oliver*, 2016 WL 1391757, at *4.

As in *Stevenson*, the facts in *Oliver* may be readily distinguished from the facts in this case on appeal. In the present case, both parties are in agreement there is no indication a hearing was held on Noyce's motion. On the contrary, the district court's journal entry plainly states that its ruling was made solely upon review of the pleadings. Not only do the facts of this case not reflect the circumstances in *Oliver* and *Stevenson*, the legal precedent cited by Noyce does not support his legal contention that Noyce was

deprived of due process by the State filing a responsive pleading to his K.S.A. 60-1507 motion.

Finally, we note that Noyce's due process argument has been raised and denied in two recent opinions of our court. See *Littlejohn v. State*, No. 115,904, 2017 WL 2833312 (Kan. App. 2017) (unpublished opinion); *State v. Roberts*, No. 114,726, 2016 WL 6829472 (Kan. App. 2016) (unpublished opinion), *petition for review filed* December 19, 2016. We find these cases are persuasive authority in support of our analysis. We find no due process error in the procedure employed by the district court.

## DID THE DISTRICT COURT ERR WHEN IT DISMISSED NOYCE'S MOTION AS UNTIMELY FILED?

Alternatively, Noyce contends he made a sufficient showing of manifest injustice to warrant extension of the 1-year time limit mandated in K.S.A. 60-1507(f). District courts are required to hold an evidentiary hearing on a K.S.A. 60-1507 motion and make findings of fact and conclusions of law with respect thereto, unless the motion, files, and records of the case conclusively show that the movant is not entitled to relief. K.S.A. 60-1507(b); Supreme Court Rule 183(f) and (j) (2017 Kan. S. Ct. R. 222). To avoid the summary denial of a motion brought under K.S.A. 60-1507, the movant bears the burden of establishing entitlement to an evidentiary hearing. *Sola-Morales*, 300 Kan. at 881. To meet this burden, the movant's contentions must be more than conclusory, and either the movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. 300 Kan. at 881.

Our review is de novo. See *Sola-Morales*, 300 Kan. at 881 (When the district court summarily denies a K.S.A. 60-1507 motion, we conduct de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief.).

Of particular importance to this appeal, under K.S.A. 60-1507(f), a criminal defendant must bring his or her application for writ of habeas corpus within 1 year of: (1) "[t]he final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction," or (2) the denial of a petition for writ of certiorari to the United States Supreme Court or the issuance of the final order of such court.

The 1-year filing deadline did not become effective until July 1, 2003; thus, defendants, such as Noyce, who had claims preexisting the statutory amendment had until June 30, 2004, to file a K.S.A. 60-1507 motion. See *Pabst v. State*, 287 Kan. 1, 22, 192 P.3d 630 (2008). Although Noyce was required to file his K.S.A. 60-1507 motion no later than June 30, 2004, he did not file it until April 13, 2015, almost 11 years after the statutory deadline. As a consequence, it is undisputed that his motion was untimely under K.S.A. 60-1507(f)(1).

The time limitation articulated in K.S.A. 60-1507(f)(1), however, "may be extended by the court only to prevent a manifest injustice." K.S.A. 60-1507(f)(2). Our Supreme Court has interpreted the phrase "manifest injustice," in the context of K.S.A. 60-1507(f)(2), to mean "'obviously unfair' or 'shocking to the conscience.' [Citation omitted.]" *State v. Holt*, 298 Kan. 469, 480, 313 P.3d 826 (2013). It is the movant's burden to establish manifest injustice by a preponderance of the evidence. Supreme Court Rule 183(g).

In summarily denying Noyce's K.S.A. 60-1507 motion, the district court found "there has [been] no presentation of manifest injustice to overcome the applicable time bar." On appeal, Noyce contends that "although he did say the magic words 'manifest injustice,' [he] disagrees that he did not make a showing of manifest injustice to warrant review of his current petition." The State, cognizant of *Kingsley*, 299 Kan. at 900, apparently believes Noyce's last sentence was mistakenly worded and, in fact, Noyce

meant to say that he did *not* say the words, manifest injustice, in his motion. As a consequence, the State asserts: "Movant concedes that at no point in his pleadings did he claim manifest injustice."

While Noyce's pro se motion lacks clarity, he implicitly acknowledged the lateness in filing his K.S.A. 60-1507 pleading in the district court. On several occasions Noyce used the phrase "manifest injustice" in his motion when referring to his claims. For example, on two occasions Noyce made reference to his counsel's ineffective assistance as constituting a "manifest injustice."

In another noteworthy instance, Noyce wrote: "Movant also prays that the Court rule that movant has met both prongs [See *Strickland v. Washington*, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984)] and therefore suffered from ineffective assistance of counsel and that *the ineffectiveness is a manifest injustice to satisfy Supreme Court Rule1183* [*sic*]." (Emphasis added.) In this regard, Supreme Court Rule 183(c)(4) references the manifest injustice exception to the 1-year time limitation provided in K.S.A. 60-1507(f). Employing a liberal construction, we read Noyce's motion as an attempt to establish that, to avoid manifest injustice, his pleading should be considered despite its untimely filing. As a result, we are persuaded that Noyce acknowledged the late filing of his K.S.A. 60-1507 motion, and made a claim that manifest injustice would occur if his motion was not heard.

Next, we consider the merits of Noyce's claim of manifest injustice. Our Supreme Court has held that a movant's failure to provide the reasons for the delay in filing a K.S.A. 60-1507 motion does not automatically preclude consideration of it. See *Vontress v. State*, 299 Kan. 607, 617, 325 P.3d 1114 (2014); *State v. Trotter*, 296 Kan. 898, 905, 295 P.3d 1039 (2013). Instead, manifest injustice should be determined from the totality of the circumstances. *Vontress*, 299 Kan. 607, Syl. ¶ 7.

In determining whether manifest injustice exists, a court should consider the following nonexhaustive list of factors: (1) whether the movant provides persuasive reasons or circumstances that prevented him or her from filing the K.S.A. 60-1507 motion within the time limitation; (2) whether the merits of the movant's claims raise substantial issues of law or fact deserving the district court's consideration; and (3) whether the movant sets forth a colorable claim of actual innocence, *i.e.*, factual, not legal, innocence. See 299 Kan. at 616. In summarily denying Noyce's motion, the district court did not indicate whether it had considered the *Vontress* factors.

The State counters that *Vontress* is inapplicable because on July 1, 2016, our legislature amended K.S.A. 60-1507 by adding, in part, the following language to subsection (f)(2):

> "(A) For purposes of finding manifest injustice under this section, *the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence*. As used herein, the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." (Emphasis added.) L. 2016, ch. 58, sec. 2.

This newly-amended version of K.S.A. 60-1507(f), does not indicate whether the legislature intended the amendment to apply prospectively or retrospectively. As a general rule, a statute operates prospectively unless (1) the statutory language clearly indicates the legislature intended the statute to operate retrospectively, or (2) the change is procedural or remedial in nature. See *State v. Bernhardt*, 304 Kan. 460, 479, 372 P.3d 1161 (2016); *Norris v. Kansas Employment Security Bd. of Review*, 303 Kan. 834, 841, 367 P.3d 1252 (2016). Importantly, under either exception, the statute may not be applied retrospectively if it would prejudicially affect a party's substantive or vested rights. *Bernhardt*, 304 Kan. at 479.

While, as the State asserts, the 2016 amendment to K.S.A. 60-1507(f) could be classified as procedural in nature because it establishes parameters for extending the 1-year filing deadline, the amendment did not go into effect until *after* the district court ruled in this case. Moreover, the amended version of the statute, subsection (f)(2)(A), precludes courts from considering the second *Vontress* factor—whether the merits of the movant's claims raise substantial issues of law or fact deserving the district court's consideration. As a consequence, we find that a retrospective application of the amendment would prejudicially affect Noyce's substantive or vested rights. Because a retrospective application of the amendment would be prejudicial to Noyce, we will consider whether Noyce has shown manifest injustice by individually analyzing the three factors enunciated in *Vontress.*

*Are there persuasive reasons or circumstances that prevented Noyce from filing his K.S.A. 60-1507 motion within the time limitation?*

Noyce asserts there were "extenuating circumstances" that prevented him from filing a direct appeal in 1999 to address his counsel's ineffectiveness. In particular, Noyce asserts that "he did not directly appeal his convictions because trial counsel told him that he could not appeal from a guilty plea." Noyce claims this allegedly improper advice "provided reasons for the delay in filing his petition." The State counters:

> "assuming that [Noyce] did not know that he could bring his claims until November of 2013, [the date he filed his motion to correct illegal sentence] at no point below, or on appeal, does movant offer an explanation for waiting until April of 2015 to file his K.S.A. 60-1507 petition."

As an appellate court, we are at a disadvantage in analyzing this factor because we do not have any district court findings about defense counsel's advice to Noyce regarding whether he could appeal his convictions or sentences, and whether he could make a postconviction attack on those convictions or sentences (and, if so, under what

circumstances). Moreover, the record on appeal does not contain a transcript of the plea hearing or sentencing which could at least shed some light on what, if anything, the trial judge and defense counsel personally informed Noyce regarding these matters. Such are the limitations inherent in the district court's summary ruling.

As mentioned earlier, district courts are required to hold evidentiary hearings unless the K.S.A. 60-1507 motion, files and records "*conclusively* show the [movant] is not entitled to relief." (Emphasis added.) K.S.A. 60-1507(b); Supreme Court Rule 183(f). Depending on a myriad of unknown facts—especially the specific advice provided by trial counsel—Noyce's reason for not filing his K.S.A. 60-1507 motion in a timely manner may be meritorious. Additionally, obtaining these facts, if any, would also shed light on the merits of whether defense counsel was ineffective.

Given the paucity of the record, and lack of briefing on the legal issues, we are reluctant to peremptorily discount Noyce's claim that he failed to raise the ineffective assistance of counsel issue in a timely fashion because of incorrect legal advice provided by his attorney. At this stage in the proceedings, Noyce has made a colorable claim to excuse his failure to meet the time period requirement of K.S.A. 60-1507(f)(1).

We find support for our conclusion in *Oliver*, 2016 WL 1391757, at *1. In Oliver, the movant entered a guilty plea, was sentenced and did not appeal. Subsequently, Oliver filed a pro se motion to correct an illegal sentence which was summarily denied by the district court because it raised a constitutional issue that was not appropriate to a K.S.A. 22-3504 motion. 2016 WL 1391757, at *1.

Oliver then filed an untimely K.S.A. 60-1507 motion which was summarily denied by the district court under the provisions of K.S.A. 60-1507(f). On appeal to our court, we stated that when a movant "contends that his attorney failed to file or perfect a direct appeal, the [movant] need not show the appeal would have [been] successful, but only

that he would have appealed had he received effective assistance of counsel." *Oliver*, 2016 WL 1391757, at *7 (citing *State v. Patton*, 287 Kan. 200, 223-24, 195 P.3d 753 [2008]). The *Oliver* court then reversed and remanded the case to the district court so it could "appoint counsel for Oliver and conduct an evidentiary hearing on the record on [his] K.S.A. 60-1507 claims" because Oliver alleged that his attorney improperly advised him that he could not appeal his guilty plea and the accuracy of this claim could not be determined from the record alone. 2016 WL 1391757, at *6-7.

Similar to *Oliver*, Noyce claims that his counsel failed to file or perfect a direct appeal and that he would have pursued such an appeal had he received effective assistance of counsel. Because the district court did not hold an evidentiary hearing, we do not have any testimony to review regarding whether defense counsel effectively represented Noyce, and the record is devoid of facts which establish what advice Noyce received from Evans about his right to an appeal. Consequently, there is a need for appointment of counsel, briefing and an evidentiary hearing because the motion, files, and records of the case do not conclusively show that Noyce is not entitled to relief.

*Do the merits of the movant's claims raise substantial issues of law or fact deserving the district court's consideration?*

As detailed in the Factual and Procedural Background section of this opinion, for the first time in this litigation, Noyce's K.S.A. 60-1507 motion raised numerous infirmities regarding his counsel's legal assistance. Under similar procedural circumstances presented in this case, our Supreme Court has stated: "A K.S.A. 60-1507 movant can overcome the failure to raise an issue at trial or on direct appeal and demonstrate exceptional circumstances by persuading a court that there was ineffective assistance of trial counsel in failing to object regarding an issue." *Trotter*, 288 Kan. 112, Syl. ¶ 9, 200 P.3d 1236 (2009). As mentioned earlier, Trotter made such an assertion in his K.S.A. 60-1507 motion.

When a defendant's K.S.A. 60-1507 motion is premised on an allegation of ineffective assistance of counsel, the defendant must satisfy the constitutional standards set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011). Under the *Strickland* test, the movant must establish (1) counsel's performance was deficient, *i.e.*, counsel's performance fell below an objective standard of reasonableness, considering all the circumstances, and (2) there is "'a reasonable probability'" that, but for counsel's error(s), the result of the proceeding would have been different, *i.e.*, counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Fuller v. State*, 303 Kan. 478, 486, 363 P.3d 373 (2015). "'[A] reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation omitted.]" *State v. Cheatham*, 296 Kan. 417, 432, 292 P.3d 318 (2013).

When a movant claims that ineffective assistance preceded a guilty plea—as in this case on appeal—prejudice means a reasonable probability that, but for counsel's deficient performance, the defendant would have insisted on going to trial instead of entering the plea. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014).

We are persuaded that one issue in particular is substantial and warrants appointment of counsel, additional briefing, and an evidentiary hearing. In his K.S.A. 60-1507 motion, Noyce contends that his first-degree murder conviction is illegal because the capital murder and first-degree murder convictions both punished him for Clifford's murder. In short, the convictions were multiplicitous. Noyce claims that Evans was ineffective for not informing him of the multiplicity problem and for encouraging him to enter a guilty plea to both the capital murder charge and the lesser-included offense of first-degree murder. In support of his ineffective assistance claim, Noyce highlights that "trial counsel was the same attorney in *State v. Scott*, [286 Kan. 54, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016)] and had challenged and filed motions raising a multiplicitous argument in that case."

In order to resolve the question of whether Noyce's multiplicity argument raises a substantial issue of law or fact, it is necessary to review our Supreme Court's opinion in Scott with attention to the legal arguments and timeframes involved in both the *Scott* and *Noyce* litigation.

Similar to the case on appeal, in *Scott*, the defendant was convicted of capital murder of Elizabeth Brittain with the premeditated killing of Douglas Britain as part of the same act or transaction connected together or constituting parts of a common scheme or course of conduct. See K.S.A. 21-3439(a)(6). Scott was also convicted of the premeditated first-degree murder of Douglas Brittain. See K.S.A. 21-3401(a).

Scott was represented by the Capital Appellate Defenders Office. On direct appeal, Scott argued that his convictions for capital murder and first-degree premeditated murder were multiplicitous because he received multiple punishments for the same crime which violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. *Scott*, 286 Kan. at 65. Applying K.S.A. 21-3107(2)(d) (Furse), our Supreme Court held that the first-degree premeditated murder of Douglas Britain was a crime necessarily proven if the crime of capital murder of Elizabeth Brittain and premeditated first-degree murder of Douglas Britain as part of the same act or transaction together as part of a common scheme were proven. Based on this legal analysis, the Supreme Court held that Scott's conviction for the first-degree premeditated murder of Douglas Britain was multiplicitous and, as a result, the conviction was reversed. *Scott*, 286 Kan. at 68.

Noyce asserts that the capital defender's office which successfully argued the multiplicity issue in *Scott* was ineffective in his case because defense counsel did not raise a similar argument prior to Noyce's pleas to multiplicitous murder charges. Whether Noyce's defense counsel should have raised a similar multiplicity argument as was raised in *Scott* depends on numerous factors.

At the outset, the timing of the two criminal litigations is relevant. In *Scott*, the murders occurred on September 13, 1996. In Noyce, the murders occurred 2 years later, on September 14, 1998. The appellant's brief in *Scott* addressing the multiplicity argument which Noyce reprises in his K.S.A. 60-1507 motion was filed on March 8, 2002—about 3 years after Noyce's guilty pleas. Finally, our Supreme Court's opinion reversing one of Scott's murder convictions on multiplicity grounds was filed on May 16, 2008—about 9 years after Noyce pled guilty in keeping with the plea agreement.

Considering the timeframes at issue, it appears the successful multiplicity argument raised in *Scott* did not become precedential until years after Noyce's pleas. What is not clear, however, is whether the multiplicity argument successfully raised in *Scott* was previously considered or should have been considered earlier when Noyce obtained court-appointed counsel from the State of Kansas Death Penalty Defense Unit and began negotiating his plea agreement. This is a question which is appropriate for an evidentiary hearing rather than speculation by an appellate court.

We are also apprised of our Supreme Court's opinion in *Trotter*, another capital murder case wherein the defendant appealed the summary denial of his K.S.A. 60-1507 motion, in part, on multiplicity grounds similar to those raised in *Scott*, and now by Noyce. In *Trotter*, after engaging in an extended analysis of this legal issue, and giving particular consideration to *Scott*, our Supreme Court held: "Trotter's two convictions arising out of the double homicide, one for capital murder based upon the intentional and premeditated killing of more than one person under K.S.A. 21-3439(a)(6) and the other for first-degree premeditated murder under K.S.A. 21-3401(a) of one of those victims, are improperly multiplicitous." *Trotter*, 288 Kan. at 124. As a result, the Supreme Court reversed Trotter's premeditated murder conviction. In sum, Noyce has raised a colorable claim of ineffectiveness that implicates the potential reversal of his premeditated murder conviction.

With regards to the prejudice prong of the *Strickland* ineffective assistance of counsel test, Noyce contends that if he had known that his murder convictions were multiplicitous, he would not have agreed to the plea bargain and would have directed his counsel to renegotiate the plea agreement or proceed to trial. At this stage of the proceedings, this claim suffices to make a showing of prejudice. See *Kelly*, 298 Kan. at 970. Additionally, given that Noyce was sentenced to a consecutive hard 40 life sentence for the premeditated murder of his son, the prejudice of a substantial sentence of imprisonment for a multiplicitous conviction is evident.

In summary, by raising the multiplicity of his two murder convictions, Noyce has raised a substantial issue of law and fact that deserves the appointment of legal counsel, full briefing, an evidentiary hearing, and the district court's consideration.

We have also considered the numerous other claims of ineffectiveness raised by Noyce. Upon our independent review of Noyce's K.S.A. 60-1507 motion, the supporting record, and appellate briefs, we do not find these other claims raise substantial issues of law or fact.

*Has Noyce set forth a colorable claim of actual innocence?*

On appeal, Noyce claims factual innocence because he was originally going to pursue an alibi defense but other defense counsel focused on an "insanity and/or psychological defense." Attached to his K.S.A. 60-1507 motion is an affidavit in which Noyce swears he was in the residence at the time of the fire which killed his wife and son but that he was innocent of setting the fire or causing their deaths. In short, under the circumstances wherein he previously has pled guilty to setting the fire and murdering his wife and son, Noyce only presents conflicting legal defenses to support his claim of actual innocence. Upon our review, we are convinced that Noyce has not made a colorable claim of factual innocence in this motion.

Applying the three *Vontress* factors to the totality of circumstances presented in this K.S.A. 60-1507 motion, we find that Noyce has shown that extension of the 1-year time period for filing this motion is necessary to prevent a manifest injustice with regard to two issues: (1) Did Noyce's attorney provide ineffective assistance of counsel in advising the defendant he could not appeal his convictions and sentences? (2) Did Noyce's counsel provide ineffective assistance of counsel by failing to advise him that his guilty plea to premeditated murder under the circumstances would result in a multiplicitous conviction for the premediated murder of Clifford Noyce? Upon remand, the district court is directed to appoint counsel for Noyce and conduct an evidentiary hearing on these two issues.

Affirmed in part, reversed in part, and remanded with directions.