

No. 08-101300-A

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**IN THE COURT OF APPEALS  
OF THE STATE OF KANSAS**

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**STATE OF KANSAS,**  
Appellee

vs.

**CORY T. ELKINS,**  
Defendant, Appellant

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**BRIEF OF APPELLEE**

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Appeal from the District Court of Douglas County, Kansas  
Honorable Michael J. Malone, District Court Judge  
District Court Case No. 2007 C R776

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**TABLE OF CONTENTS**

NATURE OF THE CASE.....1

STATEMENT OF THE ISSUE.....1

STATEMENT OF THE FACTS.....2

ARGUMENTS AND AUTHORITIES.....4

**Issue 1: Elkins’ Sixth Amendment right to confrontation was not implicated by the district court’s admission of evidence of a DNA CODIS database “hit” because the evidence was non-testimonial. ....4**

*State v. Appleby*, \_\_\_ Kan. \_\_\_, 221 P.3d 525, 550 (2009) (Case No. 98,017, filed Nov. 20, 2009).....5, 8

*Crawford v. Washington*, 451 U.S. 36, 42, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).5, 6

*Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009).....6

*State v. Laturner*, 289 Kan. 727, 218 P.3d 23 (2009).....6, 7

*United States v. Lombardozi*, 491 F.3d 61, 73 (2d Cir. 2007).....8

*United States v. Henry*, 472 F.3d 910, 914 (D.C.Cir. 2007).....8

*State v. Lewis*, 235 S.W.3d 136, 151 (Tenn. 2007).....8

*State v. Lackey*, 280 Kan. 190, 201, 120 P.3d 332 (2005).....10

*State v. Smallwood*, 264 Kan, 69, 81, 955 P.2d 1209 (1998).....10

**Issue 2: The State complied with defense discovery requests and Elkins was not denied his right to a fair trial. ....11**

*State v. Albright*, 283 Kan. 418, 425, 153 P.3d 497 (2007).....11

K.S.A. 22-3423(c).....11

*California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S.Ct. 2528 (1984)...11

K.S.A. 22-3212(g).....	11
<i>State v. Villa</i> , 221 Kan. 653, 656, 561 P.2d 428 (1977).....	12
<i>State v. Smallwood</i> , 264 Kan, 69, 81, 955 P.2d 1209 (1998).....	13
<b>Issue 3: The district court did not err when it denied Elkins’ motion for mistrial based on KBI analyst Schueler’s reference to Elkins’ DNA being in an “offender index.”</b> .....	16
K.S.A. 22-3423(c).....	16
<i>State v. Albright</i> , 283 Kan. 418, 425, 153 P.3d 497 (2007).....	16
<i>State v. Herbert</i> , 277 Kan. 61, 92, 82 P.3d 470 (2004).....	16
<i>State v. Smallwood</i> , 264 Kan, 69, 81, 955 P.2d 1209 (1998).....	17
<b>Issue 4: The State did not commit prosecutorial misconduct while cross-examining Dr. Stetler because the questions were proper cross-examination.</b> .....	17
<i>State v. Houston</i> , 289 Kan. 252, 265, 213 P.3d 728 (2009).....	17-18
K.S.A. 60-401(b).....	19
<i>State v. Smallwood</i> , 264 Kan, 69, 81, 955 P.2d 1209 (1998).....	20-21
<b>Issue 5: Cumulative error did not deprive Elkins of a fair trial. No trial errors were committed in Elkins’ case; however, if error exists, any errors were harmless both singly and cumulatively</b> .....	21
<i>State v. Houston</i> , 289 Kan. 252, 277, 213 P.3d 728 (2009).....	21
<b>Issue 6: The district court’s use of Elkin’s criminal history to calculate his sentence without submitting that criminal history to a jury was constitutionally permissible</b> .....	22
<i>State v. Ivory</i> , 273 Kan. 44, 46, 41 P.3d 781 (2002).....	22, 23
K.S.A. 21-4704.....	23
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).....	23
<i>State v. Rice</i> , ___ Kan. ___, 222 P.3d 1018 (Case No. 102,035, filed January 29, 2010).....	23

**Issue 7: The district court did not violate Elkins’ constitutional rights when it sentenced him to a presumptive sentence within the guidelines grid box and, as a result, this court is without jurisdiction to review the sentence.....24**

*State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).....24, 25, 26

K.S.A. 21-4704.....24, 25

*Cunningham v. California*, 549 U.S. 270, 166 L.Ed. 2d 856, 127 S. Ct. 856 (2007).....25

CONCLUSION.....26

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**STATE OF KANSAS,**  
Plaintiff, Appellee

vs.

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Defendant, Appellant

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**BRIEF OF APPELLEE**

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NATURE OF THE CASE

On May 16, 2008, a jury convicted Cory Elkins of four counts of rape pursuant to K.S.A. 21-3502(a)(1)(A) and three counts of aggravated criminal sodomy pursuant to K.S.A. 21-3506(a)(3)(A). The district court sentenced Elkins to 576 months' incarceration. Elkins timely appeals his convictions and sentence.

STATEMENT OF THE ISSUES

**Issue 1: Elkins' Sixth Amendment right to confrontation was not implicated by the district court's admission of evidence of a DNA CODIS database "hit" because the evidence was non-testimonial.**

**Issue 2: The State complied with defense discovery requests and Elkins was not denied his right to a fair trial.**

**Issue 3: The district court did not err when it denied Elkins' motion for mistrial based on KBI analyst Schueler's reference to Elkins' DNA being in an "offender index."**

**Issue 4: The State did not commit prosecutorial misconduct while cross-examining Dr. Stetler because the questions were proper cross-examination.**

**Issue 5: Cumulative error did not deprive Elkins of a fair trial. No trial errors were committed in Elkins' case; however, if error exists, any errors were harmless both singly and cumulatively.**

**Issue 6: The district court's use of Elkins' criminal history to calculate his sentence without submitting that criminal history to a jury was constitutionally permissible.**

**Issue 7: The district court did not violate Elkins' constitutional rights when it sentenced him to a presumptive sentence within the guidelines grid box and, as a result, this court is without jurisdiction to review the sentence.**

### STATEMENT OF THE FACTS

On July 10, 1994, J.L. decided to take a nap in the living room of her new apartment. (R. VI, 239, 242.) She was in the process of moving from one apartment in Lawrence, Kansas to another apartment also in Lawrence. (R. VI, 240.) She laid down on a couch in the living room, and awoke a few hours later to a man on top of her. (R. VI, 243.) The man attacked and struggled with J.L., knocking her to the floor. (R. VI, 250-52.) The entire attack lasted several hours. (R. VI, 254.) After the man left, J.L. ran to the house of a nearby friend who took her to the police station. (R. VI, 264.) J.L. could not identify her attacker for the police. (R. VII, 299.) J.L. went to the hospital following the police station, where a sexual assault exam was conducted. (R. VI, 266.)

On September 22, 1995, E.L. was visiting some friends in Lawrence, Kansas. (R. VII, 398-99.) At one point, she became separated from the friend with whom she planned to stay the night. (R. VII, 400.) However, E.L. had her friend's keys to the apartment, and ended up staying in the apartment alone that night. (R. VII, 401.) While sleeping, E.L. awoke to a man on top of her and covering her mouth. (R. VII, 402.) She tried to throw the man off of her but decided to stop struggling when the man began hitting and

punching her. (R. VII, 403.) The man moved E.L. back to the bed, removed her clothing, and raped her. (R. VII, 405-11.) After the attack, E.L. drove to a friend's house who then called the police. (R. VII, 412.) Like J.L., E.L. was unable to identify her attacker. (R. VII, 405.) Once at the hospital, E.L. underwent a sexual assault exam. (R. VII, 413.)

The Kansas Bureau of Investigation (KBI) conducted DNA analysis on the samples obtained from both the J.L. and E.L. rape kits. (R. IX, 536.) KBI analyst Sindey Schueler performed some DNA analysis for both cases. (R. IX, 536.) Schueler's DNA analysis on the samples from J.L.'s and E.L.'s rape kits generated male genetic profiles, which were entered into the CODIS database. (R. IX, 254-58, 560-61.) In 2006, the CODIS database showed a forensic hit between the male profiles from the J.L. and E.L. cases, indicating that the profile may have been from the same man. (R. XI, 560-61.) In 2007, there was another CODIS hit, this time to Cory Elkins' DNA profile which had previously been entered into CODIS. (R. IX, 563, 570-71.)

KBI alerted law enforcement officials of the possibility that Elkins was a suspect in the two rapes of J.L. and E.L. (R. IX, 571.) Lawrence Police Department officers went to California to arrest Elkins and obtained a DNA sample from Elkins at that time. (R. VII, 456-57.) KBI tested Elkins' DNA and matched his DNA profile to the profiles discovered from the two rape victims. (R. IX, 571-78.) The State charged Elkins with three counts of rape and two counts of aggravated criminal sodomy for the attack against

J.L., and one count of rape and one count of sodomy for the attack against E.L. (R. I, 39-40.)

Before the trial began, Sindy Schueler became aware that she had contaminated DNA evidence from E.L.'s case. (R. IX, 598-99.) Elkins' theory of defense at trial was, not only did Schueler contaminate the evidence, but she likely cross-contaminated the evidence from J.L.'s case with evidence from E.L.'s case. (R. X, 960-61, 967, 969, 978.) After a trial, the jury convicted Elkins on all four counts of rape and the three counts of aggravated criminal sodomy. The district court denied Elkins' motion for a new trial. (R. IV, 33.)

At sentencing, the district court found Elkins' criminal history to fall within a category B. (R.VIII, 3.) Elkins received an aggravated sentence of 288 months' imprisonment on count one of rape. (R. VIII, 41-42.) For each counts two through seven, Elkins received an aggravated sentence of 77 months jail. (R.VIII, 42.) All sentences were to be served consecutively, for a total of 576 months incarceration. (R.VII, 43.) Elkins timely appeals his convictions and his sentence. (R. II, 277.)

### ARGUMENTS AND AUTHORITIES

**Issue 1: Elkins' Sixth Amendment right to confrontation was not implicated by the district court's admission of evidence of a DNA CODIS database "hit" because the evidence was non-testimonial.**

#### Standard of Review

Elkins challenges the district court's admission of evidence of a DNA CODIS database "hit." (Appellant's Brief, 4.) An appellate court applies a de novo standard of

review when considering a challenge to the legal basis of the trial court's admission of evidence, such as a challenge alleging evidence was admitted in violation of the Confrontation Clause. *State v. Appleby*, \_\_\_ Kan. \_\_\_, 221 P.3d 525, 550 (2009) (Case No. 98,017, filed Nov. 20, 2009).

#### Discussion

The district court did not violate Elkins' confrontation rights when it admitted evidence of a DNA CODIS database hit. Schueler, the KBI analyst who conducted DNA analysis for the J.L. and E.L. rape cases, testified at trial regarding the DNA analysis she conducted in the two unknown suspect rape cases. (R. IX, 506-644). As Schueler testified, one purpose of conducting DNA analysis is to generate a genetic profile that can then be compared to the genetic profiles within the CODIS database. (R. IX, 544) In 2006, the unknown suspect DNA profiles from the J.L. and E.L. rape cases produced a forensic hit, indicating they possibly came from the same suspect. (R. IX, 560-561). Then, in 2007, the unknown suspect DNA profiles hit on Cory Elkins DNA profile, which had been previously entered into CODIS by a lab examiner in California. (R.IX, 570-71, 586). Schueler alerted Lawrence law enforcement officials, who subsequently arrested Elkins and obtained a sample of his DNA for KBI analysis. (R.VII, 456-57).

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Crawford v. Washington*, 451 U.S. 36, 42, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The Sixth Amendment is applied to the states through the Fourteenth Amendment. In *Crawford*, the United States Supreme Court defined the

scope of the Sixth Amendment confrontation rights in holding that a criminal defendant's right to confront witnesses applies to those witnesses who bear testimony against him. *Crawford*, 451 U.S. at 51. Testimony is defined as "a solemn declaration or affirmation made for purpose of establishing or proving some fact." *Crawford*, 451 U.S. at 51. Testimonial statements of witnesses absent from trial are admissible over a Confrontation Clause objection only when the declarant is unavailable and the defendant has had a prior opportunity to cross examine the declarant. *Crawford*, 451 U.S. at 68.

Elkins contends that the California lab examiner's analysis of his DNA that led to the initial match between his DNA in CODIS and the DNA from the two rape cases is a testimonial statement implicating the Confrontation Clause. (Appellant's Brief, 8.) In support of his argument, Elkins cites recent decisions of both the United States Supreme Court and the Kansas Supreme Court involving confrontation rights and evidence from laboratory analysts. See *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009); *State v. Laturner*, 289 Kan. 727, 218 P.3d 23 (2009).

In *Melendez-Diaz*, the United States Supreme Court held that the admission of a laboratory certificate of analysis without the analyst's testimony violated a criminal defendant's rights under the Confrontation Clause because the documents, while called "certificates", were clearly affidavits. *Melendez-Diaz*, 174 L. Ed. 2d at 321, 322. In *Laturner*, the Kansas Supreme Court relied on *Melendez-Diaz* to conclude that certain KBI forensic laboratory certificates were testimonial. *Laturner*, 289 Kan. at 734. In *Laturner*, the laboratory certificate admitted by the court included the following features:

a certified statement of the laboratory analyst attesting to the chain of evidence procedures and stating her qualifications and experience; an explanation of the approved methods and properly functioning equipment that were used during the analysis; as well as a statement from the analyst declaring under penalty of perjury that the information contained within the certificate was correct. *Laturner*, 289 Kan. at 734. Based on the nature of the certificate, the court concluded that it was intended to be and was “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination...”, thus implicating the Confrontation Clause. *Laturner*, 289 Kan. at 734. Absent a showing that the KBI analyst who completed the certificate was unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine the analyst, the admission of the certificate violated the defendant’s confrontation rights. *Laturner*, 289 Kan. at 736, 743.

Unlike the laboratory certificates at issue in *Laturner*, the evidence admitted against Elkins was not the functional equivalent of in-court testimony. The “hit” generated by CODIS, when the DNA profiles from the two unknown suspect rape cases of J.L. and E.L. hit on Elkins’ DNA profile, was routine, computer-generated data rather than an affirmation or declaration made for proving some fact. The data received by KBI from CODIS did not include any statements regarding the evidentiary procedures, methods, or equipment used in generating the data, nor did it include information regarding the CODIS analyst’s professional experience. It merely alerted the KBI of a possible match. Equally as important, unlike the certificates at issue *Laturner*, the “hit” generated by the CODIS database and received by KBI was not included within an

affidavit or sworn statement from CODIS, or in any other format that could be considered the legal equivalent to in-court testimony.

Rather, the evidence admitted against Elkins is more akin to the evidence at issue in *State v. Appleby*, \_\_\_ Kan. \_\_\_, 221 P.3d 52. In *Appleby*, the defendant objected to the trial court's admission of data from CODIS; data that the KBI laboratory analyst testifying at trial relied upon to reach her conclusion regarding the frequency of specific DNA profiles. *Appleby*, 221 P.3d at 549. The *Appleby Court* concluded that population frequency data and statistical programs used to make that population data meaningful, such as CODIS, are non-testimonial. *Appleby*, 221 P.3d at 551. First, the Kansas Supreme Court noted that the DNA evidence itself was non-testimonial because it was physical evidence. *Appleby*, 221 P.3d at 551. Second, placing the DNA evidence into the CODIS database with other DNA profiles did not transform it into testimonial evidence, even if the purpose of pooling the profiles was to allow comparisons that identify criminals. *Appleby*, 221 P.3d at 551. The court noted that several other courts have reasoned that the "...Confrontation Clause is not violated if materials that form the basis of an expert's opinion are not submitted for the truth of their contents but are examined to assess the weight of the expert's opinion." *Appleby*, 221 P.3d at 552, citing *United States v. Lombardozi*, 491 F.3d 61, 73 (2d Cir. 2007); *United States v. Henry*, 472 F.3d 910, 914 (D.C.Cir. 2007); *State v. Lewis*, 235 S.W.3d 136, 151 (Tenn. 2007). The court concluded that, although the CODIS data forms the basis of the expert's opinion, it is the opinion that testimonial and subject to cross-examination. *Appleby*, 221 P.3d at 551.

Here, as in *Appleby*, the district court allowed a KBI analyst to testify regarding CODIS data; specifically, the CODIS “hit.” Under *Appleby*, the State was not required to make available the California lab examiner who obtained and analyzed Elkins’ DNA and placed it into CODIS because neither Elkins’ DNA nor the act of placing it into CODIS was testimonial evidence. Moreover, the “hit” generated by CODIS was the result of the CODIS database programming; no CODIS analyst actually matched Elkins’ DNA to the DNA found in the J.L. and E.L. rape cases. Therefore, the district court did not err in admitting evidence of the CODIS hit without proving the California lab analyst unavailable or providing a prior opportunity to cross examine that analyst.

Additionally, the record on appeal shows that the prosecution presented the CODIS data, through the testimony of Schueler, as establishing an investigative lead and nexus between law enforcement conduct and Elkins. (R. IV, 30-32). Schueler’s analysis of the DNA from the J.L. and E.L. rape cases that “hit” on Elkins’ DNA in CODIS provided the basis for KBI alerting law enforcement officials of Elkins being a possible suspect in the rape cases. (R.IX, 570). After comparing Elkins’ DNA obtained by Kansas law enforcement to that which was found in the two rape cases, Schueler concluded that the DNA matched. (R.IX, 572-74, 587). Elkins had the opportunity to confront Schueler regarding her analysis of the DNA from the rape cases and the results that she entered into CODIS which produced the “hit”, and did confront Schueler by raising questions of contamination and the reliability of her analysis. (R.IV, 31). Consequently, Elkins’ Sixth Amendment confrontation rights were not violated.

### Harmless error analysis

A violation of the Sixth Amendment right to confrontation is subject to constitutional harmless error analysis. *State v. Lackey*, 280 Kan. 190, 201, 120 P.3d 332 (2005). Under this analysis, convictions will not be set aside for minor errors having little, if any, likelihood on changing the actual result of the trial. *State v. Smallwood*, 264 Kan, 69, 81, 955 P.2d 1209 (1998). Before a constitutional error can be held harmless, the reviewing court must be able to declare the error was harmless beyond a reasonable doubt. *Smallwood*, 264 Kan. at 81.

In this case, any error in admitting the CODIS hit was harmless. Although a California lab initially analyzed Elkins' DNA and placed it into CODIS, KBI also analyzed Elkins' DNA when it obtained a sample upon his arrest and the results showed that Elkins' DNA matched that of the two unknown suspect rape cases. (R.IX, 572-74, 587). Therefore, even if the jury had not heard evidence regarding a hit on CODIS, subsequent testing conducted by KBI showed Elkins' DNA matched the DNA from the rape cases and there is little likelihood the verdict would have been different. Elkins contends that the CODIS data appeared to validate the KBI analysis. (Appellant's Brief, 10.) Yet, the State relied entirely on analysis conducted by KBI and never argued that the CODIS hit corroborated the KBI DNA analysis from the J.L. and E.L. rape cases. (R. IV, 22, 31-32). Also, the district court limited the State's use of the CODIS data by prohibiting referring to the hit as a "match." (R.IV, 24, 30). Thus, it can be said beyond a reasonable doubt, the admission of the CODIS hit had little to no effect on the jury's verdict.

**Issue 2: The State complied with defense discovery requests and Elkins was not denied his right to a fair trial.**

Standard of Review

Elkins contends that the State failed to comply with his discovery requests for documentation to support Schueler's conclusion that she likely contaminated the evidence in E.L.'s case in 1996, thereby compromising his defense and denying him a fair trial. Elkins argues that the failure to comply warranted a mistrial and that the district erred by not granting his motion for mistrial. (Appellant's Brief, 10.)

A district court's ruling on a motion for mistrial is reviewed under an abuse of discretion standard. *State v. Albright*, 283 Kan. 418, 425, 153 P.3d 497 (2007); K.S.A. 22-3423(c). "A court abuses its discretion when no reasonable person would take the same view." 283 Kan. at 426. A court of appeals will not find the district court abused its discretion in denying a motion for mistrial unless the defendant shows substantial prejudice. 283Kan. at 426.

Discussion

Under the Due Process Clause of the Fourteenth Amendment, a criminal defendant must have a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S.Ct. 2528 (1984). Kansas law provides a criminal defendant a right to discovery and inspection in criminal proceedings, and gives a district court broad discretion to impose sanctions for a party's failure to comply with discovery orders. Pursuant to K.S.A. 22-3212(g),

"if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed

to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.”

A failure to disclose by the prosecution does not warrant automatic mistrial, and does not warrant automatic exclusion of the evidence. *State v. Villa*, 221 Kan. 653, 656, 561 P.2d 428 (1977).

Denial of Elkins’ motion for mistrial was appropriate because the State complied with discovery. While Schueler was performing DNA analysis on E.L.’s rape case, the DNA evidence was contaminated by Schueler’s own DNA. (R. IX, 599). Prior to trial, Elkins filed a motion in limine contending that the defense did not receive documentation during discovery supporting Schueler’s conclusion that she likely contaminated slides from E.L.’s rape kit in 1996 and argued that the State should be prohibited from putting on evidence regarding Schueler’s conclusion. (R.I, 132-36; R.XX, 19). The State informed the court that it had provided the defense with all documentation of DNA test results that it had from KBI. (R.XX, 33). Ultimately, the district court ruled that it would permit exploration of all probabilities of contamination, which would then be subject to cross-examination. (R. VI, 4).

At trial, during direct examination, KBI analyst Schueler testified that she had handled the slides from E.L.’s rape kit in 1996 and that, in her opinion, 1996 is when the contamination occurred. (R. IX, 603-04). Elkins objected and moved for a mistrial,

arguing that it appeared Schueler was reading from some document during her direct examination, but that the defense was not given documentation of tests performed by Schueler in 1996 and thus was surprised by her testimony. (R. IX, 603-04). The State responded that it had provided all documentation of DNA test results, and that Schueler, on direct, was referring to the date noted on the evidence envelope itself and not any reports or documentation from tests performed. (R. IX, 605). The motion for mistrial was denied. (R. IX, 606).

It is clear that the State did not possess the documentation on Schueler's 1996 testing of E.L.'s rape kit slides that Elkins' sought. As the record on appeal shows, documentation of the date Schueler examined E.L.'s slides was placed on the envelope in which the slides were contained, and the State had no documents with that information that could be turned over to the defense. (R. IX, 605-06). As Schueler testified, much of the documentation from E.L.'s case was missing. (R. IX, 615). Finally, the district court never ruled that the State failed to comply with a discovery order so as to warrant imposing any sanctions. Therefore, it was not an abuse of discretion for the district court to deny Elkins' motion for a mistrial as a discovery sanction.

#### Harmless error analysis

Even if this court finds the State failed to provide necessary information, any error was harmless. Convictions will not be set aside for minor errors having little, if any, likelihood on changing the actual result of the trial. *State v. Smallwood*, 264 Kan, 69, 81, 955 P.2d 1209 (1998).

Although Elkins did not have full information regarding Schueler's 1996 handling of E.L.'s rape kit slides, this lack of information most likely did not affect the outcome of the trial. First, despite her opinion that contamination occurred in 1996, Schueler acknowledged that the contamination of the slides could have occurred in 2004. (R. X, 810). Also, Elkins highlighted weaknesses in Schueler's opinion on when contamination occurred by questioning her ability to reach that conclusion in light of the missing documentation from E.L.'s file. (R. IX 650-51, 661). The defense expert, Dr. Stetler, also testified that it would be difficult to reach a conclusion on the issue without complete documentation. (R. X, 941-42).

Second, the failure to provide information regarding Schueler's handling of E.L.'s slides in 1996 had little, if any, impact on the jury's decision because whether Schueler handled the slides in 1996 likely did not affect the defense's theory of cross-contamination. Elkins contends the lack of information regarding Schueler's handling of the slides prejudiced the defense by leading it to pursue a theory of defense based on erroneous assumptions. (Appellant's Brief, 14.) According to Elkins' defense, because male DNA was not found during the 1996 testing of E.L.'s slides, but was found in 2004 when Schueler handled both J.L.'s and E.L.'s slides on the same day, it was likely that Schueler not only contaminated E.L.'s slides in 2004 but also cross-contaminated E.L.'s slides with DNA material from J.L.'s slides. Dr. Stetler testified that, "when one thing has been messed up...you assume there's a high probability other things have been messed up." (R. XI, 1055). According to Elkins' theory, cross-contamination resulted in

the presence of Elkins' DNA in E.L.'s slides when it previously had not been present. (R. X, 960-61, 967, 969, 978).

However, cross-contamination between the two victims' slides was a different type of contamination than the contamination of E.L.'s slides with Schueler's DNA. (R. IX, 629). Elkins' theory that Schueler likely cross-contaminated the DNA evidence in 2004, when she handled the slides from both the E.L. and J.L. rape cases on the same day in 2004, was no less plausible once Schueler testified that she handled E.L.'s slides in 1996 and likely contaminated those slides at that time. In fact, after Schueler's testimony, the defense expert still testified that there was ample opportunity for cross-contamination of the samples in 2004. (R. X, 961).

Finally, the State presented evidence to counter Elkins' cross-contamination theory. As Schueler testified, the STR method of analyzing DNA used by forensic laboratories in 2004 was more sensitive than the RLFP method of analysis used in 1996. (R. IX, 623-26; R. X, 808-10). The difference between the STR and RLFP methods provided an alternate explanation for how Elkins' DNA was not discovered in 1996 during analysis of E.L.'s slides, but was found in 2004. Consequently, the lack of full information did not mislead the defense into pursuing a cross-contamination theory because any failure by the State to provide the defense with information regarding Schueler's 1996 testing had no bearing on the likelihood that DNA material from J.L.'s slides could have contaminated DNA material present in E.L.'s slides in 2004. Any error was harmless beyond a reasonable doubt.

**Issue 3: The district court did not err when it denied Elkins’ motion for mistrial based on KBI analyst Schueler’s reference to Elkins’ DNA being in an “offender index.”**

Standard of Review

Elkins argues the district court erred by not granting his motion for mistrial when Schueler referred to the presence of Elkins’ DNA profile in an “offender index” while discussing CODIS. Pursuant to K.S.A. 22-3423(c), a district court has the discretion to order a mistrial if “prejudicial conduct... makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution.” *Albright*, 283 Kan. at 425.

A district court’s ruling on a motion for mistrial is reviewed under an abuse of discretion standard. *Albright*, 283 Kan. at 425. Judicial discretion is abused when no reasonable person would take the same view. *State v. Herbert*, 277 Kan. 61, 92, 82 P.3d 470 (2004). A defendant must show substantial prejudice before a reviewing court will find the district court abused its discretion. *Albright*, 283 Kan. at 426.

Discussion

The district court did not abuse its discretion by denying Elkins’ motion for mistrial when Schueler referred to an “offender index” because Elkins’ was not substantially prejudiced by the reference. Schueler made a single, isolated reference to an offender index, after which the district court instructed the State to inform Schueler not to use the term “offender” from that point forward. (R. IX, 569.) No further reference to an “offender index” was made, and the jury never heard information regarding what prior offense Elkins committed. Also, from the record it is clear that the

State did not solicit or expect Schueler's statement that the unknown DNA profiles from the two rape cases hit on a DNA profile in the "offender index." (R. IX, 567). Under the circumstances, Schueler's remark likely did not prejudice the jury against Elkins and a mistrial was not warranted.

#### Harmless error analysis

Convictions will not be set aside for minor errors having little, if any, likelihood on changing the actual result of the trial. *Smallwood*, 264 Kan. at 81. The inadvertent and isolated reference to an "offender index" was a minor error that had little likelihood of affecting the jury verdict in light of the DNA analysis that matched Elkins' DNA with the DNA profiles obtained from the J.L. and E.L. unknown suspect rape cases. Due to such direct evidence, any trial error on this issue was harmless beyond a reasonable doubt.

**Issue 4: The State did not commit prosecutorial misconduct while cross-examining Dr. Stetler because the questions were proper cross-examination.**

#### Standard of Review

Elkins next argues that the State committed prosecutorial misconduct by attempting to improperly shift the burden of proof to the defense during its cross-examination of Dr. Stetler. (Appellant's Brief, 18.)

Appellate courts apply a two-step analysis when considering an allegation of prosecutorial misconduct. First, the reviewing court shall determine "whether the comments were outside the wide latitude allowed in discussing the evidence." *State v.*

*Houston*, 289 Kan. 252, 265, 213 P.3d 728 (2009). Second, the reviewing court shall determine “whether the statements prejudiced the jury against the defendant and denied the defendant a fair trial, thereby requiring reversal.” 289 Kan. at 265.

Three factors are considered to determine whether a new trial is required: (1) whether the misconduct was gross and flagrant; (2) whether the misconduct demonstrates the prosecutor’s ill will; and (3) whether the evidence against the defendant is so direct and overwhelming that the misconduct likely had little weight in the minds of the jurors. 289 Kan. at 265.

#### Discussion

The prosecutor’s discussion with Dr. Stetler on the issue of retesting was a permissible discussion of the evidence. On appeal, Elkins contends that, while general questions regarding testing methods in Dr. Stetler’s own lab may have been relevant to his conclusions regarding KBI methods, any questions regarding whether Dr. Stetler himself retested the samples in Elkins case were irrelevant. (Appellant’s Brief, 20.) Elkins argues that the irrelevant inquiry establishes the prosecutor’s gross and flagrant conduct. (Appellant’s Brief, 21.)

During cross-examination, Stetler discussed his experience in working with crime scene samples. (R. X, 993-94). Stetler testified that in the past, he has received crime scene samples from forensic laboratories and sent the samples to private laboratories in order for the private laboratories to conduct their own DNA analysis on the samples. (R.

X, 995-97). Defense counsel made no objection at this time. The discussion of retesting crime scene samples continued:

“Q. [W]hen you’re talking about sending them out to the labs, are you talking about sending them to the labs unknown samples of DNA for identification purposes?

“A. Sometimes, yes.

“Q. And how many times over -- since 1993 have you done that?

“A. I really have no idea. It’s not something I keep a tally of. Maybe twenty times.

“Q. Maybe twenty times you’ve sent that out, okay. And are you talking about retesting samples?

“A. Sometimes it’s a retest, yes.” (R. XI, 1036).

Dr. Stetler testified that, in general, a research lab may want to repeat an analysis for quality assurance and validation purposes. (R. XI, 1043). At this time, the prosecutor asked, “And because you found fault with some of the results in this case, you didn’t ask to retest any of the samples in either of these cases, did you”? (R. XI, 1043). Defense counsel then objected to the prosecutor’s inquiry on the grounds that the questions improperly shifted the burden of proof because they implied the defense had an obligation to present evidence. (R. XI, 1044). The State responded that the inquiry was within proper cross-examination since Stetler testified that retesting is the best way to validate results. (R. XI, 1044). The district court agreed with the State and overruled the objection. (R. XI, 1045).

The prosecutor’s questions regarding retesting were relevant. Under K.S.A. 60-401(b), relevant evidence is evidence “having any tendency in reason to prove any material fact.” As Elkins’ states in his appeal, the entire theory of defense was that the KBI’s DNA test results were unreliable. (Appellant’s Brief, 18.) In Elkins’ case, Dr.

Stetler surmised that the KBI lab had “insufficient quality control for their testing methods resulting in a high probability of contamination.” Thus, whether Dr. Stetler performed any retesting in Elkins’ case was relevant to the theory of defense; a theory supported by Dr. Stetler’s expert opinion on the issue of KBI testing methods and reliability.

Finally, there is no evidence of ill will on the part of the prosecutor. During closing argument, the prosecutor stated that Dr. Stetler was only able to discuss the “risk”, “possibility”, and “chance” of cross-contamination. The prosecutor was not attempting to tell the jury that Dr. Stetler’s opinion was invalid for lack of support when she made this remark. Rather, the prosecutor was merely persuading the jury to give little weight to Dr. Stetler’s opinion that the KBI analysis was unreliable by pointing out the lack of support for his opinion. It was completely appropriate for the State to highlight the weaknesses in the defendant’s theory. As a result, neither the line of questioning nor the prosecutor’s closing remarks improperly shifted the burden of proof to the defense.

#### Harmless error analysis

Even assuming the questions of whether Dr. Stetler had retested the samples in Elkins’ case were improper questions, such questioning was harmless. Given the very low probabilities, as shown by the record, that the male DNA profiles discovered in the J.L. and E.L. slides were profiles of a man other than Elkins, any improper inquiry on the subject of retesting had little, if any, likelihood of having changed the result of the trial.

See *State v. Smallwood*, 264 Kan, 69, 81, 955 P.2d 1209 (1998). The evidence linking Elkins to the crime scene samples was too overwhelming. Therefore, any prosecutorial misconduct did not deny Elkins a fair trial and reversal is not required.

**Issue 5: Cumulative error did not deprive Elkins of a fair trial. No trial errors were committed in Elkins' case; however, if error exists, any errors were harmless both singly and cumulatively.**

#### Standard of Review

Elkins argues that the combination of trial errors in his case deprived him of a fair trial and requests as a remedy reversal of his conviction. (Appellant's Brief, 23.) "In the absence of any error, none can accumulate." *Houston*, 289 Kan. at 277. The existence of a single trial error is insufficient to accumulate. 289 Kan. at 277. When more than one error occurs, the combination of errors requires reversal when the totality of the circumstances show the defendant was substantially prejudiced and denied his right to a fair trial. 289 Kan. at 278.

#### Discussion

Elkins was not deprived his right to a fair trial because no trial errors occurred. The State refutes each issue that Elkins raises on appeal concerning alleged trial errors. To the extent this court finds any one of those errors occurred, the State argues that each error was harmless beyond a reasonable doubt, and refers the court to the arguments raised in issues I-IV.

Furthermore, any combination of errors did not substantially prejudice Elkins because the evidence against Elkins was overwhelming. The State presented testimony

from KBI analyst Schueler that Elkins' DNA matched the DNA obtained from investigation of the two unknown suspect rape cases of J.L. and E.L. Schueler testified that, in J.L.'s case, there would be a 1 in 131 quadrillion probability that the DNA came from a suspect other than Elkins. (R. IX, 577). Similarly, Schueler testified that in E.L.'s case, there would be a 1 in 122 quadrillion probability that the defendant's DNA and the DNA evidence from the rape came from different people. (R. IX, 57). Thus, under the totality of the circumstances, any errors that may have occurred did not substantially prejudice Elkins and he received a fair trial.

**Issue 6: The district court's use of Elkin's criminal history to calculate his sentence without submitting that criminal history to a jury was constitutionally permissible.**

#### Standard of Review

Elkin argues that his Sixth and Fourteenth Amendment rights were violated when the district court used his prior convictions to enhance his sentence under the Kansas Sentencing Guidelines Act (KSGA) without submitting his criminal history to the jury. (Appellant's Brief, 24.) An attack on the constitutionality of the KSGA is a question of law over which a court of appeal has unlimited review. *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002).

#### Discussion

The district court did not violate Elkins rights when it used his prior convictions to determine the appropriate presumptive sentence under the KSGA. Under the KSGA, K.S.A. 21-4704, the sentencing court considers the defendant's prior convictions as well as the current crime of conviction to calculate the presumptive sentence. *Ivory*, 273 Kan. at 46. As Elkins acknowledges, this issue has previously been decided adversely to him

by the Kansas Supreme Court in *Ivory*, when the court affirmed the Court of Appeals' finding that *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), did not apply when a defendant's criminal history score under the KSGA is used as a factor in determining the sentence. *Ivory*, 273 Kan. at 44. The *Ivory* Court held that, under the prior conviction exception to *Apprendi*, the fact of prior conviction need not be submitted to the jury and proven beyond a reasonable doubt. *Ivory*, 273 Kan. at 46. Moreover, as recently as January 2010, the Kansas Supreme Court upheld the use of criminal history for sentencing purposes without putting that history to a jury and proving it beyond a reasonable doubt. *State v. Rice*, \_\_\_ Kan. \_\_\_, 222 P.3d 1018 (Case No. 102,035, filed January 29, 2010).

Elkins includes this sentencing issue in his appeal from the district court's decision for possible federal review. Yet, not only has this state recently decided the issue adversely to Elkins, but as the court in *Ivory* noted, many state and federal courts have refused to extend *Apprendi* to hold that enhancing a sentence based on criminal history is unconstitutional. *Ivory*, 273 Kan. at 47. Therefore, the district court appropriately considered Elkins prior convictions in determining his presumptive sentence under KSGA and defendant's argument is without merit.

**Issue 7: The district court did not violate Elkins' constitutional rights when it sentenced him to a presumptive sentence within the guidelines grid box and, as a result, this court is without jurisdiction to review the sentence.**

#### Standard of review

Next, Elkins argues that the district court violated his Sixth and Fourteenth Amendment rights when it sentenced him under the KSGA to the aggravated sentence

within the grid box on all seven counts without requiring the jury to find the presence of any aggravating factors. (Appellant’s Brief, 25.) When a defendant challenges the constitutionality of his sentence in light of *Apprendi*, the court will consider the issue on direct appeal despite the defendant having received a presumptive sentence. *State v. Johnson*, 286 Kan. 824, 842, 190 P.3d 207 (2008). The construction of KSGA and determination of its constitutionality are a question of law subject to unlimited review on appeal. *Johnson*, 286 Kan. at 842. A statute is presumed constitutional and all doubts must be resolved in favor of its validity. *Johnson*, 286 Kan. at 842.

If this court finds that the KSGA sentencing scheme is constitutional, it lacks jurisdiction to review the presumptive sentence. *Johnson*, 286 Kan. at 842. The right to an appeal is statutory. *Johnson*, 286 Kan. at 841. KSGA defines Elkins’ right to appeal, providing: “the appellate court shall not review any sentence that is within the presumptive sentence for that crime.” *Johnson*, 286 Kan. at 841.

#### Discussion

The KSGA has previously been construed as valid and Elkins’ argument is without merit. Elkins acknowledges that the Kansas Supreme Court has previously decided the issue against him in *State v. Johnson*. In *Johnson*, the court held that K.S.A. 21-4704(e)(1) does not require judicial fact-finding and that the statute grants the sentencing judge discretion to impose the terms stated in the presumptive grid block. *Johnson*, 286 Kan. at 851.

Like the defendant in *Johnson*, Elkins contends that K.S.A. 21-4704(e)(1) violates the Sixth and Fourteenth Amendments to the United States Constitution. Elkins argues that *Johnson* was wrongly decided and includes the issue for possible federal review. (Appellant’s Brief, 27.) In support of his argument, Elkins cites the following language from K.S.A. 21-4704(e)(1): “The sentencing judge *shall* select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.” Elkins contends that this statutory language requires the court to find the presence of aggravating factors to increase a presumptive sentence. (Appellant’s Brief, 25.) Elkins also compares the Kansas sentencing scheme to the California sentencing guidelines declared unconstitutional in *Cunningham v. California*, 549 U.S. 270, 166 L.Ed. 2d 856, 127 S. Ct. 856 (2007), to support his argument. (Appellant’s Brief, 26).

Yet, Elkins fails to present any unique facts or new law that warrants reconsideration of the issue by this court. The Kansas Supreme Court in *Johnson* construed the same language from K.S.A. 21-4704(e)(1), now cited by Elkins on appeal, upon finding that the statute presented an ambiguity by including the word “shall”. The court, noting several indications of legislative intent for support, concluded that, despite use of the word “shall”, the statute “grants a judge discretion to sentence a criminal defendant to any term within the presumptive grid block, as determined by the conviction and the defendant’s criminal history.” *Johnson*, 286 Kan. at 223-225.

Also, despite Elkins' attempt to demonstrate similarity among the KSGA and the guidelines struck down in *Cunningham*, the *Johnson* court found that the United States Supreme Court in *Cunningham* appeared to approve of the Kansas sentencing scheme when it recognized in a footnote that "Kansas is one of several states that have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing" and "urged California to likewise alter its laws in some manner". *Johnson*, 286 Kan. at 848. Therefore, the district court committed no constitutional error when it sentenced Elkins to an aggravated sentence within the presumptive grid box. As a result, this court lacks jurisdiction to review his presumptive sentence.

#### CONCLUSION

This Court should affirm Elkins' four convictions of for rape, pursuant K.S.A. 21-3502(a)(1)(A), and three convictions for aggravated criminal sodomy, pursuant to K.S.A. 21-3506(a)(3)(A). No single trial error, nor the cumulative effect of any trial errors, warrants reversal of Elkins' convictions. Additionally, Elkins' sentence for the convicted crimes is constitutional and this Court should affirm his sentence.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Nicole Romine, Assistant District Attorney, hereby certify that I mailed two (2) copies of this Brief of Appellee to Heather Cessna, Kansas Appellate Defender Office, Jayhawk Tower, 700 Jackson, Suite 900, Topeka, Kansas 66603, Attorney for Appellant by U.S. mail, postage prepaid on the 19<sup>th</sup> day of March 2010; and delivered the original and sixteen (16) copies to Steve Six, Attorney General, Criminal Litigation Division, 120 S.W. Tenth, 2nd Floor, Topeka, KS 66612, on the 19<sup>th</sup> day of March 2010 for approval and filing with the Clerk of the Appellate Courts.



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