KANSAS CRIMINAL PROCEDURE REVIEW

VOL. 5 1988

SURVEY OF CRIMINAL PROCEDURE

SURVEY OF 1987 CASES DECIDED BY:

UNITED STATES SUPREME COURT
KANSAS SUPREME COURT
KANSAS COURT OF APPEALS

ARTICLE

THE KANSAS DEATH PENALTY DEBATE

EMIL A. TONKOVICH

UNIVERSITY OF KANSAS SCHOOL OF LAW
CRIMINAL JUSTICE CLINIC

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KANSAS CRIMINAL PROCEDURE REVIEW

PREFACE

In 1982 the Criminal Justice Clinic was founded at the University of Kansas School of Law. The Clinic trains third-year law students who are interested in practicing criminal law. The students are assigned to state and federal prosecutors' offices in Kansas and perform prosecutorial duties under the supervision of the prosecutors. In addition, the students are taught trial advocacy in the law school. In 1984, the students, under faculty supervision, published the first annual *Kansas Criminal Procedure Review.*

The *Review* is a survey of criminal procedure emphasizing recent cases. Since it is designed for the Kansas practitioner, only federal and Kansas law is included. The *Review* is organized according to the chronology of the criminal process. Each chapter includes a brief introduction that gives a general overview of the law and cites significant case law, statutes, and rules. Following the introduction is a survey of relevant 1987 cases decided by the United States Supreme Court, the Kansas Supreme Court, and the Kansas Court of Appeals.

The 1988 *Review* features an article I have written that examines the Kansas death penalty debate. The *Review* also includes four student notes that analyze 1987 United States Supreme Court opinions.

In the first student note, Stacey Janssen Gunya examines the decision announced in *United States v. Salerno.* The Court held in *Salerno* that the preventive detention provision of the 1984 Bail Reform Act does not violate either the fifth amendment due process clause or the eighth amendment excessive bail clause. In the second note, David Smith analyzes the Court's decision in *Maryland v. Garrison.* In *Garrison,* the Court held that the validity of a search executed pursuant to an overly broad warrant turns on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. In the third note, Scott Toth examines the decision in *Arizona v. Mauro.* The Court held in *Mauro* that a defendant is not interrogated within the meaning of *Miranda* when police allow his wife to speak with him in the presence of an officer who openly tape records the conversation. In the final note, Steven Jensen analyzes the Court's decision in *Arizona v. Hicks.* In *Hicks,* the Court held that probable cause is required to invoke the "plain view" doctrine for even cursory inspections.

This is a transition year for the *Review.* Next year the *Review* will merge with the *Kansas Law Review.* Although the *Review* will continue in its present format and will be staffed by Criminal Justice Clinic students, it will be edited and published by the *Kansas Law Review* under my supervision.

I would like to thank and acknowledge the editors and staff for their diligent efforts during this transition period, as well as express my gratitude to Ana Khan and Kathleen Brady-Mowrey for their help in preparing the manuscripts. I would also like to thank Steve McAllister, Editor-in-Chief, for his efforts in coordinating this year's *Review.*

The purpose of the Clinic and the *Review* is not only to educate law students, but also to assist and ultimately improve the Kansas criminal justice system. Any support or suggestions that would further these purposes would be greatly appreciated.

February 1, 1988 Emil A. Tonkovich

KANSAS CRIMINAL PROCEDURE REVIEW

Volume 5 **1988**

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The *Kansas Criminal Procedure Review* is published annually by the University of Kansas School of Law, Lawrence, Kansas 66045. Inquiries should be made to The Law School Book Exchange at the above address or by calling 913-864-3455.

I. INVESTIGATION AND POLICE PRACTICES

A. Arrest, Search and Seizure

The fourth amendment protects individuals against unreasonable searches and seizures by the Government.[1] This protection applies to any interest in which an individual has a reasonable expectation of privacy.[2] Generally, searches and seizures must be based on probable cause and made pursuant to a warrant.[3]

Arrests are "seizures" within the fourth amendment.[4] An arrest must be based on probable cause.[5] A warrant is not required if the arrest occurs in a public place.[6] Absent exigent circumstances or consent, however, an arrest warrant is required to arrest a defendant in his home.[7] Furthermore, absent exigent circumstances or consent, a search warrant is also required to arrest a defendant in a third party's home.[8]

A search generally must be made pursuant to a warrant based on probable cause.[9] The warrant must be issued by a neutral and detached magistrate capable of determining probable cause.[10] Additionally, the warrant must describe with particularity the place to be searched[11] and the things to be seized.[12]

Although the fourth amendment generally requires that searches be based on probable cause and made pursuant to a warrant, there are exceptions to both requirements. Emergency searches[13] and automobile searches[14] do not require a warrant, but must be based on probable cause. The following searches require neither a warrant nor probable cause: searches incident-to-arrest,[15] "stop and frisk"

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[1] The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[2] Katz v. United States, 389 U.S. 347, 351-53 (1967).

[3] U.S. CONST. amend. IV.

[4] United States v. Cortez, 449 U.S. 411, 417 (1981).

[5] *See generally id.* at 417-18.

[6] United States v. Watson, 423 U.S. 411, 414, 416-17 (1976).

[7] Payton v. New York, 445 U.S. 573, 576 (1980).

[8] Steagald v. United States, 451 U.S. 204, 205-06 (1981).

[9] U.S. CONST. amend. IV.

[10] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

[11] Steele v. United States, 267 U.S. 498, 501 (1925).

[12] Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

[13] United States v. Santana, 427 U.S. 38, 42-43 (1976).

[14] United States v. Ross, 456 U.S. 798, 825 (1982).

[15] Chimel v. California, 395 U.S. 752, 762-63 (1969).

searches,[16] "plain view" searches,[17] inventory searches,[18] and consent searches.[19]

United States Supreme Court

Colorado v. Bertine, 107 S. Ct. 738 (1987).

A container search pursuant to standard police inventory procedures administered in good faith satisfies the fourth amendment.

Maryland v. Garrison, 107 S. Ct. 1013 (1987).

The validity of a search warrant is determined on the basis of the information that police officers disclosed or had a duty to discover and disclose to the issuing magistrate. Furthermore, the validity of a search executed pursuant to an overly broad warrant turns on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. [See case note at page 61].

United States v. Dunn, 107 S. Ct. 1134 (1987).

Courts should consider four factors in determining the extent of a home's curtilage: 1) the proximity of the claimed curtilage to the home; 2) whether the area is included within the enclosure surrounding the home; 3) the area's use; and 4) the steps taken by the residents to protect the area from observation by passersby.

Arizona v. Hicks, 107 S. Ct. 1149 (1987).

Probable cause is required to invoke the "plain view" doctrine for even cursory inspections. [See case note at page 75].

O'Connor v. Ortega, 107 S. Ct. 1492 (1987).

In general, a public employee has a reasonable expectation of privacy in his office, desk, and file cabinets at work as against law enforcement officers. However, public employer searches of these areas for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, need only be judged by a reasonableness standard under all the circumstances.

New York v. Burger, 107 S. Ct. 2636 (1987).

A state statute authorizing warrantless inspections of vehicle dismantling businesses comes within the administrative search exception to the warrant requirement.

Griffin v. Wisconsin, 107 S. Ct. 3164 (1987).

A warrantless search of a probationer's home, pursuant to a state regulation replacing the probable cause standard with "reasonable grounds," satisfies the fourth amendment.

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[16] Terry v. Ohio, 392 U.S. 1, 30-31 (1968).
[17] Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion).
[18] South Dakota v. Opperman, 428 U.S. 364, 372-75 (1976).
[19] Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

Kansas Supreme Court

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

The fourth amendment is not violated when the State obtains a search warrant directing that hair samples be taken from a defendant.

State v. Holloman, 240 Kan. 589, 731 P.2d 294 (1987).

Under K.S.A. § 22-2511, when there are technical irregularities in the execution of a search warrant, a court will not suppress evidence obtained pursuant to it unless the irregularities substantially affected the defendant's rights.

City of Junction City v. Riley, 240 Kan. 614, 731 P.2d 310 (1987).

K.S.A. § 22-2401a(2)(b), authorizing municipal law officers to exercise their powers outside their jurisdiction when in "fresh pursuit," applies to an arrest made on the Fort Riley military reservation for a crime committed outside the reservation.

State v. Bishop, 240 Kan. 647, 732 P.2d 765 (1987).

The fourth amendment and section 15 of the Kansas Bill of Rights are identical for all practical purposes.

State v. Adee, 241 Kan. 825, 740 P.2d 611 (1987).

The Kansas implied consent law, K.S.A. § 8-1001, does not permit the issuance of a search warrant for a blood sample of a person suspected of driving under the influence of alcohol over the person's refusal to submit to alcohol concentration testing.

Kansas Court of Appeals

State v. Waldschmidt, 12 Kan. App. 2d 284, 740 P.2d 617 (1987).

Facts that are not included in the warrant application cannot be used retroactively to provide an alternative probable cause basis for upholding the warrant.

State v. Waldschmidt, 12 Kan. App. 2d 284, 740 P.2d 617 (1987).

Whether an individual has a reasonable expectation of privacy is determined by a two-part test. First, whether the individual manifested a subjective expectation of privacy in the object subject tc the search; and second, whether society is willing to recognize that expectation as reasonable.

State v. Waldschmidt, 12 Kan. App. 2d 284, 740 P.2d 617 (1987).

The curtilage is given the same constitutional protection as the home. There are four factors relevant in determining whether the land is subject to such protection: 1) the proximity to the home of the land claimed to be curtilage, 2) whether the land is included within an enclosure surrounding the home, 3) the nature of the uses of the land, and 4) the measures taken by the resident to protect

the land from observation.

State v. Waldschmidt, 12 Kan. App. 2d 284, 740 P.2d 617 (1987).

A police officer can seize evidence without a warrant under the "plain view" doctrine as long as the evidence is in plain view and is discovered inadvertently in a place where the police officer has a right to be.

State v. Kirby, 12 Kan. App. 2d 346, 744 P.2d 146 (1987).

To be a valid "stop and frisk" search under the fourth amendment and K.S.A. § 22-2402(1), a police officer must have a reasonable and articulable suspicion, based on fact, that the individual stopped has committed, is committing or is about to commit a crime. In determining whether the police officer had a reasonable and articulable suspicion, the court will look at the facts surrounding each particular case including the brevity of the search.

State v. Kirby, 12 Kan. App. 2d 346, 744 P.2d 146 (1987).

The "plain view" exception to the search warrant requirement applies when the initial police intrusion is lawful, the discovery of the evidence is inadvertent, and the incriminating character of the evidence is immediately apparent.

B. Interrogation Procedures

Three constitutional safeguards apply to interrogation procedures. They are the fifth amendment due process clause,[20] the fifth amendment privilege against self-incrimination,[21] and the sixth amendment right to counsel.[22]

Fifth amendment due process applies to all interrogation procedures and requires that statements be given voluntarily.[23] The test for voluntariness is whether, in light of the totality of the circumstances, the Government obtained the statement by coercion or improper influence.[24]

The fifth amendment privilege against self-incrimination applies to police custodial interrogations.[25] To mitigate the coercive influences inherent in custodial interrogations, police are required to advise the defendant of the *Miranda* warnings prior to such interrogations.[26] Subsequent to these warnings, if interrogation continues

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[20] The fifth amendment provides that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[21] The fifth amendment provides that "nor shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[22] The sixth amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his Defence." U.S. CONST. amend. VI.

[23] *See* Rogers v. Richmond, 365 U.S. 534, 539-40 (1961).

[24] *See* Haynes v. Washington, 373 U.S. 503, 513-14 (1963).

[25] Miranda v. Arizona, 384 U.S. 436, 460-61, 467 (1966).

[26] *Id.* at 444, 467-73.

without an attorney present and a statement is taken, the Government has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his rights.[27] The defendant may exercise his rights immediately or at any time during the interrogation.[28] These warnings do not apply to general on-the-scene questioning or to volunteered statements.[29] In addition, under the "public safety" exception, when a police officer questions a suspect to protect himself or the public from immediate danger, he need not give *Miranda* warnings, and any of the suspect's voluntary statements are admissible.[30]

The sixth amendment right to counsel applies to any police interrogation initiated after adversarial judicial proceedings have commenced.[31] Interrogation occurs when police deliberately elicit incriminating statements from the defendant in the absence of his attorney.[32]

United States Supreme Court

Connecticut v. Barrett, 107 S. Ct. 828 (1987).

Miranda does not require the suppression of a defendant's oral statements to police when the defendant clearly limited his request for counsel to written statements.

Colorado v. Spring, 107 S. Ct. 851 (1987).

A suspect's awareness of all the crimes about which he may be questioned is not relevant in determining the validity of his waiver of *Miranda* rights.

Arizona v. Mauro, 107 S. Ct. 1931 (1987).

A defendant is not interrogated within the meaning of *Miranda* when police allow his wife to speak with him in the presence of an officer who openly tape records the conversation. [See case note at page 69].

Greer v. Miller, 107 S. Ct. 3102 (1987).

A prosecutor's misconduct in questioning a defendant's post-arrest silence, when immediately followed by a sustained objection and curative instructions, does not violate the *Doyle* rule.

Kansas Supreme Court

State v. Hollis, 240 Kan. 521, 731 P.2d 260 (1987).

A defendant may effectively waive his right to counsel during in-

[27] *Id.* at 475.
[28] *Id.* at 473-74.
[29] *Id.* at 477-78.
[30] New York v. Quarles, 104 S. Ct. 2626, 2633-34 (1984).
[31] Brewer v. Williams, 430 U.S. 387, 398-99 (1977).
[32] Massiah v. United States, 377 U.S. 201, 206 (1964).

terrogation. The fact that the defendant has previously retained counsel does not necessarily render inadmissible a voluntary statement made in his counsel's absence.

Kansas Court of Appeals

State v. Doeden, 12 Kan. App. 2d 245, 738 P.2d 876 (1987).

Neither the fifth amendment privilege against self-incrimination nor the sixth amendment right to counsel apply when a police officer asks a driver to submit to a blood alcohol test.

C. Identification Procedures

Two constitutional safeguards apply to identification procedures. They are the fifth amendment due process clause[33] and the sixth amendment right to counsel.[34]

Fifth amendment due process applies to all identification procedures and requires that identifications be reliable.[35] To determine the reliability of identifications, a totality of the circumstances test incorporating five factors is used.[36]

The sixth amendment right to counsel applies to corporeal identification procedures conducted after the initiation of adversarial judicial proceedings.[37] Thus, an attorney's presence is not required at identification procedures that do not require the defendant's presence[38] or that occur prior to indictment or other formal charges.[39]

D. Exclusionary Rule

The exclusionary rule is a judicially created remedy that prohibits the use of evidence obtained by the police through means that violate the defendant's fourth, fifth, or sixth amendment rights.[40] The purpose of the rule is to deter illegal police conduct and to maintain judicial integrity.[41]

Limitations on the exclusionary rule prevent its strict application.

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[33] The fifth amendment provides that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[34] The sixth amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his Defence." U.S. CONST. amend. VI.

[35] Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

[36] *Id.*

[37] United States v. Wade, 388 U.S. 218, 236-37 (1967).

[38] United States v. Ash, 413 U.S. 300, 317-21 (1973).

[39] Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion).

[40] *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961).

[41] *Id.* at 656, 659 (1961).

These limitations apply when the cost to society of losing probative evidence outweighs the deterrent effect of the rule. Under this balancing test, the exclusionary rule has been held inapplicable to several situations, including grand jury proceedings,[42] civil proceedings,[43] impeachment at trial,[44] and "good faith" reliance on invalid search warrants.[45]

Under the "fruit of the poisonous tree" doctrine, the exclusionary rule excludes not only illegally obtained evidence, but also all evidence obtained or derived from exploitation of the original illegality.[46] The test employed under this doctrine is whether the evidence was obtained by exploitation of the primary illegality or by means sufficiently attenuated to purge the primary taint.[47] Unless sufficiently attenuated, the evidence will be excluded.[48] The "fruit of the poisonous tree" doctrine is applied in a variety of situations.[49]

A defendant must have "standing" to challenge constitutional violations and thereby benefit from the exclusionary rule.[50] The focus in "standing" inquiries is whether the defendant suffered an actual violation of his own fourth amendment rights.[51] To assert the exclusionary rule, the defendant must have had a legitimate expectation of privacy in the area searched.[52]

United States Supreme Court

Illinois v. Krull, 107 S. Ct. 1160 (1987).

The exclusionary rule does not apply to evidence obtained by police acting in objectively reasonable reliance on a statute, authorizing warrantless administrative searches, that is later found unconstitutional.

Kansas Supreme Court

State v. Bishop, 240 Kan. 647, 732 P.2d 765 (1987).

One whose right of privacy has not been invaded by a seizure of property has no right to object to its admission as evidence.

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[42] United States v. Calandra, 414 U.S. 338, 349-52 (1974).
[43] United States v. Janis, 428 U.S. 433, 449-54 (1976).
[44] Harris v. New York, 401 U.S. 222, 224-26 (1971).
[45] Massachusetts v. Sheppard, 104 S. Ct. 3424, 3428-30 (1984); United States v. Leon, 104 S. Ct. 3405, 3419-23 (1984).
[46] Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).
[47] *Id.* at 487-88.
[48] *Id.*
[49] *See, e.g.*, Taylor v. Alabama, 457 U.S. 687 (1982); United States v. Crews, 445 U.S. 463 (1980); Dunaway v. New York, 442 U.S. 200 (1979); United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590 (1975).
[50] For all practical purposes, "standing" is an issue only in fourth amendment cases.
[51] Rakas v. Illinois, 439 U.S. 128, 138-40 (1978).
[52] *Id.* at 143, 148-49.

Kansas Court of Appeals

State v. Waldschmidt, 12 Kan. App. 2d 284, 740 P.2d 617 (1987).

The exclusionary rule applies not only to primary evidence obtained illegally, but also to "fruit of the poisonous tree" evidence that is derived from the exploitation of the original illegality.

State v. Kirby, 12 Kan. App. 2d 346, 744 P.2d 146 (1987).

The exclusionary rule excludes not only illegally obtained evidence, but also all evidence obtained or derived from exploitation of the original illegality unless the evidence is obtained by means sufficiently attenuated to purge the taint of the illegal search. In determining whether evidence is sufficiently attenuated to allow admission, a court will consider several factors including whether Miranda warnings were given, the proximity of the illegal arrest and the statement, confession or consent to search, the purpose and flagrancy of the officers' misconduct and other intervening circumstances.

II. PRETRIAL PROCEEDINGS

A. Prosecutorial Discretion

The separation of powers doctrine generally prevents courts from interfering with the prosecution's broad discretion in criminal cases.[53] Courts are responsible, however, for protecting individuals from abuses of prosecutorial discretion that violate constitutional rights. These abuses usually concern either prosecutorial vindictiveness, which violates due process,[54] or selective prosecution, which is a denial of equal protection.[55]

B. Grand Jury

The fifth amendment guarantees any person accused of a federal felony the right to a grand jury indictment.[56] This right does not apply to state prosecutions.[57] The purpose of a grand jury is to decide whether criminal proceedings should be instituted.[58]

Grand juries are summoned and regulated by the district court.[59] The prosecution supervises and conducts grand jury proceedings.[60] A grand jury may subpoena witnesses for questioning and require them to bring documents.[61] A witness who refuses to comply with a grand jury subpoena may be held in contempt and imprisoned until the end of the grand jury term.[62] Although a grand jury witness may invoke the fifth amendment privilege against self-incrimination,[63] the privilege is removed if the witness is granted use immunity.[64]

The rules of evidence do not apply to grand jury proceedings.[65] An indictment may be based on inadmissible evidence.[66]

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[53] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).
[54] Blackledge v. Perry, 417 U.S. 21, 28-29 (1974).
[55] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
[56] The fifth amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V.
[57] Hurtado v. California, 110 U.S. 516, 538 (1884).
[58] Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).
[59] FED. R. CRIM. P. 6(a).
[60] *See generally* FED. R. CRIM. P. 6(d)-(e), 7(c)(1).
[61] Kastigar v. United States, 406 U.S. 441, 443 (1972). *See also* FED. R. CRIM. P. 17.
[62] 18 U.S.C. § 401; 28 U.S.C. § 1826(a).
[63] United States v. Mandujano, 425 U.S. 564, 572 (1976).
[64] 18 U.S.C. § 6002.
[65] Costello v. United States, 350 U.S. 359, 363-64 (1956).
[66] United States v. Calandra, 414 U.S. 338, 351-52 (1974).

United States Supreme Court

United States v. John Doe, 107 S. Ct. 1656 (1987).

An attorney who conducts a criminal prosecution may make continued use of grand jury materials in the civil phase of the same dispute without obtaining a disclosure order under Federal Rule of Criminal Procedure 6(e).

Kansas Supreme Court

State v. Cathey, 241 Kan. 715, 741 P.2d 738 (1987).

An inquisition under K.S.A. § 22-3301 can be equated with police questioning of witnesses during the investigation of a possible crime since both are inquiries to determine whether a crime has been committed and to obtain information sufficient to charge someone with the crime. However, an inquisition proceeding provides the prosecuting attorney power to have witnesses appear at the inquisition and testify under oath.

C. Indictments

The fifth amendment requires that federal felony prosecutions be initiated by a grand jury indictment.[67] In noncapital cases, the defendant may waive the indictment and elect to be charged by an information.[68]

An indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.[69] It need only, however, set forth those facts, circumstances, and elements necessary to charge an offense, sufficiently inform the accused so he is able to prepare a defense, and safeguard the accused from double jeopardy.[70] Joinder and severance issues may arise when there are multiple offenses or multiple defendants.[71]

Kansas Supreme Court

State v. Wilson, 240 Kan. 606, 731 P.2d 306 (1987).

An information that fails to include an essential element of the

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[67] The fifth amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V.

[68] FED. R. CRIM. P. 7(a)-(b).

[69] FED. R. CRIM. P. 7(c)(1). This rule implements the sixth amendment requirement that "the accused shall . . . be informed of the nature and cause of the accusation. . . ." U.S. CONST. amend. VI.

[70] Hagner v. United States, 285 U.S. 427, 431 (1932).

[71] FED. R. CRIM. P. 13-14.

crime it attempts to charge is jurisdictionally and fatally defective, and any conviction based on it must be reversed.

State v. Wilson, 240 Kan. 606, 731 P.2d 306 (1987).
State v. Bodtke, 241 Kan. 96, 734 P.2d 1109 (1987).

When a prosecutor receives leave to amend an information, amendment must be made by either filing an amended information or by making the necessary corrections on the information on file. An information that does not charge any offense, however, cannot be amended during trial over defense objection.

State v. Bishop, 240 Kan. 647, 732 P.2d 765 (1987).

Although an information that charges an offense in the statutory language is sufficient, the exact statutory words are unnecessary if the meaning is clear.

State v. Bishop, 240 Kan. 647, 732 P.2d 765 (1987).

An information is the jurisdictional instrument on which the defendant stands trial and must allege each essential element of the offense charged.

State v. Hunter, 241 Kan. 629, 740 P.2d 559 (1987).

A separate trial will be granted only when a codefendant demonstrates that a joint trial will actually prejudice his defense.

State v. Hunter, 241 Kan. 629, 740 P.2d 559 (1987).

A defendant's failure to object to the testimony of a witness, whose name is not endorsed on the information, until after the witness concludes his testimony constitutes waiver.

State v. Cathey, 241 Kan. 715, 741 P.2d 738 (1987).

Charging a defendant with aggravated battery and attempted murder is multiplicitous when there is only one victim and two acts of violence occurring at approximately the same time and place.

State v. Vakas, 242 Kan. 103, 744 P.2d 812 (1987).

An indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. Although an indictment using the exact language of the statute is sufficient, it is not necessary if the meaning of the language used is clear.

State v. Classen, 242 Kan. 192, 747 P.2d 784 (1987).

Sufficiency of an indictment or information is determined by whether it contains the elements of the offense charged and sufficiently apprises the defendant of what he must be prepared to meet, and whether it is specific enough to make a plea of double jeopardy possible.

State v. Classen, 242 Kan. 192, 747 P.2d 784 (1987).

An information is sufficient if it substantially follows the language of the statute or charges the offense in equivalent words. It should be read in its entirety, construed according to common

sense, and interpreted to contain facts that are necessarily implied.

Kansas Court of Appeals

State v. DeAtley, 11 Kan. App. 2d 655, 732 P.2d 780 (1987).
An indictment must include the essential elements of the crime charged.

City of Kansas City v. Carlock, 12 Kan. App. 2d 41, 733 P.2d 1273 (1987).
Subject matter jurisdiction is lacking when a complaint fails to allege any facts and omits all elements of the crime alleged.

State v. Woodman, 12 Kan. App. 2d 110, 735 P.2d 1102 (1987).
An information that fails to allege the exact words of the statute is not defective when the plain meaning of the language used sets forth the elements of the offense.

State v. Bryan, 12 Kan. App. 2d 206, 738 P.2d 463 (1987).
An information that fails to include an essential element of the crime it attempts to charge is jurisdictionally and fatally defective, and any conviction based on it must be reversed.

State v. Fraker, 12 Kan. App. 2d 259, 739 P.2d 940 (1987).
A prosecution for driving under the influence of drugs or alcohol commences only by filing a complaint or information.

State v. Goodnow, 12 Kan. App. 2d 294, 740 P.2d 113 (1987).
An information can be amended at any time before the verdict so long as no substantial right of the defendants is prejudiced and no additional or different crime is charged.

State v. McMannis, 12 Kan. App. 2d 464, 747 P.2d 1343 (1987).
The facts alleged in an indictment or an information must constitute an offense within the terms and meaning of the statute upon which the offense is based.

D. Initial Appearance and Bail

Persons arrested either pursuant to a complaint warrant or without a warrant are brought before the nearest available magistrate for an initial appearance.[72] If an arrest is made without a warrant, the Government must promptly file a complaint with the magistrate.[73] At the initial appearance the magistrate makes a probable cause review of the complaint.[74]

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[72] FED. R. CRIM. P. 5(a); K.S.A. § 22-2901(1).
[73] *Id.*
[74] This probable cause determination is implicit in Rule 5. Jaben v. United States, 381 U.S. 214, 220 (1964).

The magistrate informs the arrestee of the complaint against him, his *Miranda* rights, the circumstances of his pretrial release, and his right to a preliminary examination.[75] A preliminary examination is scheduled and bail is set.[76]

The purpose of bail is to assure the defendant's presence at the trial or other criminal proceeding.[77] Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" and violates the eighth amendment.[78] However, the preventive detention provision of the 1984 Bail Reform Act does not violate the eighth amendment's excessive bail clause.[79] The criteria for bail are primarily set by statute.[80]

United States Supreme Court

United States v. Salerno, 107 S. Ct. 2095 (1987).

The preventive detention provision of the 1984 Bail Reform Act does not violate either the fifth amendment due process clause or the eighth amendment excessive bail clause. [See case note at page 53].

Kansas Supreme Court

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

Bail is excessive when it is set at an amount higher than necessary to insure appearance of the accused at trial.

E. Preliminary Examination

A preliminary examination is an adversarial hearing before a magistrate to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it.[81] If probable cause is found, the defendant is held to answer in the district court.[82] If not, the complaint is dismissed and the defendant is discharged.[83]

The preliminary examination is scheduled at the initial appear-

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[75] FED. R. CRIM. P. 5(c); *See also* K.S.A. § 22-2901.
[76] FED. R. CRIM. P. 5(c); K.S.A. § 22-2901.
[77] Stack v. Boyle, 342 U.S. 1, 5 (1951).
[78] *Id.* The eighth amendment provides: "Excessive bail shall not be required. . . ." U.S. CONST. amend. VIII.
[79] United States v. Salerno, 107 S. Ct. 2095 (1987).
[80] 18 U.S.C. §§ 3141-3156; K.S.A. §§ 22-2801 to -2818.
[81] FED. R. CRIM. P. 5.1(a); K.S.A. § 22-2902(3).
[82] *Id.*
[83] FED. R. CRIM. P. 5.1(b); K.S.A. § 22-2902(3).

ance.[84] It must be held within a specified period of time.[85] A preliminary examination is not held if the defendant waives it or is indicted.[86]

Preliminary examinations are not constitutionally mandated.[87] As a prerequisite to extended post-arrest detention, however, the fourth amendment requires a probable cause determination by a judicial officer either before or promptly after arrest.[88] This fourth amendment requirement may be satisfied by various procedures.[89]

Kansas Supreme Court

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

The State must provide an indigent defendant with a transcript of prior proceedings only when the transcript is needed for an effective defense. Two factors relevant to need are: 1) the necessity of the transcript to the defendant, and 2) the availability of alternative devices to fulfill the transcript's function.

F. Arraignment

Arraignments are held in open court. The defendant is informed of the charges against him and is called upon to plead.[90]

G. Guilty Pleas

Due process requires that guilty pleas be voluntarily and understandingly made.[91] Essentially, the court must inform the defendant of all the critical elements of the charge, question him to determine his understanding of the nature and consequences of the guilty plea, and insure its voluntariness.[92]

A guilty plea is equivalent to a conviction and is an admission of all the elements of the crime charged.[93] A defendant waives several constitutional rights by pleading guilty.[94] Furthermore, a guilty plea forecloses appellate review of nonjurisdictional constitutional

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[84] FED. R. CRIM. P. 5(c). *See generally* K.S.A. § 22-2901.
[85] FED. R. CRIM. P. 5(c); K.S.A. § 22-2901.
[86] FED. R. CRIM. P. 5(c); K.S.A. § 22-2902(4).
[87] Gerstein v. Pugh, 420 U.S. 103, 120-23 (1975).
[88] *Id.* at 114, 125.
[89] *Id.* at 123-25.
[90] FED. R. CRIM. P. 10; K.S.A. § 22-3205.
[91] Boykin v. Alabama, 395 U.S. 238, 242 (1969).
[92] FED. R. CRIM. P. 11(c)-(d); K.S.A. § 22-3210(3).
[93] McCarthy v. United States, 394 U.S. 459, 466 (1969).
[94] *Boykin*, 395 U.S. at 243.

claims occurring before the plea.[95] Subsequent to the guilty plea, however, the defendant may appeal claims that relate to the Government's power to prosecute.[96]

Kansas Court of Appeals

State v. Dantzler, 12 Kan. App. 2d 181, 737 P.2d 69 (1987).

Under K.S.A. § 22-3602(a), there is no direct appeal of a denial of probation after a plea of guilty or nolo contendere. *See also State v. Harrold*, 239 Kan. 645, 722 P.2d 563 (1986).

H. Discovery

Although no general constitutional right to discovery exists in criminal cases,[97] jurisdictions provide for discovery by statute[98] or rule.[99] Discovery occurs at both the pretrial and trial stages of the criminal process.

Pretrial defense discovery is usually limited to relevant statements made by the defendant, the defendant's prior criminal record, relevant documents and tangible objects, and relevant reports of examinations and tests.[100] Absent a specific showing of materiality to the preparation of the defense, the Government is not required to disclose witness lists.[101] Similarly, a balancing test is employed to determine whether the Government must disclose the identity of informants.[102] The defense also obtains discovery through informal means, including discretionary disclosure by the prosecutor.[103]

The Government is entitled to some pretrial discovery. This discovery is typically limited to certain instances of reciprocal discovery,[104] and to notice of alibi[105] and insanity[106] defenses.

After a Government witness testifies on direct examination at trial, the Government must disclose to the defense any relevant pretrial statements made by the witness.[107] Some jurisdictions have expanded this discovery to statements of defense witnesses other than

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[95] Tollett v. Henderson, 411 U.S. 258, 267 (1973).
[96] Blackledge v. Perry, 417 U.S. 21, 30 (1974).
[97] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).
[98] *E.g.*, K.S.A. § 22-3212.
[99] *E.g.*, FED. R. CRIM. P. 16.
[100] FED. R. CRIM. P. 16(a)(1)(A)-(D); K.S.A. § 22-3212(1)-(2).
[101] *See generally id.*
[102] Roviaro v. United States, 353 U.S. 53, 62 (1957).
[103] Other informal means of defense discovery include preliminary examinations, bills of particulars, subpoenas, and depositions.
[104] FED. R. CRIM. P. 16(b); K.S.A. § 22-3212(3).
[105] FED. R. CRIM. P. 12.1; K.S.A. § 22-3218.
[106] FED. R. CRIM. P. 12.2; K.S.A. § 22-3219.
[107] Jencks v. United States, 353 U.S. 657, 666-69, 672 (1957).

the defendant.[108]

Due process imposes a duty on prosecutors to disclose exculpatory evidence to the defense.[109] This "Brady material" is generally disclosed pretrial, but the Government also has a continuing duty to disclose such evidence.[110] Unless the nondisclosed evidence is material and thereby deprives the defendant of a fair trial, there is no constitutional violation.[111] The test for materiality of nondisclosed evidence is based on the existence and form of the defense request and on the type of evidence requested.[112]

Kansas Supreme Court

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

Prosecutors are under a positive duty, independent of court order, to disclose exculpatory evidence to the defendant. A new trial should be granted, however, only if 1) evidence was withheld by the prosecutor; 2) the evidence was clearly exculpatory; and 3) it was so material that withholding it was clearly prejudicial to the defendant.

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

Under K.S.A. § 22-3213(1), a State witness' statement is not subject to subpoena, discovery, or inspection until after the witness has testified on direct examination at the preliminary hearing or at the trial.

State v. Costner, 241 Kan. 148, 734 P.2d 1144 (1987).

The identity of a confidential informant must be disclosed only if a defendant shows that the informant's identity is material to his defense.

State v. Dressel, 241 Kan. 426, 738 P.2d 830 (1987).

An attorney hired under K.S.A. 19-717 to assist the prosecution must comply with discovery requests under K.S.A. § 22-3212 to the extent that the items are within the attorney's possession, custody, or control. In addition, the Code of Professional Responsibility requires that the assisting attorney disclose evidence known to him that would tend to negate guilt, mitigate the degree of the offense, or reduce the punishment.

State v. Dressel, 241 Kan. 426, 738 P.2d 830 (1987).

A trial court has no authority to compel discovery from a complaining witness pursuant to K.S.A. § 22-3212.

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[108] *See, e.g.*, FED. R. CRIM. P. 26.2. *But see* K.S.A. § 22-3213.

[109] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[110] *See id.*

[111] *Id.*

[112] United States v. Agurs, 427 U.S. 97, 106-14 (1976). *But cf.* United States v. Bagley, 105 S. Ct. 3375 (1985) (arguably establishing a single test for materiality).

State v. Vakas, 242 Kan. 103, 744 P.2d 812 (1987).

The trial court has discretion in determining whether and to what extent sanctions should be imposed against a prosecutor for misconduct and failure to comply with discovery orders.

I. Motions and Hearings[113]

Defenses, objections, and requests that are capable of determination without a trial of the general issue may be raised pretrial by motion.[114] Certain motions, including motions to suppress evidence, must be raised prior to trial.[115]

Suppression motions are the means by which the exclusionary rule is administered. Motions to suppress evidence must be relatively specific in setting forth the legal theory for the suppression and the underlying facts. A defendant is entitled to a hearing on his motion when issues of fact, not law, are contested.[116]

The allocation of the burden and of the standard of proof at suppression hearings varies among the jurisdictions and often depends on the type of evidence sought to be suppressed. Under most circumstances, the Government has the burden of proof by a preponderance of the evidence.[117]

The defendant's testimony at a suppression hearing is not admissible at a subsequent trial in the Government's case-in-chief.[118] Such testimony, however, may be admissible to impeach the defendant.[119] The defendant does not subject himself to cross-examination on other issues,[120] and similarly, his right to cross-examine Government witnesses is narrower than at trial.[121]

J. Speedy Trial

"Speedy trial" protections apply to two time periods. These periods encompass the time between the commission of the crime and

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[113] Those cases generally related to pretrial motions and hearings are categorized in other sections that deal with the subject matter of the motion. *See, e.g., supra* Part I.A., Arrest, Search and Seizure.

[114] FED. R. CRIM. P. 12(b); K.S.A. §§ 22-3215 to -3216.

[115] FED. R. CRIM. P. 12(b)(1)-(5); K.S.A. §§ 22-3215 to -3216.

[116] *See generally* Jackson v. Denno, 378 U.S. 368, 376-77, 391-96 (1964).

[117] In Kansas, the prosecution has the burden of proof. K.S.A. §§ 22-3215(4) and -3216(2). A preponderance of the evidence standard is all that is constitutionally required to meet this burden. Lego v. Twomey, 404 U.S. 477, 482-87 (1972).

[118] Simmons v. United States, 390 U.S. 377, 390, 394 (1968).

[119] The United States Supreme Court has not directly addressed this issue. In *Simmons*, the Court stated only that such testimony may not be used against the defendant at his trial "on the issue of guilt." 390 U.S. at 394.

[120] FED. R. EVID. 104(d).

[121] *See* McCray v. Illinois, 386 U.S. 300, 313-14 (1967).

the indictment, and the time between the indictment (or arrest) and the trial.

The primary protections against preindictment delay are the statutes of limitation.[122] In addition, fifth amendment due process prohibits intentional and prejudicial Government delays that are used to gain a tactical advantage.[123]

An indictment or arrest triggers the sixth amendment speedy trial right. To determine whether there is a speedy trial violation the following factors are balanced: (1) the length of delay; (2) the reasons for delay; (3) the degree to which the defendant asserted his speedy trial right; and (4) the degree of actual prejudice to the defendant.[124] Jurisdictions often have speedy trial statutes that provide specific time limitations.[125]

Kansas Supreme Court

State v. Roman, 240 Kan. 611, 731 P.2d 1281 (1987).

Under K.S.A. § 22-3402(1) and (2), delays caused by the defendant are not to be counted in computing the time between arraignment and trial. The period in which a district court takes a defendant's motion to suppress evidence under advisement is not the accused's fault and is counted in computing the statutory speedy trial period.

State v. Maas, 242 Kan. 44, 744 P.2d 1222 (1987).

A defendant relying on the insanity defense waives the speedy trial requirements of K.S.A. § 22-3402 if trial delay is attributable to the assertion of the insanity defense.

K. Double Jeopardy

The fifth amendment double jeopardy clause generally protects against multiple trials and punishments for the same offense.[126] To raise a double jeopardy claim, the defendant must have been subjected to successive criminal prosecutions[127] and placed in jeopardy at the first criminal proceeding.[128]

Under the "dual sovereignty" concept, the double jeopardy clause does not prohibit successive prosecutions for the same act wher

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[122] United States v. Marion, 404 U.S. 307, 322 (1971); 18 U.S.C. §§ 3281-3282 K.S.A. § 21-3106.

[123] *Marion*, 404 U.S. at 324.

[124] Barker v. Wingo, 407 U.S. 514, 530 (1972).

[125] *See* 18 U.S.C. §§ 3161-3174; K.S.A. § 22-3402.

[126] The fifth amendment provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[127] *See generally* Serfass v. United States, 420 U.S. 377, 388, 391-92 (1975).

[128] Downum v. United States, 372 U.S. 734, 737-38 (1963).

they are brought by different sovereigns.[129] Federal policy[130] and many state statutes,[131] however, have limited the "dual sovereignty" concept.

Double jeopardy issues may arise in a variety of situations. These situations include reprosecution after a mistrial,[132] reprosecution after an acquittal or other decision favorable to the defendant,[133] reprosecution after a conviction,[134] and resentencing after a conviction.[135]

United States Supreme Court

Montana v. Hall, 107 S. Ct. 1825 (1987).

Trying a defendant for sexual assault after reversal of his incest conviction on grounds unrelated to guilt or innocence does not violate the double jeopardy clause.

Ricketts v. Adamson, 107 S. Ct. 2680 (1987).

The double jeopardy clause does not bar prosecution on original charges when a defendant, who pleaded guilty to lesser charges, breaches his plea agreement by refusing to testify at a codefendant's retrial.

Kansas Supreme Court

State v. Bishop, 240 Kan. 647, 732 P.2d 765 (1987).

When there is a significant break in a defendant's actions, the offenses of aggravated assault, aggravated kidnapping, and rape may be separate, distinct and not part of a single continuous act, and therefore, not multiplicitous.

State v. Holcomb, 240 Kan. 715, 732 P.2d 1272 (1987).

A single transaction may constitute two separate and distinct offenses if each offense requires proof of facts not required to prove the other.

State v. Moore, 242 Kan. 1 (1987).

Aggravated incest is not a lesser included offense of rape since not all the elements necessary to prove aggravated incest are present and required to establish rape.

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[129] Abbate v. United States, 359 U.S. 187, 193, 195-96 (1959); Bartkus v. Illinois, 359 U.S. 121, 132 (1959).

[130] The United States Department of Justice has an internal guideline known as the Petite policy. This policy is derived from Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam).

[131] *E.g.*, K.S.A. § 21-3108(3).

[132] United States v. Dinitz, 424 U.S. 600, 609-11 (1976).

[133] *See* United States v. Scott, 437 U.S. 82, 91, 94-101 (1978).

[134] *See* Burks v. United States, 437 U.S. 1, 18 (1978).

[135] *See* North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

State v. Adams, 242 Kan. 20, 744 P.2d 833 (1987).

The crime of driving under the influence of alcohol is a lesser included offense of involuntary manslaughter when it is alleged as the underlying misdemeanor in the information and all the elements of driving under the influence are required to establish involuntary manslaughter.

Lowe v. State, 242 Kan. 64, 744 P.2d 856 (1987).

The fifth amendment double jeopardy clause prohibits the reinstatement of criminal charges following acquittal if the reinstatement would lead to further proceedings resolving a factual issue going to the elements of the offense charged.

Kansas Court of Appeals

State v. Brewer, 11 Kan. App. 2d 655, 732 P.2d 780 (1987).

Under K.S.A. § 21-3107, a person cannot be convicted of two or more separate crimes if one is either a lesser included crime or is necessarily proved by proof of the other crime.

State v. Woodman, 12 Kan. App. 2d 110, 735 P.2d 1102 (1987).

Under the facts of this case, driving under the influence of alcohol is a lesser included offense of aggravated vehicular homicide. Therefore, a conviction of aggravated vehicular homicide bans a conviction of driving under the influence of alcohol.

State v. Frazier, 12 Kan. App. 2d 164, 736 P.2d 956 (1987).

A single transaction may constitute two separate and distinct offenses if each offense requires proof of facts not required to prove the other.

III. TRIAL

A. Jurisdiction and Venue

In criminal procedure, jurisdiction refers to the power to enforce criminal laws and, more specifically, to the power to hear and decide criminal cases.[136] Venue refers to the proper place of prosecution and trial.[137]

United States Supreme Court

Solorio v. United States, 107 S. Ct. 2924 (1987).

The jurisdiction of a court-martial depends solely on a defendant's status as a member of the armed forces, and not on the "service connection" of the offenses charged.

Kansas Supreme Court

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

The determination of whether to change venue will not be disturbed on appeal absent a showing of prejudice to the substantial rights of the defendant. The burden lies on the defendant to show that such prejudice in the community exists, as a demonstrable reality, and that it is reasonably certain he could not have received a fair trial.

State v. Magness, 240 Kan. 719, 732 P.2d 747 (1987).

A juvenile 16 or 17 years of age, who is charged with a felony, has juvenile offender status under K.S.A. § 38-1602(b)(3) when his two prior adjudications as a juvenile offender were made in the same juvenile hearing. Therefore, the juvenile court lacks jurisdiction to prosecute the juvenile as an adult.

State v. Mayfield, 241 Kan. 555, 738 P.2d 861 (1987).

The Kansas juvenile offender code, K.S.A. § 38-1601, provides the sole basis for jurisdiction over juvenile offenders.

State v. Hunter, 241 Kan. 629, 740 P.2d 559 (1987).

To obtain a change of venue pursuant to K.S.A. § 22-2616(1), a defendant has the burden of showing that, as a demonstrable reality, there exists such prejudice in the community that it is reasonably certain he cannot obtain a fair and impartial trial.

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[136] 18 U.S.C. §§ 3231-3244; K.S.A. § 22-2601.

[137] FED. R. CRIM. P. 18; K.S.A. §§ 22-2602 to -2615.

State v. Martin, 241 Kan. 732, 740 P.2d 577 (1987).

Venue is a jury question that may be proved by circumstantial evidence.

Kansas Court of Appeals

State v. Alexander, 12 Kan. App. 2d 1, 732 P.2d 814 (1987).

Venue is a jury question that may be proved by circumstantial evidence.

State v. Frazier, 12 Kan. App. 2d 164, 736 P.2d 956 (1987).

K.S.A. §§ 20-301 and 12-4104 grant concurrent jurisdiction to district and municipal courts for offenses that constitute violations of both a state statute and a city ordinance. When a district court and a municipal court have concurrent jurisdiction, the court that first obtains personal jurisdiction over the defendant may retain jurisdiction.

B. Sixth Amendment Right to Counsel

The sixth amendment provides a defendant with the right to counsel in criminal cases.[138] This right attaches at the initiation of formal adversarial judicial proceedings.[139] No constitutional right to counsel at trial exists, however, unless the defendant is actually incarcerated as a result of the prosecution.[140]

The right to counsel includes not only the right to retain a lawyer,[141] but also the right to have a court-appointed attorney.[142] Furthermore, implicit in the sixth amendment is the right to self-representation.[143]

The sixth amendment guarantees the right to effective assistance of counsel.[144] To support a claim of ineffective assistance of counsel, a convicted defendant must show that his counsel's performance was deficient and that the deficient performance resulted in a prejudice, depriving him of a fair trial.[145] Joint representations may cause conflicts of interest and thereby render the attorney ineffective under the sixth amendment.[146]

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[138] The sixth amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his Defence." U.S. CONST. amend. VI.

[139] Kirby v. Illinois, 406 U.S. 682, 688 (1972).

[140] Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

[141] Powell v. Alabama, 287 U.S. 45, 53 (1932).

[142] Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[143] Faretta v. California, 422 U.S. 806, 821 (1975).

[144] Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984).

[145] *Id.* at 2068.

[146] *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

United States Supreme Court

Pennsylvania v. Finley, 107 S. Ct. 1990 (1987).

A defendant has no federal constitutional right to counsel when collaterally attacking a conviction. Thus, a state-created right to counsel on post-conviction review does not trigger federal procedures for withdrawal of appointed counsel.

Burger v. Kemp, 107 S. Ct. 3114 (1987).

A defendant's right to effective assistance of counsel, under the facts of this case, was not violated when his attorney assisted in a coindictee's defense at another trial. Furthermore, the attorney's failure to present mitigating evidence at defendant's capital sentencing was reasonable under the circumstances and did not render counsel's assistance ineffective.

Kansas Supreme Court

State v. Armstrong, 240 Kan. 446, 731 P.2d 249 (1987).

The critical question in determining whether a defendant voluntarily and intelligently waived his sixth amendment right to counsel is whether the court properly made the defendant aware of the dangers and disadvantages of self-representation.

State v. Bodtke, 241 Kan. 96, 734 P.2d 1109 (1987).

A defendant claiming ineffective assistance of counsel must show both that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability the verdict would have been different had he received effective assistance.

State v. Martin, 241 Kan. 732, 740 P.2d 577 (1987).

A defendant has the right to represent himself or be represented by counsel, but does not have the right to a hybrid representation. Furthermore, a defendant who accepts counsel has no right to conduct his own trial or dictate the procedural course of his representation by counsel.

State v. Smith, 242 Kan. 336, 747 P.2d 816 (1987).

The State is required to furnish counsel to all indigent defendants charged with felonies. The responsibility of providing defendants with effective assistance of counsel is a public one and should not be borne entirely by the private bar. The State has an obligation to compensate attorneys appointed to represent indigent defendants.

Kansas Court of Appeals

State v. Cook, 12 Kan. App. 2d 309, 741 P.2d 379 (1987).

The fact that a notice of appeal is not filed, absent an indication

in the record that the defendant desired to appeal but was precluded from doing so because his attorney failed to perfect and complete an appeal, is insufficient to find ineffective assistance of counsel.

C. Sixth Amendment Right to Jury Trial

The sixth amendment provides a criminal defendant with the right to a jury trial.[147] This right, however, applies only to crimes for which the authorized penalty is greater than six months imprisonment.[148] Although juries in criminal cases typically must have twelve members and must return unanimous verdicts, neither this size[149] nor unanimity[150] is constitutionally mandated. A defendant may waive his right to a jury trial,[151] but he is not constitutionally entitled to be tried by a judge without a jury.[152]

Included in the sixth amendment is the right to be tried by an impartial jury.[153] Although jury impartiality does not require jurors to be ignorant of the facts and issues of the case,[154] adverse publicity either before[155] or during[156] the trial may create prejudice and thereby constitute a sixth amendment violation.

The impact of adverse pretrial publicity on the jury may be limited by several means, including change of venue.[157] Prior restraints, or "gag orders," on news media coverage of pretrial proceedings violate the first amendment freedom of the press.[158] Pretrial proceedings, however, may be closed to the public and the press.[159] Regarding adverse publicity during trial, the impact on the jury is prevented primarily by sequestering the jury.[160] The right of the public and the press to attend criminal trials is implicit in the first amendment.[161]

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[147] The sixth amendment provides that "the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

[148] Baldwin v. New York, 399 U.S. 66, 69 (1970) (plurality opinion).

[149] Williams v. Florida, 399 U.S. 78, 86, 103 (1970) (plurality opinion).

[150] Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972).

[151] Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

[152] Singer v. United States, 380 U.S. 24, 34 (1965).

[153] U.S. CONST. amend. VI.

[154] Irvin v. Dowd, 366 U.S. 717, 722 (1961).

[155] *Id.* at 725-29.

[156] Sheppard v. Maxwell, 384 U.S. 333, 349-63 (1966).

[157] FED. R. CRIM. P. 21(a); K.S.A. § 22-2616.

[158] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

[159] Gannett Co. v. DePasquale, 443 U.S. 368, 391 (1979).

[160] United States v. Hall, 536 F.2d 313, 326-27 (10th Cir. 1976).

[161] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).

United States Supreme Court

Tanner v. United States, 107 S. Ct. 2739 (1987).

A trial court's refusal to grant a post-verdict evidentiary hearing on jury members' alleged alcohol and drug use during trial does not violate a defendant's right to trial by a competent jury. Furthermore, substance abuse is not an improper "outside influence" within the meaning of Federal Rule of Evidence 606(b).

Buchanan v. Kentucky, 107 S. Ct. 2906 (1987).

The use of a "death-qualified" jury in a joint trial in which the death penalty is sought only against a codefendant does not violate a defendant's right to an impartial jury.

Kansas Supreme Court

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

Jury misconduct is not a ground for reversal unless it is shown to have substantially prejudiced a defendant's rights.

State v. Hood, 242 Kan. 115, 744 P.2d 816 (1987).

A defendant, not his attorney, has the right to agree to be tried by a jury of less than twelve people.

State v. Grubbs, 242 Kan. 224, 747 P.2d 140 (1987).

It is the jury's function in a criminal case to determine the weight and credibility to be given the testimony of both expert and lay witnesses.

D. Other Sixth Amendment Trial Rights

The sixth amendment also includes the following trial rights: (1) the right to a public trial;[162] (2) the right to confront adverse witnesses;[163] and (3) the right to compulsory process of favorable witnesses.[164]

Although a criminal defendant has a right to a public trial, the trial judge may close a pretrial proceeding at the defendant's request to avoid prejudicial publicity.[165] Implicit in the first amendment, however, is the right of the press and the public to attend criminal trials.[166]

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[162] The sixth amendment provides that "the accused shall enjoy the right to a . . . public trial. . . ." U.S. CONST. amend. VI.

[163] The sixth amendment provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

[164] The sixth amendment provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. CONST. amend. VI.

[165] Gannett Co. v. DePasquale, 443 U.S. 368, 393-94 (1979).

[166] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).

The right to confrontation is primarily effectuated by the defendant's cross-examination of Government witnesses.[167] Restrictions on the defendant's scope of cross-examination may violate the sixth amendment.[168] The admission of out-of-court statements, such as hearsay, may violate the confrontation clause, unless their necessity and reliability are established.[169] Implicit in the confrontation clause is the defendant's right to be present at every stage of the trial.[170] A defendant, however, may relinquish this right by being voluntarily absent[171] or extremely disruptive.[172]

The compulsory process clause gives criminal defendants the right to subpoena favorable witnesses and physical evidence. All jurisdictions have statutes or court rules authorizing the defense to use the court's subpoena power.[173] The sixth amendment right to present evidence, however, is not absolute.[174]

United States Supreme Court

Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987).

The confrontation clause does not guarantee the right to discover the identity of witnesses or require the government to produce exculpatory evidence. Instead, such claims are evaluated under the due process clause. Allowing only the trial court, and not the defendant's counsel, to review confidential government records *in camera* for information material to the accused's defense does not violate due process.

Richardson v. Marsh, 107 S. Ct. 1702 (1987).

The admission of a nontestifying codefendant's confession that has been redacted to eliminate all references to the nonconfessing defendant's existence is not barred by *Bruton* even if the defendant is linked to the confession by other evidence, so long as the jury has been instructed not to consider the confession against the defendant.

Cruz v. New York, 107 S. Ct. 1714 (1987).

The "interlocking" character of confessions given by a defendant and codefendant does not create an exception to the *Bruton* rule.

Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

Excluding a sex abuse defendant from the competency hearing of a child victim does not violate either his confrontation clause rights

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[167] Davis v. Alaska, 415 U.S. 308, 315-16 (1974).
[168] *Id.* at 316-18.
[169] Ohio v. Roberts, 448 U.S. 56, 66 (1980).
[170] Diaz v. United States, 223 U.S. 442, 455 (1912).
[171] Taylor v. United States, 414 U.S. 17, 19-20 (1973) (per curiam).
[172] Illinois v. Allen, 397 U.S. 337, 342-43 (1970).
[173] *See, e.g.*, FED. R. CRIM. P. 17(a)-(b); K.S.A. § 22-3214.
[174] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

nor his due process rights so long as his attorney attends the hearing, the hearing is limited to competency, and the defendant retains the right to cross-examine the victim-witness at trial.

Rock v. Arkansas, 107 S. Ct. 2704 (1987).

Because criminal defendants have a constitutional right to testify in their own behalf, restrictions placed on that right by a State's evidentiary rules may not be arbitrary or disproportionate to the purposes they are designed to serve. Thus, a *per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on the right to testify.

Bourjaily v. United States, 107 S. Ct. 2755 (1987).

When deciding whether to admit a hearsay statement under FRE 801(d)(2)(E), the co-conspirator exception, a court may consider the hearsay statement itself in making the required preliminary factual determinations as to whether the alleged conspiracy existed and whether the statement was made during the course and in furtherance of the conspiracy.

Kansas Supreme Court

State v. Phifer, 241 Kan. 233, 737 P.2d 1 (1987).

Even when a defendant has had an adequate opportunity to cross-examine a witness at a suppression hearing and the witness is unavailable at trial, K.S.A. § 60-460(c)(2) prohibits the admission of the witness' prior testimony against the defendant at trial.

State v. Cathey, 241 Kan. 715, 741 P.2d 738 (1987).

An unavailable witness' out-of-court statement is admissible and does not violate a defendant's confrontation clause rights if it is shown to have an adequate "indicia of reliability."

E. Fifth Amendment Privilege Against Self-Incrimination

The fifth amendment protects individuals from the introduction into a criminal proceeding of self-incriminating evidence that is compelled by the Government and is testimonial in nature.[175] This privilege against self-incrimination applies not only at trial, but also at all stages of the criminal process, including custodial interrogations.

Essentially, five criteria must be met before a person may validly invoke his fifth amendment privilege. These criteria are: (1) the

[175] The fifth amendment provides that "nor shall any person . . . be compelled in any criminal prosecution to be a witness against himself." U.S. CONST. amend. V.

privilege must be personal to the individual;[176] (2) the proceeding must be criminal or have criminal consequences;[177] (3) the information must be self-incriminating;[178] (4) the information must be compelled by the Government;[179] and (5) the information must be testimonial in nature.[180]

The Government may overcome a witness' fifth amendment privilege and compel his testimony by granting him use immunity.[181] Use immunity precludes the use of the immunized testimony, or of any information derived from it, against the witness.[182] The Government, however, may prosecute for perjury a witness who testifies falsely under a grant of immunity.[183] Immunity orders are enforced by the court through civil or criminal contempt proceedings.[184]

The Government's use of a defendant's "silence" may violate the fifth amendment privilege against self-incrimination. A prosecutor may not comment on a defendant's failure to testify at trial,[185] nor may a prosecutor use the defendant's silence pursuant to *Miranda* warnings to impeach his testimony at trial.[186] A defendant's silence either prior to arrest[187] or between arrest and *Miranda* warnings,[188] however, may be used to impeach his trial testimony.

Kansas Supreme Court

State v. Anderson, 240 Kan. 695, 732 P.2d 732 (1987).

Although a guilty plea generally waives a witness' fifth amendment privilege against self-incrimination, if he may still be subject to prosecution for other offenses, has not yet been sentenced, or his time for appeal has not yet passed, the witness may refuse to testify against an accomplice.

Kansas Court of Appeals

State v. Brewer, 11 Kan. App. 2d 655, 732 P.2d 780 (1987).

A grant of immunity must be coextensive with the fifth amendment privilege against self-incrimination.

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[176] United States v. White, 322 U.S. 694, 698 (1944).
[177] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).
[178] Hoffman v. United States, 341 U.S. 479, 486 (1951).
[179] United States v. Washington, 431 U.S. 181, 187 (1977).
[180] Schmerber v. California, 384 U.S. 757, 761 (1966).
[181] 18 U.S.C. § 6002. *See* Kastigar v. United States, 406 U.S. 441, 448 (1972).
[182] *Kastigar*, 406 U.S. at 460-62.
[183] United States v. Apfelbaum, 445 U.S. 115, 130-31 (1980).
[184] 18 U.S.C. § 401; 28 U.S.C. § 1826(a).
[185] Griffin v. California, 380 U.S. 609, 615 (1965).
[186] Doyle v. Ohio, 426 U.S. 610, 619 (1976). Such silence, however, may be admissible to impeach a defendant who testifies to an exculpatory version of the events and claims to have told the police the same version upon arrest. *Id.* at 619 n.11.
[187] Jenkins v. Anderson, 447 U.S. 231, 240 (1980).
[188] Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam).

State v. Rucas, 12 Kan. App. 2d 68, 734 P.2d 673 (1987).

An individual who has pleaded guilty to a crime but has not yet been sentenced, is entitled to exercise his fifth amendment privilege against self-incrimination with respect to that crime.

F. Trial Format and Related Issues[189]

United States Supreme Court

California v. Brown, 107 S. Ct. 837 (1987).

When a specific jury instruction fails constitutional muster, the instructions as a whole are reviewed to see if the entire charge delivered a correct interpretation of the law.

Martin v. Ohio, 107 S. Ct. 1098 (1987).

It is not a due process violation to place the burden of proving self-defense on a defendant.

Kansas Supreme Court

State v. Armstrong, 240 Kan. 446, 731 P.2d 249 (1987).
State v. Bishop, 240 Kan. 647, 732 P.2d 765 (1987).
State v. Hutchcraft, 242 Kan. 55, 744 P.2d 849 (1987).
State v. Cummings, 242 Kan. 84, 744 P.2d 858 (1987).
State v. Shehan, 242 Kan. 127, 744 P.2d 824 (1987).

A trial court must instruct the jury on lesser included offenses only when the evidence indicates that a defendant might reasonably be convicted of a lesser offense.

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

A trial court may give supplemental instructions to a jury on the jury's request to have testimony read back to it. Under K.S.A. § 22-3414(3), a defendant may not claim error in giving the instructions unless he objects before the jury retires, stating the matter to which he objects and the grounds for the objection.

State v. Hollis, 240 Kan. 521, 731 P.2d 260 (1987).

K.S.A. § 22-3423(1)(c) provides that a trial court, in its discretion, may order a mistrial whenever prejudicial conduct, in or outside the courtroom, makes it impossible to continue the trial without injustice to either side.

State v. Hollis, 240 Kan. 521, 731 P.2d 260 (1987).

Improper remarks by a prosecutor in his closing argument, unless they are so prejudicial as to be incurable, are not a sufficient basis

[189] The cases in this section relate to miscellaneous criminal procedure issues that arise during trial.

for reversal when the court instructs the jury to ignore the remarks.

State v. Hamilton, 240 Kan. 539, 731 P.2d 863 (1987).

Improper remarks by a trial judge that prejudice a defendant's substantial rights violate the defendant's constitutional right to a fair trial.

State v. Willis, 240 Kan. 580, 731 P.2d 287 (1987).

A defendant may not appeal the giving or failure to give a jury instruction unless he objects before the jury retires and clearly states the grounds for the objection.

State v. Wilson, 240 Kan. 606, 731 P.2d 306 (1987).

Unless there is some compelling and articulable reason not to do so, a trial court should use pattern jury instructions.

State v. Hunter, 241 Kan. 629, 740 P.2d 559 (1987).

In a criminal case, the court must instruct the jury on the law applicable to all the parties' theories so long as the evidence, when viewed in a light most favorable to the party requesting the instruction, supports the theories.

State v. Cathey, 241 Kan. 715, 741 P.2d 738 (1987).

A jury instruction allowing consideration of a defendant's flight, concealment, fabrication of evidence, or giving of false information is erroneous because it singles out and emphasizes the weight to be given that evidence by the jury.

State v. Martin, 241 Kan. 732, 740 P.2d 577 (1987).

An instruction based on K.S.A. § 21-3104, which defines the scope of the State's territorial jurisdiction, does not shift the burden of disproving jurisdiction to the defendant.

State v. Moore, 242 Kan. 1 (1987).

Improper remarks made by a prosecutor during closing argument are not grounds for reversal if the jury is instructed to disregard the remarks and they are not so prejudicial as to be incurable.

State v. Hill, 242 Kan. 68, 744 P.2d 1228 (1987).

The trial court must instruct the jury on lesser included offenses and self-defense, even if the evidence that supports those claims are slight and based solely on the testimony of the defendant. On appeal, the evidence that supports such instructions must be viewed in the light most favorable to the defendant.

State v. Cummings, 242 Kan. 84, 744 P.2d 858 (1987).

The decision whether to allow testimony from a previously undisclosed witness lies within the discretion of the trial court, but such testimony cannot be excluded without close questioning of the circumstances surrounding the lack of disclosure and without serious consideration of possible alternatives.

State v. Cummings, 242 Kan. 84, 744 P.2d 858 (1987).

A statement made during closing argument that is contrary to

the evidence and does not reach the level of repeated abuse or personal opinion, is not reversible error unless a contemporaneous objection was made.

State v. Cummings, 242 Kan. 84, 744 P.2d 858 (1987).

When a jury instruction is not clearly erroneous, K.S.A. § 22-3414(3) prohibits a party from claiming error unless a contemporaneous objection was made.

State v. Hood, 242 Kan. 115, 744 P.2d 816 (1987).

A prosecutor's use of peremptory challenges to exclude members of the defendant's race from a jury solely on racial grounds violates equal protection. Prosecutors must explain peremptory jury challenges that appear to be motivated solely by racial considerations. Furthermore, a defendant does not need to go outside the facts of his case to establish a prima facie case of discrimination in the exercise of peremptories.

State v. Shehan, 242 Kan. 127, 744 P.2d 824 (1987).

A trial court has a duty to instruct the jury on the law applicable to all prosecution and defense theories supported by competent evidence.

State v. Massey, 242 Kan. 252, 747 P.2d 802 (1987).

A criminal defendant has the right to have the jury instructed on any theory of defense supported by the evidence.

State v. Massey, 242 Kan. 252, 747 P.2d 802 (1987).

The declaration of a mistrial is entrusted to the trial court's discretion and will be set aside on appeal only upon a clear showing of abuse of discretion. The defendant has the burden of proving he was substantially prejudiced.

State v. Grubbs, 242 Kan. 224, 747 P.2d 140 (1987).

A jury should be instructed that it is to determine the weight to be given expert testimony.

Kansas Court of Appeals

State v. Adams, 12 Kan. App. 2d 191, 737 P.2d 876 (1987).

A trial court's duty to instruct on a lesser included offense arises only when there is evidence upon which the jury might reasonably convict a defendant of the lesser offense.

State v. Johnson, 12 Kan. App. 2d 239, 738 P.2d 872 (1987).

When a defendant fails to object to a jury instruction, an appellate court may reverse only if the instruction was clearly erroneous.

State v. Goodnow, 12 Kan. App. 2d 294, 740 P.2d 113 (1987).

Declaration of a mistrial is within the discretion of the trial court and will be granted only if a party's rights are substantially prejudiced.

IV. SENTENCING, PROBATION, AND PAROLE[190]

United States Supreme Court

Rodriquez v. United States, 107 S. Ct. 1391 (1987).

18 U.S.C. § 1347, which requires an additional two-year sentence for a felony committed while on bail, does not implicitly repeal 18 U.S.C. § 3651, which allows federal judges discretion to substitute parole for prison terms. Therefore, federal judges may suspend sentences imposed by § 1347 and impose probation.

Board of Pardons v. Allen, 107 S. Ct. 2415 (1987).

A state parole statute providing that the parole board shall release prisoners, subject to certain restrictions, creates a due process liberty interest in parole release.

Miller v. Florida, 107 S. Ct. 2446 (1987).

The application of revised sentencing guidelines to a defendant whose crimes occurred prior to their effective date violates the Constitution's *ex post facto* clause.

Kansas Supreme Court

State v. Ramos, 240 Kan. 485, 731 P.2d 837 (1987).

A sentence that is within the permissible statutory limits will not be disturbed on appeal absent special circumstances showing abuse of discretion.

State v. Hamilton, 240 Kan. 539, 731 P.2d 863 (1987).

A sentence that is within the statutory limits will not be disturbed on appeal so long as it is not an abuse of discretion or the result of partiality or prejudice.

State v. Hamilton, 240 Kan. 539, 731 P.2d 863 (1987).

Under K.S.A. § 22-3602(a), there is no direct appeal of a denial of probation following a plea of guilty or nolo contendere. *See also State v. Harrold*, 239 Kan. 645, 722 P.2d 563 (1986).

State v. Bennett, 240 Kan. 575, 731 P.2d 284 (1987).

Whether the Secretary of Corrections abused his discretion in selecting an institution for a defendant's confinement is not a justiciable issue on direct appeal of the defendant's sentence.

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[190] Death penalty cases are omitted because they are not relevant to Kansas practitioners.

State v. Bennett, 240 Kan. 575, 731 P.2d 284 (1987).
A direct appeal may be taken of a sentence imposed following a plea of guilty or nolo contendere.

State v. Bennett, 240 Kan. 575, 731 P.2d 284 (1987).
Under K.S.A. § 21-4606, a sentencing court that imposes a sentence greater than the statutory minimum does not necessarily abuse its discretion by failing to state on the record the factors it considered in arriving at the defendant's sentence.

State v. Clements, 241 Kan. 77, 734 P.2d 1096 (1987).
As to identical offenses, a defendant can only be sentenced under the lesser penalty.

State v. Griffin, 241 Kan. 68, 734 P.2d 1089 (1987).
A judge's ordinary and natural reaction to the conduct of, or evidence developed about, a defendant does not create a disqualification for bias or prejudice.

State v. Adams, 242 Kan. 20, 744 P.2d 833 (1987).
A sentence that is within the statutory limits will not be disturbed on appeal absent a showing of an abuse of discretion, such as partiality, prejudice, oppression, or corrupt motive.

Kansas Court of Appeals

State v. Brewer, 11 Kan. App. 2d 655, 732 P.2d 780 (1987).
A defendant bears the burden of proving that his due process rights were violated because his sentence resulted from inaccurate information.

State v. Brewer, 11 Kan. App. 2d 655, 732 P.2d 780 (1987).
Unless there is a statutory presumption of probation as set out in K.S.A. § 21-4606a, granting or denying probation is within the trial court's exclusive jurisdiction and is not subject to appellate review.

State v. McQueen, 12 Kan. App. 2d 147, 736 P.2d 947 (1987).
In sentencing, K.S.A. § 21-4606 allows the trial court to consider a defendant's personal history, character and condition, and prior criminal activity including that not resulting in conviction.

Swisher v. Hamilton, 12 Kan. App. 2d 183, 740 P.2d 95 (1987).
Parole is a privilege and no constitutional right is involved.

State v. Adams, 12 Kan. App. 2d 191, 737 P.2d 876 (1987).
A trial court's sentencing determination pursuant to K.S.A. § 21-4618 that a defendant used a firearm in committing an offense must be affirmed on appeal if supported by competent evidence.

State v. Lake, 12 Kan. App. 2d 275, 740 P.2d 106 (1987).
When a trial judge inappropriately criticizes a defendant's attorney during a sentencing proceeding, but the sentence imposed is within statutory limits and the statutory factors considered indicate

no abuse of discretion or prejudice against the defendant, the case need not be returned for sentencing by another judge, even though the factors considered were not specifically detailed.

State v. Goodnow, 12 Kan. App. 2d 294, 740 P.2d 113 (1987).
State v. Kulper, 12 Kan. App. 2d 301, 744 P.2d 519 (1987).

A sentence that is within the statutory limits will not be disturbed on appeal absent a showing of an abuse of discretion such as partiality, prejudice, oppression, or corrupt motive.

State v. Dean, 12 Kan. App. 2d 321, 743 P.2d 98 (1987).

A court may impose court costs as a condition of probation without considering a defendant's ability to pay. However, a court may not revoke probation for failure to pay court costs without considering whether the defendant has the ability to pay.

State v. Deavours, 12 Kan. App. 2d 361, 743 P.2d 1011 (1987).

A defendant's motion to modify a minimum sentence acts as a request for probation, absent a recommendation from the Secretary of Corrections.

V. REVIEW PROCEEDINGS

A. Post-Verdict Motions

There are three post-verdict motions. These are motions for judgment of acquittal,[191] new trial,[192] and arrest of judgment.[193] Post-verdict motions are made to the trial judge and usually are prerequisites to appeal.

A motion for judgment of acquittal alleges that the evidence is insufficient to sustain a conviction.[194] The standard is that the defendant is entitled to an acquittal if reasonable jurors could not conclude that the evidence, taken in the light most favorable to the Government, proved guilt beyond a reasonable doubt.[195]

A motion for new trial may be based on a broad range of alleged trial errors.[196] These allegations are not usually considered unless the defendant timely raised them prior to the verdict.[197] A new trial will be granted if required in the interest of justice.[198] Motions for a new trial may also be based on newly discovered evidence.[199]

A motion in arrest of judgment alleges either that the indictment failed to charge an offense or that the court lacked jurisdiction over the offense charged.[200] These allegations are never waived and may be raised at any time during the criminal process.[201]

Kansas Supreme Court

State v. Armstrong, 240 Kan. 446, 731 P.2d 249 (1987).

A trial court should not grant a new trial on the ground of newly discovered evidence unless the evidence is so material that it would likely produce a different result on retrial.

State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).

A trial court should not grant a new trial on the ground of newly

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[191] FED. R. CRIM. P. 29(c); K.S.A. § 22-3419.

[192] FED. R. CRIM. P. 33; K.S.A. § 22-3501.

[193] FED. R. CRIM. P. 34; K.S.A. §§ 22-3502 to -3503.

[194] FED. R. CRIM. P. 29(a)-(c); State v. Gustin, 212 Kan. 475, 478, 510 P.2d 1290, 1293 (1973).

[195] Goff v. United States, 446 F.2d 623, 624 (10th Cir. 1971); *Gustin*, 212 Kan. at 478-79, 510 P.2d at 1294 (1973).

[196] FED. R. CRIM. P. 33; K.S.A. § 22-3501.

[197] For example, to allege in a Rule 33 motion for new trial that illegally seized evidence was admitted at trial, the defendant must have made a pretrial motion to suppress the evidence pursuant to Rule 12(b)(3).

[198] FED. R. CRIM. P. 33; K.S.A. § 22-3501(1).

[199] *Id.*

[200] FED. R. CRIM. P. 34; K.S.A. §§ 22-3502 to -3503.

[201] FED. R. CRIM. P. 12(b)(2); K.S.A. § 22-3208(3).

discovered evidence unless the evidence is so material that it would likely produce a different result on retrial. Evidence is "newly discovered" if it is material to the defendant's cause and contains information that the defendant with reasonable diligence could not have discovered and produced at trial.

B. Appeals

No constitutional right to appellate review exists.[202] If, however, a jurisdiction grants appellate review (which all do), the review may not be conditioned so that it violates equal protection or due process.[203]

Generally, appellate courts only have jurisdiction to review "final decisions" of trial courts.[204] The Government, however, may appeal a pretrial dismissal of an indictment or a suppression of evidence,[205] and the defendant may appeal a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds.[206] Appellate courts may hear an appeal if there is any possibility that the defendant will suffer legal consequences as a result of the challenged conviction.[207]

If the appellate court determines that an error exists, it must then determine whether the error requires reversal. The appellate court will reverse if the error was properly raised in the trial court and the error was not "harmless."[208] If, however, the defendant failed to properly raise the error in the trial court, the appellate court will reverse only if it was "plain error."[209]

United States Supreme Court

Griffith v. Kentucky, 107 S. Ct. 708 (1987).

A new rule for the conduct of criminal prosecutions, such as the ruling in *Batson*, applies retroactively to all state or federal cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

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[202] McKane v. Durston, 153 U.S. 684, 687 (1894).

[203] North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969).

[204] 28 U.S.C. § 1291; K.S.A. § 22-3601.

[205] 18 U.S.C. § 3731; K.S.A. §§ 22-3602(b), 22-3603.

[206] Abney v. United States, 431 U.S. 651, 659 (1977).

[207] Sibron v. New York, 392 U.S. 40, 57-58 (1943).

[208] "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a).

[209] "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

Kansas Supreme Court

State v. Ramos, 240 Kan. 485, 731 P.2d 837 (1987).
State v. Ruebke, 240 Kan. 493, 731 P.2d 842 (1987).
State v. Willis, 240 Kan. 580, 731 P.2d 287 (1987).
State v. Holloman, 240 Kan. 589, 731 P.2d 294 (1987).
State v. Anderson, 240 Kan. 695, 732 P.2d 732 (1987).
State v. Holcomb, 240 Kan. 715, 732 P.2d 1272 (1987).
State v. Lawton, 241 Kan. 140, 734 P.2d 1138 (1987).
State v. Dressel, 241 Kan. 426, 738 P.2d 830 (1987).
State v. Grubbs, 242 Kan. 224, 747 P.2d 140 (1987).

When a defendant appeals on the ground of insufficient evidence, the appellate court reviews the evidence in the light most favorable to the prosecution to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

State v. Hodges, 241 Kan. 183, 734 P.2d 1161 (1987).

A court will entertain on appeal questions reserved by the State in a criminal prosecution only if they are of statewide interest and answers to them are vital to the correct and uniform administration of law.

State v. Adee, 241 Kan. 825, 740 P.2d 611 (1987).

Questions reserved by the State pursuant to K.S.A. § 22-3602(b)(3) will be entertained only when they involve questions of statewide interest, not merely to demonstrate whether error has been committed by the trial court.

State v. Vakas, 242 Kan. 103, 744 P.2d 812 (1987).

Issues not raised in or ruled upon by the trial court are not properly before an appellate court for review.

State v. Shehan, 242 Kan. 127, 744 P.2d 824 (1987).

When a trial court reaches the correct result based upon the wrong reason, the appellate court will affirm.

State v. Wagner, 242 Kan. 329, 747 P.2d 114 (1987).

When a defendant is convicted and released without imposition of a sentence pursuant to K.S.A. § 21-4603(2)(d), K.S.A. § 22-3608(2) controls the time for appeal. If, however, the execution of the sentence is suspended by placing the defendant on probation pursuant to K.S.A. § 21-4603(2)(c), the time for appeal is controlled by K.S.A. § 22-3608(1).

Kansas Court of Appeals

State v. Fulcher, 12 Kan. App. 2d 169, 737 P.2d 61 (1987).

In determining whether the evidence at trial was sufficient to support a conviction, the appellate court must decide whether the evidence, viewed in the light most favorable to the prosecution, con-

vinces the appellate court that a rational fact finder could find the defendant guilty beyond a reasonable doubt.

State v. Kulper, 12 Kan. App. 2d 301, 744 P.2d 519 (1987).

Constitutional grounds asserted for the first time on appeal are not properly before the appellate court for review.

State v. Cook, 12 Kan. App. 2d 309, 741 P.2d 379 (1987).

The trial court need only show on the record that the defendant was advised of the right to appeal and that an attorney was or would have been appointed to assist the defendant in such an appeal. The record must reflect that the defendant made a knowing and intelligent decision not to appeal before he can be precluded from appellate review.

State v. Anderson, 12 Kan. App. 2d 342, 744 P.2d 143 (1987).

Generally, an issue that was not before the trial court will not be considered for the first time on appeal. However, such an issue can be considered if it involves a question arising on proved or admitted facts that is determinative of the case or if consideration of the issue is necessary to protect a fundamental right of the defendant.

State v. Kirby, 12 Kan. App. 2d 346, 744 P.2d 146 (1987).

An appellate court will not substitute its view of the evidence for that of the trial court when the trial court's findings on a motion to suppress are based upon substantial evidence.

State v. McMannis, 12 Kan. App. 2d 464, 747 P.2d 1343 (1987).

An issue that is not briefed on appeal is deemed abandoned.

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THE KANSAS DEATH PENALTY DEBATE

Emil A. Tonkovich*

The death penalty has been fiercely debated in Kansas for more than ten years. During this period, the Kansas Legislature passed four bills that would have reinstated the death penalty. Former Governor Carlin, however, vetoed these bills. Last year, newly-elected Governor Hayden advocated the passage of a death penalty bill. The bill, which passed the House, was narrowly defeated by the Senate. Undoubtedly, a new death penalty bill will be introduced in the Kansas Legislature and the debate will continue.

Rather than take a position on capital punishment, this article surveys the death penalty debate. After briefly reviewing the constitutional aspects of the death penalty, it will analyze the primary arguments against the death penalty and examine the latest Kansas bill.

I. CONSTITUTIONAL ASPECTS OF THE DEATH PENALTY

The death penalty is a constitutional form of punishment. Under the eighth amendment punishment clause, a criminal sentence must be proportionate to the crime and comport with contemporary standards of decency.[1] The United States Supreme Court has consistently held that in murder cases the death penalty complies with these eighth amendment requirements.[2]

The Court has held that the death penalty is a proportionate sentence for deliberate murders. As the Court stated, the death penalty is an "extreme sanction suitable to the most extreme of crimes."[3] The Court also has held that the death penalty comports with contemporary standards of decency. After recognizing the death penalty's long history of acceptance in the United States, the Court, in 1976, found that it is "evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."[4] To support this finding, the Court cited the fact

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* Professor of Law, University of Kansas. J.D. 1977, *summa cum laude*, Notre Dame.

[1] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[2] *Id.* at 176-78. In 1972, however, death penalty *procedures* were held unconstitutional. Furman v. Georgia, 408 U.S. 238 (1972). Only two Supreme Court Justices have ever written opinions stating that the death penalty is unconstitutional per se.

[3] *Gregg*, 428 U.S. at 187.

[4] *Id.* at 179.

that 35 states had death penalty statutes and that public opinion polls indicated that the majority of Americans favor the death penalty.

Today, support for the death penalty is even stronger. The number of states with death penalty statutes has increased to 37.[5] Furthermore, a 1986 Associated Press poll showed that 86% of Americans favor the death penalty.

Evidence of public support for the death penalty is relevant not only for constitutional purposes, but also in deciding whether Kansas should enact a death penalty statute. Opponents of the death penalty argue that it does not deter murder and that it will cost millions of dollars to implement. Death penalty proponents respond that the vast majority of legislatures and taxpayers would not support the death penalty if it was totally ineffective and extremely costly.

II. ARGUMENTS AGAINST THE DEATH PENALTY

Although death penalty debates typically focus on the morality issue, the death penalty opponents in Kansas made an essentially economic argument. They argued that the death penalty would cost the state millions of dollars. Furthermore, they argued that the death penalty does not deter murder. Thus, through a cost-benefit analysis the opponents claimed that the death penalty is not cost-effective. Although the deterrence and cost arguments were very persuasive, they do not withstand close scrutiny.

A. Deterrence

The United States Supreme Court, referring to premeditated murders, stated that "the death penalty *undoubtedly* is a *significant deterrent.*"[6] The Court has consistently recognized that the death penalty serves a valid social purpose by deterring murders.[7] This finding is based on sound legal principles and logical reasoning. Deterrence is a fundamental purpose of criminal law. The greater the punishment, the greater the deterrence.[8] This basic legal principle leads to the inescapable conclusion that for some types of murder the death penalty provides greater deterrence than a term of imprisonment.[9]

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[5] U.S. Department of Justice Bureau of Justice Statistics.

[6] *Gregg*, 428 U.S. at 185-86 (emphasis added).

[7] For example, the Court held that the death penalty should not be imposed upon an accomplice to a robbery felony-murder, who did not actually kill or intend to kill, because in that situation the death penalty would not serve as a deterrent. The Court reasoned that the death penalty should be imposed only in those situations in which it serves as a deterrent. Enmund v. Florida, 458 U.S. 782, 798-800 (1982).

[8] Most murderers, like most other criminals, certainly consider the likelihood of apprehension and the potential punishment when deciding whether to commit the crime.

[9] Although some murders are deterred by the death penalty, many types of criminal

A recent United States Department of Justice report unequivocally supports this analysis.[10] The report states that it is "clear that capital punishment has a deterrent effect."[11] After thoroughly analyzing the latest deterrence studies, the report finds that "the death penalty is the most effective deterrent for some kinds of murder"[12] and that "deterrence appears to be an undeniable fact of life."[13]

Opponents of the death penalty, citing their own statistical studies, disagreed with the Supreme Court and the Justice Department. Although their studies at best raised doubts as to the death penalty's deterrent effect, the opponents apparently were able to persuade many senators that the death penalty does not deter murder.[14] Thus, many of the senators were persuaded that there was no benefit to the death penalty.

Logically, this perception alone probably would have defeated the death penalty bill. The overwhelming public support for capital punishment,[15] however, required that the senators also find that the death penalty would be too costly to implement.

B. Cost

Opponents argued that the death penalty would cost millions of dollars per year to implement. Although the opponents offered several estimates, the most comprehensive estimate was $7 million per year.[16] Careful analysis, however, reveals that the opponents grossly overestimated the death penalty cost.

The opponents, relying on figures provided by the Board of Indigent Defense Services (B.I.D.S.), grossly exaggerated the number of death penalty cases per year.[17] To analyze cost, two figures must be determined: (1) the number of capital trials; and (2) the number of death penalty appeals, i.e., the number of death sentences imposed.[18] Although specific estimates are difficult because of inadequate data in Kansas, it is apparent that the B.I.D.S. estimates were ridiculously high.

The B.I.D.S. estimated that there would be 80 capital trials per

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homicide are not deterred. For example, "heat of passion" killings are not deterred. These homicides, however, are considered voluntary manslaughter and appropriately are not covered under death penalty statutes.

[10] U.S. Department of Justice, *Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission* (Feb. 13, 1987).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Thus, retribution remained the only justification for the death penalty.

[15] A 1987 survey showed that 69% of Kansans favor the death penalty and only 24% oppose it. University of Kansas Institute for Public Policy and Business Research, *Third Annual Public Opinion Survey of Kansas.*

[16] This estimate was made by Professor David J. Gottlieb, University of Kansas, School of Law.

[17] The Kansas Legislative Research Department's cost estimates also relied on the B.I.D.S. figures.

[18] Capital trials (particularly sentencing) and capital appeals are definitely more costly than noncapital trials and appeals.

year.[19] According to Kansas Bureau of Investigation (K.B.I.) statistics, in 1986 there were only 107 criminal homicides that could be categorized as either first degree murder, second degree murder, or voluntary manslaughter. It is incredible to estimate that 80 of these homicides would result in capital trials.

A realistic estimate is that there will be approximately 10 capital trials per year. This estimate is roughly made by subtracting from the 107 criminal homicides the following: (1) voluntary manslaughters, i.e., "heat of passion" killings; (2) second degree murders, i.e., intentional, but not premeditated, killings; (3) felony-murders not covered by the Kansas bill, e.g., murder occurring during robberies, burglaries, and arsons, and all unintentional felony-murders; (4) murders covered by the Kansas bill that either do not display an aggravated circumstance or display an outweighing mitigating circumstance; and (5) capital cases in which the defendant pleads guilty. Although specific numbers for each of these categories are unavailable, it is obvious that the vast majority of criminal homicides would *not* result in capital trials.

A specific estimate can be made by analyzing the Sedgwick County figures. There were 12 first degree murder cases filed in Sedgwick County in 1986. Only three of the cases, however, would have been death penalty cases.[20] According to K.B.I. statistics, 26% of Kansas criminal homicides in 1986 occurred in Sedgwick County. Thus, the Sedgwick County figures indicate that there would be only 12 capital cases filed in Kansas per year. This figure would be further reduced by capital defendants who plead guilty.[21]

In addition to exaggerating the number of capital trials, the B.I.D.S. grossly overestimated the number of death sentences. The B.I.D.S. estimated that there would be 16 death sentences per year.[22] For this estimate to be accurate, Kansas would need to impose the death sentence *eight* times more frequently than the national average.

A realistic estimate is that there would be two death sentences per year in Kansas. This estimate is obtained by computing the per capita death sentence rate in the 37 states that have the death penalty and adjusting the result to the Kansas murder rate.[23] This esti-

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[19] Apparently this is an estimate of first degree murder cases filed annually. This figure is irrelevant because it includes noncapital first degree murders and does not estimate how many cases will be tried.

[20] These figures were supplied by James Puntch, Chief Trial Attorney for the Sedgwick County District Attorney.

[21] It is reasonable to assume that a substantial percentage of capital defendants would plead guilty in exchange for a term of imprisonment.

[22] The number of death sentences represents the number of capital appeals. This is the most important estimate in the cost analysis because capital appeals are clearly the most expensive aspect of the death penalty.

[23] U.S. Department of Justice Bureau of Justice Statistics. These 37 states have a total population of approximately 180 million and in 1985 imposed 273 death sentences. The national murder rate in 1985 was 7.9 per 100,000 compared to 4.9 per 100,000 in Kansas. According to the latest census, Kansas has a population of 2.3 million. (The 1985 figures were the latest available when the opponents' cost estimates were made.)

mate is further verified by comparing the number of death sentences in Missouri. Missouri has nearly four times as many murders as Kansas yet annually imposes only eight death sentences.[24] Thus, a comparison with Missouri will also result in an estimated two death sentences per year in Kansas. Furthermore, the Kansas estimate does not consider that the scope of the Kansas bill was much narrower than other death penalty statutes and would have resulted in even fewer death sentences.

Applying this reasonable estimate of death penalty cases to the *opponents'* cost estimates would reduce the cost to approximately $1 million per year.[25] This figure would be reduced further by weighing the savings that would result from the death penalty. For example, the cost of incarcerating each murderer would be at least $300,000 over his lifetime. Also, because defendants faced with the death penalty would be far more willing to plead guilty in exchange for a term of imprisonment, there would be fewer murder trials and more favorable plea bargains for the State.[26] Finally, the cost is arguably justified if only one murder per year would be deterred.

Although the opponents' cost estimates were grossly overestimated, they were extremely timely. Cost arguments—even those based on ridiculous figures—are persuasive when made to legislators facing a budget crisis.

III. KANSAS DEATH PENALTY BILL

The Kansas House bill[27] was modeled after existing death penalty statutes. It differed from existing statutes, however, in three areas.[28] First, the House bill significantly limited the definition of capital murder. The Senate committee[29] version clarified this definition. Second, the House bill required a special sentencing jury. This provision was repealed by the Senate committee. Third, the House bill implied that prosecutors could not exercise discretion in seeking the death penalty. The Senate committee version expressly provided for prosecutorial discretion.

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[24] U.S. Department of Justice Bureau of Justice Statistics (1985 figures).

[25] This assumes that the opponents accurately estimated the additional costs involved in capital trials and appeals.

[26] Defendants will certainly try to avoid the death penalty and, except under rare circumstances, prosecutors will accept offers to plead to life imprisonment. Under present Kansas law, however, if the prosecutor refuses a plea to a lesser charge, the defendant will go to trial because he will at worst, be eligible for parole in 15 years. Thus, a death penalty statute will result in fewer trials and the State will save the *entire* cost of these first degree murder trials and appeals. Furthermore, if the prosecutor decides to plea bargain he will be in a stronger position and receive a better agreement.

[27] H.R. 2062 (1987).

[28] Other variances were due to poor drafting and failure to update the draft bill with recent case law.

[29] Kansas Senate Committee on Federal and State Affairs.

A. Definition of Capital Murder

The House bill defined capital murder as premeditated murder and intentional murder in the commission of kidnapping, rape, and aggravated criminal sodomy.[30] Thus, the death penalty was limited to premeditated murders and intentional felony-murder when the underlying crime is an inherently dangerous felony against a person. Most death penalty statutes, on the other hand, include premeditated murder and all intentional felony-murders.[31]

Under the House bill, capital murder was wisely limited to the most heinous killings. Unfortunately, the bill was poorly drafted and did not consider either disparity of punishment or the impact upon plea bargaining.[32] The House bill simply stated that the defined murders would be subject to the death penalty.

The Senate committee amendments attempted to address these problems. Capital murder was separately defined as a new class AA felony[33] and subject to the death penalty or life imprisonment with eligibility for parole after 25 years of imprisonment.[34] These amendments clarified the definition of capital murder, lessened the disparity in punishment, and improved the plea bargaining process.

The Senate committee amendments, however, should have been more extensive. Enacting a death penalty statute requires a complete revision of the criminal homicide statutes.[35] Great disparity in punishment must be avoided and the parties must have reasonable latitude in plea bargaining.

B. Special Sentencing Jury

A House bill amendment required that the death penalty be imposed by a special sentencing jury.[36] Under this provision, following a capital murder conviction, a new jury would be empaneled to decide whether to impose the death penalty. Opponents supported this provision on the theory that it would avoid conviction-prone "death qualified" juries at the trial's guilt phase.[37]

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[30] H.R. 2062 §§ 1-3 (1987) (House amendments).

[31] U.S. Department of Justice Bureau of Justice Statistics. For example, death penalty statutes typically include felony-murder when the underlying felony is robbery, burglary, or arson.

[32] For example, a defendant found guilty in a death penalty case would either be sentenced to death or eligible for parole in 15 years. This disparity in punishment is too great and would inhibit flexible plea bargaining.

[33] H.R. 2062 § 1(b) (1987) (Senate amendments).

[34] *Id.* §§ 3(a), 15(b).

[35] Even without the death penalty, the Kansas criminal homicide statutes need to be revised in terms of classification and punishment. Inserting a death penalty provision, without considering its impact on the other statutes, further exacerbates the situation.

[36] H.R. 2062 § 7(2) (1987) (House amendments).

[37] In a capital case in which the same jury determines guilt and imposes sentence, potential jurors who indicate an inability to follow the law and impose the death sentence when the law requires may be excluded "for cause" from the jury panel. Lockhart v. McCree, 106 S. Ct. 1758 (1986). Opponents of the death penalty argue that "death qualified" juries are prone to conviction. The Supreme Court rejected this argument. *Id.*

Special sentencing juries are unprecedented[38] and unnecessary.[39] Furthermore, this procedure is inconsistent with sentencing theory[40] and would be very time-consuming and extremely expensive.[41] Ironically, special sentencing juries may also be more likely to impose death sentences.[42]

The Senate committee repealed the special sentencing jury provision. Under the Senate amendment, the decision to impose the death penalty would be made by the trier-of-fact.[43] The Senate procedure has been specifically approved by the U.S. Supreme Court and is the standard procedure in states with death penalty statutes.[44]

C. Prosecutorial Discretion

The House bill implied that prosecutors would not have discretion in seeking the death penalty.[45] This implication is unprecedented[46] and may violate the separation of powers doctrine.[47] Prosecutorial discretion is essential in criminal cases, particularly those involving the death penalty. The State, as well as the defendant, benefits when a prosecutor exercises his discretion not to seek the death penalty.[48]

The Senate committee amendments expressly provided for prosecutorial discretion. Under the Senate amendment, at the arraignment the prosecutor must notify the defendant of his intent to seek the death penalty.[49] This gives the defendant and the trial judge sufficient notice to prepare for capital jury selection. Following a guilty verdict or guilty plea, the prosecutor may move for a death sentence proceeding.[50] This allows the prosecutor to re-evaluate his earlier decision to seek the death penalty.

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[38] No other state's death penalty statute provides for a special sentencing jury.

[39] *See supra* note 37.

[40] The jury (or judge) who heard the guilt phase of the trial is in a far better position than a new jury to determine a fair sentence.

[41] A new jury would need to be empaneled. Furthermore, to ensure a fair sentence, virtually the entire case would need to be presented to the new jury.

[42] If the trial jury also sentences the defendant, jurors with "residual doubts" about guilt are extremely unlikely to impose a death sentence. (This also ensures that the death penalty will be imposed only when all jurors are absolutely convinced of guilt.) Jurors on a special sentencing jury, however, obviously will not have "residual doubts" and thus, will be more likely to impose a death sentence.

[43] H.R. 2062 § 6(2) (1987) (Senate amendments).

[44] *Lockhart*, 106 S. Ct. at 1768-69.

[45] Although prosecutorial discretion could be implied, both proponents and opponents assumed that the bill did not provide prosecutorial discretion.

[46] All other states' death penalty statutes permit prosecutorial discretion.

[47] It could be argued that the Legislature unconstitutionally infringed upon prosecutorial discretion.

[48] In addition to the obvious benefit to the defendant, the State would also benefit by saving the time and cost of unwarranted death penalty prosecutions. Many cases that technically fit within a death penalty statute may not warrant a death sentence.

[49] H.R. 2062 § 6(1) (1987) (Senate amendments).

[50] *Id.* § 6(2).

IV. CONCLUSION

The death penalty is a constitutional form of punishment that has been enacted by 37 states and is supported by the overwhelming majority of Americans. Furthermore, a strong argument can be made that the death penalty is a cost-effective deterrent for some types of murder.

Despite these facts, the Kansas Senate defeated the death penalty bill by a 22-18 vote. The vote was particularly unexpected because the Kansas Legislature had passed four death penalty bills in the past ten years. The defeat was caused by six senators withdrawing their support for the death penalty. Five senators actually switched their votes and one voted against the bill after campaigning with Governor Hayden and promising to vote for the death penalty.

Two explanations have been offered for the senators withdrawing their support for the death penalty.[51] First, it has been suggested that, when faced with a governor that would sign a death penalty bill, some senators could not vote for the bill on moral grounds. Although the morality of the death penalty is certainly questionable, this "morality switch" might indicate that the senators' prior support for capital punishment was politically motivated. Second, it has been suggested that some senators voted against the death penalty to embarrass Governor Hayden, who had vigorously campaigned on the death penalty issue and promised the voters a death penalty statute.

The death penalty debate undoubtedly will continue.[52] The only issue in this debate should be the morality of the death penalty. Perhaps the Kansas Senate made the right decision for the wrong reasons.

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[51] These explanations have been offered by death penalty proponents. It is possible that these senators withdrew their support for the death penalty because they did not carefully consider the issue when Governor Carlin was in office.

[52] Governor Hayden raised the death penalty issue in his 1988 State of the State Address.

PREVENTIVE DETENTION: *United States v. Salerno**

I. INTRODUCTION

Our constitutional form of government is a delicate balance between two important principles: the protection of individual liberty interests and the preservation of society as a whole. *United States v. Salerno*[1] represents a confrontation between these two principles.

The 1984 Bail Reform Act favors the preservation of society by detaining, without bail, arrestees posing a threat to the safety of the community.[2] The Supreme Court recently considered the constitutionality of the Act in *United States v. Salerno*.[3] The Court upheld the pretrial detention of dangerous arrestees, finding that pretrial detention constituted a permissible governmental regulation and, therefore, the Act did not violate the fifth or eighth amendments to the Constitution.[4]

This Note will examine three topics. First, it will discuss the provisions and the legislative history of the 1984 Bail Reform Act. Second, it will discuss why the Act withstood constitutional challenge in *Salerno*. Third, it will address the constitutional issues raised by the lack of a specific limitation on the length of detention.

II. BACKGROUND

A. Provisions of the 1984 Bail Reform Act

The 1984 Bail Reform Act requires pretrial detention for arrestees charged with certain serious felonies when "no condition or combination of conditions will reasonably assure the safety of any other person and the community . . . ."[5] Pretrial detention is available in two situations: (1) when the arrestee has previously committed a specific offense while on release awaiting trial; and (2) when there is probable cause to believe that an arrestee, whose appearance at trial cannot be assured, has committed a major drug trafficking offense or a felony with a firearm.[6]

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* Stacey Janssen Gunya

1 107 S. Ct. 2095 (1987).
2 18 U.S.C. §§ 3142-45 (1982).
3 107 S. Ct. 2095.
4 *Id.*
5 18 U.S.C. § 3142(e).
6 *Id.*

In cases where the detention presumption arises, the court must hold a hearing at which a judicial official decides whether or not to detain the arrestee. Such a hearing must be held at the arrestee's first appearance.[7] At the detention hearing, the arrestee is entitled to the assistance of counsel, may testify, present or proffer evidence in his behalf, and may cross examine the Government's witnesses.[8] The judge's discretion in these hearings is limited to consideration of the following statutory factors: the nature and seriousness of the charges, the substance of the Government's evidence against the arrestee, the arrestee's background and character, and the nature and seriousness of the danger posed by the arrestee's release.[9] The Government must prove by clear and convincing evidence that releasing the arrestee would create a danger to the community.[10] A detention order must be in writing and state the reasons for detention.[11] Following a pretrial detention order, an arrestee is entitled to an expedited appeal.[12]

B. The Legislative History

The legislative history of the 1984 Bail Reform Act reveals that Congress intended the Act to respond to a pressing social problem — the consequences of recidivism among arrestees released on bail.[13] In drafting the Act, Congress sought to respond conscientiously to the problem without exceeding the bounds of permissible regulation.[14]

Specifically, Congress intended to limit the scope of the Act by covering only "a small but identifiable group of particularly dangerous defendants," namely organized crime members, terrorists and narcotics traffickers.[15] Congress also indicated an intent to expressly limit the length of time an arrestee could be detained.[16] Some senators expressed a desire that detention be limited to an absolute ninety days.[17] Others wanted a sixty day limit with certain excludable time provisions.[18] The final version of the Act did not, however, contain a specific time limit.[19]

Congress also indicated that it intended to enact a permissible regulation that would not violate the due process rights of an arres-

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[7] *Id.* at § 3142(f).
[8] *Id.*
[9] *Id.* at § 3142(g).
[10] *Id.* at § 3142(f).
[11] *Id.* at § 3142(i).
[12] *Id.* at §§ 3142(b), (c).
[13] S. REP. No. 225, 98th Cong., 2d. Sess. 4-7, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3183, 3185-3186.
[14] *Id.*
[15] *Id.*
[16] 130 CONG. REC. S941-45 (daily ed. Feb. 3, 1984).
[17] *Id.* at S941-45 (statements of Senators Thurmond, Laxalt and Grassley).
[18] *Id.* at S941, S945 (statements of Senators Specter and Mitchell).
[19] The Courts have interpreted the pretrial detention provisions as being subject to the ninety day provision of the Speedy Trial Act. United States v. Colombo, 777 F.2d 96, 100-101 (2d Cir. 1985) (*citing* Speedy Trial Act, 18 U.S.C. §§ 3161 et seq.).

tee.[20] Consequently, the Act includes several specific procedural safeguards.[21]

III. *United States v. Salerno*

A. Facts and Case History

Anthony Salerno and Vincent Cafaro were arrested pursuant to an indictment charging twenty-nine counts of violating the Racketeer Influenced and Corrupt Organizations Act. The indictment alleged thirty-five specific acts of racketeering, including mail and wire fraud, extortion, and conspiracy to commit murder. A pretrial detention hearing was held in the district court. The Government conceded that neither defendant posed a risk of flight, but contended that no condition of bail would assure the safety of the community. The Government presented a lengthy proffer of evidence which indicated that Salerno was the "boss" of the Genovese crime family and Cafaro was his "captain." Two Government witnesses testified that Salerno had personally participated in murder conspiracies. Salerno opposed detention without bail by challenging the credibility of the Government's witnesses and offering a letter from his doctor stating that Salerno suffered from a serious medical condition. Cafaro responded that the Government's evidence was merely "tough talk."[22]

The district court granted the Government's motion for detention, concluding that the Government had established by clear and convincing evidence that no condition of bail would ensure the safety of the community. The court noted the serious nature of both defendants' involvement in organized crime and the resulting present danger to the community. The Second Circuit Court of Appeals, however, held the 1984 Bail Reform Act unconstitutional. The United States Supreme Court, in an opinion written by Chief Justice Rehnquist, reversed the Second Circuit.[23]

B. United States Supreme Court

The Supreme Court considered the constitutionality of the pretrial detention provisions of the 1984 Bail Reform Act under the fifth and eighth amendments to the Constitution. The Court held that when governmental interests are compelling and the procedural safeguards are sufficient, detention on the grounds of dangerousness does not violate the fifth amendment. The Court also rejected the

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[20] S. REP. No. 225, 98th Cong., 2d. Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182.

[21] 18 U.S.C. § 3142(f).

[22] *Salerno*, 107 S. Ct. at 2099.

[23] *Id.* at 2098-100.

eighth amendment challenge, holding that there is no absolute right to bail and that the eighth amendment does not prohibit the government from pursuing other compelling interests through the regulation of pretrial release.

1. Fifth Amendment Due Process

The Court first found that the Act survived a facial challenge under the fifth amendment due process clause.[24] The Court reasoned that incarceration does not necessarily imply punishment because the government's regulatory interest can at times outweigh an individual's liberty interest.[25] The Act, the Court reasoned, meets the criteria for proper governmental regulation of an individual's liberty.[26] Specifically, the Court found the Act responsive to a legitimate societal problem of criminal recidivism by those free on bond awaiting trial.[27] The Court further found that pretrial detention with careful procedural safeguards is not an excessive response to the problem.[28]

The Court cited precedent in which the governmental interest in regulation outweighed the liberty interest of an individual.[29] For example, dangerous individuals may be detained in times of war;[30] aliens awaiting deportation may be detained if they are dangerous;[31] the government may detain the mentally ill who pose a danger to the community;[32] the government may detain dangerous juveniles;[33] competent adults may be detained following arrest while awaiting a judicial determination of probable cause;[34] and, finally, arrestees may be incarcerated until trial if they present a risk of flight or may endanger a witness.[35] Considering these numerous examples, the Court concluded that detention on the ground of dangerousness to the community was not particularly novel.[36] Thus, the Court held when governmental interests are compelling and the procedural safeguards are sufficient, detention on the ground of dangerousness does not violate the fifth amendment.[37]

2. Eighth Amendment Excessive Bail

The Court also considered the pretrial detention provisions of the Act under the eighth amendment to the Constitution, which pro-

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[24] *Id.* at 2101.
[25] *Id.*
[26] *Id.* (*citing* Bell v. Wolfish, 441 U.S. 520 (1979)).
[27] *Salerno*, 107 S. Ct. at 2101.
[28] *Id.*
[29] *Id.* at 2102.
[30] *Id.* (*citing* Ludecke v. Wadkins, 335 U.S. 160 (1948)).
[31] *Id.* (*citing* Carlson v. Landon, 342 U.S. 524 (1979)).
[32] *Id.* (*citing* Addington v. Texas, 441 U.S. 418 (1979)).
[33] *Id.* (*citing* Schall v. Martin, 467 U.S. 253 (1984)).
[34] *Id.* (*citing* Gerstein v. Pugh, 420 U.S. 103 (1979)).
[35] *Id.* (*citing* Bell v. Wolfish, 441 U.S. 520 (1979)).
[36] *Salerno*, 107 S. Ct. at 2102.
[37] *Id.* at 2104.

vides that "excessive bail shall not be required."[38] The defendants in *Salerno* contended that the purpose of bail is to ensure the appearance of the accused at trial and that bail could only be denied if the accused would not appear. Congress, the defendants argued, had no authority to define other situations in which bail could be denied.[39]

The Court rejected the defendants' eighth amendment challenge, finding that there was nothing in the eighth amendment that provided an absolute right to bail.[40] The Court also found nothing in the eighth amendment prohibiting the government from pursuing other compelling interests through the regulation of pretrial release.[41] Since the defendants conceded the compelling purpose of the Act, the Court concluded that the Act did not violate the eighth amendment.[42]

IV. ANALYSIS

The Court's arguments supporting the constitutionality of pretrial detention are generally persuasive. Precedent exists for the regulation of an individual's liberty when there is a compelling governmental interest. Exceptions are made to the right to bail when the integrity of the judicial system is threatened by the accused's risk of flight or danger to a witness. Danger to the community is certainly as compelling an interest as preservation of the judicial system.[43]

The Court has recognized several exceptions to an individual's due process rights when the individual presents a danger to the community.[44] The authorization of pretrial detention in the Bail Reform Act is another constitutionally valid exception. Infringement on the liberty interest of a competent adult, however, must be carefully limited by procedural safeguards. The Act provides such safeguards at the detention hearing by allowing the accused the right to counsel, to testify on his own behalf, and to cross-examine government witnesses.[45] The judge's discretion is limited and the government must prove dangerousness by clear and convincing evidence.[46] These procedural safeguards are more stringent than those found in other constitutionally valid pretrial or dangerousness-based

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[38] *Id.* (*citing* U.S. CONST. amend. VIII.).
[39] *Salerno*, 107 S. Ct. at 2104.
[40] *Id.* at 2104-05.
[41] *Id.* at 2104.
[42] *Id.* at 2105.
[43] Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention*, 55 VA. L. REV. 1223 (1969).
[44] *See supra* notes 33-39 and accompanying text.
[45] 18 U.S.C. § 3142(f).
[46] *Id.*

detentions.[47]

The Court, however, does not clearly address the argument that the presumption of innocence is offended by the pretrial detention provisions of the Act. Although the Act has been criticized for unduly relying on an indictment to rebut the presumption of innocence,[48] the indictment's importance in determining detention without bail is limited and not unprecedented. Furthermore, the Act requires courts to consider several other factors in determining whether pretrial detention is proper, such as the strength of the actual evidence against an arrestee, the seriousness of prior convictions, the background and character of the arrestee, and the precise danger that the arrestee's release poses.[49] The indictment, therefore, is not the only factor used to support pretrial detention. Instead, it acts more as a threshold condition that gives the government jurisdiction over the individual. Furthermore, it creates a judicial duty not to release those properly in custody who pose a clear threat to the safety of the community. Because the indictment plays a limited role in determining the propriety of pretrial detention, any threat to the presumption of innocence is limited.

Moreover, consideration of the seriousness of the charges against an arrestee as a factor in denying bail is not unprecedented. Courts consider the charges against an arrestee when bail is denied on the grounds that the arrestee poses a risk of flight.[50] Thus, the use of the indictment under the Act is no greater threat to the presumption of innocence than already exists.

Although the strict procedural safeguards of the Act are generally adequate to insure due process, and its limited reliance on the indictment does not offend the presumption of innocence, the Act does lack one important safeguard. It does not limit the length of time an arrestee may be incarcerated while awaiting trial. The courts have interpreted the pretrial detention provisions as being limited only by the Speedy Trial Act.[51] The Speedy Trial Act, however, has been ineffective in protecting an arrestee from excessive incarceration.[52] Under the pretrial detention provisions of the Act, arrestees have been incarcerated for four,[53] six,[54] eight,[55] and sixteen months[56] while awaiting trial. Such lengthy detention is inconsistent with constitutional standards for permissible governmental regulation.

Proper governmental regulation must not be so excessive as to

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[47] Schall v. Martin, 467 U.S. 253 (1984).
[48] *Salerno*, 107 S. Ct. at 2107 (Marshall, J., and Stevens, J., dissenting).
[49] 18 U.S.C. § 3142(g).
[50] Stack v. Boyle, 342 U.S. 1, 3 (1951).
[51] *See supra* note 22.
[52] United States v. Melendez-Carrion, 790 F.2d 984, 996 (2d Cir. 1986).
[53] United States v. Theron, 782 F.2d 1510, 1516 (2d Cir. 1986).
[54] United States v. LoFranco, 620 F. Supp. 1324 (N.D.N.Y. 1985).
[55] *Melendez-Carrion*, 790 F.2d at 996.
[56] United States v. Zannio, 798 F.2d 544, 548-49 (1st Cir. 1986).

constitute punishment.[57] Pretrial incarceration for as long as eight months has been held to constitute punishment.[58] Consequently, in the absence of a clear limitation on the length of incarceration, arrestees may be detained under the Act for unconstitutionally long periods.

Moreover, lengthy incarceration is inconsistent with Congressional intent. The record of debate indicates discussion of both a sixty and ninety day time limit.[59] In fact, the length of time arrestees are being held while awaiting trial is well beyond either of the limits contemplated by Congress.

V. CONCLUSION

In *United States v. Salerno*, the Court rejected fifth and eighth amendment challenges to the constitutionality of the 1984 Bail Reform Act. The Court, however, did not address the fact that the Act may permit arrestees to be detained for unconstitutionally long periods of time. The Speedy Trial Act, which courts have interpreted as governing the length of incarceration, provides a ninety day limit with provisions for excludable time. Under the provisions for excludable time, however, arrestees have been held as long as sixteen months while awaiting trial.

Case-by-case adjudication of the limits of Bail Reform Act detention will only further lengthen the criminal justice process. Amending the Act to provide a sixty or ninety day absolute limit would further the Congressional intent and ensure a "bright line" test for determining the proper length of pretrial detention. The Act, therefore, should be amended to include an absolute time limit on the length of detention.

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[57] Bell v. Wolfish, 441 U.S. 520, 535-37 (1979).

[58] Fleming v. Nestor, 363 U.S. 603 (1960).

[59] *See supra* notes 16-19 and accompanying text. Apparently, the Act lacks a time limit provision because Congress failed to reach a consensus on the length of detention.

APPLYING THE GOOD FAITH EXCEPTION TO THE PARTICULARITY AND EXECUTION OF SEARCH WARRANTS: *Maryland v. Garrison**

I. INTRODUCTION

Few social problems in the last decade have raised the public's conscience like illegal drug use and abuse. Television documentaries, advertising campaigns, and drug literature denouncing drug abuse have become commonplace in today's society. Government officials and scholars constantly stress the connection between illegal drugs and violent crime. In response to these concerns, President Reagan declared a war on drugs. The early results of this war are notable. For instance, the number of convictions for violation of the Drug Abuse Prevention and Control Act between 1980 and 1985 almost doubled.[1] The public became aware of the problem and embraced the President's war on drugs.

Unfortunately, the success of the administration's war on drugs has often come at the expense of individual constitutional liberties and freedoms. One area heavily attacked since Reagan's declared war is fourth amendment protections. The courts repeatedly have been asked to resolve a conflict between an individual's fourth amendment rights and law enforcement officers' duty to search for and seize contraband.

Maryland v. Garrison[2] is such a case. In *Garrison*, the Supreme Court further narrowed the scope of the fourth amendment by creating a new "Reasonable Factual Mistake" exception to the warrant requirement. This decision follows the recent trend of Supreme Court decisions since the President's declared war on drugs, leading to the possibility of a "Drug Exception" to the fourth amendment.[3] This Note will analyze the Supreme Court decision in *Garrison* and consider whether the benefits of curtailing the spread of illegal drugs outweigh the detriments to personal liberty.

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* David R. Smith

[1] In 1980, there were 2,541 convictions compared to 4,727 in 1985. *Statistical Abstract of the United States* 1987 (107 ed. No. 297 1987).

[2] 107 S. Ct. 1013 (1987).

[3] *See* Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987). This note expands on the ideas advanced in Wisotsky's article. Apparently, Wisotsky deserves the credit for coining the phrase "Drug Exception."

II. SEARCH WARRANTS AND THE FOURTH AMENDMENT

The fourth amendment protects citizens "against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[4] The Supreme Court has ruled that the fourth amendment protects any interest in which an individual has a reasonable expectation of privacy.[5] The fourth amendment protects people not places.[6]

A search warrant satisfies the fourth amendment when it meets the following four requirements: (1) the warrant is supported by probable cause; (2) the warrant is issued by a neutral and detached magistrate; (3) the warrant describes with particularity the places to be searched and the things to be seized; and (4) the warrant is executed properly.[7] The *Garrison* decision addresses the third and fourth requirements.

The purpose of requiring particularity is to protect the individual's privacy interest from a general search or "general, exploratory rumaging in a person's belongings."[8] A place to be searched is sufficiently described if the executing officers can ascertain and identify the place with reasonable effort.[9] Before *Garrison*, only the particular place described in the search warrant could be lawfully searched pursuant to the warrant.[10]

Although these same principles apply regardless of the type of dwelling or structure to be searched, the federal courts have created specific law regarding valid searches of multiple dwelling units like the type searched in *Garrison*. First, the police, absent a recognized exception, must have probable cause specifically related to each unit to be searched.[11] Second, a search warrant for an apartment building or complex must describe the particular subunit to be searched with sufficient clarity to preclude indiscriminate searching of other subunits.[12]

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[4] U.S. CONST. amend. IV.

[5] Katz v. United States, 389 U.S. 347, 351-53 (1967) (emphasis added). The expectation of privacy must be both subjective and reasonable as recognized by society. *Id.* at 361 (Harlan, J., concurring).

[6] *Id.* at 351.

[7] U.S. CONST. amend. IV. *See also infra* notes 8-10 and accompanying text.

[8] Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). *See also* Marron v. United States, 275 U.S. 192, 196 (1927).

[9] Steele v. United States, 267 U.S. 498, 503 (1925).

[10] *See generally Garrison*, 107 S. Ct. at 1018-20.

[11] United States v. Hinton, 219 F.2d 324, 325-26 (7th Cir. 1955).

[12] *See* United States v. Higgins, 428 F.2d 232 (7th Cir. 1970).

III. *Maryland v. Garrison*

A. Facts and Case History

Acting upon information supplied by a reliable confidential informant, a detective from the Baltimore City Police Department applied for a search warrant to search the residence of Lawrence McWebb. The informant told the detective that McWebb was known as "Red Cross" and that he had personally bought marijuana from "Red Cross" at a third floor apartment located at 2036 Park Avenue within the previous twenty-four hours. Before applying for the warrant, the detective investigated the 2036 Park Avenue premises in order to verify the information. His investigation included an exterior examination of the building and an inquiry to the Baltimore Gas & Electric Company to confirm that McWebb resided in the third floor apartment at 2036 Park Avenue. The investigation determined that the informant was correct in describing McWebb's residence.[13]

The Baltimore City Police Department then obtained a warrant to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment" for marijuana and other illegal items.[14] Six officers executed the warrant on the same day. They fortuitously came upon McWebb in front of his building at 2036 Park Avenue and used his key to unlock the first floor door and gain entrance. McWebb immediately led the officers up the stairs to the third floor without permitting them to investigate the layout of the first or second floors. McWebb unlocked the third floor door at the top of the staircase and the officers entered a foyer where they encountered Harold Garrison who was unknown to them at that time. Garrison was standing in the foyer in his bedclothes in front of two open doorways. To their left, the officers could see through a doorway into a living room area later determined to be McWebb's apartment. To their right, the officers could see through a doorway into a bedroom area where they could see a small quantity of marijuana on a dresser. They later determined the bedroom area to be part of Garrison's apartment.[15]

Some of the officers entered Garrison's doorway to seize the marijuana and conduct a further search of the premises. Other officers entered and searched McWebb's apartment. While conducting the search of Garrison's apartment, one of the officers answered the telephone and the caller asked for "Red Cross", the name the informant had given for McWebb. During the search, neither McWebb nor Garrison indicated that they lived in two separate apartments. Before the officers realized that there were two sepa-

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[13] *Garrison*, 107 S. Ct. at 1015.
[14] *Id.* at 1015, n. 1.
[15] *Id.* at 1015.

rate apartments, they had discovered and seized heroin, drug paraphernalia, and approximately $4,000 in cash from Garrison's apartment. As soon as the officers realized that they were in two separate apartments, they discontinued the search.[16]

The trial court denied Garrison's motion to suppress the evidence seized from his apartment. The Maryland Special Court of Appeals affirmed the trial court's decision, concluding that the police could not reasonably have discovered that the third floor contained two separate apartments. The court did not find that the police had made a reasonable mistake, but rather ruled that there was free access between the two apartments. Thus, in effect, only one apartment existed and it was covered by the warrant. The Maryland Court of Appeals reversed the Special Court of Appeals, finding that the State was attempting to create a good faith exception to the warrant requirement and refused to create such an exception. The court found that the warrant precisely and unambiguously described the premises to be searched and that the police improperly expanded the search to Garrison's apartment which was not described in the warrant. The United States Supreme Court, in an opinion written by Justice Stevens, reversed the Maryland Court of Appeals.[17]

B. United States Supreme Court

The United States Supreme Court separated the case into two independent constitutional issues. First, the Court addressed whether the warrant itself was valid. Second, the Court addressed whether the execution of the warrant was reasonable.[18]

In determining the validity of the warrant, the Court addressed the particularity requirement and considered whether a factual mistake invalidates a warrant.[19] The Court ruled that it must judge the constitutionality of the officers' conduct in light of the information available to them at the time they applied for the warrant. The Court stated that "items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued."[20] Thus, discovery of facts after a warrant has been issued does not retroactively invalidate the warrant.[21] Therefore, the Court concluded that the warrant was validly issued.[22]

Regarding the execution of the search warrant, the Court recognized the "need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants."[23] The Court heavily relied

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[16] *Id.*
[17] *Id.* at 1015-17.
[18] *Id.* at 1017.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1018.
[22] *Id.*
[23] *Id.*

on its decision in *Hill v. California*[24] in determining the reasonableness of the officers' factual mistake in executing the warrant. *Hill* involved an arrest without a warrant on the mistaken belief that the person observed was a man whom the police had probable cause to arrest. The Court ruled that the officer's reasonable mistake did not invalidate the search incident to arrest.[25] The *Garrison* Court extended the *Hill* rationale, stating that "[u]nder the reasoning in *Hill*, the validity of the search of respondent's apartment . . . depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable."[26] The Court concluded that the officers in the present case satisfied this objective test and did not violate the fourth amendment.[27]

IV. ANALYSIS

A. The "Drug Exception" to the Fourth Amendment

Since 1982, at least thirteen major Supreme Court decisions have been handed down narrowing the scope of fourth amendment protections in drug cases. The trend of the Court clearly has been to liberalize search rules in favor of law enforcement.

This trend, including *Garrison*, unfortunately is required to rid our society of the prevalence of drugs and drug abuse. Drug dealers traditionally have gone to great lengths to confuse police searching for evidence so that they can establish a legal defense should a search be successful. Past successful tactics include using the same number for several apartments in the same building and using apartments with no numbers at all. Even if the police determine the correct apartment to search, the drug traffickers know that they have a better chance of attacking a warrant under the particularity requirement if these tactics are used. McWebb and Garrison may have employed such a tactic. They created an appearance of one apartment and did not inform the executing officers that two apartments existed. The law should not confer special protections on those who fail to number their door or deceive police with confusing appearances. Thus, the decision in *Garrison* protects societal interests in undermining drug trafficking.

B. Particularity of the Warrant

The Supreme Court properly held that the search warrant satisfied the particularity requirement. Facts discovered during its exe-

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[24] 401 U.S. 797 (1971).
[25] *Id.* at 803-04.
[26] *Garrison*, 107 S. Ct. at 1019.
[27] *Id.*

cution did not retroactively invalidate it.[28] The Court's ruling is consistent with the rationale of the particularity requirement. If a factual mistake is objectively reasonable, then the resulting search is not a general search. In the mind of a reasonable officer, the search is within the parameters of the warrant. In *Garrison*, the officers' extensive investigation lead them to the conclusion that only one apartment existed.

C. *Execution of the Warrant*

The Supreme Court properly held that the execution of the warrant was reasonable under the fourth amendment. One of the purposes of a search warrant is to prevent hindsight from determining the reasonableness of a search or seizure.[29] Courts must determine the reasonableness of warrant execution in light of the facts actually known to the police at the time of the search.[30] In *Garrison*, the police reasonably did not know at the time of the search that two apartments existed on the third floor. Their extensive pre-search investigation and the circumstances of the search reasonably lead them to the conclusion that only one apartment existed.

The Court properly extended the holding in *Hill v. California*[31] to this case. In *Hill*, the court stated that "sufficient probability, not certainty, is the touchstone of the reasonableness under the fourth amendment . . . ."[32] Similarly, in *Garrison*, there was a "sufficient probability" that the apartment the officers were searching was McWebb's.

The fourth amendment protects persons against unreasonable searches, not imperfect ones.[33] In *Garrison*, the Court properly recognized this distinction. *Garrison* takes into account the realities of police situations and yet requires sufficient particularity to protect individual liberties.[34]

V. CONCLUSION

The Supreme Court in *Garrison* has identified constitutional parameters and given law enforcement officers some guidelines on per-

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[28] *Id.* at 1018.
[29] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
[30] Terry v. Ohio, 392 U.S. 1, 21-22 (1968).
[31] 401 U.S. 797 (1971).
[32] *Id.* at 802.
[33] Brinegar v. United States, 338 U.S. 160, 176 (1949).
[34] One noted commentator on the subject of search and seizure law makes a distinction between constitutional and unconstitutional good faith. If a mistake is one of fact that if true would render the search unquestionably constitutional, then the actual resulting search is constitutional. W. LAFAVE, 1 SEARCH AND SEIZURE 1.2 (1978, 1986 Supp. at 8-9). However, if a mistake leads to an improper legal conclusion such as the existence of probable cause, then the actual resulting search is unconstitutional. *Id.* Using this analysis, the *Garrison* search would not be prohibited by the fourth amendment.

missible behavior. The decision allows officers to conduct their business in executing a search warrant without constantly looking back to determine the factual correctness of the warrant. Clearly, law enforcement benefits from this. With this decision, a reasonable mistake in fact in applying for and executing a search warrant does not necessarily destroy the admissibility of its fruits.

It appears that the Court has created a new exception to the warrant requirement, permitting officers to conduct warrantless searches when they have a reasonable, but mistaken, belief that they are complying with a search warrant. The Court probably intended to create such an exception. The Court could have expanded current legal doctrine in support of its holding. Specifically, the Court could have invoked the good faith exception to the exclusionary rule or expanded the plain view exception to search warrants. The failure to use either of these alternatives and its use of the *Hill v. California* case shows that the Court chose to create a new exception to the warrant requirement. Although this exception continues the recent trend by narrowing the scope of fourth amendment protection, the social gain in preventing the rapid spread of drugs in our country outweighs the infringement on our personal liberties.

DEFINING INTERROGATION UNDER MIRANDA: *Arizona v. Mauro**

I. INTRODUCTION

The United States Supreme Court has continuously attempted to define the scope of allowable police interrogation practices. One question that frequently arises is whether particular police conduct amounts to interrogation within the meaning of *Miranda v. Arizona*.[1] The Court recently confronted this issue in *Arizona v. Mauro*.[2] In *Mauro*, the Court held that a defendant was not interrogated within the meaning of *Miranda* when police allowed his wife to speak with him in the presence of an officer who tape-recorded their conversation. This Note will assess *Mauro* in light of the Court's prior decisions.

II. BACKGROUND

A. Miranda v. Arizona

In *Miranda v. Arizona*,[3] the Court formulated the now familiar procedural safeguards to secure the privilege against self-incrimination. The prosecution may not use statements stemming from custodial interrogations of a suspect, unless it demonstrates that the defendant waived his *Miranda* rights.[4] Thus, when a suspect in custody requests counsel, all interrogation must cease until an attorney is present.[5] Whether particular police conduct amounts to interrogation for *Miranda* purposes, however, can be answered only on a case-by-case basis.

B. Rhode Island v. Innis

In *Rhode Island v. Innis*,[6] the Court held that interrogation refers to more than express questioning by the police.[7] In *Innis*, the police arrested the defendant for the shotgun slaying of a taxicab driver. After arresting him, the police advised the defendant of his

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* W. Scott Toth
1 384 U.S. 436 (1966).
2 107 S. Ct. 1931 (1987).
3 384 U.S. 436 (1966).
4 *Id.* at 479.
5 *Id.*
6 446 U.S. 291 (1980).
7 *Id.* at 298.

Miranda rights. The defendant responded that he understood, and that he wished to speak with his lawyer. While transporting the defendant to the police station, two of the arresting officers engaged in a conversation indicating that there were many handicapped children in the area where the police thought the murder weapon was hidden. Upon hearing the conversation, the defendant directed the officers to the weapon.[8]

The Supreme Court ruled that the defendant had not been interrogated within the meaning of *Miranda*.[9] The Court ruled that *Miranda* applies only when there is direct questioning or its functional equivalent.[10] The functional equivalent is words or actions on the part of the police that they know are reasonably likely to elicit an incriminating response.[11] In determining whether police conduct constitutes interrogation, the Court stated that it is necessary to look at both the police intent and the suspect's perceptions of police actions.[12]

The Court then applied its test to the facts of *Innis*. The Court found that the defendant's response was not the product of words or conduct that the police "should have known were reasonably likely to elicit an incriminating response."[13] The troubling aspect of the *Innis* decision is that "[i]t is wholly unclear whether the Court's interrogation standard was actually based on the perceptions of the suspect or of a reasonable person in the suspect's position or upon the perceptions of a reasonable police officer or of the particular officer involved."[14] In *Mauro*, the Court attempted to resolve this uncertainty.[15]

III. *Arizona v. Mauro*

A. Facts and Case History

In *Mauro*, the defendant was arrested for beating his infant son to death. After the police advised him of his *Miranda* rights, he indicated that he did not want to answer any questions, and that he wanted to see a lawyer. Because no detention area was available, the police placed the defendant in the police captain's office. The

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[8] *Id.* at 294-95.
[9] *Id.* at 301.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 302.
[14] Sonershein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L. J. 404, 438 (1982). The *Innis* Court, however, noted that "this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 U.S. at 301.
[15] The Court in *Mauro* specifically stated that the Arizona Supreme Court's decision "appeared to misconstrue our decision in *Rhode Island v. Innis*." Arizona v. Mauro, 107 S. Ct. 1931, 1934 (1987).

defendant's wife, also at the station, then indicated that she wished to speak with her husband. The police were reluctant to let the meeting take place, but they finally allowed it on the condition that an officer be present. Using a recorder placed in plain sight, an officer taped the conversation. At trial, the government used the tape to rebut the defendant's insanity defense.[16]

The Arizona Supreme Court held that the police had violated the defendant's fifth amendment rights. The court concluded that the police had indirectly interrogated the defendant within the meaning of *Miranda*, because they intended to elicit incriminating information. Having found that the officers acted with intent, the court deemed it unnecessary to address the defendant's perceptions. The United States Supreme Court, in an opinion written by Justice Powell, reversed the Arizona Supreme Court.[17]

B. United States Supreme Court

The Court held that the police conduct did not amount to the functional equivalent of interrogation.[18] The Court based its decision on the two factors discussed in *Innis*. First, the officers never intended to elicit incriminating statements from the defendant.[19] The mere possibility that the defendant might incriminate himself was not equivalent to an attempt by the officers to elicit incriminating statements.[20] Second, the Court looked to the defendant's perceptions to see whether "he would feel that he was being coerced into incriminating himself,"[21] and found that the defendant was not subjected to compelling influences, psychological ploys, or the type of direct questioning that *Miranda* was designed to protect against.[22] The Court doubted that a suspect, when told that his wife wanted to speak to him, would feel in any way that he was being coerced into incriminating himself.[23]

The fundamental purpose of *Miranda*, which is to prevent government officials from using the coercive nature of confinement to extract confessions, guided the Court's holding in *Mauro*.[24] The Court concluded that the officers' treatment of the defendant simply did not offend *Miranda*'s purpose.[25]

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[16] *Mauro*, 107 S. Ct. at 1932-33.

[17] *Id.* at 1934.

[18] *Id.*

[19] *Id.* at 1936.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1936-37.

[25] *Id.* at 1937.

IV. ANALYSIS

In *Mauro*, the Court attempted to clarify the *Innis* test. In determining whether police conduct constituted interrogation, the Court focused on two essential factors.[26] First, the Court looked to whether or not the government's purpose was to elicit an incriminating response; and second, whether the suspect actually felt that he was being coerced into making an incriminating response.[27]

A. Police Intent

In *Mauro*, the Court noted that the mere possibility that a suspect may incriminate himself is not equivalent to an affirmative police intent to elicit an incriminating response.[28] Thus, a police officer may hope that a suspect will incriminate himself without actually intending to elicit an incriminating response. The problem with this reasoning, however, is that the focus is subjective, based solely on the intent of the particular officer involved.[29] Under the Court's subjective view, an officer may merely explain that he was hoping to elicit an incriminating statement without actually intending for the suspect to incriminate himself. Thus, relying solely on a subjective standard will open police interrogation practices to abuse.

Police abuse will be significantly alleviated by supplementing the subjective analysis with an objective standard for evaluating police intent. Under an objective test, if a reasonable person would infer that the officer's actions were designed to elicit an incriminating response, then the police activity would constitute "interrogation."[30] Adding an objective element to the analysis would not change the result in *Mauro*, but would substantially reduce the potential for police abuse.

B. Suspect's Perspective

The other consideration is the suspect's perspective. An interrogation should not be deemed coercive unless a suspect in fact feels coerced. It is clear from the *Mauro* opinion that the Court used a subjective standard in determining that Mauro did not perceive that

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[26] *Id.* at 1936.
[27] *Id.*
[28] *Id.*
[29] Detective Manson, the officer present at the conversation, testified that there were other legitimate reasons — not related to securing incriminating information — for having a police officer present. *Id.* at 1936. These included a concern for the protection of Mrs. Mauro. They were also concerned that Mauro and his wife might "cook up a lie or swap statements with each other that shouldn't have been allowed, and whether some escape attempt might have been made, or whether there might have been an attempt to smuggle in a weapon." *Id.* at 1933.
[30] LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 6.7 (1985).

he was being coerced.[31] A subjective analysis alone, however, presents the same problems as when determining police intent.

A more reasonable approach would be to supplement the subjective analysis with an objective standard for evaluating a suspect's perspective. Under an objective test, if a reasonable person would feel interrogated, then the police action would constitute "interrogation." Adding an objective element would not change the result in *Mauro*, but would alleviate the need to rely solely on a suspect's self-serving testimony.

V. CONCLUSION

Although a subjective-objective analysis of both police intent and a suspect's perspective in determining whether interrogation occurs would undoubtedly enhance a suspect's fifth amendment protection, it probably exceeds the fundamental principles of *Miranda*. A better test that is consistent with *Miranda* would be for the Court to focus solely on a suspect's perspective and apply an objective standard. An objective evaluation of a suspect's perspective would be fully responsive to *Miranda* because it would identify the situations in which a suspect experiences the functional equivalent of direct questioning.[32] Police intent is relevant only to the broader policy of deterring bad faith police conduct, not to *Miranda*'s more limited purpose of prohibiting coercive custodial interrogations. Thus, an objective evaluation of a suspect's perceptions alone would adequately protect a suspect's fifth amendment rights.

[31] Arizona v. Mauro, 107 S. Ct. 1931, 1936 (1987).
[32] LAFAVE & ISRAEL, *supra* note 30.

RESTRAINTS ON PLAIN VIEW DOCTRINE: *Arizona v. Hicks**

I. INTRODUCTION

Before criticizing President Reagan's recent nominations of conservative judges to the Supreme Court, one should note a recent Supreme Court decision[1] authored by Justice Scalia, a Reagan appointee. Those who fear that a conservative shift in the Court will lead to the erosion of individual liberties gained under the Warren Court may well find their fears unfounded. In *Arizona v. Hicks*,[2] Justice Scalia proves that once a nominee joins the Supreme Court, there is no way to predict with certainty how he or she will vote on a given issue.

In *Arizona v. Hicks*, the Supreme Court held that probable cause is required to invoke the "plain view" doctrine for even cursory inspections.[3] This decision, which hinders law enforcement and breaks with accepted practice, was authored by Justice Scalia. This Note criticizes Justice Scalia's failure to exempt cursory inspections from the probable cause requirement.

II. HISTORY OF THE PLAIN VIEW DOCTRINE

The "plain view" doctrine permits the warrantless seizure of evidence inadvertently discovered by police who are lawfully in a position to view the item.[4] This exception to the warrant requirement is based on the notion that once police are lawfully in a position to observe an item, its owner no longer has a reasonable expectation of privacy.[5]

Prior to *Arizona v. Hicks*, the Supreme Court had not directly addressed the issue of whether probable cause is required to invoke the "plain view" doctrine. However, decisions rendered by the Court lead lower courts to develop the "plain view" doctrine in two distinct directions: full-blown searches requiring probable cause, and cursory inspections requiring only reasonable suspicion.[6]

The evolution of this dual standard began with Justice Stewart's

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* Steven Jensen

[1] Arizona v. Hicks, 107 S. Ct. 1149 (1987).

[2] *Id.*

[3] *Id.* at 1153-54.

[4] Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

[5] Illinois v. Andreas, 463 U.S. 765, 771 (1983).

[6] *See generally*, 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7(b), at 717 (2d ed. 1987).

concurring opinion in *Stanley v. Georgia*.[7] His opinion makes a distinction between a full-blown search and "mere inspection" when applying the "plain view" doctrine, implying that mere inspection should be held to a lower standard. Justice Stewart's rationale for the distinction is that a mere inspection is not prone to the same abuses as a full-blown search.[8]

The distinction further evolved in *Coolidge v. New Hampshire*.[9] The *Coolidge* plurality stated that the "plain view" justification is not applicable unless it is immediately apparent that the object is contraband or evidence of a crime.[10] The Court, however, offered no guidance, leaving the interpretation of "immediately apparent" to the lower courts.[11]

Because *Stanley* hinted that a mere inspection should be held to a lower standard than a full-blown search, and the Supreme Court did not address the issue in *Coolidge*, an overwhelming majority of both state and federal courts have held that a standard less than probable cause can justify a cursory inspection.[12] The following passage is typical of the position adopted by most lower courts:

> "the minimal additional intrusion which results from an inspection or examination of an object in plain view is reasonable if the officer was first aware of some facts and circumstances which justify a reasonable suspicion (not probable cause, in the traditional sense) that the object is or contains a fruit, instrumentality, or evidence of a crime."[13]

Two Supreme Court cases furthered the distinction between a full-blown search and a cursory inspection. The first, *Texas v. Brown*,[14] reasoned that a full-blown search of an item in plain view must be based on probable cause, but the mere observation of such an item generally does not involve a fourth amendment search.[15] The second case, *United States v. Place*,[16] extended "stop and frisk"[17] principles to items of personal property, permitting a brief search and seizure of those items based on a reasonable suspicion that an item contains contraband or evidence of a crime.[18]

Thus, case law leading up to *Arizona v. Hicks* generally recognized that under the "plain view" doctrine police could conduct a full-blown search of items found in plain view if based on probable

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[7] 394 U.S. 557, 571 (1969) (Stewart, J., concurring).
[8] *Id.* at 571.
[9] 403 U.S. 443 (1971) (plurality opinion).
[10] *Id.* at 466.
[11] 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7(b), at 717 (2d ed. 1987). Interpreted strictly, the "immediately apparent" standard would bar any examination of an article that would extend beyond the reason for the officer's presence on the premises. But as Professor LaFave points out, most courts have not taken such a narrow view. *Id.*
[12] *Id.*
[13] *Id. See, e.g.*, People v. Eddington, 23 Mich. App. 210, 178 N.W.2d 686 (Mich. 1970). *See also*, State v. Noll, 116 Wis. 2d 443, 343 N.W.2d 391 (Wis. 1984).
[14] 460 U.S. 730 (1983).
[15] *See generally id.* at 736-44.
[16] 462 U.S. 692 (1983).
[17] Terry v. Ohio, 392 U.S. 1, 30-31 (1968).
[18] *Place*, 462 U.S. at 702.

cause. Further, police could conduct a cursory inspection of such items on less than probable cause. In *Hicks*, the Supreme Court squarely addressed whether probable cause is required to invoke the "plain view" doctrine and whether there are different standards for full-blown searches and cursory inspections.

III. *Arizona v. Hicks*

A. Facts and Case History

The defendant fired a gun through the floor of his apartment injuring a man below. Based on the exigency of the circumstances, police officers made a warrantless search of the defendant's apartment to look for the source of the bullet, possible other victims, and weapons.[19]

During the search, one of the officers noticed two sets of expensive stereo components in plain view. The stereo equipment was of a type frequently stolen and seemed out of place in the otherwise ill-furnished apartment. In addition, the apartment was littered with drug paraphernalia, a .45-caliber automatic pistol, a .22-caliber sawed-off rifle, and a stocking mask. Suspecting that the equipment had been stolen, the officer read and recorded the serial numbers. In order to read the numbers, the officer had to move a stereo turntable a few inches. The officer then reported the serial number, and after being advised that the turntable had been stolen in an armed robbery, he immediately seized it.[20]

At the defendant's armed robbery trial, the trial court granted his motion to suppress the stolen equipment. The Arizona Court of Appeals affirmed, concluding that, although the initial intrusion was valid, obtaining the serial number was an additional search, unrelated to the exigency. The United States Supreme Court, in an opinion written by Justice Scalia, affirmed the Arizona Court of Appeals.[21]

B. United States Supreme Court

The Court held that probable cause is required to invoke the "plain view" doctrine and refused to adopt a distinction between a full-blown search and a cursory inspection, stating that "[a] search is a search."[22] However, the Court did note that a truly cursory inspection of an item in plain view is not a fourth amendment search and that the mere recording of serial numbers does not constitute a seizure.[23] In this case, the officer moved the turntable a

[19] *Hicks*, 107 S. Ct. at 1152.
[20] *Id.*
[21] *Id.* at 1152-55.
[22] *Id.* at 1153.
[23] *Id.* at 1152.

few inches and the State conceded the lack of probable cause. Therefore, the Court found that the officer's actions constituted an illegal search and seizure.[24]

The Court reasoned that had the officers known that the stolen stereo equipment was in the defendant's apartment, they would have been required to obtain a warrant based upon probable cause in order to seize the equipment.[25] Under the facts of *Hicks*, the Court found no reason to allow a search or seizure without probable cause since probable cause would have been necessary had the officers known that the equipment was in the apartment.[26]

IV. ANALYSIS

A. The Search Was Reasonable Under the Fourth Amendment

In *Hicks*, the entry into the defendant's apartment was justified by the exigent circumstances. Once lawfully inside, the officers were justified in searching the entire apartment for the source of the bullet, weapons, and possible other victims. Finding the stolen stereo equipment was not the result of a general search, but rather an inadvertent discovery. The equipment was discovered in "plain view" and thus, the search was reasonable under the fourth amendment.

B. The "Bright Line" Approach is Too Rigid

The Court eliminates the distinction between a full-blown search and a cursory inspection, stating that "a search is a search."[27] Thus, probable cause is required for all "plain view" searches, regardless of their intrusiveness. The Court ignores, however, that it has long recognized that searches vary in intrusiveness[28] and that it has adopted standards of reasonableness (less than probable cause) when a careful balancing of governmental and individual interests suggest such a standard is appropriate.[29] Therefore, the Court's "bright line" approach is inappropriate because it does not consider distinctions in the level of intrusiveness. Such an approach does not follow the Court's previous cases, nor the spirit of the fourth amendment.

Probable cause should be required for a full-blown search of an item in plain view in order to prevent a general search. However, by its very nature, a cursory inspection is minimally intrusive and limited in scope. By demanding that cursory inspections also be based

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[24] *Id.* at 1153-54.
[25] *Id.*
[26] *Id.* at 1154.
[27] *Id.* at 1153.
[28] *Id.* at 1159 (O'Connor, J., dissenting).
[29] *Id.* (*citing* New Jersey v. T.L.O., 649 U.S. 325, 341 (1985)).

upon probable cause, the Court has extended the fourth amendment beyond its original purpose. Clearly, a cursory inspection is not a general search and thus, should not require probable cause.

Although a "bright line" approach may be desirable, the facts of *Hicks* demonstrate that such an approach is often too rigid.[30] For example, had the serial number been on the front of the turntable, exposed to the officer, the Court stated that there would not have been an illegal search.[31] But because the serial number happened to be facing the wall and the officer had to move the turntable a few inches, the Court held that the search was illegal.[32] By openly displaying the turntable in his living room, however, the defendant did not have a reasonable expectation of privacy.[33] The defendant did not face the serial number toward the wall to hide or conceal anything. Rather, the manufacturer just happened to stamp the serial number on the back of the turntable. Therefore, the fourth amendment should not have prohibited the cursory inspection of the turntable.

C. The Decision Will Unduly Hamper Law Enforcement

Under the *Hicks* decision, law enforcement officers are not allowed to move an item in plain view without probable cause. Such a limitation will greatly hamper law enforcement efforts and unduly inconvenience the police. For example, under the facts of *Hicks*, the police would need to leave the defendant's apartment and continue a separate investigation until they established probable cause to believe the turntable was contraband or evidence of a crime, and then obtain a warrant.[34] By allowing a brief cursory inspection of the turntable, the follow-up investigation and inconvenience would be eliminated.[35]

Finally, serial numbers are often the only identifying feature on mass produced items. Therefore, from a practical standpoint, a cursory inspection is not only helpful, but often necessary.

V. CONCLUSION

Justice Scalia's opinion in *Hicks* unreasonably restricts the "plain view" doctrine. By refusing to acknowledge a distinction between a full-blown search and a cursory inspection, the Court places serious

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[30] This rigid approach may lead lower courts to relax the probable cause standard in order to permit cursory inspections. For example, had the State not conceded the lack of probable cause in this case, a lower court could easily have found, as Justice O'Connor did, that probable cause existed. *Id.* at 1160.

[31] *Id.* at 1152.

[32] *Id.*

[33] *See*, Katz v. United States, 389 U.S. 347, 351 (1967).

[34] Once the police leave, their subsequent intrusion would no longer be justified by exigent circumstances. Therefore, they would need a warrant.

[35] Furthermore, the investigation delay may result in the destruction of evidence.

roadblocks in the way of effective law enforcement without any significant enhancement of individual privacy interests. Thus, *Hicks* imposes a high cost for a *de minimus* benefit.