Kansas Law Review

SURVEY OF KANSAS LAW: CRIMINAL LAW AND PROCEDURE

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I. INTRODUCTION

While substantive criminal law and criminal procedure problems may not be the heart of many Kansas lawyers' practices, these areas still generate strong diversity of views and consume a large amount of the Kansas appellate courts' time. For example, during this survey period, July 1976 through July 1978, there were more than three hundred criminal cases decided by the Kansas Supreme Court. Moreover, each year the legislature spends a fair amount of time debating and enacting legislation affecting the criminal process. This Article will make no attempt to discuss all of the cases and enactments of this period. Rather, the author has selected those that appear to have changed the law, are new to Kansas, or raise questions that may well have substantial impact on the practice of criminal law in this state. Those selected will not be exhaustively discussed. The intent is to summarize what the courts and legislature have done, point out changes in the law, and consider generally any questions these cases and enactments raise. It is hoped that the discussion will provide a starting point for research and analysis of the particular problems considered. The Article will first discuss the 1977 and 1978 legislative sessions, then address a variety of criminal procedure problems, and conclude by focusing upon homicide.

II. LEGISLATIVE ACTION

A. Public Intoxication

The 1977 legislature made numerous changes. Among these are three that affect public intoxication and result in the abolishment of the crime of public intoxication in Kansas. In enacting section 65-4059 of Kansas Statutes Annotated,¹ the legislature prohibited political subdivisions, like city or county governments, from punishing a person for being intoxicated in public, being a common drunkard, or being found in enumerated places in an intoxicated condition. At the same time, the statute makes it clear that the offenses involving driving under the influence are not affected. The legislature also repealed section 21-4109,² which had made it a crime to be in a public place intoxicated from liquor, narcotics, or other drugs. Thus, apparently

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neither the chronic alcoholic nor the heroin addict can be punished for being in public under the influence.\(^3\)

In a companion bill, the legislature amended both section 12-4509\(^4\) relating to municipal judges' sentencing authority, and section 21-4502,\(^5\) relating to state misdemeanors. Now the appropriate judge may, upon conviction of any city ordinance violation or state misdemeanor and a showing that "the act constituting the violation . . . was substantially related to the possession, use or ingestion of a cereal malt beverage or an alcoholic beverage . . .", order the person to attend and complete a suitable educational program dealing with the effects of alcohol or other chemicals upon humans. The legislature appears to have intentionally left out drugs other than alcohol. In short, the legislature, by its changes affecting public intoxication and sentencing possibilities, has followed up on the stated purpose of the 1972 Alcoholism and Intoxication Treatment Act, which was "that alcoholic and intoxicated persons may not be subjected to criminal prosecutions solely because of their consumption of alcoholic beverages."\(^6\)

These new changes appear to have no impact upon the availability of intoxication as a defense. It must be remembered, however, that while voluntary intoxication is not a complete defense to a crime\(^7\) and is not equated with the defense of insanity in this state,\(^8\) whether by liquor or other drugs it can be a defense in specific intent crimes.\(^9\) It also should be pointed out that the Kansas Supreme Court has recently concluded that chronic alcoholism is not involuntary intoxication under section 21-3208 and thus not a complete defense.\(^10\)

B. Children

Several new crimes were created by the 1978 legislature. Apparently concerned with the increased use of children in pornography, the legislature made it a class E felony to use or induce a person under the age of sixteen to engage in sexually explicit conduct for the purposes of promoting any printed or visual medium that is delineated in the statute.\(^11\) In another enactment, the legislature made it a crime to contribute to a child's misconduct or deprivation, which is defined as causing or encouraging a person under the age of eighteen "to become a delinquent, miscreant, wayward or deprived child or a traffic offender or truant . . . or to commit an act which, if committed by an adult would be a crime."\(^12\) A person can be found to have violated this last statute even if a child is not prosecuted.\(^13\)

Another new crime, concerning aggravated interference with parental custody,
will probably arise when there is, or has been, a custody fight over children. This statute will be triggered when one parent, without the consent of the court or a party having lawful custody of the child, takes the child or hires someone to take the child, or refuses to return the child after a sanctioned visitation period expires. This has been made a class E felony, which, as a practical matter, will make it more likely that the state would try to extradite someone from another state if a child were to be taken out of Kansas.

C. Dollar Limits for Theft

A 1978 enactment that is bound to have significant impact upon the criminal practice in Kansas was the changing of the dollar value that determines whether one is charged with felony or misdemeanor theft. The dividing line is now $100. It must be observed, however, that this change only affects the crimes of general theft defined in section 21-3701, theft of services found in section 21-3704, and criminal damage to property found in section 21-3720. This means that such crimes as theft of lost or mislaid property, giving worthless checks, and unlawful use of a finance card are not affected by the change. There does not seem to be a rational justification for treating these basic theft crimes differently. The only explanation which has been offered is that there was pressure from business people not to change the worthless check section, and the proposed changes in the sections not altered were in a bill separate from the one that was ultimately passed. In addition to its impact on potential punishment, the misdemeanor-felony distinction affects other issues, such as when the right to counsel attaches and the kind of trial a person may obtain.

This theft change took effect upon publication in the statute book, July 1, 1978. The question might arise whether this statute applies to thefts that occurred immediately before the effective date of the statute. There are at least three basic reasons why the change should be prospective only. First, new statutes generally are applied prospectively unless otherwise clearly indicated by the legislature. Second, there is no mention of retroactive application in the statute, and, in fact, it states that it is to be effective upon publication. Third, the scope and application section of the

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21 Id. § 21-3704.
22 Id. § 21-3720.
23 Id. § 21-3703 (1974).
24 Id. §§ 21-3707, -3708.
25 Id. § 21-3729. This section on the unlawful use of credit cards was amended to read “financial card.”
Criminal Code, section 21-3102, which provides that "[t]his code has no application to crimes committed prior to its effective date," would seem to be applicable to all crimes that are included in the Criminal Code, notwithstanding that this section was intended to deal with the new Criminal Code that became effective in 1970.

D. Sentencing

There have been several changes in the sentencing area, most of which may be found in Senate bill 951. Rape has been changed from a class C to a class B felony, effective July 1, 1978. Most of the other changes became effective January 1, 1979. One change concerned maximum sentences for class B, C, D, and E felonies. The sentencing judge is given the discretion to set the maximum number of years for a defendant within a range prescribed by the legislature. The Habitual Criminal Sentencing Act was also amended.

Several changes were made concerning presentence reports. If the sentencing judge finds that an adequate presentence investigation cannot be conducted in the county, the defendant may be sent to the Kansas Reception and Diagnostic Center (KRDC) or the State Security Hospital. The same section authorizing this presentence investigation at KRDC also authorizes a sentencing judge, in appropriate circumstances, to release the defendant on probation subject to certain conditions, such as requiring complete or partial restitution. Also effective in 1979 is a provision that makes a presentence report discretionary in misdemeanor cases but mandatory in all felony cases unless the court finds that there is adequate and current information available from a previous report or from other sources. While it is not clear what "other sources" means, it is quite clear that the thrust is to have the presentence report information available before sentencing. This presentence information is to be made available to the prosecution and counsel for the defendant when requested by both or one of them; and defense counsel is authorized, after receiving court approval, to disclose the diagnostic report information to the defendant. A final change concerning sentence procedure is that section 21-4603(3) has been amended to require the sentencing judge to set out in the commitment order the reasons for imposing the sentence, and in the case of class A, B, or C felonies to state whether the defendant is convicted as an aider and abettor.

E. Parole Eligibility

There have also been some substantial changes made in section 22-3717, which deals with parole eligibility, effective January 1, 1979. The parole eligibility date

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39 Id.
41 Id. § 1 (codified at Kan. Stat. Ann. § 21-3502 (Supp. 1978)).
43 Id. § 4 (codified at Kan. Stat. Ann. § 21-4504 (Supp. 1978)). Also note new §§ 22-3717(2)(F) and 21-4608(3) dealing with computation of sentences and parole eligibility when there are consecutive and/or concurrent sentences given.
49 For parole changes not covered here and for changes in the probation area and in the computation
is made definite in some cases but completely indefinite in others. The emphasis in most cases is on serving more time before parole. Prior to 1979, good time was credited at the start of sentence and could be taken away for misconduct. After January 1, 1979, good time will be awarded as the sentence is served, that is, as it is earned, pursuant to rules and regulations to be promulgated by the secretary of corrections.40

The new law requires the parole board to meet with the defendant within six months after the date of sentence to set a parole eligibility date. Once the parole eligibility date arrives the inmate is entitled to a parole hearing before the Kansas Adult Authority. For class B or C felonies the inmate will be eligible for a parole hearing after serving the minimum sentence. This date may be advanced by the amount of good time awarded the inmate by the secretary of corrections. Unless the inmate is sentenced under the Habitual Criminal Act,41 however, a parole hearing may be held any time after 120 days42 if the secretary of corrections requests a hearing for “good cause.” Class D and E felons are treated about the same way. These offenders will be eligible for parole hearing and parole after serving their minimum sentence less good time; but clearly they can be considered earlier, depending upon their performance in prison. For example, if they have not been sentenced as a habitual criminal or under the Mandatory Minimum Sentence Act,43 they may be paroled any time after 120 days if the secretary of corrections so certifies them. Thus, a D or E felon is eligible to see a board after 120 days upon certification under the rules and regulations of the secretary of corrections, whereas a B or C felon cannot see the Kansas Adult Authority after 120 days unless the Adult Authority finds there is good cause for the secretary’s request. If an inmate has been sentenced under the Habitual Criminal Act, he or she must serve the minimum sentence less good time before the parole board sees him or her. For class A felons or anyone sentenced to a minimum sentence of twenty-nine years or more, the inmate must serve fifteen calendar years of confinement before being eligible for a parole hearing. Finally, for class A, B, or C felonies, if convicted as an aider and abettor, the inmate may be paroled anytime after 120 days if the secretary of corrections certifies him or her to see the Adult Authority.

A final point about parole eligibility concerns a person convicted of an article 34, chapter 24 crime (crimes against persons) when the defendant used a firearm in the commission of the offense. New section 22-3717 again incorporates section 21-461844 that unequivocally requires the convicted person to serve the minimum sentence before being eligible for parole.45

42Pursuant to the old and the new § 21-4603(2), the sentencing court has 120 days from the date of sentence or after probation is revoked to modify the sentence or revocation. If an appeal has been taken the sentencing court has 120 days from the clerk of the district court’s receipt of the mandate from the appellate court. Act of May 12, 1978, ch. 120, § 5, 1978 Kan. Sess. Laws 538 (codified at Kan. Stat. Ann. § 21-4603 (Supp. 1978)).
Certainly any criminal lawyer should be completely familiar with these new parole provisions, particularly defense counsel, since parole considerations are extremely relevant when a plea bargain or guilty plea is a possibility.\textsuperscript{46}

\textbf{F. Expungement}

Another significant change that was made by the 1978 legislature involves the expungement of conviction records. The possibility of expunging a criminal record is relevant to defense counsel giving advice about guilty pleas, as well as to those convicted persons who want to seek better jobs, lower insurance rates, or further education. Expungement has been possible under certain circumstances in Kansas since 1971.\textsuperscript{47} The 1978 Kansas legislature reexamined this area and enacted two new statutes that replace sections 12-4515, 21-4616, and 21-4617.\textsuperscript{48}

Under these new sections, it is still possible to have a conviction stemming from a city ordinance violation or a state misdemeanor or felony violation expunged, each having slightly different requirements.\textsuperscript{49} For example, most city ordinance violators or state misdemeanants and class D and E felons may apply for expungement \textit{two years after} satisfying their sentence. A person who is a habitual violator of certain misdemeanor statutes or a class A, B, or C felon, however, cannot petition for expungement until five years after satisfying whatever sentence is given.\textsuperscript{50} The \textit{type} of crime is now the important factor, not the age of the person at the time of the commission of the crime, and everyone has to wait at least two years. This is a significant change because under the old law a person under the age of twenty-one at the time of the crime could apply for expungement immediately after satisfying the sentence.

Regardless of the crime, the judge is now required to inform the person of the expungement possibility in all cases in which no incarceration is given.\textsuperscript{51} Thus, while a person receiving a jail or prison term may still apply for expungement, the judge is under no obligation to tell the person of this possibility at the time of sentencing.

The statutes state that persons whose convictions have been expunged will be treated just as if they had not been convicted, except (1) the conviction may be used for sentencing if the person is subsequently convicted of another crime; (2) the conviction must be disclosed in employment applications with private detective agencies, private patrol operators, or with a criminal justice agency; (3) the conviction must be disclosed any time the expungement order requires disclosure; or


\textsuperscript{49} The procedure for expungement is detailed in the statute.


\textsuperscript{51} Id. §§ 27(f), 28(f) (codified at Kan. Stat. Ann. §§ 12-4516(f), 21-4619(f) (Supp. 1978)).
(4) the conviction may be disclosed when it is an element of a subsequent crime. 62 In this regard, it must be noted the new laws do not provide, as the old laws did, that the court may set aside the guilty verdict and dismiss the complaint or information against the person who is granted expungement. The person has no affirmative duty to disclose the conviction unless one of the exceptions applies.

The new law specifically directs the custodian of the arrest and conviction records to disclose them only to the qualified people set out in the exceptions noted above. 63 That some people can be told of the conviction after expungement indicates the legislature contemplated that the record of conviction would be preserved. Therefore, it would seem that a record-keeping system making this conviction available to some but not to others would be required, yet the legislature simply directs the clerk of the court to forward a certified copy of the expungement order to the Federal Bureau of Investigation, the Kansas Bureau of Investigation, the secretary of corrections, and other criminal justice agencies that may have a record of the conviction. 64 In order to comply with the apparent legislative purpose, the expungement order should indicate that expungement is effective for some inquiries but not all. If computers are involved, a computer program would have to be devised to accomplish this disclosure (or nondisclosure) goal. When noncomputerized records are involved, a clear rule should be developed which directs the personnel having access to these records (e.g., police department or clerk of the court personnel) when to disclose and perhaps provides for contempt of court charges for inappropriate releases. Whichever system is involved, it must be made clear that the search of the records shows no record exists, not just that it was expunged, or else the purpose of expungement is defeated.

Another problem raised by the new laws is the effect of an expungement order upon an arrest record. As indicated earlier, the statutes direct “the custodian of the records of arrest, conviction and incarceration relating to the crime shall not disclose the existence of such records, except [to certain people enumerated in the statute].” 65 Apparently, therefore, a government agency is restricted in disclosing the fact of arrest. The new laws, however, also provide that after expungement a person may state “he or she has never been convicted of such crime.” 66 No mention is made of the arrest, which leaves open the question whether a person can also state “never arrested.” It seems that the purpose of the statute would be defeated by forcing the person to disclose the arrest, since disclosure would lead to some discussion of the expunged crime.

While it is not clear what the legislature contemplated about an arrest that led to an expunged conviction, it appears it did not contemplate the use of these pro-

62 Id. §§ 27(e), 28(e) (codified at Kan. Stat. Ann. §§ 12-4516(e), 21-4619(e) (Supp. 1978)). These subsections incorporate the definitions of private detective agencies and private patrol operators given in Kan. Stat. Ann. § 75-7601 (1977), and the broad definition of criminal justice agency given in id. § 22-4701 (Supp. 1978). In addition, under § 28(g), the person whose record is expunged must still comply with “state or federal law relating to the use or possession of firearms by persons convicted of a felony.” Act of May 12, 1978, ch. 120, § 28(g), 1978 Kan. Sess. Laws 538 (codified at Kan. Stat. Ann. § 21-4619(g) (Supp. 1978)).
63 Id. §§ 27(h), 28(h) (codified at Kan. Stat. Ann. §§ 12-4516(h), 21-4619(h) (Supp. 1978)).
64 Id. §§ 27(e), 28(e) (codified at Kan. Stat. Ann. §§ 12-4516(e), 21-4619(e) (Supp. 1978)). Old Supreme Court Rule 184 should also be considered.
65 Id. §§ 27(h), 28(h) (codified at Kan. Stat. Ann. §§ 12-4516(h), 21-4619(h) (Supp. 1978)).
66 Id. §§ 27(g), 28(g) (codified at Kan. Stat. Ann. §§ 12-4516(g), 21-4619(g) (Supp. 1978)) (emphasis added).
visions to remove an arrest record that did not lead to a conviction. A person may have a common law right to this, however. When considering the arrest record problem, it should be remembered that the real question is what is the probative value of the information itself. An arrest record merely indicates that charges have been asserted by a law enforcement officer, and the officer could have made a reasonable mistake. In any event, if there has not been a prosecution there appears to be no good reason to keep stale arrest records anyway.

There is also a question whether these new provisions are retroactive. It appears that some parts are and others are not. The Kansas rule is that, unless otherwise clearly indicated, statutes are to be applied prospectively only. Here the legislature has done a very curious thing. It has clearly told the custodian of arrest, conviction, and incarceration records that the new rules making the conviction records available for some purposes after expungement are to be applied to expungements obtained under old sections 12-4515 and 21-4617. This is clear because the new statutes specifically refer to these old statutes. In the sections dealing with what the person whose record has been expunged must disclose, however, the new sections do not refer to expungements under the old statutes. Thus, it appears that a person whose conviction was based upon a criminal act prior to July 1, 1978, is not required to disclose what a person today must disclose. As a practical matter, it may not make any difference because it will probably be picked up by a routine check of the records. Accordingly, an applicant should be aware of this possibility to avoid being rejected simply because the conviction was not disclosed.

The parts of the new provisions requiring a minimum two year waiting period are apparently not to be applied retroactively because there is no specific reference to the old statutes in these new sections. Moreover, it may be argued that the expungement possibility was part and parcel of the sentence that was given prior to July 1, 1978. Clearly, both the defendant and judge would have been aware of the immediate expungement opportunity, and this may have been part of the plea bargaining process and the reason that the defendant pleaded guilty. Thus, to apply the waiting period retroactively may raise a number of problems and possibly litigation. Consequently, the statute should be applied prospectively, and a person committing a criminal act prior to July 1, 1978, who qualifies under the old provisions should not have to wait two years from the date of satisfying the sentence to file a petition.

In summary, significant changes have been made in the law of expungement. The type of crime is now the important fact, not the age of the actor. A person under twenty-one who has been convicted of a crime that occurred after July 1, 1978, must now wait at least two years from the time of serving whatever sentence was given before applying for expungement. If an expungement of any crime is ordered, the lawyer must be concerned about precisely what is going to happen to the client's

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71 It may be argued, however, that expungement is a privilege and not a right and, therefore, it may be taken away. It must also be noted that the legislature has in the past explicitly stated that a new statute was to be applied prospectively. See Kan. Stat. Ann. § 21-4618 (Supp. 1978).
record. The client should be prepared to deal with the possibility that, as a practical matter, it may be impossible to operate a perfect record-keeping system. It may be advisable for the convicted person to voluntarily disclose the conviction or arrest and stress that there has been an expungement, rather than risk inadvertent disclosure by the record-keeper, especially if the crimes are relatively minor and occurred when the person was young.

G. Crime Victim Compensation

Another noteworthy new law enacted by the 1978 legislature was House bill 2163, which establishes a state financed program of crime victim compensation. Compensation is to be awarded to crime victims who have suffered personal injury or death as a result of criminal acts or to their dependents. A special board is to determine, independent of any court adjudication, the existence of a crime, the damages caused, and other prerequisites for compensation. Compensation up to $10,000 can be awarded for economic loss, i.e., loss of earnings, medical expenses, and replacement services.

The board that administers the act is to be appointed by the governor. In determining whether to award any compensation, the board will look to see if the claim has been filed within one year after the injury or death of the victim and will award compensation only if the claimant will suffer financial stress if the award is not granted. Property damage claims are excluded and awards will be reduced by any benefit the victim has received from collateral sources, such as hospital insurance, workers' compensation, or social security. The legislature has appropriated to the board for fiscal 1979 a total $214,190, of which $64,190 is to be used for operating expenditures and $150,000 for the payment of claims and attorney's fees.

H. Repeal of the Criminal Injury Statute

The 1978 legislature repealed section 21-3431, which provided,

Criminal injury to persons is the maiming, wounding, disfiguring, causing great bodily harm, or endangering of life or a person under circumstances which would constitute murder or manslaughter if death had ensued.

In 1977 the Kansas Supreme Court considered this statute in State v. Kirby. Kirby, who apparently had no intent to injure anyone and did not know the complaining witnesses, had fired several shots from a .30 caliber M-1 rifle into the ceiling of a kitchen. At least two of these bullets ricocheted into the complaining witnesses' house across the street. On these facts Kirby was convicted of violating section 21-3431. The supreme court reversed the conviction, declaring the statute unconstitutional under both section 10 of the Bill of Rights of the Kansas Constitution and the due process clause of the fourteenth amendment to the United States Constitu-

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63 Act of May 12, 1978, ch. 28, § 23, 1978 Kan. Sess. Laws 190. It should be noted that the 1979 legislature will have to find a new way of funding this fund. This has been necessitated by an attorney general's opinion declaring the use of a one dollar special fee on all lawsuits as an unconstitutional exercise of the state's general taxing power.
tion because it was too vague and indefinite. The court was concerned that an ordinary person of common intelligence could not determine what specific conduct was being proscribed and whether the prohibited acts had to be done intentionally or in a wanton manner. The court, evidently believing that nonintentional acts could constitutionally be punished, invited the legislature to remedy this problem by promulgating a new statute. Apparently the legislature was unable to draft a law that it felt conformed to the Kirby decision.66 There are some statutes that may provide an example for the legislature in this task. New York has two statutes that have been held to be constitutional and appear to punish the acts that section 21-3431 was designed to prohibit. These statutes provide,

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person. Reckless endangerment in the second degree is a class A misdemeanor.67

A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person. Reckless endangerment in the first degree is a class D felony.68

These statutes would probably satisfy Kirby's concern that "endangering of life" was vague and undefined. In addition to the New York approach, the American Law Institute's proposed draft should be considered. Section 211.2 of the Model Penal Code, entitled "Recklessly Endangering Another Person," provides,

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.69

The legislature should also consider section 21-320170 on criminal intent, which defines wanton conduct.

1. Prettrial Diversion Procedure

The 1978 legislature enacted a new statute that makes possible, in certain cases, prettrial diversion in lieu of criminal proceedings.71 Diversion is defined as the "referral of a defendant in a criminal case to a supervised performance program prior to adjudication."72 The statute provides that "each district attorney shall adopt written policies and guidelines for the implementation of the diversion program in

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67 N.Y. CRIM. LAW (McKinney) § 120.20 (1975). This section was held to satisfy the void-for-vagueness test in People v. Lucchetti, 33 A.D.2d, 305 N.Y.S.2d 259 (1969). The legislative comments to this section should also be examined.
68 N.Y. CRIM. LAW (McKinney) § 120.25 (1975). This provision was held to be constitutional in People v. Nixon, 34 A.D.2d 403, 309 N.Y.S.2d 236 (1970). The legislative comments should also be considered.
accordance with this act.\textsuperscript{73} Thus, it appears that the legislature contemplated that each district would have some kind of diversion program available.\textsuperscript{74} The written guidelines will be used in determining when a defendant is to be referred to a supervised performance program prior to adjudication on the merits of a charge. It appears that the prosecutor will have to initiate the diversion process. The statute provides, "Each defendant shall be informed in writing of the diversion program . . . ."\textsuperscript{75} This provision seems to require the prosecutor to give notice only to a defendant who the office feels should be considered for diversion. If the prosecutor decides to initiate the diversion process, the defendant is entitled to be present and represented by counsel at any conference concerning diversion. It is also clear that if there is a diversion agreement and the defendant satisfies it, the criminal charge(s) will be dismissed with prejudice. The key factor to this program seems to be the prosecutor, and there are only general guidelines for the development of the criteria to be used in determining eligibility for diversion in the statute.

\section*{J. Guilty By Reason of Insanity Release Procedures}

The 1978 legislature also addressed the situation involving a person found not guilty by reason of insanity who remains in a state security facility or state hospital for more than one year after acquittal.\textsuperscript{76} This person is now entitled, upon written request, to a hearing to determine whether or not he or she continues to be dangerous to anyone, including himself or herself. This request is to be filed in the district court in the county where the person is hospitalized, and upon receipt the court is to order a mental examination to be conducted by the chief medical officers of the state security hospital within twenty days.\textsuperscript{77} The district court is then to schedule a hearing, at which the committed person will have the right to present evidence, cross-examine witnesses, and have counsel. Both county and district attorneys will receive notice of this hearing and will be permitted to participate at the hearing. If the person is found to be no longer dangerous, the court shall order the person discharged.

One interesting fact that is not specifically addressed by this new provision is whether a committed person is to be given specific notice of the right to request this annual hearing. It would appear that some notice of this right must be given or the annual review is really without much meaning. As a practical matter, notice will probably be provided either by the court upon commitment or by the trial attorney initially and then by the institution. This should have been made clear.

This annual hearing mechanism should be considered along with the amendments made by the 1978 legislature to section 22-3428.\textsuperscript{78} This provision empowers the judge who conducts the hearing described above to stipulate conditions for re-
lease and provide for the creation and implementation of a reentry program for an individual who has been committed to the state security hospital after being found not guilty for reasons of insanity, but is now being discharged because no longer dangerous. The court may exercise jurisdiction and supervisory control over the patient for a maximum of two years. During this time, it may order the individual to continue medication, to receive psychiatric counseling, or to submit to supervision by parole or probation officers. During the two year period the patient may seek full or partial discharge from the conditions of release. The new amendment also sets forth possible actions by the court if conditions of release are violated. The county that has committed the patient is to bear the costs of the reentry program.

In Kansas a person is automatically committed after a finding of not guilty by reason of insanity. This raises a serious equal protection problem that should be considered by the legislature. The District of Columbia Court of Appeals addressed a similar problem created by automatic committal in *Bolton v. Harris.* The *Bolton* court pointed out that the jury’s finding when acquitting a defendant because of insanity is that there was a reasonable doubt about the person’s sanity at the time the crime was committed, but there is no specific finding that the person is dangerous at the time of acquittal. Nevertheless, a person so acquitted is automatically committed. In addition, District of Columbia law provided that if there was an involuntary civil commitment there must be a hearing to determine if the person is presently dangerous to himself or others. The *Bolton* court found that this raised an equal protection problem and concluded that there was no rational reason to treat a person acquitted by reason of insanity differently. The court held that a person found not guilty by reason of insanity could not be committed to a mental institution until there had been some hearing on his or her present mental state. It would appear that the same problems considered by the *Bolton* court exist in Kansas. A person found not guilty by reason of insanity is automatically committed, but there is no specific finding that the defendant is presently dangerous. A hearing, however, is required for involuntary civil commitments, which squarely raises the equal protection problem.

**K. Miscellaneous**

Another procedural change concerned defendants found incompetent to stand trial. In an apparent attempt to bring the Kansas procedure in line with a United States Supreme Court case, *Jackson v. Indiana,* section 22-3303 was amended to provide that a defendant who is found incompetent to stand trial may be committed for evaluation and treatment to an appropriate institution for up to ninety days. If the institution’s chief medical officer, however, certifies to the court within ninety days that the defendant “has a substantial probability of attaining competency to

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76 395 F.2d 642 (D.C. Cir. 1968).
78 See KAN. STAT. ANN. § 22-3428 (Supp. 1978). The jury is instructed that a finding of not guilty by reason of insanity will result in automatic commitment.
79 Id. §§ 59-2912, -2914.
stand trial in the foreseeable future, the court will then order the defendant to remain in an appropriate institution for up to six months or until the defendant attains competency, whichever occurs first. If the chief medical officer finds that the defendant does not have a substantial probability of attaining competency within the prescribed time, the court will then order the secretary of social rehabilitation services to commence involuntary commitment proceedings. Remember that the finding of incompetency to stand trial is not a finding that the defendant is not guilty by reason of insanity.

The 1977 legislature also made changes in the rules on giving bond in certain traffic offenses and blood alcohol tests. Today a person who is halted for a violation of traffic laws may surrender his or her valid Kansas driver's license in lieu of a cash bond. If cash bond is given, it is now possible to surrender a bankcard draft from a valid credit card approved by the Division of Motor Vehicles. Also amended was section 8-1001, which deals with chemical tests to blood alcohol content. This statute now exempts from civil or criminal liability any person taking or causing the taking of blood for blood alcohol tests when the tests are performed by qualified persons in a competent manner and at the direction of a law enforcement officer.

III. CASE LAW ON CRIMINAL PROCEDURE

Having reviewed legislative action in 1977 and 1978 in the areas of substantive criminal law and criminal procedure, it is now appropriate to begin to examine the many cases in which the Kansas appellate courts were confronted with criminal procedure cases. Again, it must be noted that only a few of the cases have been selected for discussion.

A. Fourth Amendment

1. Seizure of the Person

Whenever there is a seizure of the person, the fourth amendment to the United States Constitution and section 15 of the Bill of Rights to the Kansas Constitution must be considered. A seizure of the person for purposes of the fourth amendment occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." Obviously, this includes both arrests and what have come to be known as detentions based on less than probable cause or stops. While evidence illegally seized during either an arrest or stop must be excluded at trial, it is important to determine which is involved because arrests require probable cause and stops require only reasonable suspicion.

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87 Id. § 22-3301 (1974).
88 Id. § 8-2107 (Supp. 1978). See id. § 8-2107a (dealing with Kansas' accepting drivers' licenses from other states).
90 Terry v. Ohio, 392 U.S. 1, 16 (1967).
The Kansas Supreme Court in *State v. Boone*\(^4\) had occasion to consider whether there had been a valid stop pursuant to section 22-2402(1),\(^5\) which authorizes a stop when an officer reasonably suspects a person has committed or is committing a crime. In *Boone* there had been a robbery committed at 2:15 a.m. on a rainy night. As the arresting officers started to cruise the area of the robbery at 2:30 a.m., the following description of the robbers was broadcast over the police radio: "two white males, one wearing an army fatigue jacket, believed to be blond also wearing a gas mask; the other was larger and wore a ski mask." About thirty minutes earlier, when on routine patrol, the officers had noticed defendant, Boone, standing inside the screen door of a house, with two long-haired persons whose sex could not be determined. After circling the block, the officers found the house dark and the tan Ford station wagon that had been in front of the house gone. Apparently these circumstances, coupled with the policemen’s knowledge (according to the opinion) that Boone had been involved in previous robberies, caused the officers to go back a third time to the house shortly after hearing the broadcast. Upon arrival at about 3:00 a.m., the police parked across the street. Shortly thereafter a tan Ford station wagon approached. As it moved in front of the police car, the officers turned on their headlights, clearly exposing Boone as the driver. They pulled the vehicle over, and Boone immediately exited and stood beside the car. The officers approached Boone with their guns drawn. The officer who patted Boone down told him that he had been stopped because there had just been a robbery. While the pat-down was taking place, the other officer went to the opposite side of the car and with the aid of a flashlight looked through the windows. He observed on the front floorboard a twenty dollar bill and a five dollar bill clipped together that appeared to be wet and on the back floorboard what appeared to be a gas mask. At this point, Boone was handcuffed and advised of his rights. The car was then searched and more evidence was found. Defendant moved to suppress all evidence found in the car and on his person because it was the product of an illegal detention.

The court held that the detention was a stop and that it was based upon reasonable suspicion. The court’s analysis of the facts and the law concerning when detention constitutes a stop and when it constitutes an arrest merits examination. The court concluded that the initial seizure of Boone by the officers with drawn guns was a stop and the arrest did not occur until after the money and the mask were observed and defendant was handcuffed. In doing so, it applied section 22-2202(3),\(^6\) which defines arrest to be a restraint when the person is being held for further criminal proceedings. The court, while not explicitly saying so, appeared to rely solely on what the intent of the officers was in determining if an arrest occurred. It concluded that initially the officers intended only to temporarily detain him.\(^7\) This conclusion rested entirely upon what the officers stated their intent had been at the time of the seizure.\(^8\)

In any event, the question becomes one of deciding at what point a stop triggers the application of the fourth amendment and the Kansas constitution. It is clear in *Boone* that there was a physical restraint and the type of seizure that makes both


\(^6\) *Id.* § 22-2202(3) (Supp. 1978).

\(^7\) For the statutory definition of detention, see § 22-2202(8).

\(^8\) For a general discussion of when an arrest occurs, see Meyer, *supra* note 93.
constitutional protections applicable. Obviously, not all intercourse between citizen and law enforcement personnel will invoke the constitutional provisions. It is interesting to note that the Boone court seems to emphasize the temporary nature of the initial detention, but it does not seem to focus on how long a person can be detained and where a person can be detained for purposes of a detention not amounting to an arrest.

In a case decided one year after Boone, the court in State v. Holthaus did implicitly deal with these issues. There the court considered a situation in which defendant had been taken to the police station “until such time as they [the police] could determine what was going on.” It is not clear how long Holthaus was at the station before he was arrested, but it is clear that he had not been put under arrest for any crime when he was brought there. The court, in upholding the arrest that occurred at the station and after defendant’s story was investigated, simply stated that the person was being detained until his story could be checked out. Citing Boone, it concluded that this stop was justifiable because there was reasonable suspicion for the initial detention.

The conclusion in Holthaus seems to be clearly inconsistent with what is generally thought to be a justifiable course of action during stops on less than probable cause. For example, detention decisions normally arise when an officer is confronted by a spontaneous, fast-changing situation, the purpose of the brief stop being to check out the situation while the suspect is kept at the place of seizure. Section 22-2402 supports this on its face when it provides that an officer may, without making an arrest, “stop any person in a public place whom he reasonably suspects is committing . . . a crime and may demand of him his name, address and explanation of his actions.” Also, it seems clear the Kansas statute contemplates a brief stop in that the officer is only to ask for name, address, and explanation of the person’s action, and detention is defined by statute as a temporary restraint. Thus, assuming that Holthaus did not consent to being taken to the station, which appears to be the case, the court seems to be creating a new category of restraint—“investigative detention.” The holding of a suspect at the police station surely cannot be classified as a stop pursuant to the stop and frisk statute whose purpose is to allow an officer in a public place to detain temporarily an individual and obtain an explanation of his or her actions at the place of seizure. Consequently, the taking of the suspect to the police station has to amount to more than a stop, and therefore
it would appear that an arrest has occurred, requiring the police to have probable cause at the time the suspect was taken to the station house. The American Law Institute in its Model Code of Pre-Arraignment Procedure speaks directly to this point. It provides,

[A] law enforcement officer, lawfully present in any place, may . . . order a person to remain in the officer’s presence near such place for such period as is reasonably necessary [to obtain or verify the identification of such person, to obtain or verify an account of such person’s presence or conduct or determine whether to arrest such person] but in no case for more than 20 minutes . . . .

Another issue that was considered by the court in Boone was whether the facts known to the officers at the time Boone was seized constituted “reasonable suspicion.” The court concluded that the officers had prior knowledge or had observed conduct that justified a reasonable suspicion to believe a crime had been committed by the person in the car. Obviously, reasonable suspicion is a general standard and is to be decided on a case-by-case basis, and therefore a close examination of precisely what the officers did know is essential. It was a late rainy night with few people out. They knew (again according to the opinion) that Boone had been involved in previous robberies. It is not clear, however, upon what this knowledge of previous robberies was based. Did they, in fact, know he had been convicted? If so, how long ago? Did this knowledge come from informants or from Boone’s general reputation in the community or among members of the police? The court’s opinion indicates that the officers knew Boone and his friends had left the residence at about 2:00 a.m. and two males were involved in the robbery. It is, however, not clear from the case report how the officers could have been certain that it was Boone standing in the front door. After all, the officers were apparently at all times seated in their car when they observed Boone, and it was dark and raining. Another fact not discussed was that at the time of the stop Boone was in the car alone and there was no indication that Boone had blond hair or that there had been a tan Ford station wagon involved in the robbery. Also, the house was apparently in the vicinity of the crime, but, again, the opinion does not make it clear how close the house was to the robbery and whether there was enough time to go from the house to the place of the robbery in the time frame involved (the officers observed Boone the first time at approximately 2:00 a.m. and the robbery occurred at 2:15 a.m.).

In any event, equipped with the knowledge set out above, the officers approached Boone with guns drawn. Boone was told as he was patted down that he had been stopped because there had been a robbery. Yet, he was asked no questions about who he was, nor was he given an opportunity to explain his presence. As indicated, one officer immediately went to the other side of the car and looked inside. Thus, quite clearly one officer was more interested in the car, which had not been implicated, than he was in asking defendant any questions or obtaining consent to look into the car.

It is clear that the court did conclude that the facts showed reasonable suspicion

105 See Terry v. Ohio, 392 U.S. 1, 16 (1967); Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963) (arrest when police moved suspect from situs of accosting).
to stop the individual, even though many of the facts referred to certainly could be construed as innocent behavior and the officer's suspicions appear to be more in the nature of good hunches. The major factors apparently were the prior robberies and the time of day. There is really no guidance, however, on what type of facts are considered crucial.\textsuperscript{108} This is unfortunate. The court simply decided that the test under the fourth amendment and the Kansas Bill of Rights is whether the officers' actions are reasonable and that this test is to be determined on a case-by-case basis.\textsuperscript{109} The decision in Boone in effect says that if one sees a past felon in the area of a robbery late at night, one can conduct not only a stop and a pat-down but also an inspection of his or her car, which might have been the real reason for the stop. This is similar to a random license check stop when police have a purpose for stopping a car other than for a random license check.

Random license checks were considered by the Kansas Court of Appeals in Overland Park v. Sandy\textsuperscript{110} and were upheld. The court's reasoning was that the legislature, in promulgating section 8-244,\textsuperscript{111} which requires all drivers of vehicles to possess a valid driver's license and display it upon demand, must have intended police officers to have the power to stop a vehicle to check the driver's license even though the officer had no cause to believe that the driver did not possess a valid license, for to hold otherwise would make the statute meaningless. There was, however, a limitation placed upon the officer's ability to check licenses. The court concluded that officers may neither make a license check as a guise for seeking evidence of other crimes nor use it as a device to harass drivers. The court then held that there had been a random license check, and since the officer was legitimately in a place where he had a right to be, any contraband obtained that was in plain view was seizable under the plain view doctrine.

Other courts have considered this question of random driver's license checks. Nebraska has reached the same result as was reached in Sandy.\textsuperscript{112} There are a number of courts,\textsuperscript{113} however, that have reached a different result when there is a random check with no specific facts justifying the intrusion. The most recent case is State v. Prouse.\textsuperscript{114} According to the Delaware court, random stops in the absence of justifying facts fails the federal and state constitutional test of reasonableness because random vehicle stops are inherently arbitrary.

The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any visible identifiable group could stop a disproportionate number of persons in the group.\textsuperscript{116}

\textsuperscript{108} While the United States Supreme Court case of Terry v. Ohio, 392 U.S. 1 (1967), was not decided as a stop case, its standard of objective facts provides a benchmark, and the facts there were clearly stronger than they were in Boone. The facts in Adams v. Williams were also stronger than in Boone. See Adams v. Williams, 407 U.S. 143 (1972). See also Meyer, supra note 93.

\textsuperscript{109} See supra note 93.

\textsuperscript{109} See ALL MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 3-12 (Official Draft May 17, 1972); Meyer, supra note 93. Also see Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349 (1974); LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, SUP. CR. REV. 127 (1974).


\textsuperscript{111} See KAN. STAT. ANN. § 8-244 (1975).

\textsuperscript{112} See State v. Holmberg, 231 N.W.2d 672 (1975).


\textsuperscript{116} Id. at 1364.
Although no discrimination was indicated in the stop of Prouse, the “evil of the possibility for discriminatory stops” requires the “rigid invalidity rule” that was adopted by the court. Accordingly, the Delaware Supreme Court affirmed a trial court order suppressing marijuana seized in plain view during such a random check. The officer involved testified that he randomly chose defendant’s vehicle for a document check without having received any indication of criminal or traffic violation. The court specifically limited its holding to random vehicle stops.

2. Arrest Warrants

The Kansas Supreme Court case of Wilbanks v. State has created much discussion among members of the bar and deserves comment in this Survey. The Kansas Supreme Court held that Wilbanks could not be extradited to Idaho unless within thirty days the State of Idaho corrected the defective Idaho arrest warrant that was the basis of the extradition request. The warrant was based upon a complaint that merely set out the language of the allegedly violated statute and contained no facts and circumstances. Thus, the complaint did not contain sufficient information to enable a magistrate to make a probable cause determination.

The question arises whether this case affects the general law of arrest in Kansas. Many people believe it does. The author, however, is of the opinion that it has little impact, if any, on fourth amendment cases. Although the court based its decision upon the fourth amendment and the Kansas constitution in holding that an arrest warrant must be issued upon a finding of probable cause by a magistrate who is presented facts and circumstances, the court was simply following the decisions of the United States Supreme Court in Giordenello v. United States and Jaben v. United States. The Wilbanks court did note, however, that a few Kansas cases had indicated that “a properly verified complaint, charging an offense substantially in the language of the statute, is sufficient authority for a finding of probable cause and the issuance of an arrest warrant.” The court then went on to specifically disapprove of these holdings, however. It must be pointed out that the cases disapproved involved situations in which no evidence was found as a result of a search incident to the arrest, and therefore no question of suppression of evidence arose. In fact, these cases make it clear that if evidence were found it would be inadmissible. Thus, it has been clear in this state for a long time that if an arrest warrant was premised upon the mere conclusions of an officer or the simple words

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117 The United States Supreme Court recently decided a similar case, Michigan v. Doran, .... U.S. ...., 99 S. Ct. 530 (1978). A Michigan court had denied extradition because no factual basis was shown for the demanding state’s determination of probable cause. The Supreme Court reversed, concluding that article IV, § 2 of the United States Constitution prevented the courts of the asylum state from reviewing the probable cause determination of the demanding state. While this case does directly affect the extradition issue in Wilbanks, what the federal and state constitutions require in the allegation of a complaint is not affected, and the Kansas decision, at least to the extent it is based on the Kansas constitution, still remains good law.

131 381 U.S. 214 (1965).
224 Kan. at 74-75, 579 P.2d at 139. The cited cases involved situations in which no evidence was found as a result of a search incident to the arrest.
of the statutes, any evidence produced from the execution of that warrant was suppressible because it was obtained as a result of an illegal arrest.

It also appears that Wilbanks has no impact on those situations in which a person is arrested pursuant to a defective arrest warrant and no evidence is obtained incident to the arrest. Presumably, the state could simply file another complaint that included the appropriate facts and circumstances and proceed under the new warrant. This conclusion is supported by the fact that the Wilbanks court gave the State of Idaho thirty days to show probable cause and correct their extradition papers. In addition, the illegal arrest would not prevent a court from trying a defendant, provided legally obtained evidence was available. The United States Supreme Court made this clear in Gerstein v. Pugh, in which it stated, “Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction.” One arrest principle that Wilbanks clearly did not affect was a valid warrantless arrest. If the arresting officer could have made a valid warrantless arrest (i.e., if it can be shown that the officer possessed sufficient knowledge to establish probable cause at the time of the arrest) the defective arrest warrant can be ignored, notwithstanding that it was used to make the arrest, and the state can proceed as if there had been a warrantless arrest.

Wilbanks may effect a change in the application of the law when an arrest is pursuant to a defective arrest warrant and the arrestee is held for an extended period of time without a probable cause determination. The United States Supreme Court in Gerstein held that the fourth amendment requires a judicial determination of probable cause as a prerequisite to extended restraints of liberty following a warrantless arrest. The hearing required is ex parte, essentially the kind held when an arrest warrant is requested. Another change Wilbanks may cause might be in the operation of some prosecutors’ offices. Now before filing a complaint, the officers concerned with the case will have to be contacted to supply the facts and circumstances. This may cause more work at the outset, but it would seem that this would give the prosecutor better information about the case earlier, and, in any event, this kind of discussion would have to take place eventually.

The upshot of Wilbanks, then, is that if there is an arrest warrant issued pursuant to a conclusionary complaint, any evidence obtained as a result of an arrest based upon that warrant will be suppressible unless the arresting officers could otherwise legally arrest without a warrant. When there are no evidentiary consequences flowing from an arrest pursuant to a defective warrant, the state will simply have to start over and the jurisdiction of the court will not be affected. Inadequate complaints and affidavits could be obviated simply by including facts and circumstances, which should always be done. It makes no sense for the state to run the risk of losing unexpected evidence obtained pursuant to an arrest based upon a conclusionary warrant.

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130 Id. at 119 (citations omitted).
132 This statement may be too broad. In certain instances an arrest may not be valid if the arresting officers have time to obtain an arrest warrant and fail to do so. This is particularly true if the arrest occurs in a private dwelling. See text at notes 129-37 infra. Thus, under these circumstances, an arrest will be invalid if based on a warrant issued pursuant to a conclusionary complaint, even though the officers had probable cause to arrest. Any evidence obtained during the improper arrest will be suppressible.
133 See Meyers, supra note 93, at 697. Remember that a complaint may also be found to be inadequate because it does not provide notice as to the nature of the charge.
It should be noted that the United States Supreme Court in *Franks v. Delaware*127 dealt with a problem related to the adequacy of affidavits. A defendant is now entitled under the fourth amendment to a hearing when a substantial preliminary showing (offer to prove) is made that a false statement was either knowingly, intentionally, or with reckless disregard for the truth included in the affidavit. If the defendant can show this by a preponderance of the evidence, the affidavit minus this statement must be reexamined. This decision would seem to overrule several Kansas cases.128

Another United States Supreme Court case relevant to arrest warrants decided during the survey period is *United States v. Watson*.129 This case held that the requirement of obtaining a search warrant whenever time permits is not applicable to an arrest made in a public place in the daytime, even though it was clear there was time to get an arrest warrant. In other words, the Court refused to accept the theory that the United States Constitution always requires an arrest warrant if there is time to get one. The Court, however, clearly did not consider whether an arrest made in a private place would be valid if there were time to get an arrest warrant. While the Kansas courts have not recently considered this issue, other state and federal courts have. The Second Circuit Court of Appeals held in *United States v. Reed*130 that warrantless felony arrests by federal agents effected in the suspect’s home, in absence of exigent circumstances, even though based upon statutory authority and probable cause, are unconstitutional.131 A thorough consideration of the Supreme Court’s numerous pronouncements on this subject led the Second Circuit to this conclusion. Even the language of *Watson* and *United States v. Santana*,132 which both upheld warrantless arrests in public places, points in this direction. The *Reed* court also found support for its conclusion from the fundamental doctrine that the fourth amendment protects citizens’ reasonable expectations of privacy. The Supreme Court has made it perfectly clear that a person’s reasonable expectation of privacy in the home is entitled to unique protection.133 The Second Circuit also suggested that entering a person’s home to arrest him or her is a double invasion of the privacy interest in that there is an invasion connected with the arrest as well as an invasion of the sanctity of the home.

The Second Circuit, anticipating that the question of what constitutes exigent circumstances excusing a warrantless arrest would arise, pointed to the checklist developed by the Court of Appeals for the District of Columbia in *Dorman v. United States*.134 There the court indicated that exigent circumstances turned on such factors as,

(1) the gravity or violent nature of the offense with which the suspect is to be

130 572 F.2d 412 (2d Cir. 1978).
131 Id. at 424.
133 There is language in the Supreme Court’s opinions supporting this proposition as early as 1886, see Boyd v. United States, 116 U.S. 616 (1886), and as recently as 1976, see United States v. Martinez-Fuerte, 428 U.S. 543 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976).
134 435 F.2d 385, 393 (D.C. Cir. 1970).
charged; (2) whether the suspect "is reasonably believed to be armed"; (3) "a clear showing of probable cause . . . to believe the suspect committed the crime"; (4) "strong reason to believe that the suspect is in the premises being entered"; (5) "a likelihood that the suspect will escape if not swiftly apprehended" and (6) the peaceful circumstances of the entry.135

The Second Circuit's opinion, while based upon the United States Constitution, is addressed exclusively to federal agents and certiorari was not sought. The decision, therefore, may not be applicable to the states. State courts in recent years have also addressed the problem of making warrantless arrests in a private home when there is time to get an arrest warrant. Most of these state courts have agreed with Reed and have concluded that an entry into a home to make an arrest is similar to an entry to search the property and the same test should apply.136 The highest court in New York, however, has reached the opposite result. In People v. Payton137 the court concluded that even though there was time to get a warrant and no exigent circumstances existed, an officer having probable cause might enter a home to effect a felony arrest without an arrest warrant. The court determined there was a substantial difference between an intrusion connected with making an arrest and one for the purpose of searching the premises, and different tests ought to be applied. The court left open the possibility that some entries for arrest may be unconstitutional.

3. Searches Without a Warrant

The general rule pertaining to searches under the fourth amendment is that a search must be done pursuant to a search warrant issued by a neutral and detached magistrate. There are narrow exceptions to this rule, but the burden is on the state to show exigent circumstances existed that justify the warrantless seizure.138 These exigent circumstances generally fall into one of the following categories: search incident to a lawful arrest,139 the vehicle search,140 the so-called blood exception,141 hot pursuit,142 pat-down incident to a stop,143 and the inventory of a vehicle.144 A search warrant is also not needed when voluntary consent is obtained.145 The plain view doctrine allows an exception to the general search warrant rule in very narrow circumstances.146 Some important developments in the area of search incident to a lawful arrest and the plain view doctrine that have occurred at both the state and federal level will be discussed below.

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135 Id.
a. Search Incident to a Lawful Arrest

An officer may search the person arrested and the immediate area for the purpose of protecting the officer, preventing escape, or discovering fruits, instrumentalities, or evidence of the crime. The leading case on this issue is *Chimel v. California*, which limited the search incident to a lawful arrest to the person and the area "within the immediate control" of that person. The phrase "immediate control" was construed to mean the "area from which he [the arrestee] might gain possession of a weapon or destructable evidence." The latest United States Supreme Court case concerning a search incident to a lawful arrest is *United States v. Chadwick*.

In this case federal agents arrested three suspected drug couriers at a train station on the basis of probable cause to believe that the suspects' footlocker contained marijuana. This probable cause was apparently based upon two grounds; a trained dog had signaled that the locker contained drugs, and one of the suspects fit a drug trafficker's profile. At the time of the arrest the footlocker was in an open car trunk and the engine of the car was not running. A search of the suspects uncovered a key to the footlocker but no weapons. The suspects and the footlocker were taken to the agents' office, where the footlocker was searched.

The court held that the agents had violated the fourth amendment by opening the footlocker and searching it at the office without a warrant and without exigent circumstances calling for an immediate search. Specifically, the majority found several reasons why this search was unreasonable. First, it noted that the privacy interest of people in their luggage is strong and that the various reasons reducing the expectation of privacy in automobiles do not apply to a footlocker. Second, the mobility factor did not apply here. Third, the majority added that this search was remote in time and place from the arrest. Accordingly, it could not be saved by the search incident to an arrest doctrine. On the other hand, the dissent would have upheld the search under the two lines of authority emanating from the automobile and the search incident to arrest cases.

Recently, the Kansas Court of Appeals applied *Chadwick* in *State v. Dean*. The facts of this case were as follows: Dean was caught speeding, but he attempted to prevent apprehension by fleeing. Officer Meyers, hearing a broadcast for a fleeing car, proceeded to the vicinity. In the meantime, Dean had lost control of his car, and it had become disabled. As Officer Meyers approached the car, he observed the sole occupant, Dean, open the door of the passenger side and either put something under the seat or under the car through the open door. Meyers then ordered defendant out of the car, checked him for weapons, handcuffed him, and held him until the radar officer arrived. Officer Meyers then returned to the car, where he saw an orange overnight case directly under the opened passenger door. He picked up the locked case and, opening it with a key he had found on the floor of the car, found marijuana. Meyers then departed the scene to answer another call, leaving the opened case on the front seat of the car. Some thirty minutes later Officer Meyers returned and found the other officer still completing reports. Meyers then continued

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149 *Id.* at 763.
his search of the case, locating a pistol. Both searches of the case were made without a warrant and without the consent of defendant.

The court, relying upon Chadwick, suppressed both the marijuana and the gun. It noted that there clearly was the expectation of privacy because the case was locked. The search did not fall within the incident to the lawful arrest exception to the search warrant requirement because (1) the officers had reduced the luggage to their control and there was no worry that defendant could obtain evidence or a weapon from it; (2) defendant was nowhere near the bag when it was searched and, therefore, it was not within his immediate control; and (3) the weapon was found some thirty minutes after the arrest and thus not incident to it.

There has been considerable litigation concerning what kind of arrest is sufficient to invoke the search incident to a lawful arrest doctrine. Clearly, the arrest must be lawful—there must be probable cause to arrest at the precise moment in time the arrest occurs. It is not, however, as clear whether an arrest for any crime will trigger this exception to the search warrant requirement. The United States Supreme Court has decided two cases relevant to this issue in the last five years, United States v. Robinson and Gustafson v. Florida. In Robinson the Court held that the fourth amendment does not bar the admission in evidence of heroin discovered by a police officer during a thorough search of a traffic offender whom he was taking into custody for a serious traffic offense carrying a mandatory minimum jail sentence, a mandatory fine, or both. In Gustafson the Court held admissible marijuana discovered by a police officer during a full search of a traffic offender (failure to carry a driver's license) whom he was taking into custody for further investigation after an arrest for an offense that did not carry a mandatory minimum sentence. In both of these cases the Court made it clear that a law enforcement officer's authority to make a full search incident to a lawful custodial arrest requires no justification beyond the fact of the arrest itself. While the Court did not specifically define a custodial arrest, it apparently means that the officer takes the suspect to the station house. Thus, the two cases seem to make it clear that if the officer does take the arrestee to the station house a full search of the person can be conducted and any evidence obtained is admissible.

These cases raise several questions. Should a minor offense trigger this power? Should it make a difference if the officer is not required to take the defendant into custody but can issue a citation or summons or notice to appear? There is also the problem of how to categorize the seizure of a person that does not eventuate in a trip to the station. Certainly, if an officer has probable cause or has observed a crime being committed in his presence and seizes the person, an arrest, not a stop, has occurred. Is this a plain arrest or a custodial arrest? Justice Stewart raised this intriguing question in a brief concurring opinion in Gustafson, in which he expressed the view that a persuasive case could have been made by defendant, but was not, that a full custodial arrest for a minor traffic offense violated the fourth amendment. It would seem that rules could be created to accommodate this difference. For example, a legislature or court could classify arrests for nontraffic offenses as custodial arrests, which would then trigger the right to search the person and immediate area. A plain arrest could be defined to include only arrests for certain

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minor offenses and traffic violations. Consequently, the officer in these cases would only be able to conduct a frisk in limited circumstances when the officer could point to facts that justified the belief he or she was in danger. In other words, the arrest itself would not automatically justify a full search or frisk for weapons or evidence.154

There are a number of state courts that have considered this problem since Robinson and Gustafson were decided. Most of these courts have analyzed searches incident to traffic arrests on state constitutional grounds and have required the state to show more than was required by the United States Supreme Court.155 At least one state has considered the situation in which a notice to appear had been signed by the defendant and then there was a search of the person. An en banc Washington Supreme Court in State v. Hehman156 held as a matter of public policy that a custodial arrest for a minor traffic offense (defective taillight and expired driver's license) was "unjustified, unwarranted and impermissible"157 if the offender signed a promise to appear in court. The court also noted the growing trend to decriminalize minor traffic offenses. Thus, pills discovered during a search incident to the motorist's arrest for failing to have a valid driver's license were inadmissible.158

b. Plain View Doctrine

While there have been several Kansas cases during the survey period holding that evidence was admissible under the plain view doctrine, State v. Jones159 merits specific discussion. At 3:39 a.m. a resident of an apartment house reported a fire. The police responded to the call and saw through a window in defendant's apartment what appeared to be smoke. The officer pushed the door open, entered, and after a brief inspection found a rubber-backed rug smoldering on top of a floor furnace. The rug was taken outside and the officers returned to look for occupants and to clear the smoke. As the officers began to open windows, one of them noticed a small wooden box on a coffee table that appeared to contain the remains of partially smoked marijuana cigarettes and a plastic bottle containing seeds. They also observed a large wooden box open by the side of the divan that contained a package of vegetation believed to be pot. There was nothing in the record to indicate that the police knew who occupied the apartment or knew defendant.

The court of appeals held that the evidence was admissible under the plain view doctrine, relying upon the United States Supreme Court case of Coolidge v. New Hampshire.160 The Jones court concluded that Coolidge set out three requirements for the invocation of the plain view doctrine—(1) the initial intrusion that afforded the officer the plain view must be lawful, (2) the incriminating nature of the evidence must be immediately apparent, and (3) the evidence must be inadvertently discovered. It then determined that all of these factors were present. First, the

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156 90 Wash. 2d 45, 578 P.2d 527 (1978).
157 578 P.2d at 528.
158 See also KAN. STAT. ANN. §§ 8-2104 to -2116 (1975 & Supp. 1978) (arrests and issuance of citations for state traffic violations); id. §§ 12-4212, -4213 (1975).
officers had a legitimate right to be where the marijuana could be seen because the fire was an emergency that needed quick attention. Second, it appeared that the officers had the expertise to recognize pot when they saw it. Third, the discovery was inadvertent because the officers did not know who lived in the apartment, did not know defendant, and went there for the purpose of checking out a fire.

The third requirement of inadvertency necessitates further consideration because, however laudatory it may be, it is probably not constitutionally mandated. Justice Stewart’s opinion in Coolidge dealing with the plain view doctrine was joined by only four justices. Justice Harlan, while concurring in the judgment of the Court, declined to join the part of the opinion dealing with plain view. Thus, a majority of the Court did not support this requirement, and it is not binding on the states.\footnote{The California Supreme Court has recognized this. See North v. People, 8 Cal. 3d 301, ..., 502 P.2d 1305, 1308-09, 104 Cal. Rptr. 833, 836-37 (1972). The inadvertent requirement was very recently discussed in United States v. Hare, 589 F.2d 1291 (6th Cir. 1979). This court assumes that inadvertent discovery is a requirement.}

Even if the inadvertence requirement is not bottomed upon the United States Constitution, however, the same result could still be reached in Jones by basing this requirement on the Kansas Bill of Rights.\footnote{See Oregon v. Hass, 420 U.S. 714 (1975).}

Defendant in Jones had argued to the court that State v. Schur\footnote{217 Kan. 741, 538 P.2d 689 (1975).} required exclusion of the evidence. The facts in Schur are as follows: The police came to Schur’s apartment because of a complaint by an upstairs neighbor that the stereo was too loud. As the officer knocked at a sliding glass window he observed a yellow, rolled-up cigarette on the table, and when Schur opened the door the officer smelled an odor that he believed to be from burning marijuana. The officer identified himself and asked if he could enter. Schur refused to admit him, but the officer entered anyway and noticed another rolled-up cigarette and a small medicine bottle found to contain two small pills. Believing the pills to be amphetamines, the officer seized both the cigarettes and the pills. The cigarettes and pills were in fact marijuana and amphetamines. The district court suppressed the evidence, and the State appealed.

The Kansas Supreme Court upheld the district court’s suppression of the evidence. The basis for its decision is not clear, however, and presents some serious problems concerning the application of the plain view doctrine. The rule of the case seems to be that, notwithstanding the fact of the seeing of the evidence and the existence of probable cause (apparently to believe there was contraband in the apartment, not to arrest), the police could not seize the evidence because there were no exigent circumstances, that is, it was not a “now or never” situation. The court held as follows:

[T]he refusal by defendant of permission to enter his apartment, and his standing in the doorway, could not properly be considered by the officer as factors creating “exigent circumstances.” These acts by themselves are merely an assertion of his right to the privacy of his premises and to be secured against unreasonable searches and seizures . . . . Absent a showing of circumstances indicating the likely destruction of evidence, other than defendant’s refusal of entry, the observation of a yellow, rolled cigarette in plain view and the detection of an odor similar to burning marijuana would not authorize a search of the premises without a valid
warrant or consent. The correct procedure, in the absence of exigent circumstances when an officer comes upon evidence in plain view, would be the procedure approved by this court in State v. Boyle, supra, and State v. Yates, . . . wherein the police obtained a valid search warrant after viewing the contraband on the defendant's premises.104

It is certain that the plain view of clearly seizable evidence, although providing probable cause to procure a search warrant, is not an “exigent circumstance” that will allow a warrantless search. The United States Supreme Court set forth this rule in Coolidge v. New Hampshire.

[Plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent “exigent circumstances.” Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.105

The plain view doctrine operates as an exception only in narrow circumstances—the officer must already have legitimately gained entry, whether by a search warrant, by a valid warrantless search due to exigent circumstances, or by any other legitimate means such as consent. Then, upon lawful entry any object in plain view whose incriminating nature is immediately apparent can be seized. Consequently, it may be more accurate to say that plain view does not allow a warrantless search, only a warrantless seizure. Justice Stewart in Coolidge stated that

plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as “hot pursuit” or search incident to a lawful arrest, or by an extraneous valid reason for the officer’s presence. And, given the initial intrusion, the seizure of an object in plain view . . . does not convert the search into a general or exploratory one.106

The problem with the court’s reasoning in Schur lies with its negative inference that it would have been a lawful search if there had been “a showing of circumstances indicating the likely destruction of evidence”—a now or never situation.107 This seems to indicate that the court believed that “now or never” was a valid exigent circumstance that would authorize the entry. In Coolidge, upon which the Schur court relies for its holding, Justice Stewart refers to “exigent circumstances” that justify an entry, but it appears from his opinion that he was using this as a term of art to include only those circumstances that have been allowed as limited exceptions to the search warrant rule.108 “Now or never” is not one of the recognized exigent circumstances. Moreover, the United States Supreme Court in Chimel v. California109 specifically rejected a “now or never” rationale when it refused to sanction the search of a whole house on the ground that there was probable cause

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104 Id. at 745-46, 538 P.2d at 694 (citations omitted).
105 403 U.S. at 468.
106 Id. at 467.
107 217 Kan. at 745-46, 538 P.2d at 694.
108 See text at notes 138-146 supra.
to believe that seizable evidence in the house might be destroyed by a confederate of defendant. Consequently, insofar as the Schur decision indicates that “now or never” circumstances will allow a lawful warrantless search, it would appear to be contrary to the mandate of the United States Supreme Court and therefore invalid.

A question arises about what the officer could have legitimately done in Schur after being refused entry. The officer was apparently investigating a noise complaint and could legitimately knock on the door. Moreover, looking through a window is apparently not considered a search,170 but the moment the officer entered the apartment a search would occur.171 Thus, the officer apparently had probable cause to seek a search warrant, but clearly could not search the apartment without one unless one of the recognized exceptions applied such as consent or search incident to a lawful arrest. There was obviously no consent, and while an officer may make a limited search incident to a lawful arrest, it appears that this arrest was unlawful. The officer might have properly entered the apartment to make an arrest, however. There appears to have been probable cause to believe that there was a marijuana cigarette, arguably confirmed when the door was opened. The question is whether the officer had reason to believe that Schur was the one present and committing the crime of possession or use. If he had grounds to arrest before he entered, it would appear that he could enter to make a warrantless arrest.172 On the other hand, if probable cause was not obtained until after entering the apartment and finding Schur the only occupant, an illegal search preceded the arrest and the evidence would be suppressible.178 It should also be noted that since possession of marijuana is a misdemeanor in this state, the officer not only needs probable cause under section 22-2401(c)(2)(i),174 but also must believe that the evidence would be lost if an arrest were not made immediately. This requirement does not apply if it is determined that the crime was committed in the officer’s view.176

The Louisiana Supreme Court, in State v. Parker,176 recently considered the plain view doctrine and made some observations that should be thoughtfully considered. The case involved a policeman who had spotted an unattended van parked in a burglar-plagued area. While looking through the vehicle’s window with his flashlight to make sure that nothing was going on, he saw what looked like marijuana in a bag protruding from the driver’s seat. He opened the unlocked passenger door, examined the bag more closely, and removed it. He then called for another officer to watch for the driver’s return while he took the pot to the police station. In suppressing the drugs, a divided court made the following observations:

All too often, lawyers and courts alike attribute greater importance to the “plain view” doctrine than it deserves: it is easy to call it an “exception,” but it is not an exception to the requirement that a search or seizure must be supported by a warrant issued by a magistrate upon a finding of probable cause. Plain view serves to provide a means of securing probable cause, and, absent the applicability of one of the true exceptions to the warrant requirement, nothing more.

175 Id. § 22-2401(d).
176 Id. § 22-2401(d).
From the cases we may deduce the following. When an officer inadvertently observes evidence of a crime from a vantage point that does not intrude upon a protected area or when that protected area is entered with prior justification, there is no violation of the search warrant rule because there has been no "search." . . . This does not, however, mean that the officer may, without more, seize the evidence. If the evidence is itself within a protected area, the officer may not enter that area to effect the seizure without first obtaining a warrant, absent exigent circumstances or another exception to the warrant requirement.177

B. Confessions

1. In General

Normally the admissibility of a confession178 will be raised in a pretrial motion to suppress a confession pursuant to section 22-3215.179 There are basically two ways in which a confession may be attacked. First, it may be alleged that it was involuntary, not a volitional statement, and thus was obtained in a way that violates the due process clause of the fourteenth amendment to the United States Constitution. In this situation the court will look to the totality of the circumstances to determine if the confession was voluntary. Factors that will be considered include the number of interrogators, the length of questioning, where it took place, the defendant's experience with criminal proceedings, and his or her age, educational level, and mental capacity.180

Second, since the Miranda v. Arizona181 decision in 1966, the admissibility of a confession has depended on whether the Miranda warnings182 were given prior to any in-custody interrogation. If they were not and a confession was obtained, it is inadmissible. The inquiry focuses only on whether there was an in-custody interrogation183 and whether the warnings were given, not whether the statement was voluntary. In short, when considering a Miranda claim it is totally irrelevant whether the confession is voluntary under the due process test. The Miranda rights may be waived, but the state has a heavy burden to prove that the waiver was made voluntarily, knowingly, and intelligently. Essentially the same test used for determining whether a confession was voluntary is used to determine if there was an effective waiver.184 It must be pointed out that even if the Miranda warnings are given and there is an effective waiver, a confession could still be found to be involuntary under circumstances indicating that the statement was not volitional.185 As a practical

177 Id. at ...., 355 So. 2d at 903-04 (emphasis added).
178 Confessions can be made orally or reduced to a written statement or video or audio tape. State v. Tredwell, 223 Kan. 577, 580-81, 575 P.2d 550, 553-54 (1978); State v. Wilson, 220 Kan. 341, 347, 552 P.2d 931, 937 (1976). See also State v. Goodwin, 223 Kan. 257, 573 P.2d 999 (1977) (confession typed from tape that was erased and not available at trial).
180 Spano v. New York, 360 U.S. 315 (1959). Since there is a presumption of sanity in Kansas, a defendant attacking a confession on the ground that he or she was mentally incompetent when it was given has the burden to overcome this presumption by substantial evidence. State v. Gilder, 223 Kan. 220, 227-28, 574 P.2d 196, 203-04 (1977).
182 You have the right to remain silent, any statement you make may be used against you, and you have a right to the presence of an attorney, either retained or appointed. Id. at 471.
185 This issue was examined in the recent Supreme Court case of Mincey v. Arizona, .... U.S. ...., 98 S. Ct. 2408, 2415-19 (1978).
matter, almost all questions concerning admissibility of a confession will involve the *Miranda* test since the involuntariness of a confession is difficult to establish.

2. **Juvenile Confessions**

There are several Kansas cases involving confessions of juveniles that merit comment. The two most recent cases are *State v. Cross* and *State v. Young*. It is clear from these cases that a confession is not suppressible simply because the person making it was a juvenile. It is far from clear, however, precisely what standard is being used to determine when a juvenile confession is admissible. Both of these cases refer not only to the voluntariness test, but to *Miranda* as well. As noted above, if *Miranda* is applicable the only inquiries are whether there was an in-custody interrogation, if so, whether the *Miranda* warnings were given, and if they were and no counsel was present, whether there was an effective waiver.

*Young* and *Cross* rely on the older case of *State v. Hinkle*, and a close reading of this case indicates that it held "[t]hese [Miranda] guidelines are the measure for courts to apply in determining whether a confession or statement is voluntarily made and admissible." Thus, while it is unfortunate the court used the word "voluntary," this holding seems to make it clear that *Miranda* is the test. If the Kansas Supreme Court or Court of Appeals meant that *Miranda* is not the sole test to be used in determining the admissibility of all confessions obtained during in-custody interrogation of juveniles, it should specifically hold *Miranda* guidelines not applicable in the same manner as for an adult and provide a clear analysis explaining why.

Clearly age, experience with the criminal process, presence of a parent, educational and mental condition, and other factors continue to be relevant, but now are relevant to whether the person understood the warnings, and, if a waiver was made, whether the waiver was voluntarily, intelligently, and understandably given. It must be noted that in each of the three cases referred to above, the juvenile court waived its jurisdiction and the juvenile was tried as an adult. Also, the *Cross* court reads *In re Gault* as making the self-incrimination clause of the fifth amendment applicable to juvenile court when the charge involved may lead to commitment to a state institution. Thus, it makes no sense not to make *Miranda*, which is premised upon the fifth amendment's self-incrimination clause, applicable to interrogations of juveniles.

3. **Interrogation After Suspect Desires to See Lawyer Or Not to Talk**

As a result of *Miranda*, it was generally believed that if the accused indicated a desire to remain silent or consult with counsel, there could be no questioning. In 1975 the United States Supreme Court decided *Michigan v. Mosley* which held that a fully warned bank robbery suspect's assertion of his right to remain silent, immediately honored by police detectives, did not render inadmissible the

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189 Id. at 479, 479 P.2d at 847. It is true that *State v. Hinkle* referred to many cases that discussed voluntariness, but the factual bases of these cases appear to have occurred before *Miranda*.
190 387 U.S. 1 (1967).
suspect's inculpatory statement about an unrelated murder obtained in a second custodial interrogation held more than two hours later at a different location by different detectives who had given him a fresh set of **Miranda** warnings and interrogated him about a different crime.

The Kansas Court of Appeals considered a case similar to **Mosley** in **State v. Holt**. Holt, after being arrested and given his **Miranda** warnings, elected not to talk until he saw a lawyer. The questioning stopped, and he was taken to the police station, where he was again given his rights and where he again declined to discuss the allegations without an attorney present. Holt was then booked and put in jail. The next morning a different detective interrogated him, apparently informing defendant of his rights, and Holt signed a waiver and made a statement. There was a conflict about whether Holt requested a lawyer at this third interview, defendant saying he did and the detective saying he did not, but it is clear that Holt did not see an attorney. The trial court admitted the statement and defendant appealed, asserting that the statement was inadmissible inasmuch as he had made at least two prior requests for an attorney and should not have been interrogated until an attorney was present.

The court of appeals upheld the trial court, apparently finding that the pre-*Mosley* Kansas Supreme Court case of *State v. Law* was controlling. The Law court held that the suspect could waive his right to remain silent and the right to have an attorney present so long as the waiver was voluntary, intelligent, and knowing, notwithstanding that he had requested counsel, was then jailed, and, in a subsequent interrogation the next morning, before seeing counsel, "waived" his rights and made a statement. While the *Holt* court declined to find Holt's waiver bad as a matter of law either because it took place after there had been two separate requests for counsel or because it was not made after consulting with a lawyer, the court was obviously troubled by the actions of the police. The court, however, concluded that there was enough evidence to support the trial court's determination that there had been an effective waiver.

The court's treatment of this issue raises a problem. This case is quite different from *Mosley* in that the focus of the first interview with Mosley was about a different crime than was involved in the second questioning. Thus, the refusal to be questioned about the robbery was honored in *Mosley*. Also, in the second interrogation Mosley did not request a lawyer or refuse to talk about the homicide. It would seem therefore that *Holt*, in which there was repeated interrogation on the same crime and repeated assertion of the right to remain silent without an attorney present, would come under the general prohibition in *Miranda* against continued interrogation in the face of the assertion of rights rather than under the narrow exception apparently carved out by *Mosley*.

Second, the *Holt* court apparently determined that the sixth amendment is the basis of the *Miranda* warning that a suspect has the right to counsel when any ques-

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384 U.S. at 473-74.
tioning takes place. While the presence of counsel was obviously involved in *Miranda*, it was viewed as one of the procedural safeguards the Court thought essential to preserve the defendant's right to remain silent. It seems quite clear that the *Miranda* decision was bottomed upon the fifth amendment self-incrimination clause and not the sixth. The difference is significant because the sixth amendment right to counsel does not attach until the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

4. Impeachment of the Defendant

Two United States Supreme Court cases make it clear that a confession obtained in a manner violating *Miranda* cannot be used in the government's case-in-chief, but can be used to impeach the credibility of a defendant who takes the stand, so long as there is a cautionary instruction to the jury that the confession can only be considered on the issue of defendant's credibility. This principle was recently considered and applied in Kansas by the supreme court in *State v. Roberts*. The court cleared up a question left by the United States Supreme Court decisions whether a confession that was involuntary, not just obtained in violation of *Miranda*, could be used to impeach a defendant who took the stand. The Kansas court held that an involuntary confession cannot be used for any purpose because it is unreliable and untrustworthy by definition. The *Roberts* rule was recently affirmed by the United States Supreme Court in *Mincey v. Arizona*.

Another impeachment situation arises when the prosecutor attempts to destroy the defendant's credibility by inquiring about his or her refusal to answer questions after *Miranda* warnings have been given. The United States Supreme Court in *Doyle v. Ohio* held that the due process clause of the fourteenth amendment forbids the use, for impeachment purposes, of the fact of accused's silence at the time of arrest or the giving of the *Miranda* warnings, even though the defendant subsequently takes the stand in his or her own defense. The Court's reasoning was that post-warning silence is insolubly ambiguous, and the *Miranda* warnings imply to the suspect that silence will carry no penalty. The Kansas courts have considered this issue several times, but only some of these cases will be discussed here.

In *State v. Heath* the Kansas Supreme Court held that it was "constitutionally impermissible for a state prosecutor to impeach a defendant's exculpatory story told...

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*See id. at 444, 458, 467, 478-79. Clearly, the cases leading up to *Miranda*, such as *Masiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), were based upon the sixth amendment right to counsel, but it is just as clear that the majority of the Court in *Miranda* based its decision upon the fifth amendment self-incrimination clause and did not follow the analysis of *Masiah* or *Escobedo*. Also, the reader should carefully examine the recent case of *Brewer v. Williams*, 430 U.S. 387 (1976), in which the majority of the Court, in excluding a confession on the sixth amendment right to counsel grounds, again made it clear that *Miranda* was based upon a fifth amendment self-incrimination clause.


... U.S. ..., 98 S. Ct. 2408 (1978). This case contains an excellent discussion of the factors to be considered for determining whether a confession is involuntary. See *id.* at ..., 98 S. Ct. at 2414-19.


for the first time at the trial by cross-examining him as to his post-arrest silence after receiving the Miranda warning.\textsuperscript{204} The Heath court made two other important points. First, it held that it was impermissible for the State to comment on defendant's post-arrest silence during its closing argument. Second, the court was not persuaded that these references to defendant's silence constituted harmless error because the defense relied upon an alibi and the prosecutor persistently referred to the silence. Consequently, the court could not find beyond a reasonable doubt that these references had little, if any, impact upon the trial.\textsuperscript{205}

Considering a related question, the Kansas Supreme Court in State v. Singleton,\textsuperscript{206} held that when a defendant has answered questions after having been given the Miranda warnings and later takes the stand and testifies in a manner inconsistent with the prior discussions with the police, the defendant can be cross-examined even though the government did not introduce in its case-in-chief the defendant's prior statements. In essence, the court held that Singleton had waived his rights to remain silent when he voluntarily answered the questions put to him by the police and therefore could not claim reversible error when asked about his prior statements or when the prosecutor pointed out in closing argument the differences between the defendant's statement to the police at the time of arrest and his statements during the trial. The court distinguished State v. Heath\textsuperscript{207} and State v. Clark\textsuperscript{208} on the grounds that here there was no exercise of the right to remain silent and Singleton did not carry on a limited discussion with the police that discussed the crime.

The Kansas Court of Appeals in Lassley v. State\textsuperscript{209} made two conclusions about Doyle\textsuperscript{210} that are of interest. First, it concluded that Doyle was to be applied retroactively. This means that a prisoner convicted prior to 1976 after taking the stand and being impeached by his or her silence in response to the Miranda warnings can now bring a section 60-1507\textsuperscript{211} motion attacking the conviction. Second, unlike in Heath, the court found that while it is generally reversible error to permit the cross-examination of the defendant about his or her silence after the Miranda warnings, it was not such error in Lassley's case because of the overwhelming evidence of guilt that made error harmless beyond a reasonable doubt.\textsuperscript{212}

5. Incriminating Statements Made During Polygraph Tests

Generally, the results of polygraph tests are inadmissible unless, among other things, a written stipulation is made by both the State and the defendant, the stipulation is made part of the record, the defendant voluntarily and knowingly consents to the examination, and the judge finds the examiner qualified.\textsuperscript{213} As a result of

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\textsuperscript{204} Id. at 52, 563 P.2d at 421.
\textsuperscript{205} See note 212 and accompanying text infra.
\textsuperscript{206} 223 Kan. 559, 575 P.2d 540 (1978).
\textsuperscript{207} 222 Kan. 50, 563 P.2d 418 (1977).
\textsuperscript{210} Doyle v. Ohio, 462 U.S. 610 (1976).
\textsuperscript{211} KAN. STAT. ANN. § 60-1507 (1976).
\textsuperscript{212} For two Kansas Supreme Court cases applying the harmless error rule in impeachment cases, see State v. Smith, 223 Kan. 294, 574 P.2d 161 (1978) and State v. Mims, 220 Kan. 726, 556 P.2d 387 (1976). The leading United States Supreme Court cases dealing with the harmless error rule when constitutional violations are involved are Fahy v. Connecticut, 375 U.S. 85 (1963) and Chapman v. California, 386 U.S. 18, 21-24, 26 (1967).
State v. Blosser,\textsuperscript{214} defense counsel must be aware that oral incriminating statements made during the polygraph test are admissible, apparently in the government's case-in-chief, even though there has been no agreement prior to the test that the results could be used at trial and counsel was not present during the test. In Blosser defense counsel, apparently having accompanied defendant to the test, left after defendant was given his rights but before the administration of the test. It is not clear from the case report whether defense counsel was asked to leave or voluntarily left. Prior to the test the examiner, a special agent of the Kansas Bureau of Investigation, asked defendant some questions, and defendant made some incriminating statements. The court recognized that oral incriminating statements made during pretrial conferences or mental competency determinations are inadmissible; yet, without explaining why polygraph tests are different, it apparently determined that the oral statements given by Blosser were admissible because, if voluntarily made, they would be a trustworthy form of evidence. One must ask whether defendant understood how these statements might be used. Moreover, while it seems clear that this was not an in-custody interrogation and Miranda would not apply, the cases of Massiah v. United State\textsuperscript{215} and Brewer v. Williams\textsuperscript{216} should be considered. These cases establish the rule that an individual, against whom adversary proceedings have commenced, has a right to legal representation when the government interrogates him. The examiner in Blosser was a state agent and a complaint had already been filed and defendant had counsel. It would seem that under these circumstances there would have to be a clear waiver of the right to have counsel present as well as a showing that defendant understood that what he said could be used against him. Clearly, the court did not consider this issue.

C. Fifth Amendment Cases—Government's Comment on the Defendant's Failure to Take the Stand

In State v. Wilson\textsuperscript{217} the defense had produced neither witnesses nor offered any testimony and the prosecutor in closing argument had made the following statements: "These gentlemen have had a fair hearing. They have had every opportunity to cross-examine each and every witness we have presented. They had every opportunity to do whatever they wanted in their own defense . . . ."\textsuperscript{218} The Kansas Supreme Court reaffirmed its position that calling the jury's attention to the fact that the state's evidence is uncontradicted does not constitute comment upon the failure of the defendant to take the stand which violates the self-incrimination clause of the fifth amendment. The court then concluded that the statement "they had every opportunity to do whatever they wanted in their own defense" was not a comment upon defendant's failure to take the stand, but only emphasized that no defense whatsoever had been presented.

An important case on compulsory self-incrimination, Lakeside v. Oregon\textsuperscript{219} was decided by the United States Supreme Court in 1978. The issue centered on the
following instruction given by a state trial judge to the jury over the objection of defense counsel:

Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence.\textsuperscript{220}

The trial judge stated that the reason for giving this was to properly protect defendant. Defense counsel, on the other hand, argued that this was like waving a red flag in front of the jury and would lead to an adverse inference being drawn from defendant’s failure to take the stand, violating the compulsory self-incrimination clause of the fifth amendment. The United States Supreme Court, applying \textit{Griffin v. California},\textsuperscript{221} which held that the Constitution “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt,” concluded that the instruction given by the Oregon judge did not violate \textit{Griffin}. It reasoned that \textit{Griffin} was concerned only with adverse comment and that this penalized a defendant for exercising a constitutional right. In addition, the \textit{Griffin} Court had concluded that permitting the prosecutor or the judge to ask the jury to draw adverse inference from the defendant’s failure to take the stand amounted to compulsory self-incrimination prohibited by the fifth and fourteenth amendments. Since the \textit{Lakeside} instruction said that the jury must draw no adverse inference, the problems of \textit{Griffin} did not exist. The Court did not find that the giving of the instruction in a case in which the defense is presented through witnesses would bring the jury’s attention to the fact that the defendant did not testify and thus violate the fifth and fourteenth amendments. To find this, the Court determined it would have to assume that the jury had not noticed the defendant’s failure to take the stand until the instruction was given and that the jurors would totally disregard the instruction telling them to give no weight to this fact. The Court was unwilling to premise a constitutional doctrine upon these assumptions. The Court added, however, that it may not have been wise for a judge to give this instruction over defendant’s objections and states were free to prohibit trial judges from giving this kind of instruction.

The \textit{Lakeside} instruction is apparently being given in some courts in Kansas. In \textit{State v. Reeves},\textsuperscript{222} decided shortly before \textit{Lakeside}, the Kansas Supreme Court considered a trial in which an instruction very similar to the \textit{Lakeside} instruction was given. It appears, however, that the defense counsel wanted the instruction given. The instruction provided, “You should not consider the fact that the defendants did not testify in arriving at your verdict,”\textsuperscript{223} and the prosecutor commented during closing argument to the jury, “You can judge for yourself if that thing [failure to take the stand] should or ought to be considered in your deliberations. I am not supposed to comment on that. I can’t comment on it.”\textsuperscript{224} While the court found that the prosecutor’s comments were provoked by defense counsel,

\textsuperscript{220} Id. at ___., 98 S. Ct. at 1092.
\textsuperscript{221} 380 U.S. 609 (1965).
\textsuperscript{222} 224 Kan. 90, 577 P.2d 1175 (1978).
\textsuperscript{223} Id. at 93, 577 P.2d at 1178.
\textsuperscript{224} Id.
it nevertheless concluded that this violated *Griffin*. Thus, the court did not directly address the question whether the *Lakeside* instruction is a good or bad instruction. Of course, the court could hold on state grounds that the instruction should not be given.

**D. Sixth Amendment Cases**

1. *Confrontation*

The question that has often arisen in Kansas concerning confrontation is when can the testimony of a witness given at a preliminary hearing be used at trial. Generally, it is acceptable when the state shows two things—(1) the witness testified at a previous judicial proceeding in which the defendant had the opportunity to cross-examine, and (2) the witness is unavailable. The unavailability question turns on whether the state can show it exercised reasonable diligence and made a good faith effort in attempting to find the witness. In a recent Kansas Court of Appeals case the court made it clear that the simple serving of a Kansas subpoena in a foreign jurisdiction was not enough to meet the unavailability requirement.

*In re Nichols* also dealt with the confrontation clause. There the court of appeals was asked to declare unconstitutional section 60-447a, which provides in part that the complaining witness in a rape-related crime cannot be cross-examined about previous sexual conduct with any person unless a timely motion, along with an offer of proof, is filed and the judge determines in an *in camera* hearing that the proposed evidence is relevant and not otherwise inadmissible. This was a case of first impression and the court of appeals, while recognizing that the sixth amendment and its Kansas counterpart include the rights of cross-examining witnesses and presenting witnesses, held that the statute was constitutional. The court's reasoning was twofold. First, it noted that the statute does not totally bar the right to cross-examine the witness, and, in any event, evidence of previous sexual conduct can be used if the judge finds it relevant. Second, the court pointed out that the statute promotes two valid state purposes—(1) it protects the rape victim from unnecessary embarrassment, and (2) it encourages rape victims to report the crime and participate in the prosecution.

In another confrontation case, *State v. Jones*, defendants Jones and Shaw were being tried jointly. Shaw did not testify, but his extrajudicial statement implicating both of the codefendants was admitted. A detective, called by the state, testified in front of the jury about a conversation one of the codefendants, Shaw, had with a Ms. Trotter who was in the courtroom. Ms. Trotter had related that Shaw had asked her to provide an alibi for him and had told her that Jones and he had committed the crimes in question. There was no objection by Jones' lawyer, and in fact counsel objected to the judge's admonishing the jury on the basis that it would simply bring their attention to this statement. On appeal Jones asserted that error

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had been committed when the jury was not admonished. While concluding that
the statement was inadmissible, the court determined that there was no reversible
error committed, notwithstanding that the introduction impinged upon a constitu-
tional right, because there had not been a contemporaneous objection made to the
introduction of the statement as required by statute.\(^230\)

This holding in Jones raises some interesting questions. First, it is arguable
that the codefendant’s statement was inadmissible even though counsel had not
objected. For its conclusion of inadmissibility the Jones court apparently relied on the
United States Supreme Court case of Bruton v. United States.\(^231\) In this case the
Court held that it was reversible error to admit a codefendant’s confession inculpating
defendant even though the trial judge had instructed the jury that the confession
was inadmissible hearsay against defendant and should not be considered in deter-
mining his guilt or innocence. The admission violated defendant’s right of cross-
examination secured by the sixth amendment. Thus, if the state wants to use the
confession against the confessor, it would have to forego a joint trial or delete all
reference to the codefendant.\(^232\) There are several reasons why Bruton may not be
applicable to the facts in Jones, however. In Dutton v. Evans\(^233\) the Court refused
to set aside a conviction when a third party had testified about a spontaneous state-
ment by a defendant’s accomplice attributing liability to defendant. The statement
in Jones certainly appears to be more this type of statement than the more formal
confession in Bruton. Also, the Evans Court indicated that factors such as whether the
hearsay evidence was crucial to the case and whether the confession was obtained
in a coercive atmosphere of official interrogation should be taken into account, which
may be relevant in the Jones situation. It should be noted, however, that there was
a state statute involved in Evans that specifically allowed admission of these types
of statements.

Second, there is a problem with allowing a procedural defect (lack of con-
temporaneous objection) to foreclose remedying a constitutional error. The Jones
court stated that a contemporaneous objection must be made even though the evi-
dence that is introduced infringes on the defendant’s constitutional rights. It would
seem that the statement of the Jones court is simply too broad.\(^234\) The Kansas
Supreme Court also considered this contemporaneous objection rule in State v. Fisher\(^235\)
stating, “Failure to comply with the contemporaneous objection rule or some other
state procedural requirement may bar a challenge, even upon federal constitu-
tional grounds, to a conviction in a state court.”\(^236\) In using the word “may” it appears
that the court here was not ruling out all possibilities.\(^237\) Also, assuming a Bruton-
type fact situation, Bruton itself would seem to cast doubt on the Jones holding inas-
much as the Court in Bruton concluded that the incriminating extrajudicial state-
ment’s impact was so potentially strong that a cautionary instruction was not suffi-

\(^{231}\) 391 U.S. 123 (1968).
\(^{232}\) The broad language of Bruton was somewhat limited by the United States Supreme Court in
Nelson v. O’Neil, 402 U.S. 622 (1971), in which the Court held that Bruton was inapplicable when the
codefendant took the stand but denied making the confession.
\(^{233}\) 460 U.S. 74 (1970).
\(^{234}\) For a case implicitly indicating this, see State v. Sullivan, 224 Kan. 110, 578 P.2d 1108 (1978).
\(^{236}\) Id. at 83-84, 563 P.2d at 1019 (citations omitted, emphasis added).
cient to protect defendant’s rights. Moreover, there are some constitutional errors that are so fundamental and affect the truth-finding process so substantially that a defendant’s ability to obtain a fair trial will be destroyed. It would seem that a defendant should be able to raise these fundamental constitutional errors for the first time on appeal under the plain error doctrine, which does not appear to be currently applied in Kansas.

The Kansas cases dealing with the contemporaneous objection rule appear to all be premised upon section 60-404. Thus, it would seem appropriate for the Kansas Legislature to consider promulgating a statute creating a plain error rule like rule 52(b) of the Federal Rules of Criminal Procedure and other state statutes. Also, it appears possible for the Kansas courts to construe the harmless error statutes, sections 60-2105 and 60-261, to permit appellate courts to recognize for the first time on appeal errors that affect substantial rights of the defendant.

Finally, it would appear that the court in Jones is saying that defense counsel’s failure to make the appropriate objection was not ineffective assistance of counsel, even though the court is saying the attorney made a mistake. Query whether the court would have reached the same result if there had been no objection made to obviously illegally obtained evidence or to testimony about an eyewitness identification premised upon an unduly suggestive lineup. This should be considered when reading the discussion that follows about ineffective assistance of counsel.

Two final comments about the confrontation clause must be made. First, it is now clear that the admission of an out-of-court statement does not offend the confrontation clause so long as the declarant is called and subject to cross-examina-

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238 Justice Black, in Chapman v. California, 386 U.S. 18 (1967), concluded that certain kinds of constitutional violations required automatic reversal and could not be considered harmless error. He cited three examples—the right to counsel, a coerced confession, and the lack of an impartial judge. Id. at 23 n.8. For another example, see the Right to Counsel section at notes 250-255 infra. For a good Kansas case discussion on Bruton v. United States and the harmless error rule, see State v. Sullivan, 224 Kan. 110, 578 P.2d 1108 (1978).

239 See Fed. R. Crim. P. 52(b), which provides, “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”


241 KAN. STAT. ANN. § 60-2105 (1976) provides, The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it, the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court.

242 KAN. STAT. ANN. § 60-261 (1976) provides,

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

tion. Second, it should be noted that the Kansas court has considered the prosecutor's duty to produce written statements of its witnesses in connection with the right of effective cross-examination under the sixth amendment right to confrontation clause. Section 22-3213(2) provides in part,

After a witness called by the state has testified on direct examination, the court shall, on the motion of the defendant, order the prosecution to produce any statement . . . of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified . . .

The decision to strike the testimony is a discretionary one for the trial court judge. In determining whether to strike the prior testimony, the court is to consider among other things why the statement was not produced, the nature, relevance, and importance of the statement, the risk of prejudice to the defendant, and how essential the testimony is to the State.

2. Right to Counsel

Four cases, two United States Supreme Court cases and two Kansas cases, will be mentioned here. In the United States Supreme Court case of Holloway v. Arkansas one attorney represented three codefendants and the Court reversed the convictions. Defense counsel had, weeks before trial and again before the impanelling of the jury, unsuccessfully sought the appointment of separate counsel, arguing that he was presented with a potential conflict of interest and therefore could not provide adequate representation for each defendant. The Court held that the trial judge's failure to appoint separate counsel or to take adequate steps to determine whether the risk of a conflict of interest was real or too remote to require separate counsel deprived defendants of their right to effective assistance of counsel. Moreover, the trial court's action of improperly requiring joint representation over timely objection was held to be reversible error regardless of whether prejudice had been independently established.

There is no doubt that representation of a person charged with a crime is becoming more and more complicated. This not only presents a problem for those few attorneys who spend most of their time doing criminal defense work or prosecution, but it is a particular problem for the person who is occasionally appointed to represent an indigent person. In addition, more and more frequently section 60-1507 motions charging ineffective assistance of counsel are being filed by those who are convicted. Obviously, ineffective assistance is not equated with losing, but until an excellent opinion by Judge Foth, Chief Judge of the Kansas Court of Appeals, the standard for determining ineffective assistance in Kansas was not clear. In Schoonover v. State the court noted that the many Kansas cases dealing with ineffective assistance of counsel claims contained language describing ineffective assistance as "wholly ineffective and inadequate," "complete absence of counsel,

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or “a farce and mockery.” Chief Judge Foth stated that the correct articulation of the test is whether the representation was “reasonably competent,” adding that he believed this has been the standard applied by the supreme court in the past.\textsuperscript{253} The Schoonover court also made it clear that, while a defendant is not entitled to the most experienced and brilliant lawyer, the lawyer must be honest, loyal, and provide faithful representation whether counsel is appointed or retained. It is interesting to note that the Supreme Court of the United States has never really defined the test to be used for determining ineffective assistance of counsel. Recently the Court refused to grant a writ of certiorari in a case raising this issue.\textsuperscript{254} This prompted a dissent by Justice White, joined by Justice Rehnquist. Justice White’s point was that the circuits are split on the standards to be applied and it is the Court’s responsibility to determine the level of competence needed to assure the right to counsel mandated by the sixth amendment.

Another case relevant to ineffective assistance to counsel is State v. Nixon.\textsuperscript{255} There the Kansas Supreme Court made it clear that certain decisions such as whether to take the stand, request a jury trial, or plead guilty are clearly the defendant’s; yet certain decisions, because they involve professional judgments, can be made only by the attorney after consultation with the client. Examples of these latter kind of decisions are which witness to call, whether and how to cross-examine, what trial motions to make, what jurors to strike, and other strategy decisions.

\textbf{E. The Prosecutor’s Role}

The Supreme Court of Kansas in State v. Turner\textsuperscript{256} made it clear that the prosecutor controls the criminal prosecution, not the judge. Here the court considered section 22-2905(2),\textsuperscript{257} which provides in part, “When a defendant is bound over . . . , the prosecuting attorney shall file an information . . . .”\textsuperscript{258} In Turner the prosecutor was not happy with the magistrate’s decision, and so he dismissed the original charge and filed new, harsher charges. Defendant asserted that under the statute the prosecutor was bound by the decision of the magistrate after the preliminary hearing. The court responded by holding that only the prosecutor could make the decision and the language of the statute was directory rather than mandatory. This apparently means that before jeopardy attaches, and whenever the prosecutor is unhappy with the outcome of the preliminary hearing, the prosecutor may dismiss and start over. It would seem that the prosecutor could not do this too many times without running into problems with the speedy trial or due process requirements or abuse of authority and possibly some sort of double jeopardy claims. It is quite clear, however, that the prosecutor is to determine what charges are to be filed or reduced as well as whether to make a deal and drop certain charges.\textsuperscript{259}

In a recent drug case\textsuperscript{260} a key witness had changed his position before trial, of which the prosecutor was aware, but did not advise defense counsel. Apparently

\textsuperscript{253} Remember Chief Judge Foth was a commissioner for the Kansas Supreme Court for many years.
\textsuperscript{254} State v. Marszal, 650 N.W.2d 268 (Kan. 2002).
\textsuperscript{257} KAN. STAT. ANN. § 22-2905(2) (1974) (current version at KAN. STAT. ANN. § 22-2905(1) (Supp. 1978)).
\textsuperscript{258} Id.
\textsuperscript{259} Id.
defense counsel learned of it during the jury trial and was given overnight to digest the change. The court held that learning of the change in testimony during the trial did not prejudice the defense because after the recess defendant was given ample opportunity to cross-examine all witnesses, and it was not considered a key part of the case. When considering the prosecutor's duty to disclose, the Kansas case of State v. Kelly and the United States Supreme Court case of Giglio v. United States should also be examined. Giglio provides some interesting comments about the duty to reveal material defense evidence. Due process prohibits the deliberate use of known false evidence. Also, due process requires that upon demand a prosecutor give a defendant all evidence material to the defense's case. This includes evidence that merely attacks the credibility of a prosecution witness. The rule is violated if the prosecutor's office negligently fails to make available to the particular prosecutor trying the case all such evidence, even if that prosecutor is unaware of the existence of the evidence. When the reliability of the witness is a crucial factor, the nondisclosure of evidence also falls within the above stated rule. A new trial is required only "if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."

IV. CASE LAW ON HOMICIDES

A homicide occurs when one human being kills another. It may be classified as justifiable, excusable, or criminal. Criminal homicide in Kansas is basically divided into the three following types: (1) murder—first degree and second degree; (2) manslaughter—voluntary and involuntary; and (3) vehicular homicide. With the exception of felony murder, the general elements of murder are an act or omission on the part of the defendant that constitutes malice and that causes the death. Malice is an indispensable element of all murder, both first and second degree, and this is the concept that distinguishes murder from manslaughter. Malice is either express or implied, but there is no difference in legal effect between the two. Express malice is normally found when there is a clear intention to kill. Implied malice generally means there is no actual intent to kill, but the defendant's act, which caused the death, discloses a state of mind considered equivalent to the intent to kill. Malice is implied when death results in such situations as follow: when there is the intent to inflict great bodily harm; when an act is willfully performed or omitted and the natural tendency of such behavior is to cause death or great bodily harm; or when another felony is committed or attempted. In all murder convictions, save felony murder, the jury must be specifically instructed on malice and must specifically find that malice existed. In felony murder the malice is implied legally as a fiction from the intent to engage in the felony.

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283 Id. at 154.
285 Id. § 21-3402.
286 Id. § 21-3403.
287 Id. § 21-3404.
288 Id. § 21-3405.
A. First and Second Degree Murder

As indicated above, Kansas has two degrees of murder. First degree is defined as the malicious killing of a human being committed either (1) willfully, deliberately, and with premeditation, or (2) in the perpetration or attempt to perpetrate any felony. In proving the former the State must show the intent to kill with premeditation and deliberation. The intent to kill normally will have to be inferred from the facts unless, for example, there is a specific admission or the defendant’s defense is self-defense. Absent this, the intent to kill may be established by the presumption that a person intends the natural and probable consequences of his or her acts. For instance, the specific intent to kill may be inferred from the intentional use of a deadly weapon on a vital part of another human being.

Premeditation and deliberation are not as easily established. Deliberation normally is not defined separately. To the extent it would add anything, it would appear to mean that the defendant acted in a cool state of mind. Thus, when the defendant’s mind is dominated by a state of fear or passion it would seem that he or she could not have acted deliberately. Deliberation can also be construed to require some reflection after the forming of the intent to kill, but this concept is generally found in premeditation. Basically premeditation means that the defendant must have thought about killing the victim and formed the intent to kill beforehand.

One of the fundamental questions is how long beforehand must the killer have formulated the intent. The defendant must have a cool mind and only a brief moment of thought is required, but tests differ from a matter of seconds to an appreciable amount of time. The Kansas Supreme Court recently considered this question in State v. Martinez, a first degree premeditated and deliberated murder case. The instruction on premeditation provided in part that the killing must have been “thought of beforehand for any length of time sufficient to form an intent to act, however short.” The Court found this instruction unacceptable, but it upheld the conviction, apparently finding as a matter of law that there were sufficient facts to support the jury finding of premeditation. The standard to be applied is whether “an appreciable amount of time . . . elapse[d].” It should be noted that section 56.04 of the Pattern Instructions for Kansas—Criminal defines premeditation “to have thought over the matter beforehand.” It would seem after this case that a defendant will be entitled to the appreciable amount of time instruction.

Another issue frequently raised concerning premeditated and deliberated murder is whether there is sufficient evidence to support the jury’s verdict. The Kansas Supreme Court in State v. Henson considered this and held that premeditation could not be inferred simply from defendant’s use of a deadly weapon. It was a

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272 Id. at 537, 575 P.2d at 32.
273 Id. at 538, 575 P.2d at 32.
274 Pattern Instructions for Kansas—Criminal § 56.04 (Supp. 1975) [hereinafter cited as P.I.K.—Criminal]. Both prosecutors and defense counsel should not be afraid to seek different instructions than are found in PIK. Certainly, proposed instructions must be in writing, Kan. Stat. Ann. § 22-3414(3) (1974), and supported by authority, but Martinez indicates the court is willing to add to PIK and it has specifically disapproved some PIK instructions. See, e.g., State v. McClanahan, 212 Kan. 288, 510 P.2d 153 (1973).
factor, however, that along with other circumstances, such as lack of provocation, type of wound, and motive, would be sufficient to support a reasonable inference of premeditation and deliberation.\textsuperscript{276} The crucial problem is to determine if the evidence shows, as a matter of law, a premeditated killing or only indicates an impulsive killing, which would be second degree murder. An en banc California Supreme Court has articulated a standard for answering this question that should be of help to prosecutors and judges alike. The test provides as follows:

The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as “planning” activity; (2) facts about the defendant’s prior relationship and/or conduct with the victim from which the jury could reasonably infer a “motive” to kill the victim, which inference of motive together with facts of types (1) or (3), would in turn support an inference that the killing was the result of “a pre-existing reflection” and “careful thought and weighing of considerations” rather than “mere unconsidered or rash impulse hastily executed”. . . ; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a “preconceived design” to take his victim’s life in a particular way or a “reason” which the jury can reasonably infer from facts of type (1) or (2).

Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires extremely strong evidence of (1) or evidence of (2) in conjunction with (1) or (3).\textsuperscript{277}

A final point about premeditated and deliberated murder is that it is a specific intent crime. The specific intent or special mental element is the premeditation and deliberation, not the intent to kill. Thus, the specific intent defenses such as intoxication\textsuperscript{278} or diminished capacity are available for this crime.\textsuperscript{279}

B. Felony Murder

The other type of first degree murder in Kansas is felony murder. For this crime there is no requirement that the State prove the intent to kill or malice. The State must prove all the elements of the felony or an attempted felony for the felony murder rules to be invoked,\textsuperscript{280} and, notwithstanding that the Kansas statute says any felony, it must be a felony that is classified as inherently dangerous to human life and the death must be a direct result of the commission of that felony.\textsuperscript{281}


\textsuperscript{277} People v. Anderson, 70 Cal. 2d 15, ..., 447 P.2d 942, 949 (1968). After making this statement the court then illustrated its application by discussing the facts of the instant case as well as others. For another excellent case discussing where the line between first degree murder and second degree murder should be drawn as a matter of law, see Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967).


\textsuperscript{279} People v. Conley, 64 Cal. 2d 310, 411 P.2d 911 (1966); State v. Hall, 214 N.W.2d 205 (Iowa 1974).


Normally, the act of killing, albeit accidental, must be committed by the defendant or an accomplice acting in the furtherance of a felony or an attempted felony.\textsuperscript{282}

Generally, the felony murder doctrine, as indicated above, ascribes malice to the felon who commits an inherently dangerous felony. Kansas seems to ascribe more to the felony murder doctrine in that it has concluded “the malice, intent, premeditation and deliberation which distinguishes first degree murder from other homicides are supplied by the evidence of the felony being committed.”\textsuperscript{283} The court by adding intent, premeditation, and deliberation to malice has apparently modified the traditional rule, which says that malice is supplied as a legal fiction from the intent to commit the felony, and premeditation and deliberation are irrelevant. Prosecutors often choose this theory because it is not necessary for the trier of fact specifically to find malice, but it must be noted that if felony murder is not a possibility, the State can always proceed under one of the traditional malice theories.

Very often more than one person will be involved in the commission of the felony. When this occurs it is generally necessary to apply an aiding and abetting theory, and section 21-3205,\textsuperscript{284} the “liability for crimes of another” statute, becomes important. An aider and abettor will be treated just as if he or she had pulled the trigger or had been the prime actor and will be charged with a felony, which justifies the application of the felony murder rule. This issue apparently came up in \textit{State v. Branch},\textsuperscript{285} in which the defendants were convicted of conspiracy to commit robbery, aggravated robbery, and felony murder. The court appears to have blurred the aiding and abetting theory with conspiracy and seems to suggest that a conspiracy to commit robbery is a sufficient crime to invoke the felony murder rule. Yet the court stated, “Each member of the conspiracy was equally responsible for Bruner's death if the murder was committed during the perpetration of the robbery.”\textsuperscript{286} This would indicate that the test was whether the death occurred during the perpetration of the robbery, and the actor's liability would then turn on establishing aiding and abetting.\textsuperscript{287} The court should have made it clear (1) whether it was using the conspiracy as the crime for invoking the felony murder doctrine, (2) whether it was using the theory of conspiracy to show that participation in a conspiracy alone shows complicity and makes the coconspirator guilty of all of the acts of the other coconspirators that are reasonably foreseeable to be committed during the course of the conspiracy,\textsuperscript{288} or (3) whether it was simply applying the “liability for crimes of another” statute. Certainly the elements of conspiracy


\begin{enumerate}
  \item A person is criminally responsible for a crime committed by another if he intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.
  \item A person liable under subsection (1) hereof is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing or attempting to commit the crime intended.
\end{enumerate}


\textsuperscript{286} Id. at 382, 573 P.2d at 1043-44.

\textsuperscript{287} For a case dealing with liability for acts of another, see State v. Wilson, 221 Kan. 359, 559 P.2d 374 (1977).

\textsuperscript{288} See Pinkerton v. United States, 328 U.S. 640 (1946). Note particularly what Justice Rutledge says in his dissent.
and the facts necessary to show aiding and abetting under the Kansas statute require different findings. It may well be that after there is a completed crime the same facts used to show the conspiracy will prove that there was liability for crimes of another. When, however, there is a killing done by one of the parties to a crime, even accidentally, the general theory used to find the nonactor guilty is liability for crimes of another. It is clear that conspiracy is a separate and distinct crime, whereas liability for crimes of another under section 21-3205 is simply a theory used to hold the aider guilty of a crime committed by another. Clearly, a person may be convicted of both conspiracy and the completed crime. 280

Perhaps the single most important point about the felony murder doctrine is that the felony must be established. Recently the Kansas Supreme Court was presented with the issue of what state of mind must be proved to establish aggravated robbery, a crime that is often used to invoke the felony murder doctrine. In State v. Thompson 280 the court held that robbery 291 and aggravated robbery 292 can be established by simply showing that the taking of the property is done with the general intent to commit the act. 293 It is now not necessary, therefore, for the state to show a specific intent to deprive the owner of his or her property permanently. This decision appears to change the common law of robbery and what was thought to be the law in Kansas prior to July 1, 1970. The court concluded that the legislature intended to do away with the requirement of specific intent in the Criminal Code, which became effective in July 1970. This conclusion was apparently premised upon the fact that the legislature in enacting sections 21-3426 and 21-3427 omitted any reference to the intent to steal and simply prohibited the taking of any property.

It is curious that the court would conclude that the legislature intended to make a significant change in Kansas law without any reference to, or discussion of, legislative history. For example, the working papers of the Advisory Committee on Criminal Law Revision of the Judicial Council could have been consulted and discussed. In this regard, it is interesting to note that the comments of the Judicial Council immediately following section 21-3427 make no specific reference to the fact that these statutes would cause a significant change in Kansas law or depart from the common law. In fact, these comments suggest that the new law was really a consolidating and refining statutory change. Also, since robbery is a common law crime, the court should have considered the United States Supreme Court's statement in Morrissette v. United States 294 that when the legislature

borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. 295

Accordingly, courts will normally interpret common law terminology in statutes

280 Id.
292 Id. § 21-3427.
295 Id. at 263.
according to its common law meaning rather than its everyday meaning. The *Morissette* Court was confronted with a theft statute that contained no express prescription of the mental element necessary. Because the common law definition of theft so clearly included the intent to take property of another, the Court was unwilling to construe the Congress’ silence as a clear indication that it intended to remove the specific mental element from the crime.

The result of the court’s conclusion in *Thompson* is that a person can be convicted of a class B felony without any showing of a specific intent and consequently the felony murder doctrine can be invoked by a general intent crime. This also means that such defenses as intoxication are not available.\textsuperscript{296} It would seem appropriate for the legislature to consider this problem carefully.

Another facet of felony murder that was confronted by the Kansas Supreme Court during this survey period was whether it was error to charge, convict, and punish for both premeditated and deliberated murder and felony murder when there was only one death. In *State v. Jackson*\textsuperscript{297} there was a three count information, count II charging premeditated and deliberated murder and count III charging felony murder. The jury was instructed that it could find the defendants guilty under both theories, but if it did they only could be punished for one. According to the case report, the jury came back with a verdict of guilty as charged.

The *Jackson* court concluded that the State is not required to proceed on just one of the murder theories so long as the defendant is made fully aware of the charges.\textsuperscript{298} Consequently, it let stand the convictions for both. A general verdict of guilty under both theories is apparently all right if there is evidence to support either or both theories. It would appear then that the reviewing court would only have to focus on whether there was substantial evidence to support one of the theories. The court in *Jackson* did not specifically speak to this point but it cited *State v. Wilson,*\textsuperscript{299} in which the court made the following statement:

When an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilt by reason of the killer’s malignant purpose. In such case the verdict is unanimous and guilt of murder in the first degree has been satisfactorily established. If a verdict of first degree murder can be justified on either of two interpretations of the evidence, premeditation or felony murder, the verdict cannot be impeached by showing that part of the jury proceeded upon the one interpretation of the evidence and part on another.

The above holding meets with general acceptance in other jurisdictions in the absence of a statute which requires the jury to agree to the mode in which a murder was committed.\textsuperscript{300}

The language in *Wilson* that refers to some jurors supporting one theory and some supporting another theory raises interesting questions. While there is no


\textsuperscript{297} 223 Kan. 554, 575 P.2d 536 (1978).

\textsuperscript{298} The court seems to have gone even further than *Jackson* in State v. Foy, 224 Kan. 558, 582 P.2d 281 (1978), when it found an information charging only malice aforethought, deliberation, and premeditation sufficient to sustain a felony murder conviction. This case would seem to raise a question whether there was sufficient notice afforded to prepare a defense.

\textsuperscript{299} 220 Kan. 341, 552 P.2d 931 (1976).

\textsuperscript{300} Id. at 345, 552 P.2d at 935-36 (citations omitted, emphasis added).
doubt that there was a unanimous verdict concerning guilt of murder, the possibility posed by the court makes it possible to convict someone on a theory that was not unanimously supported by the jury. Since there must be a unanimous jury verdict in Kansas criminal cases, the question arises whether this less than unanimous support for a theory violates this rule. Also, while the United States Supreme Court has upheld state criminal statutes authorizing a nine to three verdict and a ten to two verdict, these cases do not help because there is no Kansas statute authorizing less than unanimous verdicts in criminal cases.

Arguably, the unanimous jury problem does not exist when there are separate counts in an information, one charging premeditated and deliberated murder and the other felony murder. Here the appellate court would not have to speculate about how many jurors supported which verdict if each count were separately considered and a separate verdict from the jury were given. This argument is not without its difficulties, however. It appears that each separate count must state a separate offense. If this is the case, an information charging both premeditated and deliberated murder and felony murder raises problems. Clearly, there are two different theories upon which a conviction of first degree murder may be obtained, but there has been only one death and thus, only one crime, not two. Section 21-3401 contemplates this because it provides that murder is premeditated and deliberated or felony murder. Also, there is only one homicide, and that same fact would have to be shown in each count, which seems to violate section 21-3107 delineating the rule on multiple prosecutions for the same act.

A few final points need to be made about Jackson. While it did uphold a conviction on both theories when both theories were submitted to the jury, the court suggested that it might be reversible error in some cases when it stated, "On the facts of this case we find it did not constitute prejudicial error." Also, the court noted that the better approach to this problem would be for the trial court to submit the case to the jury on alternative theories. Finally, the Jackson court did unequivocally conclude that a defendant could not be given two sentences for one homicide.

Another facet of the felony murder problem that has recently been examined is whether the merger doctrine should be used to prohibit the application of the felony murder rule when a burglary based upon aggravated assault, i.e., breaking and entering with the intent to injure, is involved. The court in State v. Foy concluded that the merger doctrine was not applicable. Broadly stated, the merger doctrine prohibits the use of the felony murder rule when the felony involved is an integral part of the homicide and the evidence produced by the state shows it to be an offense included in fact within the offense charged. In other words, the felony must be

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305. See Speers v. United States, 387 F.2d 698 (10th Cir. 1967); P.I.K.—CRIMINAL, supra note 274, § 68.08. See also State v. Dorsey, 224 Kan. 152, 578 P.2d 261 (1978), dealing with joining in a single count more than one offense.
308. 224 Kan. at 557, 578 P.2d at 539.
a separate and distinct crime, clearly independent of the homicide. For example, assault with intent to kill or assault with a deadly weapon cannot be the felony used to invoke the felony murder rule because assault is an integral part of the homicide. To hold otherwise would be to make all intentional killings first degree murder.

In cases prior to Foy, the Kansas courts had held that the merger doctrine prohibited the use of felonious assault and aggravated assault to invoke the rule.\textsuperscript{310} In State v. Goodsell\textsuperscript{311} and State v. Rueckert,\textsuperscript{312} however, the court had held that aggravated robbery does not merge into the homicide. Its reasoning was that while force is involved in a robbery, the essence of robbery is depriving another of property, which is not an element of homicide.\textsuperscript{313} The court in Foy concluded that the merger doctrine was inapplicable when the crime was aggravated burglary, even though this crime is based on aggravated assault. It determined that the aggravated burglary, with the intent to commit aggravated assault, was complete upon entry and therefore did not merge with the subsequent homicide. Thus, the court found that the intent to commit an aggravated assault only related to the breaking and entering, apparently distinguishing between assaults committed indoors and out-of-doors.

Justice Prager in his dissent in Foy made two observations that should be studied. He concluded that the felony used here, aggravated burglary,

had as an essential element, the intent to commit an aggravated assault. The same intent is then used as an element of the homicide itself. I, of course, agree that in a proper case a burglary may be used to invoke the felony-murder rule. I cannot agree that an intent to commit the same assault may be used both as an element of the burglary and also as an element of the homicide so as to make the felony-murder rule applicable.\textsuperscript{314}

Thus, the general merger rule should be applicable, and this felony could not be used to sustain a felony murder conviction. In addition, Justice Prager said reversal was required because the jury had been instructed that first degree murder could be found “if the killing occurred during the perpetration of an aggravated assault.”\textsuperscript{315} Again, this is contrary to the general merger doctrine.

The Kansas courts seem to be continually expanding the scope of the felony murder doctrine by making it easier to find a class A felony and being less concerned about the state of mind of the defendant. It certainly must be remembered that malice can be inferred from a variety of facts, and it would seem more appropriate to severely punish a person who the jury has found to have acted with malice rather than a person to whom malice has been imputed as a legal fiction. Also, it is worth noting that when the felony murder concept was created most felonies were capital offenses, and therefore there was often no difference in punishment for first degree murder and other felonies.

The final issue concerning felony murder discussed here concerns when a defendant charged with felony murder is entitled to an instruction on lesser degrees of homicide. To understand this question, it is necessary to first sketch the lesser

\textsuperscript{312} 221 Kan. 727, 733, 561 P.2d 850, 857 (1977).
\textsuperscript{313} Id. at 733, 561 P.2d at 857.
\textsuperscript{314} Id. at 731, 582 P.2d at 291.
degrees of homicide in Kansas. As indicated above, there are two types of first
degree murder, premeditated and felony murder. The lesser included offense for
first degree murder is second degree murder. There are two types of second degree
murder, intentional and nonintentional. Intentional second degree murder arises
when there is clearly the intent to kill, but the killing is impulsive and there was
no time for premeditation and deliberation. The lesser included offense here
would be voluntary manslaughter—an intentional killing without malice. At
common law nonintentional murder arose when the defendant did not have the intent
to kill, but either had the intent to do serious bodily harm with death the likely
result or acted in an extremely negligent way, aware of the risk of death his or her
acts were creating, the so-called depraved heart murder. The lesser included
homicide offense in nonintentional second degree murder is involuntary man-
slaughter.

The court in State v. Rueckers was confronted with the question of when a
defendant charged with felony murder is entitled to an instruction on lesser homicides. It stated that the general rule requiring the full range of lesser offense in-
structions to be given, if there is evidence to support it, does not apply in felony
murder cases when all the evidence indicates that the killing occurred during the
commission of the felony. If there is some question whether the felony in fact
occurred, however, the lesser homicides can be considered. This rule is based
largely upon State v. Bradford, in which the supreme court upheld an instruction
on felony murder and second degree murder as a lesser included offense even though
defendant objected. In Bradford there was some question about the commission
of the felony and therefore other types of homicides could be considered. This must
mean that if the finder of fact finds that the felony cannot be established, it can then
consider whether the defendant intentionally or nonintentionally killed the victim.
If there is an intentional killing, the finder of fact would then have to consider
whether it was premeditated and deliberated or an impulsive killing, or, if the facts
warrant, whether there were circumstances that would make it voluntary man-
slaughter. On the other hand, if it was an unintentional killing, the fact finder
would have to determine whether it was second degree murder or involuntary man-
slaughter.

Anyone considering the Bradford rule today, leaving aside the tactical reasons
for wanting or not wanting a lesser offense considered by the finder of fact, must

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See text at notes 264-279 supra.

220 Id.

221 It has been defined as follows:

Extremely negligent conduct, which creates what a reasonable man would realize to be not only
an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or
others—though unaccompanied by any intent to kill or do serious bodily injury—and which
actually causes the death of another, may constitute murder. There is a dispute as to whether, in
addition to creating this great risk, the defendant himself must subjectively be aware of the great
risk which his conduct creates, in order to be guilty of murder.

W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 541 (1972).

180, 542 P.2d 1051 (1975).


224 Id. at 731-32, 561 P.2d at 855-56.


227 Today in Kansas the trial judge is required to submit to the jury, or consider himself if acting as
trier of fact, all lesser crimes when there is evidence to support them regardless of lack of request or an
examine it in view of State v. Jackson\textsuperscript{325} and State v. Wilson.\textsuperscript{326} In these cases, as noted earlier,\textsuperscript{327} the court sustained convictions for premeditated and deliberated murder and felony murder for one homicide. It would appear that if there is any question whether the killing was intentional or whether there was no time to premeditate and deliberate, the judge would be obligated to instruct the jury on the lesser included offenses when there are two counts in the information, one for felony murder and one for premeditated and deliberated murder.\textsuperscript{328}

There is one other case concerning the lesser included homicides of felony murder that should be noted. In State v. Sullivan\textsuperscript{329} a defendant charged with felony murder had been denied an instruction on involuntary manslaughter as a lesser included offense. The supreme court reversed, holding that involuntary manslaughter is a lesser included offense of first degree murder (felony murder) and if there is evidence to indicate that the defendant might not have committed the felony, the jury should be able to apply the so-called misdemeanor-manslaughter rule found in section 21-3404.\textsuperscript{330} Specifically the court stated, “If the jury found defendants had gone to burglarize the farmhouse but had not yet committed the necessary overt act to make it attempted burglary they had committed only trespass. In such a case the jury could find the defendants guilty of involuntary manslaughter.\textsuperscript{331} This statement raises several issues. It is interesting to speculate whether a criminal trespass, which has to be the trespass referred to, is a violation of a statute or ordinance “enacted for the protection of human life or safety” that is required by section 21-3404. The criminal trespass statute, section 21-3721,\textsuperscript{332} seems to be designed to protect property, not human life, and thus would not be a proper vehicle to invoke the involuntary manslaughter statute. It would appear that the legislative history and the purpose of this statute should be thoroughly considered before it is used to invoke the misdemeanor-manslaughter rule. It is interesting to note that neither a felony found not to be inherently dangerous to human life nor an unlawful act in violation of a statute not enacted for the protection of human life and safety can be used to invoke either the felony murder rule or the misdemeanor-manslaughter rule, respectively.

Another type of involuntary manslaughter was addressed in State v. Cates,\textsuperscript{333} in which the court considered the lawful act done in a lawful manner requirement of involuntary manslaughter. It held that the use of excessive force in self-defense

\textsuperscript{325} 223 Kan. 554, 575 P.2d 536 (1978).
\textsuperscript{327} See text at notes 297-307 supra.
\textsuperscript{328} It would also seem that if, as the supreme court indicated in Wilson, one count of an information may charge both premeditated and deliberated murder and felony murder, the Bradford rule may improperly deny a defendant an instruction on lesser included homicides.
\textsuperscript{329} 224 Kan. 110, 578 P.2d 1108 (1978).
\textsuperscript{330} KAN. STAT. ANN. § 21-3404 (1974) provides, "Involuntary manslaughter is the unlawful killing of a human being, without malice, which is done unintentionally in the commission of an unlawful act not amounting to [a] felony, or in the commission of a lawful act in an unlawful or wanton manner. As used in this section, an "unlawful act" is any act which is prohibited by a statute of the United States or the State of Kansas or an ordinance of any city within the state which statute or ordinance is enacted for the protection of human life or safety."
\textsuperscript{332} KAN. STAT. ANN. § 21-3721 (1974).
could be classified as a lawful act done in an unlawful manner. Query how an intentional act, assault with intent to kill, which is obviously involved in self-defense, could be used to justify an involuntary manslaughter conviction that by definition involves an unintentional killing. The court has apparently answered this question by determining that the inquiry is whether the killing is intentional or not.\textsuperscript{334} It is hard to believe, however, that pointing a loaded gun at a person and intentionally pulling the trigger can be classified as an unintentional killing. Thus, it would seem that when someone intentionally points a gun at someone else and pulls the trigger it is not possible to find involuntary manslaughter. The relevant lesser included offense in this case should be voluntary manslaughter. Therefore, if excessive force is involved in a self-defense claim, the proper verdict would be voluntary manslaughter, assuming all the elements of self-defense could be established except that too much force was used.\textsuperscript{335}

C. Voluntary Manslaughter

The Kansas voluntary manslaughter statute is a typical statute. It provides, “Voluntary manslaughter is the unlawful killing of a human being, without malice, which is done intentionally upon a sudden quarrel or in the heat of passion.”\textsuperscript{336} It is clear that voluntary manslaughter cannot be established unless there is an intentional killing.\textsuperscript{337} Thus, voluntary manslaughter is a potential lesser included offense in first degree premeditated and deliberated murder and second degree intentional murderer.

In \textit{State v. Coop}\textsuperscript{338} the Kansas Supreme Court examined the voluntary manslaughter statute, specifically the words “a sudden quarrel or in the heat of passion.” Relying upon the earlier case of \textit{State v. Ritchey},\textsuperscript{339} the court defined heat of passion as follows:

“Heat of passion” includes an emotional state of mind characterized by anger, rage, hatred, furious resentment, or terror. It must be of such a degree as would cause an ordinary man to act on impulse without reflection.

The emotional state constituting “heat of passion” must arise from circumstances constituting sufficient provocation. Whether the provocation is sufficient to cause an ordinary man to lose control of his actions and his reason is a question for determination by the trier of fact.

The test of the sufficiency of the provocation is objective, not subjective.\textsuperscript{340}

Recognizing it was a case of first impression, the court addressed Coop’s assertion that “heat of passion” and “sudden quarrel” presented separate grounds for establishment of voluntary manslaughter. Notwithstanding the legislature’s use of the word “or” to separate “heat of passion” and “upon sudden quarrel,” the court essentially concluded that since there is no Kansas case defining “sudden quarrel” and apparently only one jurisdiction that treats the two terms differently, “[s]udden

\textsuperscript{335} See, e.g., \textit{Commonwealth v. Colorado}, 231 Pa. 343, 80 A. 571 (1911).
\textsuperscript{338} 223 Kan. 302, 573 P.2d 1017 (1978).
\textsuperscript{340} 223 Kan. at 305, 573 P.2d at 1020.
quarrel is one form of provocation for 'heat of passion.' Thus, the heat of passion rule is the only test. Yet the court went on to use some curious language, stating, "The provocation whether it be 'sudden quarrel' or some other form of provocation must be sufficient to cause an ordinary man to lose control of his actions and his reason." The court interestingly enough did not specifically discuss what it thought the Kansas Legislature's intent was in using the two phrases rather than one term such as "an extreme emotional disturbance" or "adequate provocation." Again, there was no reference made to a specific legislative history such as the working papers of the Advisory Committee on Criminal Law Revision of the Judicial Council or to the lack of available legislative history. Certainly, the issue is what the Kansas Legislature meant, not what other states have done. It would seem that the appropriate legislative committees might want to consider whether the court's interpretation is in fact the legislature's intent.

This case raises two other points that merit brief comment. First, the court's definition of heat of passion would appear not to include diminished capacity (e.g., mental disabilities not amounting to insanity or intoxication). Generally, courts do not allow this to be used to negate malice, but there are some exceptions. For example, some courts will allow diminished capacity to be considered by a jury to negate malice in self-defense cases when the defendant argues that a mental condition caused an honest but unreasonable belief that it was necessary to kill in self-defense. It is interesting to note that California, which has a statute similar to Kansas', has accepted diminished capacity as a basis for reducing murder to manslaughter. California does have, however, a somewhat different definition of malice. Malice aforethought is defined as including "[a]n awareness of the obligation to act within the general body of laws regulating society." It should be noted that the Model Penal Code seems to take a middle ground between the traditional view and the California view. Apparently, it would recognize diminished capacity as a basis for negating malice when "there is reasonable explanation or excuse" for the diminished capacity, i.e., "extreme mental or emotional disturbance." The Kansas court, in adopting the objective standard for judging the defendant's reaction to a certain set of facts, which is the general rule, has apparently not followed the Model Penal Code approach for determining if adequate provocation existed. It must be pointed out that the objective test seems incongruous. Voluntary manslaughter involves an intentional killing that would, therefore, be at least with malice in the absence of reduction. Malice is negated because of human frailty, but the reduction is limited to cases in which the reasonable person would have killed or acted rashly and thereby differentiates between persons of equal culpability by failing to consider personal weakness.

The final issue concerning voluntary manslaughter is who has the burden of proving that the killing was done in the heat of passion. The United States Su-

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31 Id. at 307, 573 P.2d at 1021.
32 Id.
34 See, e.g., Burton v. State, 254 Ark. 673, 495 S.W.2d 841 (1973) (indication that intoxication could impair judgment on the reasonable need for force).
The Supreme Court has recently considered this. In *Mullaney v. Wilbur*\(^{347}\) the Court held that the fourteenth amendment due process clause precluded the State of Maine from requiring a defendant charged with murder to prove by a preponderance of the evidence that a felony homicide was committed in the heat of passion on sudden provocation. Consequently, the burden falls on the prosecution to prove the absence of such passion beyond a reasonable doubt. It would appear after this case that a defendant would be entitled to a specific instruction reflecting this decision. There were also several questions left unanswered by the *Mullaney* decision—for example, whether it applies to traditional affirmative defenses and whether it applies to total defenses as well as partial defenses.

In 1977 the Supreme Court seemed to all but reverse *Mullaney*. In *Patterson v. New York*\(^{348}\) the Court held that the fourteenth amendment was not violated by a statute placing the burden on a second degree murder defendant to prove by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance. This defense was established by statute and delineated an affirmative defense that reduced the killing to manslaughter, but bore no relationship to the elements of the crime (death, intent to kill, and causation) that the State must prove beyond a reasonable doubt. The Court seemed to distinguish *Mullaney* on the ground that the New York statute involved no shifting of the burden to the defendant to disprove any fact essential to the offense charged, since in New York the affirmative defense of emotional disturbance bore no direct relationship to any element of murder. There was a strong dissent, which showed concern that the majority had authorized the legislature "to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime" and to classify the factor as an affirmative defense.\(^{349}\) Certainly, any Kansas lawyer having a potential voluntary manslaughter case today must consider these two cases and make a determination on who has the burden of proof in Kansas. The Kansas statute clearly does not speak in terms of an affirmative defense.

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\(^{347}\) 421 U.S. 684 (1975).


\(^{349}\) Id. at 223.