KANSAS CRIMINAL PROCEDURE REVIEW

VOL. 1 1984

SURVEY OF 1983 CASES DECIDED BY:

UNITED STATES SUPREME COURT
COURT OF APPEALS FOR THE TENTH CIRCUIT
KANSAS SUPREME COURT
KANSAS COURT OF APPEALS

UNIVERSITY OF KANSAS SCHOOL OF LAW
CRIMINAL JUSTICE CLINIC

No portion of this publication may be reproduced without prior written permission from the Dean of the University of Kansas School of Law.

UNIVERSITY OF KANSAS SCHOOL OF LAW

MEMBERS OF THE FACULTY
1983-84

Michael J. Davis
Dean and Professor of Law.
B.A. 1964, Kansas State; J.D. 1967, Michigan.

Fred B. Lovitch
Associate Dean and Professor of Law.
B.S. 1962, Pennsylvania; LL.B. 1965, Pennsylvania.

Terry L. Bullock
District Judge, Shawnee County District Court, and Lecturer in Law. B.A. 1961, Kansas State; LL.B. 1964, Kansas.

Robert Clair Casad
Kane Professor of Law. B.A. 1950, Kansas; M.A. 1952, Kansas; J.D. 1957, Michigan; S.J.D. 1979, Harvard.

Barkley Clark
Robert A. Schroeder Distinguished Professor of Law. B.A. 1962, Amherst; LL.B. 1965, Harvard.

George Cameron Coggins
Professor of Law. B.A. 1963, Central Michigan; J.D. 1966, Michigan.

Gerald L. Cooley
Lecturer in Law. B.S. 1958, Kansas; J.D. 1959, Kansas.

Sandra Jo Craig
Associate Professor of Law. B.A. 1971, New Mexico; J.D. 1974, New Mexico.

Phillip E. DeLaTorre
Associate Professor of Law. B.A. 1975, Kansas; J.D. 1978, Harvard.

Martin B. Dickinson, Jr.
Professor of Law. B.A. 1960, Kansas; M.A. 1961, Stanford; J.D. 1964, Michigan.

Robert L. Glicksman
Associate Professor of Law. A.B. 1973, Union College; M.A. 1974, Harvard; J.D. 1977, Cornell.

Raymond A. Goetz
Professor of Law. J.D. 1950, Chicago; M.B.A. 1963, Chicago.

Webster L. Golden
Lecturer in Law. B.A. 1966, Kansas; J.D. 1969, Virginia.

David Gottlieb
Associate Professor of Law and Director, Defender Clinic. B.A. 1969, Oberlin College; J.D. 1974, Georgetown.

Edwin W. Hecker, Jr.
Professor of Law. B.A. 1966, Oakland; J.D. 1969, Wayne State; LL.M. 1970, Harvard.

Francis H. Heller
Roy A. Roberts Professor of Law and Political Science. M.A. 1941, Virginia; J.D. 1941, Virginia; Ph.D. 1948, Virginia.

Robert H. Jerry, II
Associate Professor of Law. B.S. 1974, Indiana State; J.D. 1977, Michigan.

Thomas K. Jones
Lecturer in Law. B.S. 1970, Kansas; J.D. 1974, Kansas.

William A. Kelly
Professor of Law. B.A. 1942, Kansas; LL.B. 1949, Kansas.

Philip C. Kissam
Professor of Law. B.A. 1963, Amherst; LL.B. 1968, Yale.

Keith G. Meyer
Professor of Law. B.A. 1964, Cornell College; J.D. 1967, Iowa.

John F. Murphy
Professor of Law. B.A. 1959, Cornell; LL.B. 1962, Cornell.

John C. Peck
Professor of Law. B.S. 1968, Kansas State; J.D. 1974, Kansas.

Dennis D. Prater
Lecturer in Law. B.A. 1969, Kansas; J.D. 1973, Kansas.

Laurence M. Rose
Professor of Law. B.A. 1969, State University of New York (Stony Brook); J.D. 1972, New York University.

James P. Rowles
Visiting Associate Professor of Law. A.B. 1967, Stanford; J.D. 1972, Stanford; J.S.M. 1976, Stanford.

Irma Stephens Russell
Lecturer in Law. B.A. 1969, Kansas; M.A. 1972, Kansas; B.S. 1974, Kansas; J.D. 1980, Kansas.

Peter C. Schanck
Professor of Law and Law Library Director. B.A. 1960, Dartmouth College; J.D. 1963, Yale; M.L.S. 1972, Maryland.

Elinor P. Schroeder
Professor of Law. B.A. 1968, Michigan; J.D. 1974, Michigan.

Sidney A. Shapiro
Professor of Law. B.S. 1970, Pennsylvania; J.D. 1973, Pennsylvania.

Deanell R. Tacha
Vice Chancellor for Academic Affairs and Professor of Law. B.A. 1968, Kansas; J.D. 1971, Michigan.

Emil A. Tonkovich
Associate Professor of Law and Director, Criminal Justice Clinic. B.A. 1973, Indiana University; J.D., summa cum laude, 1977, Notre Dame.

William E. Westerbeke
Professor of Law. B.A. 1964, Bowdoin; M.A. 1968, Middlebury; J.D. 1970, Stanford.

Marilyn V. Yarbrough
Professor of Law. B.A. 1966, Virginia State College; J.D. 1973, California (Los Angeles).

RETIRED FACULTY

Frederick James Moreau
Dean Emeritus and Professor of Law Emeritus. Ph.B. 1922, Wisconsin; LL.B. 1924, Wisconsin; LL.M. 1937, Columbia.

Charles H. Oldfather
Professor of Law Emeritus. B.A. 1941, Nebraska; LL.B. 1948, Harvard.

William R. Scott
Professor of Law Emeritus. B.A. 1930, Harvard; LL.B. 1933, Harvard.

Earl B. Shurtz
Professor of Law Emeritus. B.A. 1951, Kansas; J.D. 1956, Kansas.

Paul E. Wilson
Kane Professor of Law Emeritus. B.A. 1937, Kansas; M.A. 1938, Kansas; LL.B. 1940, Washburn.

KANSAS CRIMINAL PROCEDURE REVIEW

Editor in Chief

Emil A. Tonkovich
Associate Professor of Law

Associate Editors

John E. Angelo
Mary Phelps Dugan
Edward C. Fensholt
James P. Gerstenlauer
Michael L. Riggs

Staff Members

Carol J. Bacon
Peggy Glazzard
Vincent L. Gualtier
Donald J. Hanson
Mark A. Knight
Linda C. Lahman
Richard A. Macias
Amy A. McGowan
Mary Ann Neath
Stacy Parkinson
Dell M. Shanahan
Roxann E. Tate

Editorial Consultants

Robin D. Fowler
Assistant District Attorney
Douglas County, Kansas

L. Eric Johnson
Trial Attorney
U.S. Department of Justice

PREFACE

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

The Review is a survey of criminal procedure emphasizing recent cases. Since it is designed for the Kansas practitioner, only federal and Kansas law is included. The Review is organized according to the chronology of the criminal process. Each chapter includes a brief introduction which gives a general overview of the law and cites significant case law, statutes, and rules. Following the introduction is a survey of relevant 1983 cases decided by the United States Supreme Court, the Tenth Circuit Court of Appeals, the Kansas Supreme Court, and the Kansas Court of Appeals. The major cases are analyzed and the holdings of the other cases are listed.

Due to factors inherent in an initial publication, this first volume of the Review is a relatively modest effort. In next year's volume, the introductions to the chapters will be expanded, especially those pertaining to investigation and police practices. An appendix containing the Federal Rules of Criminal Procedure and Chapter 22 of the Kansas Statutes Annotated will also be included.

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

March 1, 1984 — Emil A. Tonkovich

KANSAS CRIMINAL PROCEDURE REVIEW

Volume 1 **1984**

CONTENTS

The Kansas Criminal Procedure Review is published annually by the University of Kansas School of Law, Lawrence, Kansas 66045. Inquiries should be made to Professor Emil A. Tonkovich at the above address or by calling 913-864-4550.

I. INVESTIGATION AND POLICE PRACTICES

A. Arrest, Search and Seizure

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

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

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

Although the fourth amendment generally requires that searches be based on probable cause and be made pursuant to a warrant, there are exceptions to both requirements. Emergency searches[13] and automobile searches[14] do not require a warrant, but must be based on probable cause. The following searches require neither a warrant

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

nor probable cause: searches incident-to-arrest,[15] "stop and frisk" searches,[16] "plain view" searches,[17] inventory searches,[18] and consent searches.[19]

United States Supreme Court

United States v. Knotts, 103 S. Ct. 1081 (1983).

A "beeper" installed in a container may be monitored by law enforcement officers while the container is transported on public roadways.

Minnesota law enforcement officers installed a beeper inside a chloroform container later sold to Armstrong, a suspected manufacturer of illicit drugs. Armstrong picked up the container and loaded it into his car. The officers followed Armstrong to the defendant's Wisconsin cabin by maintaining visual surveillance and monitoring the beeper signals. At times the officers lost visual contact of the car and were forced to rely only on the beeper. After three days of intermittent visual surveillance of the cabin, the officers obtained a search warrant. Executing the warrant, they discovered a drug laboratory in the cabin. Officers found the container in which the beeper was installed outside the cabin. The defendant claimed the warrantless monitoring of the beeper violated the fourth amendment and sought to suppress the evidence.

The United States Supreme Court held that monitoring the beeper constituted neither a search nor a seizure under the fourth amendment. The Court explained that persons who invoke fourth amendment protections must show that government action invaded their reasonable expectation of privacy. Persons traveling in an automobile on public streets are exposed to observation. The beeper is merely a more effective way of observing what is already public. The government made limited use of the beeper signal. The beeper did not reveal information about any movement within the cabin. The Court refused to decide whether the warrantless installation of the beeper violated the fourth amendment.

Florida v. Royer, 103 S. Ct. 1319 (1983).

When police officers have a "reasonable suspicion of criminal activity" based on a "drug courier profile," they may approach an individual in a public place, identify themselves as police officers, and ask to see the individual's identification. The encounter is either consensual and, thus, not a seizure, or it is a type of investigative stop authorized by *Terry v. Ohio,* 392 U.S. 1 (1968). If, however, the

---

[15] Chimel v. California, 395 U.S. 752 (1969).
[16] Terry v. Ohio, 392 U.S. 1 (1968).
[17] Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion).
[18] South Dakota v. Opperman, 428 U.S. 364 (1976).
[19] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

encounter escalates beyond a *Terry*-type stop into a custodial interrogation, it must be based on probable cause.

Narcotics detectives stopped the defendant (Royer) in a public area of Miami International Airport because his appearance, mannerisms, luggage, and actions fit a "drug courier profile." They identified themselves as police and asked the defendant to speak with them. Upon request, but without oral consent, the defendant gave his airline ticket and driver's license to the detectives. The ticket bore the name "Holt"; the name on the driver's license was "Royer." When asked about the discrepancy, the defendant explained that a friend had made the reservation in the name "Holt." The defendant became noticeably more nervous. The detectives told the defendant that they believed he was transporting narcotics. They retained the defendant's ticket and driver's license and asked him to accompany them to a small room nearby. The defendant said nothing, but went with the detectives. The detectives brought the defendant's luggage to the room without seeking his consent. When one detective asked the defendant to consent to a search of the luggage, he remained silent, but produced a key and unlocked one suitcase. The suitcase contained drugs. The defendant consented to a request to break the lock on a second suitcase. It also contained drugs. Detectives then arrested the defendant. At trial, the defendant sought to suppress the drugs.

In a plurality opinion, the United States Supreme Court found that the police had exceeded the limits of a *Terry* investigative stop and held that the defendant's consent was ineffective to justify the search. The Court explained that the validity of the search depended upon the defendant's consent. Police could approach the defendant in a public place and question him without "seizing" him under the fourth amendment. The defendant, however, would be free to refuse to answer and could even decline to listen to the questions. A refusal to answer would not provide the reasonable, objective grounds required for even a momentary detention. In contrast, the Court also noted that "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop." 103 S. Ct. at 1324. Reasonable suspicion of criminal activity cannot, however, justify custodial interrogation; probable cause is required. The arresting officer testifed that he did not have probable cause prior to opening the suitcases. The plurality found that not only had the defendant been seized before giving his consent to the search, but also that the police had gone beyond the limits of a *Terry* investigative stop. Because the defendant's consent was tainted by the illegal police conduct, the evidence should have been suppressed. The Court focused on the officers' conduct after the initial stop in the airport, but before the formal arrest. The police took the defendant's ticket, identification, and luggage and led him to a small room. They never told him that he was free to go. For all practical purposes the defendant was under arrest. The consent given after the arrest was neither voluntary nor effective and did not justify the search.

Illinois v. Gates, 103 S. Ct. 2317 (1983).

The rigid "two-pronged" test of *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969), is abandoned. To determine if an informant's tip establishes probable cause for a search warrant, the issuing magistrate must make a practical, common sense decision whether, based on the totality of the circumstances presented in the affidavit, a fair probability exists that contraband or evidence of a crime will be found in a particular place.

The Bloomingdale, Illinois Police Department received an anonymous letter that stated the defendants sold illegal drugs. The letter described in detail the routine the defendants followed in traveling to Florida, picking up the drugs, and returning to Bloomingdale where they sold them. According to the letter, the defendants transported over $100,000 in drugs per trip. The author further claimed that the defendants had over $100,000 in drugs in the basement of their home. On the basis of the information in the letter, police corroboration of many of the details, and police surveillance of the defendants' suspected drug-buying trip to Florida, a search warrant was issued for the defendants' car and residence. The searches revealed 350 pounds of marijuana in the car, and marijuana, weapons, and other contraband in the home. All of these items were eventually suppressed on the ground that the affidavit for the search warrant failed the *Aguilar-Spinelli* test for probable cause.

The United States Supreme Court rejected the strict interpretation of the *Aguilar-Spinelli* test and reversed the lower court's suppression of the items seized. The *Aguilar-Spinelli* test required that the affidavit establish the means by which the informant acquired his information and the veracity of the informant or the reliability of his information. The Court abandoned the *Aguilar-Spinelli* test, refusing to bind the concept of probable cause to such a strict set of rules. The Court explained that veracity or credibility should not be analyzed separately, but should be considered with the basis of knowledge in a practical, common sense analysis of the totality of the circumstances. A common sense examination of all the circumstances leads to a "balanced assessment of the relative weights of all the various indicia of reliability attending an informant's tip." 103 S. Ct. at 2330. This practical approach prevents the focusing of undue attention on details that should not be isolated from other, more relevant facts included in the affidavit.

Illinois v. LaFayette, 103 S. Ct. 2605 (1983).

Police officers may make a warrantless search of any container or article in the possession of an arrestee at the stationhouse, provided the search is made for inventory purposes and is conducted pursuant to routine administrative procedures.

Police officers arrested the defendant for disturbing the peace. An officer at the stationhouse searched the defendant's shoulder bag and

found several amphetamine pills. The defendant, claiming that his fourth amendment rights had been violated, sought suppression of the drugs.

The United States Supreme Court refused to suppress the evidence. Noting that *South Dakota v. Opperman,* 428 U.S. 364 (1976), established the inventory search of impounded vehicles as a valid exception to the warrant requirement, the Court extended the *Opperman* principle to include the warrantless stationhouse search of containers or articles carried by arrestees. The Court held that the search of arrestees and their personal effects for inventory purposes does not violate the fourth amendment. Neither probable cause nor a warrant is required because the search is for inventory purposes. The Court, balancing the defendant's fourth amendment interests against the relevant government interests, found that the search safeguarded several strong government interests, including: protection of the arrestee's property, deterrence of false claims of theft or damage, prevention of possible harm to other inmates, and verification of identity. The Court held that although these interests could have been protected by less intrusive means, the issue was not what could have been achieved, but what the fourth amendment requires. Thus, even though less intrusive means are available, failure to use them does not make the search unreasonable. The Court refused to set specific guidelines for inventory searches, opting instead to allow individual police departments to establish their own procedures.

United States v. Place, 103 S. Ct. 2637 (1983).

When a law enforcement officer's observations lead to an articulable suspicion that luggage contains illicit drugs, the officer may seize and briefly detain the luggage to perform a limited investigation short of a full search.

Drug Enforcement Administration agents stopped the defendant as he arrived at La Guardia Airport from Miami. The agents told the defendant that, based on their own observations and on information given to them by Miami police, they believed he was carrying narcotics. When the defendant refused to consent to a search of his luggage, the agents seized the luggage and took it to Kennedy Airport where, approximately ninety minutes later, a trained narcotics dog performed a "sniff test." The dog reacted positively to one of the bags. Because it was Friday, the agents held the luggage until Monday morning when they obtained a search warrant. Agents found more than one thousand grams of cocaine in the bag. The defendant sought to suppress the cocaine as the fruit of an unconstitutional seizure of his luggage.

The United States Supreme Court acknowledged the general rule that the warrantless seizure of personal property is per se unreasonable under the fourth amendment, but recognized certain exceptions. Citing *Terry v. Ohio,* 392 U.S. 1 (1968), the Court asserted that a

limited seizure of a person is permissible despite the absence of probable cause, when a reasonable, articulable suspicion of criminal activity exists. The Court extended the *Terry* principle to investigative detentions of luggage suspected of containing illicit drugs. Therefore, an officer may briefly detain a person's luggage when he has reasonable suspicion that the luggage contains narcotics. The inherently transient nature of drug courier activity at airports rendered this extention of the *Terry* doctrine essential to effective criminal investigation. Whether the detention of personal property in other situations absent probable cause offends the Constitution depends on the "context of a particular law enforcement practice." 103 S. Ct. at 2643.

Despite the government's compelling interest in controlling drug traffic, the Court held that the ninety-minute detention of the defendant's luggage, without probable cause, was too intrusive in duration and, thus, violated the fourth amendment. The Court noted that the duration of the detention, because of the absence of a diligent pursuit of the investigation by the agents, was alone sufficient to render the seizure unreasonable. In evaluating the agents' diligence the Court considered the failure of the agents to inform the defendant where his baggage was to be taken, the length of time he might be dispossessed, and how the bags would be returned to him. The Court found, however, that "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime." 103 S. Ct. at 2644.

Michigan v. Long, 103 S. Ct. 3469 (1983).

Police officers acting incident to a lawful investigatory stop of an automobile may search those areas of the passenger compartment in which a weapon may be placed or hidden if the officers have a "reasonable belief based on 'specific and articulable facts' . . . [that] the suspect is dangerous and [that] the suspect may gain immediate control of weapons." 103 S. Ct. at 3480.

Two police officers patrolling a rural area after midnight observed a speeding car traveling erratically swerve off the road into a shallow ditch. The officers stopped to investigate. The defendant, the driver and sole occupant of the car, met the officers at the rear of the vehicle. He appeared to be under the influence of alcohol or drugs and did not respond to the officers' request for his vehicle registration. The defendant then turned and walked toward the open door of his car. The officers followed him and saw a large hunting knife on the floorboard. After frisking the defendant and finding no weapons, an officer shined a flashlight in the car. He noticed something protruding from under the car's armrest. The officer entered the vehicle, lifted

the armrest, and discovered a pouch containing what appeared to be marijuana. During the search of the vehicle and prior to his arrest, the defendant was under the control of the second officer.

The United States Supreme Court, refusing to suppress the marijuana, held that the need to ensure the safety of police officers and others justified the search of the vehicle's interior for weapons. In *Terry v. Ohio,* 392 U.S. 1 (1968), the Court upheld the validity of a limited, protective, pat-down search of persons for weapons in the absence of probable cause to arrest because of the need for law enforcement officers to protect themselves and others. Noting that roadside stops are particularly hazardous for police and that weapons near a suspect in his car are just as dangerous as those on his person, the Court extended the *Terry* principle to vehicle searches. The Court stressed that police may not conduct automobile searches after every investigative stop. A search of an automobile following an investigative stop is justified only if the officer has an "articulable and objectively reasonable belief that the suspect is potentially dangerous." 103 S. Ct. at 3481. Police control of the suspect does not preclude the lawful *Terry*-type search of the vehicle's interior. The Court reasoned that a suspect under police control might break away and retrieve a weapon from his vehicle or, because he is not under arrest, he might re-enter the vehicle and gain access to a weapon. The Court limited its decision to searches of the passenger compartment of an automobile and declined to address the validity of a search of the trunk.

Texas v. Brown, 103 S. Ct. 1535 (1983).

Law enforcement officers may make a warrantless seizure of a tied-off, opaque balloon lying on the seat of a lawfully stopped car if the officers are lawfully present at the location, the discovery is inadvertent, and the nature of the balloon provides the officers with probable cause to associate it with criminal activity.

United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983).

United States Customs agents' suspicionless boarding of a seabound sailboat in domestic waters to check its manifest and documentation pursuant to 19 U.S.C. 1581(a) is reasonable and does not violate the fourth amendment.

United States v. Place, 103 S. Ct. 2637 (1983).

A canine "sniff search" of private property located in a public place does not constitute a search under the fourth amendment.

Illinois v. Andreas, 103 S. Ct. 3319 (1983).

Under proper conditions, the warrantless reopening by law enforcement officers of a container that has already been lawfully opened and found to hold contraband does not violate the fourth amendment.

Court of Appeals for the Tenth Circuit

United States v. McCranie, 703 F.2d 1213 (10th Cir. 1983).

Police have the "reasonable suspicion" required to lawfully detain a person when the person demonstrates "drug courier profile" characteristics and has a criminal record.

A narcotics agent questioned the defendant in the Atlanta airport. He notified agents in Tulsa, the defendant's destination, of his suspicions that the defendant was carrying illicit drugs. The agent also informed the Tulsa agents that the defendant had a criminal record which included arrests for sale and possession of narcotics, grand larceny, and aggravated assault. A federal narcotics agent and two police officers met the defendant in Tulsa. They asked to search the defendant's suitcase, but he refused. The police detained the defendant and summoned a dog trained to detect contraband. The dog arrived within two minutes and detected drugs in the suitcase. At trial the defendant moved to suppress the drugs. He claimed that his detention prior to the dog's arrival was a "seizure," but that "there were no articulable, objective observations of his behavior that gave the police a reasonable suspicion that he had committed a crime." 703 F.2d at 1216. Thus, the defendant argued that his unlawful detention tainted the narcotics seizure.

The Court of Appeals for the Tenth Circuit held that the detention was not unlawful. The court did not decide whether the detention was a seizure under the fourth amendment. The court noted, however, that if the detention had been a seizure, the "drug courier profile" characteristics exhibited by the defendant, combined with his criminal record, established "reasonable suspicion" justifying the seizure.

Smith v. Oklahoma City, 696 F.2d 784 (10th Cir. 1983).

An arrest warrant based on probable cause established solely from hearsay evidence is valid if the hearsay has indicia of reliability.

United States v. Skipworth, 697 F.2d 281 (10th Cir. 1983).

A tape-recorded telephone conversation between the defendant and a Government witness is admissible when the witness voluntarily consents to the recording.

United States v. Lee, 700 F.2d 424 (10th Cir. 1983).

Law enforcement officers may make a warrantless search of an arrestee's motel room, after the rental period has expired, even though the officers had an opportunity to apply for a warrant.

United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983).

In determining whether exigent circumstances existed for a warrantless search, courts must consider the searching officers' ability to obtain a telephone warrant. A warrantless search is justified if time is too critical to obtain a telephone warrant.

United States v. McCranie, 703 F.2d 1213 (10th Cir. 1983).

A narcotics agent's questioning of a defendant constitues a mere police-citizen contact, not a seizure, when the questioning takes place in a public waiting area at an airport, there is no overt display of police authority, neither the defendant's ticket nor his wallet is seized, and the entire encounter takes only a short time.

United States v. McCranie, 703 F.2d 1213 (10th Cir. 1983).

A dog sniff of luggage, which police suspect contains contraband, is neither a search nor a seizure under the fourth amendment.

United States v. Long, 705 F.2d 1259 (10th Cir. 1983).

A police officer may stop and briefly question the occupants of an automobile if he has a reasonable, articulable suspicion that criminal activity may be afoot.

United States v. Jones, 707 F.2d 1169 (10th Cir.), *cert. denied,* 104 S. Ct. 184 (1983).

Law enforcement officers may search an abandoned satchel because an individual who voluntarily abandons a satchel relinquishes any expectation of privacy in it.

United States v. Karo, 710 F.2d 1433 (10th Cir. 1983).

Individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them. The warrantless use of a beeper to monitor the location of noncontraband inside private residences or other protected places is an unconstitutional search or seizure.

United States v. Kerr, 711 F.2d 149 (10th Cir. 1983).

When the authority to authorize applications for wiretaps has been validly delegated to a particular official, it continues so long as that official remains qualified.

United States v. Kerr, 711 F.2d 149 (10th Cir. 1983).

Wiretap information is admissible before a grand jury although the information is related to an offense not authorized by the original Title III wiretap order. No application to amend the original authorization is required.

United States v. Gabriel, 715 F.2d 1447 (10th Cir. 1983).

Evidence discovered as a result of observations made by an agent while looking through a window of a house that he believed was under construction, in order to determine whether anyone lived there, falls within the "plain view" exception to the warrant requirement.

Mason v. United States, 719 F.2d 1485 (10th Cir. 1983).

A search warrant valid on its face may be challenged only on a showing that the affiant included false statements made knowingly or in reckless disregard of the truth. The defendant must be given a hearing if the false statements are necessary to find probable cause.

Mason v. United States, 719 F.2d 1485 (10th Cir. 1983).

In determining probable cause for a search warrant, the relevant determination is whether there was sufficient information for a reasonably cautious person to believe that an offense had been or was being committed, that is, that there was a showing of reasonable probability of criminal activity. A prima facie case is unnecessary.

United States v. Tabor, 722 F.2d 596 (10th Cir. 1983).

A warrantless sweep search is valid if the officer, in light of the surrounding circumstances, has a clear and reasonable suspicion of danger.

Kansas Supreme Court

State v. Deskins, 234 Kan. 529, ____ P.2d ____ (1983).

Police officers may set up a roadblock to investigate drunk driving violations provided the roadblock stops all motorists, is conducted pursuant to an authorized plan, and satisfies a balancing of interests test.

Police officers set up a roadblock ostensibly to check the licenses of passing motorists. The actual purpose of the roadblock was to apprehend drunk drivers. An officer stopped the defendant's car, checked the defendant's license and noticed that he displayed signs of intoxication. The officer subjected the defendant to a sobriety test. The defendant failed the test and was arrested for driving under the influence of alcohol. The defendant claimed that the stop at the roadblock violated the fourth amendment.

The Kansas Supreme Court held that the stop was valid under the fourth amendment despite the absence of probable cause or reasonable suspicion that a violation had been committed. Relying primarily on *Delaware v. Prouse,* 440 U.S. 648 (1979), the court found that the roadblock was conducted properly. The court balanced thirteen factors in determining whether the state's interest in curtailing drunk driving outweighed the motorist's fourth amendment interests. The roadblock satisfied this balancing test primarily by fulfilling the two major requirements for a checkpoint implicit in *Prouse.* First, since all motorists were stopped, the roadblock did not involve the "unbridled discretion" of the police. Second, the roadblock presented only a minimal intrusion to the motorists.

State v. Jones, 233 Kan. 112, 660 P.2d 948 (1983).

While executing a search warrant, police may seize evidence in plain view if all the elements of the "plain view" doctrine are satisfied.

State v. Dunn, 233 Kan. 411, 662 P.2d 1286 (1983).

A search warrant affidavit must provide sufficient facts upon which a magistrate can make an independent determination that probable

cause exists. The affidavit need not set forth the necessary elements of a crime.

State v. Hill, 233 Kan. 648, 664 P.2d 840 (1983).

The court presumes that a search warrant affidavit is valid and factually unchallengeable, unless the affidavit contains materially false statements which are deliberately or recklessly made.

State v. Walter, 234 Kan. 78, ____ P.2d ____ (1983).

When supported by substantial evidence, a trial court's finding that a search warrant affiant's sworn statements were not made in deliberate or reckless disregard of the truth may not be disturbed on review.

State v. Deskins, 234 Kan. 529, ____ P.2d ____ (1983).

Section 15 of the Bill of Rights of the Kansas Constitution is identical in scope to the fourth amendment to the United States Constitution.

State v. Deskins, 234 Kan. 529, ____ P.2d ____ (1983).

Police officers, after arresting the occupant of an automobile, may lawfully make a contemporaneous search of the passenger compartment of the automobile incident to the arrest.

Kansas Court of Appeals

State v. Rose, 8 Kan. App. 2d 659, 665 P.2d 1111 (1983), *petition for review denied* (Sept. 8, 1983).

A search warrant affidavit based upon information provided by an informant should be considered in view of the totality of the circumstances. The issuing judge should make a common sense decision whether a fair probability exists that contraband or evidence of a crime will be found in a particular place.

The defendant was convicted of possession of marijuana with intent to sell. He appealed, claiming that the search warrant affidavit was insufficient. The affidavit contained the name and statement of an informant who had observed contraband in the residence searched. The informant stated that he had previously helped transport truckloads of marijuana to the residence and described in detail criminal conduct that had occurred in the residence on two other occasions. The police verified that the criminal conduct had occurred at the time and in the manner described by the informant. The defendant argued that the affidavit did not adequately show the reliability of the informant or of the informant's information as required by *Spinelli v. United States,* 393 U.S. 410 (1969) and *Aguilar v. Texas,* 378 U.S. 108 (1964).

The Kansas Court of Appeals found the affidavit sufficient under the test announced by the United States Supreme Court in *Illinois v. Gates,* 103 S. Ct. 2317 (1983). The court stated it would no longer

follow prior Kansas decisions that applied the "two-pronged" *Aguilar-Spinelli* test and are inconsistent with *Gates*. Under the *Gates* test, the court found that the totality of the circumstances set forth in the affidavit demonstrated a fair probability that contraband or evidence of a crime would be found in the place to be searched.

State v. Mitchell, 8 Kan. App. 2d 416, 658 P.2d 1063 (1983).

To support a finding of probable cause, an affidavit for a search warrant to search the defendant's premises for narcotics must contain more information than that drugs were purchased from the defendant on two occasions.

State v. Hayes, 8 Kan. App. 2d 531, 660 P.2d 1387 (1983).

A police officer may legally seize evidence in plain view if he is lawfully present when he sees it.

State v. Maley, 8 Kan. App. 2d 553, 662 P.2d 269 (1983).

An application and supporting affidavit to amend an eavesdropping order may incorporate the original application, affidavit, and order without rendering the amendment invalid.

State v. Jacob, 8 Kan. App. 2d 729, 667 P.2d 397 (1983).

A search warrant affidavit which states that a KBI agent had personally viewed four marijuana plants growing in an open field, what appeared to be several marijuana stalks trampled by human feet, several sets of footprints near the field, and that the agent had heard voices near the field, is insufficient to support a finding of probable cause.

B. Interrogation Procedures

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

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

---

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

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

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

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

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

The fifth amendment privilege against self-incrimination applies to all police custodial interrogations.[25] To mitigate the coercive influences inherent in custodial interrogations, police are required to advise the defendant of the "*Miranda* warnings" prior to such interrogations.[26] Subsequent to these warnings, if interrogation continues without an attorney present and a statement is taken, the Government has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his rights.[27] The defendant may exercise his rights immediately or at any time during the interrogation.[28] These warnings do not apply to general on-the-scene questioning or to volunteered statements.[29]

The sixth amendment right to counsel applies to any police interrogation initiated after adversarial judicial proceedings have commenced.[30] Interrogation occurs when police deliberately elicit incriminating statements from the defendant in the absence of his attorney.[31]

United States Supreme Court

Oregon v. Bradshaw, 103 S. Ct. 2830 (1983).

When in the custody of law enforcement officers an accused asserts his fifth amendment right to counsel, but later volunteers an inculpatory statement, a determination of the admissibility of the statement involves a two-step analysis: (1) whether the accused initiated conversation with the officers, and (2) whether the accused knowingly and intelligently waived his previously asserted right to an attorney.

Police officers, investigating the death of a youth whose body was found in his wrecked pickup truck, asked the defendant to submit to questioning at the police station. The defendant, after being advised of his *Miranda* rights, told investigators that he had provided the deceased with liquor on the night of the accident. Following his arrest for furnishing liquor to a minor, the defendant asserted his right to remain silent and his right to counsel. Questioning stopped immediately. Sometime later the defendant asked a police officer, "Well, what is going to happen to me now?" The officer clearly explained to the defendant that he was under no obligation to speak. Despite this admonition, a conversation between the defendant and the officer ensued. The officer described the charges and custody procedures to the defendant and suggested the defendant take a polygraph test.

---

[25] Miranda v. Arizona, 384 U.S. 436, 460-61, 467 (1966).
[26] *Id.* at 444, 467-73.
[27] *Id.* at 475.
[28] *Id.* at 473-74.
[29] *Id.* at 477-78.
[30] Brewer v. Williams, 430 U.S. 387, 398-99 (1977).
[31] Massiah v. United States, 377 U.S. 201, 206 (1964).

The next day the defendant failed a polygraph examination. The test was administered after police had provided a second set of *Miranda* warnings and the defendant has signed a written waiver of his rights. After learning of the test results, the defendant confessed to having been at the wheel of the pickup truck at the time of the wreck and to having passed out from intoxication moments before the truck left the road.

In a plurality decision, the United States Supreme Court held that when an accused offers an inculpatory statement after asserting his right to counsel, an inquiry into the admissibility of the statement involves a two-step analysis. First, the statement must be made after the accused has "initiated" conversation with police within the meaning of *Edwards v. Arizona,* 451 U.S. 477 (1981). Thus, the accused must volunteer conversation generally related to the investigation or show a willingness to participate in a general discussion about the investigation. The conversation must involve more than statements or inquiries about routine incidents of custody, but the accused need not volunteer dialogue referring to the subject matter of the criminal investigation. Second, the prosecution must demonstrate that the accused knowingly and intelligently waived his previously asserted right to counsel. A finding of waiver must include a determination that the accused, not the police, initiated the dialogue. The Court emphasized that initiation and waiver must be analyzed separately; "clarity of application is not gained by melding them together." 103 S. Ct. at 2835. Applying the two-step analysis the Court found that the defendant initiated conversation with the police when he asked the officer, "Well, what is going to happen to me now?" Completing the analysis, the Court determined that the defendant's waiver of his previously asserted rights was valid.

California v. Beheler, 103 S. Ct. 3517 (1983).

In determining when a person is "in custody" for *Miranda* purposes, the ultimate inquiry is simply whether the suspect has been subjected to a formal arrest or to equivalent restraints on his freedom of movement.

Court of Appeals for the Tenth Circuit

United States v. Scalf, 708 F.2d 1540 (10th Cir. 1983).

Knowledge of an accused's request for counsel made during a custodial interrogation is imputed to all law enforcement officers who subsequently speak with the suspect.

After the defendant's arrest for bank robbery, the arresting officers advised him of his *Miranda* rights. He asserted his fifth amendment right to counsel. Federal agents who were unaware of the request for counsel interrogated the defendant. The defendant confessed to the agents after signing a waiver of his *Miranda* rights. The defendant's

motion to suppress his confession was denied, and he was convicted one month before the United States Supreme Court decided *Edwards v. Arizona,* 451 U.S. 477 (1981).

The Court of Appeals for the Tenth Circuit ruled that *Edwards,* since it did not announce a new rule of law but merely clarified principles announced by the Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), applies retroactively. Under *Edwards,* when an accused asserts his fifth amendment right to counsel he cannot lawfully be interrogated until his attorney is present, unless he initiates a conversation about the investigation.

The Tenth Circuit further held that knowledge of a defendant's request for an attorney is imputed to all law enforcement officers who subsequently speak with the accused. To hold otherwise would create a good faith exception to the exclusionary rule, which the court declined to do absent direction from the Supreme Court.

United States v. Franklin, 704 F.2d 1183 (10th Cir.), *cert. denied,* 104 S. Ct. 146 (1983).

Assuming *arguendo* that adversarial judicial proceedings have begun, the Government does not violate a defendant's sixth amendment right to counsel when it obtains incriminating statements by tapping the phone of a consenting, passive listener.

United States v. Kaatz, 705 F.2d 1237 (10th Cir. 1983).

Evidence obtained during an Internal Revenue Service civil audit is admissible in subsequent criminal proceedings even though the agent who conducted the audit did not warn the taxpayer that a criminal investigation might ensue.

Kansas Supreme Court

State v. Garcia, 233 Kan. 589, 664 P.2d 1343 (1983).

Law enforcement officers may lawfully ask an accused "routine police booking questions" after the accused has invoked his fifth amendment right to counsel if the questions are not designed to elicit an incriminating response.

The defendant was arrested on charges of aggravated battery and first degree murder. After he was advised of his *Miranda* rights, the defendant told the police that he wanted to speak to an attorney. Questioning immediately stopped. Several hours later a detective asked the defendant for information necessary to complete a personal history form. The information included the defendant's name, address, physical description, description of his car, names and addresses of relatives, prior arrests, and the name of his parole officer. The questioning lasted five minutes. At his trial the defendant asserted the insanity defense. To rebut the insanity defense, the detective who questioned him testified about the defendant's speech and demeanor during the personal history questioning. The defen-

dant was convicted on all counts. He appealed, claiming the information concerning his speech and demeanor was unlawfully obtained during the custodial interrogation conducted after he had asserted his fifth amendment right to counsel.

The Kansas Supreme Court held that the routine questioning was not a custodial interrogation under *Miranda v. Arizona,* 384 U.S. 436 (1966). The court defined "interrogation" as "express questioning or its functional equivalent in the form of 'any words or actions on the part of the police . . . that the police should know are likely to elicit an incriminating response from the suspect.'" 233 Kan. at 603, 664 P.2d at 1354 (quoting *Rhode Island v. Innis,* 446 U.S. 291, 300 (1980)). The court concluded that the detective's questions were designed to obtain routine background information rather than to elicit an incriminating response. It emphasized that the questioning was brief, and that it was not conducted in order to view the defendant's speech and demeanor.

State v. Roadenbaugh, 234 Kan. 474, ____ P.2d ____ (1983).

A police officer, for his own protection, may inquire about the location of a suspect's weapon before giving *Miranda* warnings.

The defendant was a homicide suspect. The police dispatcher broadcast the defendant's name, description, and that he might be armed and carrying a suitcase. That same day, an officer saw a man who matched this description carrying a suitcase. The officer stopped the man, the defendant, and asked him his name. After the defendant responded, the officer ordered him to put the suitcase down and place his hands against a building. While patting down the defendant, the officer asked him where his weapon was. The defendant pointed to the suitcase and then told the officer the weapon was in the suitcase. The defendant claimed that, because he had not received *Miranda* warnings, the admission of his gesture and verbal statement violated his fifth amendment privilege against self-incrimination.

The Kansas Supreme Court held that police officers, for personal safety reasons, are permitted to ask for the location of weapons before giving a suspect *Miranda* warnings. Citing *Terry v. Ohio,* 392 U.S. 1 (1968), the court stated that police officers may physically search a suspect for weapons without giving *Miranda* warnings. The court reasoned that asking a suspect the location of a weapon is less intrusive than physically searching him. The officer, therefore, had not violated the defendant's fifth amendment rights.

State v. Miles, 233 Kan. 286, 662 P.2d 1227 (1983).

The defendant's failure to request a *Jackson v. Denno* hearing or to timely object at trial to the admission of his confession on the ground that it was made involuntarily waives his right to raise that issue for the first time on appeal, unless the opportunity to object did not exist before the appeal.

State v. Price, 233 Kan. 706, 664 P.2d 869 (1983).

General on-the-scene questioning about facts surrounding the cause of an accident or other general fact-finding questioning of citizens is not custodial interrogation and, thus, does not require *Miranda* warnings.

State v. Taylor, 234 Kan. 401, ____ P.2d ____ (1983).

Questioning to locate a missing person is investigatory interrogation to which *Miranda* does not apply.

Kansas Court of Appeals

State v. Goering, 8 Kan. App. 2d 338, 656 P.2d 790 (1983), *petition for review denied* (April 8, 1983).

When an investigation is focused on a defendant at the time interrogation begins, any inculpatory statement made by the defendant before *Miranda* warnings are given, if there is not a knowing and voluntary waiver, is not admissible at trial as evidence of guilt.

State v. Mzhickteno, 8 Kan. App. 2d 389, 658 P.2d 1052 (1983).

If a police officer may be disciplined for refusing to answer questions during an in-house, administrative investigation of his suspected criminal conduct, any statements made are involuntary and, thus, inadmissible in a subsequent judicial proceeding.

C. Identification Procedures

Two constitutional safeguards apply to identification procedures. They are the fifth amendment due process clause[32] and the sixth amendment right to counsel.[33]

Fifth amendment due process applies to all identification procedures and requires that identifications be reliable.[34] To determine the reliabilty of identifications, a totality of the circumstances test incorporating five factors is used.[35]

The sixth amendment right to counsel applies to corporeal identification procedures conducted after the initiation of adversarial judicial proceedings.[36] Thus, an attorney's presence is not required at

---

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

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

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

[35] *Id.*

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

identification procedures that do not require the defendant's presence[37] or that occur prior to indictment or other formal charges.[38]

Court of Appeals for the Tenth Circuit

United States v. Lee, 700 F.2d 424 (10th Cir. 1983).

Photo arrays containing mug shots of other persons and a single, front-view photograph of the defendant are not impermissibly suggestive and do not taint a witness' subsequent in-court identification.

Kansas Supreme Court

State v. Shepherd, 232 Kan. 614, 657 P.2d 1112 (1983).

The court should caution the jury about the credibility of an eyewitness identification when it is critical to the State's case and there is a serious question of its reliability.

State v. Mitchell, 234 Kan. 185, ____ P.2d ____ (1983).

An in-court identification can stand on its own, despite a deficient pretrial identification, if it is based upon a witness' observation at the time of the crime.

State v. Maxwell, 234 Kan. 393, ____ P.2d ____ (1983).

A lineup containing only four individuals is not fundamentally unfair per se and does not violate due process.

State v. Coy, 234 Kan. 414, ____ P.2d ____ (1983).

A pretrial voice identification of a defendant is admissible at trial, unless the totality of the circumstances indicates that the voice identification was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

D. Exclusionary Rule

The exclusionary rule is a judicially-created remedy which prohibits the use of evidence obtained by the police through means which violate the defendant's fourth, fifth, or sixth amendment rights.[39] The purpose of the rule is to deter illegal police conduct and to maintain judicial integrity.[40]

Limitations on the exclusionary rule prevent its strict application. These limitations apply to situations in which the cost to society of

---

[37] United States v. Ash, 413 U.S. 300, 317-21 (1973).
[38] Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion).
[39] *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961).
[40] *Id.* at 656, 659 (1961).

losing probative evidence outweighs the deterrent effect of the rule. Under this balancing test, the exclusionary rule has been held inapplicable to the following situations: grand jury proceedings,[41] civil proceedings,[42] and impeachment at trial.[43]

Under the "fruit of the poisonous tree" doctrine, the exclusionary rule excludes not only illegally obtained evidence, but also all evidence obtained or derived from exploitation of the original illegality.[44] The test employed under this doctrine is whether the evidence was obtained by exploitation of the primary illegality or by means sufficiently attenuated to purge the primary taint.[45] Unless sufficiently attenuated, the evidence will be excluded.[46] The "fruit of the poisonous tree" doctrine is applied in a variety of situations.[47]

A defendant must have "standing" to challenge constitutional violations and thereby benefit from the exclusionary rule.[48] The focus in "standing" inquiries is whether the defendant suffered an actual violation of his own fourth amendment rights.[49] To assert the exclusionary rule, the defendant must have had a legitimate expectation of privacy in the area searched.[50]

Court of Appeals for the Tenth Circuit

United States v. Scalf, 708 F.2d 1540 (10th Cir. 1983).

A search warrant affidavit containing statements unlawfully elicited from an accused need not be invalidated under the "fruit of the poisonous tree" doctrine if lawfully obtained information in the affidavit establishes probable cause for the search.

Kansas Supreme Court

State v. Knapp, 234 Kan. 170, ____ P.2d ____ (1983).

Statements and other evidence obtained from a defendant subsequent to an unlawful arrest need not be suppressed as "fruit of the poisonous tree" when the evidence was obtained with the voluntary cooperation of the defendant, and the law enforcement officers acted in good faith.

---

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

The defendant's ex-wife and her neighbor were murdered in Winfield, Kansas. Police suspected the defendant, then a sergeant in the Army, of involvement in the crimes. The police notified military authorities at Ft. Huachuca, Arizona, the defendant's duty station, of their suspicion. Military authorities located the defendant and took him to the military police station. KBI agents asked the military police to make the defendant available for questioning the next day. After checking with a military attorney, the military police agreed to detain the defendant overnight. The KBI agents arrived the next day to question the defendant. The agents twice advised the defendant of his *Miranda* rights, and after signing a waiver of rights form from which he excised a provision agreeing to answer questions, the defendant provided the agents with a written statement. He also gave the agents oral and written permission to search his barracks room and automobile. When the agents pointed out gaps in his written statement, the defendant agreed to discuss them, but insisted the discussion proceed immediately. The defendant also agreed to submit hair and fingerprint samples if taken immediately, and assisted the agents in their efforts to obtain the samples. At all times the defendant maintained his innocence. The defendant was convicted. He appealed, claiming that his detention was illegal and that the evidence subsequently obtained was inadmissible "fruit of the poisonous tree."

The Kansas Supreme Court upheld the admission of the evidence. The court, citing *Wong Sun v. United States,* 371 U.S. 471 (1963), noted that evidence obtained as a result of an illegal arrest is admissible if it is obtained under circumstances sufficiently attenuated from the illegal arrest. To determine whether the circumstances were sufficiently attenuated, the court considered the following factors set forth in *Brown v. Illinois,* 422 U.S 590 (1975): the giving of *Miranda* warnings prior to obtaining the evidence; the time between the arrest and the procurement of evidence; any intervening circumstances; and the flagrancy of any police misconduct. Applying the *Brown* test to the facts of this case, the court found that the evidence was admissible. First, the KBI agents had no part in the illegal arrest. Second, the military police acted in the good faith belief that their detention was proper. Third, the defendant voluntarily cooperated with the agents and dictated the terms of his statements, interrogation, and searches. Finally, the defendant was fully advised of his rights and understood them.

State v. Worrell, 233 Kan. 968, 666 P.2d 703 (1983).

A defendant lacks standing to challenge an illegal search, unless he has a legitimate expectation of privacy in the area searched.

II. PRETRIAL PROCEEDINGS

A. Prosecutorial Discretion

The separation of powers doctrine generally prevents courts from interfering with the prosecution's broad discretion in criminal cases.[51] Courts are responsible, however, for protecting individuals from abuses of prosecutorial discretion that violate constitutional rights. These abuses usually involve either prosecutorial vindictiveness, which violates due process,[52] or selective prosecution, which is a denial of equal protection.[53]

Kansas Supreme Court

State v. Compton, 233 Kan. 690, 664 P.2d 1370 (1983).

The statutory prohibition of plea bargaining in driving under the influence cases does not violate the separation of powers doctrine and, therefore, is constitutional.

B. Grand Jury

The fifth amendment guarantees all persons accused of a federal felony the right to a grand jury indictment.[54] This right does not apply to state prosecutions.[55] The purpose of a grand jury is to decide whether criminal proceedings should be instituted.[56]

Grand juries are summoned and regulated by the district court.[57] The prosecution supervises and conducts grand jury proceedings.[58] A grand jury may subpoena witnesses for questioning and require them to bring documents. [59] A witness who refuses to comply with a grand jury subpoena may be held in contempt and imprisoned until the end

---

[51] *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

[52] Blackledge v. Perry, 417 U.S. 21, 28-29 (1974).

[53] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

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

[55] Hurtado v. California, 110 U.S. 516, 538 (1884).

[56] Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).

[57] FED. R. CRIM. P. 6(a).

[58] *See generally* FED. R. CRIM. P. 6(d), (e), and 7(c)(1).

[59] Kastigar v. United States, 406 U.S. 441, 443 (1972); *see also* FED. R. CRIM. P. 17.

of the grand jury term.[60] Although a grand jury witness may invoke the fifth amendment privilege against self-incrimination,[61] the privilege is removed if the witness is granted use immunity.[62]

The rules of evidence do not apply to grand jury proceedings.[63] An indictment may be based on inadmissible evidence.[64]

United States Supreme Court

United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983).

Justice Department civil attorneys do not have automatic access to evidence gathered by a grand jury, but must demonstrate a "particularized need" to obtain the evidence.

A grand jury indicted two corporate officials on two counts of conspiracy and nine counts of tax fraud. The officials pleaded guilty to one count of conspiracy in exchange for the Government's dismissal of the remaining charges. The Government then moved for disclosure of all the grand jury materials to attorneys and their staff in the Justice Department's Civil Division. The Civil Division wanted the information to pursue a civil suit against the officials under the False Claims Act. The Division believed it was automatically entitled to the materials under Federal Rule of Criminal Procedure 6(e)(3)(A)(i), which permits disclosure of grand jury materials without a court order to an "attorney for the government for use in the performance of such attorney's duty."

The United States Supreme Court, examining the historic treatment of grand jury proceedings, the legislative history of the rule, and the interests in grand jury secrecy, rejected the Government's automatic disclosure argument. Emphasizing the secrecy traditionally surrounding grand jury proceedings, the Court found nothing in the legislative history of the rule to suggest that Congress intended to deviate from that tradition. Instead, the Court noted the legislative history reveals automatic disclosure is available only to the Justice Department's criminal attorneys working with the grand jury. The Court also expressed concern that allowing automatic disclosure would promote the use of grand juries for civil discovery.

United States v. Baggot, 103 S. Ct. 3164 (1983).

An Internal Revenue Service tax investigation is not "[preliminary] to or in connection with" a judicial proceeding, and therefore parties may not obtain disclosure of grand jury materials under Federal Rule of Criminal Procedure 6(e)(3)(C)(i).

---

[60] 18 U.S.C. § 401; 28 U.S.C. § 1826(a).
[61] United States v. Mandujano, 425 U.S. 564, 572 (1976).
[62] 18 U.S.C. § 6002.
[63] Costello v. United States, 350 U.S. 359, 363-64 (1956).
[64] United States v. Calandra, 414 U.S. 338, 351-52 (1974).

The defendant was the target of a special federal grand jury investigating possible commodities futures violations. The defendant was never indicted, but he pleaded guilty to two misdemeanor counts of violating the Commodity Exchange Act. The violations concerned a scheme to create sham losses and to generate kickbacks of unreported income. The Internal Revenue Service sought disclosure of the grand jury materials for use in an audit to determine the defendant's civil tax liability.

The United States Supreme Court focused on the actual purpose to be made of the grand jury materials. The Court concluded that unless the primary purpose of disclosure is to prepare for litigation, the disclosure is not "[preliminary] to or in connection with" a judicial proceeding and, therefore, is barred by Federal Rule of Criminal Procedure 6(e)(3)(C)(i). The mere fact that litigation may arise from the matter in which the material is to be used does not make the use preliminary to a judicial proceeding. Substantial justification must be shown to warrant a break of grand jury secrecy; not every valid government purpose will supply such justification. In the instant case, the Court recognized that the Internal Revenue Service need not resort to litigation to determine or enforce payment of a tax liability. The government's audit, therefore, was not conducted to prepare for a judicial proceeding. Thus, the Court denied disclosure of the grand jury materials.

Illinois v. Abbott & Assocs., Inc., 103 S. Ct. 1356 (1983).

A state attorney general must demonstrate a "particularized need" before disclosure of federal grand jury materials and transcripts may be obtained.

Court of Appeals for the Tenth Circuit

In the Matter of Grand Jury Subpoena Duces Tecum, 697 F.2d 277 (10th Cir. 1983).

An FBI agent's sworn testimony is sufficient to make the necessary showing that material subpoened by a grand jury is relevant to the grand jury's investigation.

In re Grand Jury Subpoena to First National Bank, Englewood, Colorado, 701 F.2d 115 (10th Cir. 1983).

Absent a showing of compelling need by the Government, disclosure of documents may not be obtained by a grand jury when the disclosure is likely to chill the first amendment right to association.

Nigro v. United States, 705 F.2d 1224 (10th Cir. 1983).

Grand jury secrecy of immunized testimony is an adequate safeguard against the threat of foreign prosecution. Therefore, any refusal to testify by an immunized witness may be punishable by a contempt citation.

Snelling v. United States, 719 F.2d 1067 (10th Cir. 1983).

The testimony of a grand jury witness, who was granted immunity pursuant to the Organized Crime Control Act, could be compelled over a privilege against self-incrimination claim, since immunity granted by the Act is coextensive with such privilege.

In re Grand Jury Proceedings, Vargas, 723 F.2d 1461 (10th Cir. 1983).

A grand jury may properly subpoena an attorney's records or work product, notwithstanding the attorney-client privilege, upon a prima facie showing that the attorney has engaged in a crime or fraud.

C. Indictments

The fifth amendment requires that federal felony prosecutions be initiated by a grand jury indictment.[65] In noncapital cases, the defendant may waive the indictment and elect to be charged by an information.[66]

An indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.[67] It only needs, however, to set forth those facts, circumstances, and elements necessary to charge an offense; to sufficiently inform the accused so he is able to prepare a defense; and to safeguard the accused from double jeopardy.[68] Joinder and severance issues may arise when there are multiple offenses or multiple defendants.[69]

Court of Appeals for the Tenth Circuit

United States v. Huff, 699 F.2d 1027 (10th Cir.), *cert. denied,* 103 S. Ct. 2107, 2127 (1983).

A conviction will not be reversed for failure to sever the trials of multiple defendants, unless the defendants meet their heavy burden of showing that prejudice resulted from the joinder of their trials.

United States v. Gabriel, 715 F.2d 1447 (10th Cir. 1983).

A district court does not abuse its discretion by denying a motion for a bill of particulars when the prosecution has fully disclosed all the documentary and physical evidence it intends to produce at trial and has also disclosed the alternative nature of the Government's case.

---

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

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

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

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

[69] FED. R. CRIM. P. 13 and 14.

United States v. Hopkins, 716 F.2d 739 (10th Cir. 1983).

In determining the sufficiency of an indictment, the indictment as a whole must be considered. An indictment is sufficient if it (1) contains the elements of the offense and apprises the defendant of what he must be prepared to meet at trial; and (2) is sufficiently specific so that the defendant can, if appropriate, raise a double jeopardy claim. If the indictment is sufficient, but further specificity is desired, the remedy is to apply for a bill of particulars.

United States v. Boston, 718 F.2d 1511 (10th Cir. 1983).

An indictment must inform the accused of the nature of the crime charged and its basis so that he may prepare his defense. The indictment must protect the accused against prosecution for the same offense.

Mason v. United States, 719 F.2d 1485 (10th Cir. 1983).

Absent a showing of prejudice, a trial court does not abuse its discretion by failing to grant the defendant's motion for severance of a joint trial, despite the defendant's claim that the codefendant will offer an antagonistic defense.

United States v. Janoe, 720 F.2d 1156 (10th Cir. 1983).

An indictment is sufficient if it contains the elements of the offense charged and fairly informs the defendant of the charge against him, and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

United States v. Janoe, 720 F.2d 1156 (10th Cir. 1983).

An indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form.

United States v. Salazar, 720 F.2d 1482 (10th Cir. 1983).

An indictment is sufficient if (1) it contains the elements of the offense charged and adequately apprises the defendant of what he must defend against; and (2) it shows to what extent he may plead a former acquittal or conviction as a bar to further prosecution for the same offense.

United States v. Burrell, 720 F.2d 1488 (10th Cir. 1983).

A severance is within the sound discretion of the trial court, and the court's decision will not be disturbed on appeal absent an abuse of discretion.

Kansas Supreme Court

State v. Hutton, 232 Kan. 545, 657 P.2d 567 (1983).

The crucial point to consider when there are discrepancies in the time of an offense charged in a complaint, information, or indictment is whether the defendant was prejudiced or misled in making his defense.

State v. Nott, 234 Kan. 34, ____ P.2d ____ (1983).

When two defendants are jointly tried, each defendant has a separate, absolute right not to be called as a witness, and defendants cannot call each other as witnesses absent a waiver of this right. If a defendant desires to call a codefendant as a witness, but the codefendant refuses to waive his right not to be called as a witness, the defendant's only remedy is to seek a severance.

State v. Hobson, 234 Kan. 133, ____ P.2d ____ (1983).

The Kansas inquisition statute, section 22-3101 of the Kansas Statutes, contains no language expressly limiting the time when inquisition proceedings may be used by a prosecutor. An inquisition can be held after an accused has been bound over for trial following a preliminary examination.

State v. Chatmon, 234 Kan. 197, ____ P.2d ____ (1983).

A conviction on a charge not made in the information or not properly brought before the court is a clear denial of due process under the fourteenth amendment.

State v. Pondexter, 234 Kan. 208, ____ P.2d ____ (1983).

When criminal conduct resulting in a second charge is precipitated by a previous charge, the two are sufficiently connected to be consolidated for trial.

State v. Martin, 234 Kan. 548, ____ P.2d ____ (1983).

Whether to grant a severance pursuant to section 22-3204 of the Kansas Statutes is a decision left to the sound discretion of the trial court.

State v. Martin, 234 Kan. 548, ____ P.2d ____ (1983).

Grounds for severance are present when antagonistic defenses among codefendants are irreconcilable and mutually exclusive.

D. Initial Appearance and Bail

Persons arrested either pursuant to a complaint warrant or without a warrant are brought before the nearest available magistrate for an initial appearance.[70] If the arrest is made without a warrant, the Government must promptly file a complaint with the magistrate.[71] At the initial appearance the magistrate makes a probable cause review of the complaint.[72]

The magistrate informs the arrestee of the complaint against him, his "*Miranda* rights," the circumstances of his pretrial release, and his

---

[70] FED. R. CRIM. P. 5(a); K.S.A. § 22-2901(1).

[71] *Id.*

[72] This probable cause determination is implicit in Rule 5. Jaben v. United States, 381 U.S. 214, 220 (1964).

right to a preliminary examination.[73] A preliminary examination is scheduled and bail is set.[74]

The purpose of bail is to assure the defendant's presence at the trial or other criminal proceeding.[75] Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" and violates the eighth amendment.[76] The criteria for bail are primarily set by statute.[77]

United States Supreme Court

McGee v. Alaska, 104 S. Ct. 16 (1983).

Federal courts should not grant bail to a state prisoner seeking federal habeas corpus review merely because the state does not object to bail. Requests to the Supreme Court for bail pending disposition of a petition for certiorari are granted only in extraordinary circumstances.

Court of Appeals for the Tenth Circuit

Meechaicum v. Fountain, 696 F.2d 790 (10th Cir. 1983).

A defendant jailed for criminal charges in one state cannot constitutionally be denied bail solely because he faces another state's extradition proceedings.

E. Preliminary Examination

A preliminary examination is an adversarial hearing before a magistrate to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it.[78] If probable cause is found, the defendant is held to answer in the district court.[79] If not, the complaint is dismissed and the defendant is discharged.[80]

The preliminary examination is scheduled at the initial appearance.[81] It must be held within a specified period of time.[82] A

---

[73] FED R. CRIM. P. 5(c); *see also* K.S.A. § 22-2901.
[74] *Id.*
[75] Stack v. Boyle, 342 U.S. 1, 5 (1951).
[76] *Id.* (The eighth amendment provides: "Excessive bail shall not be required. . . ." U.S. CONST. amend. VIII).
[77] 18 U.S.C. §§ 3141-3154; K.S.A. §§ 22-2801 to -2817.
[78] FED. R. CRIM. P. 5.1(a); K.S.A. § 22-2902(3).
[79] *Id.*
[80] FED. R. CRIM. P. 5.1(b); K.S.A. § 22-2902(3).
[81] FED. R. CRIM. P. 5(c); *see generally* K.S.A. § 22-2901.
[82] *Id.*

preliminary examination is not held if the defendant waives it or is indicted.[83]

As a prerequisite to extended post-arrest detention, the fourth amendment requires a probable cause determination by a judicial officer either before or promptly after arrest.[84] Preliminary examinations, however, are not constitutionally mandated.[85] The fourth amendment requirement may be satisfied by various procedures.[86]

Kansas Supreme Court

State v. Sherry, 233 Kan. 920, 667 P.2d 367 (1983).

Hearsay evidence in the form of a forensic examiner's report is constitutionally admissible to establish probable cause at a preliminary examination, as authorized by section 22-2902a of the Kansas Statutes.

The defendant was charged with possession of marijuana and cocaine. At a preliminary examination the State introduced the results of laboratory tests on the drugs. The forensic examiners who performed the tests did not appear. The results of the tests were offered as evidence pursuant to § 22-2902a, which allows a forensic examiner's report to be admitted into evidence at a preliminary examination without requiring the presence of the examiner. The trial court found the statute unconstitutional primarily because it denied the accused the opportunity to cross-examine the forensic examiner. The court sustained the defendant's motion to dismiss.

The Kansas Supreme Court reversed. The court noted that the purpose of a preliminary examination is merely to determine whether there is probable cause to believe both that a crime was committed, and that the crime was committed by the accused. The preliminary examination informs the accused of the nature of the crime charged, and the sort of evidence he will be required to meet at trial. The accused, however, has no constitutional right to confront witnesses at a preliminary examination. The court reasoned that if the accused desired to question the forensic examiners, he could have subpoenaed them. Citing *Gerstein v. Pugh,* 420 U.S. 103 (1975), the court recognized that the Constitution does not forbid states from authorizing the use of hearsay evidence at preliminary examinations.

The court, refuting the trial court's other grounds for declaring §22-2902a unconstitutional, held that the statute did not violate the sixth amendment right to counsel or the fourteenth amendment's due process and equal protection clauses. Regarding the sixth amendment right to counsel, the court noted that a defense attorney could

---

[83] FED. R. CRIM. P. 5(c); K.S.A. § 22-2902(4).
[84] Gerstein v. Pugh, 420 U.S. 103, 114, 125 (1975).
[85] *Id.* at 120-23.
[86] *Id.* at 123-25.

subpoena a forensic examiner to question him. Thus, the statute did not deny counsel the opportunity to effectively represent the accused at the preliminary examination or at the trial.

State v. Hunter, 232 Kan. 853, 658 P.2d 1050 (1983).

A magistrate's purpose in conducting a preliminary examination is limited to determining whether it appears that a felony has been committed and whether there is probable cause to believe that the defendant committed it.

State v. Jones, 233 Kan. 170, 660 P.2d 965 (1983).

In a preliminary examination, the proper test for determining if a defendant should be bound over for trial is whether there is sufficient evidence to support probable cause that a crime was committed and that the defendant committed it.

State v. Jones, 233 Kan. 170, 660 P.2d 965 (1983).

When the evidence at a preliminary hearing tends to show that the offense charged was committed and that the defendant committed it, the magistrate should bind the defendant over for trial even if the evidence conflicts or raises a reasonable doubt about the defendant's guilt.

State v. Lashley, 233 Kan. 620, 664 P.2d 1358 (1983).

The sufficiency of a preliminary examination may be challenged only by a motion to dismiss. A magistrate's order binding a defendant over for arraignment is not a final judgment from which a defendant may appeal.

F. Arraignment[87]

Arraignments are held in open court. The defendant is informed of the charges against him and is called upon to plead.[88]

G. Guilty Pleas

Due process requires that guilty pleas be voluntarily and understandingly made.[89] Essentially, the defendant must be informed by the court of all the critical elements of the charge, and the court must question the defendant to determine his understanding of the nature and consequences of the guilty plea.[90]

---

[87] No significant arraignment cases were decided in 1983.
[88] FED. R. CRIM. P. 10; K.S.A. § 22-3205.
[89] Boykin v. Alabama, 395 U.S. 238, 242 (1969).
[90] FED. R. CRIM. P. 11(c) and 11(d); K.S.A. § 22-3210(3).

A guilty plea is equivalent to a conviction and is an admission of all the elements of the crime charged.[91] A defendant waives several constitutional rights by pleading guilty.[92] Furthermore, a guilty plea forecloses appellate review of nonjurisdictional constitutional claims occurring before the plea.[93] Subsequent to the guilty plea, however, the defendant may appeal claims that relate to the Government's power to prosecute.[94]

United States Supreme Court

Haring v. Prosise, 103 S. Ct. 2368 (1983).

If an alleged fourth amendment violation is not litigated in a state criminal proceeding, a guilty plea will not preclude a subsequent federal civil suit based on that violation.

Police officers arrested the defendant for a controlled substance violation. The officers made a brief search of the defendant's apartment and later searched the entire apartment pursuant to a search warrant. The defendant pleaded guilty without challenging the search. While in prison, he filed a *pro se* action under 42 U.S.C. §1983 against the police officers who had participated in the search. The complaint alleged that the officers' search had been unlawful.

The United States Supreme Court examined whether the principle of collateral estoppel applies to a conviction based on a guilty plea. The Court concluded that collateral estoppel precludes the relitigation of only those issues that were actually litigated and decided in the first action, and which were necessary to support the judgment rendered in that action. In this case no fourth amendment issue was actually litigated under state law, and determination of the fourth amendment claim was not necessary to support the criminal conviction. Therefore, the defendant was not barred from litigating the validity of the search under § 1983.

Court of Appeals for the Tenth Circuit

United States v. Baez, 703 F.2d 453 (10th Cir. 1983).

The trial court's reference during *voir dire* to a codefendant's guilty plea is plain error that requires reversal, unless an instruction is given to inform the jury that it can consider the codefendant's guilty plea only as evidence relating to credibility.

---

[91] McCarthy v. United States, 394 U.S. 459, 466 (1969).
[92] Boykin v. Alabama, 395 U.S. 238, 243 (1969).
[93] Tollett v. Henderson, 411 U.S. 258, 267 (1973).
[94] Blackledge v. Perry, 417 U.S. 21, 30 (1974).

United States v. Blackner, 721 F.2d 703 (10th Cir. 1983).

A federal prosecutor's failure to notify the court of a plea agreement whereby the Government agreed not to take a position on sentencing in exchange for a guilty plea, violates Federal Rule of Criminal Procedure 11(e)(5), and the defendant may withdraw his plea.

Kansas Supreme Court

State v. Robinson, 233 Kan. 384, 662 P.2d 1275 (1983).

A prosecutor's threat, during plea negotiations, to recommend sentencing under the habitual criminal act if the defendant demands a trial, does not make the defendant's guilty plea involuntary.

State v. Compton, 233 Kan. 690, 664 P.2d 1370 (1983).

Section 8-1567 of the Kansas Statutes validly prohibits plea bargaining for the purpose of permitting a defendant charged with driving under the influence to escape the mandatory penalties.

H. Discovery

Although there is no general constitutional right to discovery in criminal cases,[95] jurisdictions provide for discovery by statutes[96] or rules.[97] Discovery occurs at both the pretrial and trial stages of the criminal process.

Pretrial defense discovery is usually limited to relevant statements made by the defendant, the defendant's prior criminal record, relevant documents and tangible objects, and relevant reports of examinations and tests.[98] Absent a specific showing of materiality to the preparation of the defense, the Government is not required to disclose witness lists.[99] Similarly, a balancing test is employed to determine whether the Government must disclose the identity of informants.[100] The defense also obtains discovery through informal means, including discretionary disclosure by the prosecutor.[101]

The Government is entitled to some pretrial discovery. This discovery is typically limited to certain instances of reciprocal discovery[102] and to notice of alibi[103] and insanity[104] defenses.

---

[95] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

[96] *E.g.,* K.S.A. § 22-3212.

[97] *E.g.,* FED. R. CRIM. P. 16.

[98] FED. R. CRIM. P. 16(a)(1) (A)-(D); K.S.A. § 22-3212(1) and (2).

[99] *See generally id.*

[100] Roviaro v. United States, 353 U.S. 53, 62 (1957).

[101] Other informal means of defense discovery include preliminary examinations, bills of particulars, subpoenas, and depositions.

[102] FED. R. CRIM. P. 16(b); K.S.A. § 22-3212(3).

[103] FED. R. CRIM. P. 12.1; K.S.A. § 22-3218.

[104] FED. R. CRIM. P. 12.2; K.S.A. § 22-3219.

After a Government witness testifies on direct examination at trial, the Government must disclose to the defense any relevant pretrial statements made by the witness.[105] Some jurisdictions have expanded this discovery to defense witnesses other than the defendant.[106]

Due process imposes a duty on prosecutors to disclose exculpatory evidence to the defense.[107] This so-called "Brady material" is generally disclosed pretrial, but the Government also has a continuing duty to disclose such evidence.[108] Unless the nondisclosed evidence is material, and thereby deprives the defendant of a fair trial, there is no constitutional violation.[109] The test for materiality of nondisclosed evidence is based on the existence and form of the defense request and on the type of evidence requested.[110]

Court of Appeals for the Tenth Circuit

United States v. Monaco, 700 F.2d 577 (10th Cir. 1983).

The Government's failure to provide a defendant with a witness' tape-recorded statement after the witness has testified at trial is not reversible error when there is no evidence of governmental misconduct and the defendant can receive a fair trial without the missing evidence.

United States v. Muse, 708 F.2d 513 (10th Cir. 1983).

The Government's failure to produce a confidential informant for a defense interview does not deny the defendant a fair trial when the Government has made reasonable efforts to produce the informant.

United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983).

The Government's failure to disclose a written grant of immunity to a rebuttal witness after the defense counsel has requested such disclosure may be inexcusable, but a new trial is not required, unless the undisclosed grant of immunity is material to the case.

United States v. Burrell, 720 F.2d 1488 (10th Cir. 1983).

Disclosure of the identity of a confidential informant is not required when the informant is not a participant in, or witness to, the crime charged.

Kansas Supreme Court

State v. Shepherd, 232 Kan. 614, 657 P.2d 1112 (1983).

When the prosecution unintentionally withholds evidence which the defendant has not requested, a new trial will be granted only when

---

[105] Jencks v. United States, 353 U.S. 657, 666-69, 672 (1957).
[106] *E.g.*, FED. R. CRIM. P. 26.2. *But see* K.S.A. § 22-3213.
[107] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[108] *See id.*
[109] *Id.*
[110] United States v. Agurs, 427 U.S. 97, 106-14 (1976).

the record establishes that: (1) the prosecution withheld or suppressed the evidence; (2) the evidence was clearly exculpatory; and (3) the exculpatory evidence was so material that withholding it from the jury was clearly prejudicial to the defendant.

I. Motions and Hearings[111]

Defenses, objections, and requests which are capable of determination without a trial of the general issue may be raised pretrial by motion.[112] Certain motions, including motions to suppress evidence, must be raised prior to trial.[113]

Suppression motions are the means by which the exclusionary rule is administered. Motions to suppress evidence must be relatively specific in setting forth the legal theory for the suppression and the underlying facts. A defendant is entitled to a hearing on his motion when issues of fact, not law, are contested.[114]

The allocation of the burden and of the standard of proof at suppression hearings varies among the jurisdictions and often depends on the type of evidence sought to be suppressed. Under most circumstances, the Government has the burden of proof by a preponderance of the evidence.[115]

The defendant's testimony at a suppression hearing is not admissible at a subsequent trial in the Government's case-in-chief.[116] Such testimony, however, may be admissible to impeach the defendant.[117] The defendant does not subject himself to cross-examination on other issues,[118] and similarly, his right to cross-examine Government witnesses is narrower than at trial.[119]

J. Speedy Trial

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

---

[111] Those cases generally related to pretrial motions and hearings are categorized in other sections which deal with the subject matter of the motion, *e.g.*, Arrest, Search, and Seizure.

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

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

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

[115] For example, in some jurisdictions the prosecution has the burden of proof. *See e.g.*, K.S.A. 22-3215(4) and -3216(2). A preponderance of the evidence standard is all that is constitutionally required to meet this burden. Lego v. Twomey, 404 U.S. 477, 482-87 (1972).

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

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

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

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

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

The primary protections against preindictment delay are the statutes of limitation.[120] In addition, fifth amendment due process prohibits intentional and prejudicial Government delays which are used to gain a tactical advantage.[121]

An indictment or arrest triggers the sixth amendment speedy trial right. To determine whether there is a speedy trial violation the following factors are balanced: (1) the length of delay; (2) the reasons for delay; (3) the degree to which the defendant assserted his speedy trial right; and (4) the degree of actual prejudice to the defendant.[122] Jurisdictions often have speedy trial statutes which provide specific time limitations.[123]

United States Supreme Court

United States v. Eight Thousand Eight Hundred & Fifty Dollars, 103 S. Ct. 2005 (1983).

The *Barker v. Wingo,* 407 U.S. 514 (1972), balancing test used to determine the existence of sixth amendment speedy trial violations is also applicable in assessing the timeliness of a Government forfeiture action.

On September 10, 1975, a customs inspector seized $8,850 from the defendant. The defendant had failed to declare that she was transporting more than $5,000 into the United States. Under 31 U.S.C. § 1102(a), the Government is authorized to seize unreported monetary instruments to the extent that they exceed $5,000. On September 18, the Customs Service informed the defendant that the money seized was subject to forfeiture. The Customs Service, suspecting the defendant of narcotics violations, conducted an investigation from October 1975 to April 1976. No evidence of narcotics violations was found. Two months later, however, the defendant was indicted for knowingly and willfully making false statements to a customs officer. She was convicted in December 1976. In March 1977 the Government filed a complaint seeking forfeiture of the $8,850. The defendant claimed that the eighteen-month delay between the seizure of the money and the filing violated her right to due process.

The United States Supreme Court analogized the fifth amendment right against deprivation of the use of property to a defendant's sixth amendment right to a speedy trial and adopted the test developed in *Barker.* The *Barker* test involves balancing four factors: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his

---

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

[121] Marion, 404 U.S. at 324.

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

[123] 18 U.S.C. §§ 3161-3174; K.S.A. § 22-3402.

speedy trial right; and (4) prejudice to the defendant. After balancing the *Barker* factors, the Court concluded that the Government's delay in bringing civil forfeiture proceedings was not unreasonable. Although the eighteen-month delay was substantial, it was justified by the Government's diligence in pursuing related criminal matters. Furthermore, the defendant never sought commencement of the civil forfeiture proceeding and did not demonstrate that the delay prejudiced her defense.

Court of Appeals for the Tenth Circuit

United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983).

A seven-month preindictment delay does not violate the defendant's fifth amendment due process rights, absent a showing that actual prejudice resulted from the delay and that the Government caused the delay to gain a tactical advantage or to harass the defendant.

United States v. Pino, 708 F.2d 523 (10th Cir. 1983).

A twenty-eight-month preindictment delay does not violate the defendant's fifth amendment due process rights, absent a showing that actual prejudice resulted from the delay and that the Government caused the delay to gain a tactical advantage or to harass the defendant.

United States v. Primrose, 718 F.2d 1484 (10th Cir. 1983).

Federal Rule of Criminal Procedure 48(b) is applicable only to post-arrest situations.

Kansas Supreme Court

State v. Calderon, 233 Kan. 87, 661 P.2d 781 (1983).

In determining whether a defendant has been deprived of his right to a speedy trial, a court must balance the length of the delay, the reasons for the delay, any assertions of his right to a speedy trial, and the prejudice resulting from the delay.

State v. Rosine, 233 Kan. 663, 664 P.2d 852 (1983).

When a person charged with a crime appears before a court pursuant to an "O.R." bond and no complaint is filed at that time, the person has not been arraigned and the speedy trial requirements of section 22-3402 of the Kansas Statutes are not invoked.

State v. Ransom, 234 Kan. 322, ____ P.2d ____ (1983).

When the State dismisses a pending criminal case without making a showing of necessity and then charges the same defendant with the same offense, the time between arraignment and dismissal of the first

prosecution must be added to the time between arraignment and trial of the second prosecution in calculating the speedy trial time limits under section 22-3402 of the Kansas Statutes.

State v. Ransom, 234 Kan. 322, ____ P.2d ____ (1983).

When the State dismisses a pending criminal case upon a showing of necessity and subsequently files a second case charging the same defendant with the same offense, the speedy trial time period under section 22-3402 of the Kansas Statutes commences on the date the defendant is arraigned in the second case.

State v. Haislip, 234 Kan. 329, ____ P.2d ____ (1983).

When the State dismisses and then refiles identical criminal charges against the same defendant, the time between arraignment and dismissal of the original charges is not included in the speedy trial calculation under section 22-3402 of the Kansas Statutes, if the dismissal was made upon an adequate showing of necessity and the State was not attempting to manipulate the speedy trial requirement.

State v. White, 234 Kan. 340, ____ P.2d ____ (1983).

The 180-day speedy trial time limitation contained in the Agreement on Detainers, sections 22-4401 to -4408 of the Kansas Statutes, commences upon receipt of a prisoner's notice and request for final disposition of a charge by the proper prosecuting officer and appropriate court of the state that filed the detainer.

Kansas Court of Appeals

State v. Strong, 8 Kan. App. 2d 589, 663 P.2d 668 (1983), *petition for review denied* (July 18, 1983).

A person who is in custody serving one or more sentences is not being held solely by reason of a pending charge. Thus, it is not required that the trial on the pending charge begin within the statutory period set in section 22-3402 of the Kansas Statutes.

K. Double Jeopardy

The fifth amendment double jeopardy clause generally protects against multiple trials and punishments for the same offense.[124] To raise a double jeopardy claim, the defendant must have been subjected to successive criminal prosecutions[125] and must have been put in jeopardy at the first criminal proceeding.[126]

---

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

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

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

Under the "dual sovereignty" concept, the double jeopardy clause does not prohibit successive prosecutions for the same act when they are brought by different sovereigns.[127] Federal policy[128] and many state statutes,[129] however, have limited the "dual sovereignty" concept.

Double jeopardy issues may arise in a variety of situations. These situations include: reprosecution after a mistrial;[130] reprosecution after an acquittal or other decision favorable to the defendant;[131] reprosecution after a conviction;[132] and resentencing after a conviction.[133]

United States Supreme Court

Missouri v. Hunter, 103 S. Ct. 673 (1983).

When a legislature specifically authorizes cumulative punishment under two statutes a prosecutor may seek, and a court may impose, cumulative punishment under such statutes in a single trial, regardless of whether the two statutes proscribe the "same" conduct under *Blockburger.*

Court of Appeals for the Tenth Circuit

United States v. Genser, 710 F.2d 1426 (10th Cir. 1983).

Violation of two distinct statutory provisions constitutes two offenses for double jeopardy purposes if each provision requires proof of an element not necessary to the other.

United States v. Poe, 713 F.2d 579 (10th Cir. 1983).

Government witnesses' violation of a court's sequestration order, though sufficient to justify a mistrial, does not bar retrial, unless the violation stemmed from prosecutorial misconduct intended to subvert the protections afforded by the double jeopardy clause and to provoke the defendant into requesting a mistrial.

United States v. Hines, 713 F.2d 584 (10th Cir. 1983).

When two charges arise out of the same transaction, but are not identical, conviction on the first charge does not bar subsequent prosecution.

---

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

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

[129] *E.g.,* K.S.A. § 21-3108(3).

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

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

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

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

Kansas Supreme Court

State v. Hobson, 234 Kan. 133, ____ P.2d ____ (1983).

Offenses charged are not duplicitous when each offense requires evidence of an additional element which the other does not.

The defendant was charged with first-degree murder as an aider and abettor and with conspiracy to commit murder. The facts at trial established that the defendant did the following: hired her son and a friend to kill her stepson; suggested the date on which to carry out the murder; ensured that the other members of the family were not present when her son and his friend abducted her stepson; provided her car for use in the commission of the crime; and disposed of her stepson's billfold to hinder the investigation. The defendant was convicted on both charges. She appealed her conviction, contending that the conspiracy charge was duplicitous of the aiding and abetting charge and should have been dismissed.

The Kansas Supreme Court held that the crimes of aiding and abetting and of conspiracy are not duplicitous. Therefore, charging both crimes does not violate the fifth amendment double jeopardy clause. The court applied the test for duplicity that examines whether each of the offenses charged requires proof of an additional element which the other does not. If each offense requires an additional fact, the offenses are not duplicitous. The court reasoned that conspiracy requires an agreement to commit a crime, but does not require actual participation in the substantive offense. On the other hand, aiding and abetting requires actual participation in the substantive offense, but does not require an agreement.

State v. Fisher, 233 Kan. 29, 661 P.2d 791 (1983).

Collateral estoppel in criminal cases is to be applied practically, not hypertechnically. When the same evidence is common to two or more distinct offenses, but standing alone does not substantially prove them, its use in one prosecution will not bar its use in a subsequent prosecution for a different offense.

State v. Fisher, 233 Kan. 29, 661 P.2d 791 (1983).

A defendant who has been convicted either on a guilty plea or a nolo contendere plea has been in jeopardy; subsequent prosecution for the same or an included offense, based upon the same facts, is barred.

State v. Calderon, 233 Kan. 87, 661 P.2d 781 (1983).

The prosecution's factual statement establishing the elements of a crime required for a plea of nolo contendere does not bar, under the Kansas double jeopardy statute, subsequent trial of a defendant on a separate charge arising out of the same transaction.

State v. Mourning, 233 Kan. 678, 664 P.2d 857 (1983).

The prosecution of one offense is not barred by a former prosecution of another offense arising out of the same conduct, if each of the offenses requires proof of an element not required by the other offense.

Kansas Court of Appeals

State v. Smith, 8 Kan. App. 2d 494, 660 P.2d 978 (1983), *petition for review denied* (Sept. 22, 1983).

The State can file and submit to the jury charges in the alternative, but if the charges arise from a single event and differ only in the degree of intent necessary to convict, the defendant cannot be convicted of both.

III. TRIAL

A. Jurisdiction and Venue

In criminal procedure, jurisdiction refers to the power to enforce criminal laws and, more specifically, to the power to hear and decide criminal cases.[134] Venue refers to the proper place of prosecution and trial.[135]

Court of Appeals for the Tenth Circuit

United States v. Neal, 718 F.2d 1505 (10th Cir. 1983).

A change of venue is within the trial court's discretion and, absent an abuse of that discretion, the court's decision will not be disturbed on appeal.

Kansas Supreme Court

State v. Rainey, 233 Kan. 13, 660 P.2d 544 (1983).

A party moving for a change of venue has the burden of establishing prejudice and must show specific facts and circumstances which indicate that it will be practically impossible to obtain an impartial jury in the county where the prosecution was originally brought.

State v. Calderon, 233 Kan. 87, 661 P.2d 781 (1983).

Generally, venue exists only in the county where the crime was committed. Under section 22-2603 of the Kansas Statutes, however, if an overt act occurs in one county, and the effects of such overt act, which are necessary to complete the crime, occur in another county, the prosecution may be brought in any county in which any of such acts occurs.

State v. Hill, 233 Kan. 648, 664 P.2d 840 (1983).

To obtain change of venue, the defendant must show that he could not receive a fair and impartial trial because of prejudice against him in the county where the case is pending. This showing may not be based on speculation.

---

[134] 18 U.S.C. §§ 3231-3244; K.S.A. § 22-2601.

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

State v. Crispin, 234 Kan. 104, ____ P.2d ____ (1983).

The party moving for a change of venue has the burden of establishing prejudice. Specific facts and circumstances must be established which show that it will be practically impossible to obtain an impartial jury in the original county.

State v. Chatmon, 234 Kan. 197, ____ P.2d ____ (1983).

In a criminal action the trial court must not only have jurisdiction over the offense charged, but it must also have jurisdiction over the issue to be decided.

State v. Taylor, 234 Kan. 401, ____ P.2d ____ (1983).

A change of venue will not be granted unless the defendant can show, as a demonstrable reality, that he cannot receive a fair and impartial trial in the county where the case is pending.

B. Sixth Amendment Right to Counsel

The sixth amendment provides a defendant with the right to counsel in criminal cases.[136] This right attaches at the initiation of formal adversarial judicial proceedings.[137] There is no constitutional right to counsel at trial, however, unless the defendant is actually incarcerated as a result of the prosecution.[138]

The right to counsel includes not only the right to retain a lawyer,[139] but also the right to have a court-appointed attorney.[140] Furthermore, implicit in the sixth amendment is the right to self-representation.[141]

The sixth amendment guarantees the right to effective assistance of counsel.[142] Various standards of effectiveness have been devised by the courts.[143] Joint representations may cause conflicts of interest and thereby render the attorney ineffective under the sixth amendment.[144]

United States Supreme Court

Morris v. Slappy, 103 S. Ct. 1610 (1983).

A defendant is not entitled to a "meaningful relationship" with his attorney under the sixth amendment right to counsel.

---

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

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

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

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

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

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

[142] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[143] The United States Supreme Court had not set a standard of effectiveness, but instead has left it to the discretion of the trial courts. *Id.* at 771.

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

The defendant was charged with several felonies. Mr. Goldfine, a public defender, represented the defendant at the preliminary hearing and conducted a lengthy investigation in preparation for trial. However, Goldfine was hospitalized and six days before the trial Mr. Hotchkiss, a senior attorney with the public defender's office, was assigned to the case. Hotchkiss reviewed the files and the investigation conducted by Goldfine, and conferred at length with the defendant about the upcoming trial. At the opening of the trial the defendant complained that his new attorney had not been given adequate time to prepare for trial. After being assured by Hotchkiss that he was prepared, the court overruled the defendant's *pro se* motion for continuance. The defendant renewed his motion on the second day of trial, and again the court overruled it. During the third day of trial the defendant presented the court with a *pro se* petition for a writ of habeas corpus, claiming he was not represented by counsel. The defendant claimed that Goldfine, not Hotchkiss, was his attorney. The court treated the defendant's petition as a motion for continuance and overruled it. The Court of Appeals for the Ninth Circuit reversed, finding a right to a "meaningful" attorney-client relationship inherent in the sixth amendment.

The United States Supreme Court stressed that the "meaningful relationship" element created by the Ninth Circuit was entirely without authority in the law, and made clear that such a novel ingredient was not a part of the sixth amendment right to counsel. The Court reasoned that no court could possibly guarantee that a defendant would develop a meaningful rapport with his attorney.

Jones v. Barnes, 103 S. Ct. 3308 (1983).

The sixth amendment right to effective assistance of counsel does not require a court-appointed defense attorney to raise on appeal every non-frivolous argument urged by his client.

The defendant was found guilty of several charges, and an attorney was appointed to represent him on appeal. The defendant suggested several arguments that he wanted raised on appeal, but his counsel rejected most of them. After his attorney filed a brief with the court, the defendant filed three *pro se* briefs raising issues his attorney had rejected. At oral argument the defendant's counsel argued only those issues raised in his brief. The defendant claimed his sixth amendment right to counsel was violated by the defense attorney's refusal to include in his brief or argument the issues raised by the defendant in his *pro se* briefs.

The United States Supreme Court, focusing upon the need for professional evaluation in determining the issues and strategy for appeal, held that allowing a defendant to decide which issues should be raised on appeal seriously interferes with the attorney's exercise of judgment. The Court reasoned that requiring an attorney to pursue every non-frivolous issue would undermine the attorney's role as an effective and zealous advocate for the defendant. The Court acknowl-

edged, however, that the defendant retains the right to make certain fundamental decisions regarding his case, such as whether to plead guilty or to waive a jury trial.

Rushen v. Spain, 104 S. Ct. 453 (1983).

Violation of a defendant's right to counsel is subject to harmless error analysis, unless the violation, by its very nature, cannot be harmless.

Court of Appeals for the Tenth Circuit

United States v. Glick, 710 F.2d 639 (10th Cir. 1983).

A defendant is denied his right to counsel if his attorney's performance falls below reasonable standards of competency, and the attorney's inadequate performance prejudices the defendant.

United States v. Janoe, 720 F.2d 1156 (10th Cir. 1983).

A defendant is denied his sixth amendment right to effective assistance of counsel if his attorney fails to exercise the skill, judgment, and diligence of a reasonably competent defense attorney.

United States v. Winkle, 722 F.2d 605 (10th Cir. 1983).

If a defendant shows that his attorney's previous representation of a Government witness adversely affected the adequacy of the defendant's representation, he need not show prejudice to prove his sixth amendment right to counsel was denied.

United States v. Winterhalder, 724 F.2d 109 (10th Cir. 1983).

A defendant is constitutionally entitled to counsel on his first appeal of right.

C. Sixth Amendment Right to Jury Trial

The sixth amendment provides a criminal defendant with the right to a jury trial.[145] This right, however, applies only to crimes for which the authorized penalty is greater than six months imprisonment.[146] While juries in criminal cases typically must have twelve members and must return unanimous verdicts, neither this size[147] nor unanimity[148] is constitutionally mandated. Although a defendant may waive his right to jury trial,[149] he is not constitutionally entitled to be tried by a judge without a jury.[150]

---

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

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

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

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

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

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

Included in the sixth amendment is the right to be tried by an impartial jury.[151] Although jury impartiality does not require jurors to be ignorant of the facts and issues involved in the case,[152] adverse publicity either before[153] or during[154] the trial may create prejudice and thereby constitute a sixth amendment violation.

The impact of adverse pretrial publicity on the jury may be limited by several means, including change of venue.[155] Prior restraints, or "gag orders," on news media coverage of pretrial proceedings violate the first amendment freedom of the press.[156] Pretrial proceedings, however, may be closed to the public and the press.[157] Regarding adverse publicity during trial, the impact on the jury is prevented primarily by sequestering the jury.[158] The right of the public and the press to attend criminal trials is implicit in the first amendment.[159]

Court of Appeals for the Tenth Circuit

Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983).

A defendant is entitled to a jury trial for multiple petty offenses arising out of the same act, transaction, or occurrence only if he is actually threatened at the commencement of trial with an aggregate potential penalty of more than six months imprisonment.

D. Other Sixth Amendment Trial Rights

The sixth amendment also includes the following trial rights: (1) the right to a public trial;[160] (2) the right to confront adverse witnesses;[161] and (3) the right to compulsory process of favorable witnesses.[162]

While a criminal defendant has a right to a public trial, the trial judge may close a pretrial proceeding at the defendant's request to avoid prejudicial publicity.[163] Implicit in the first amendment, how-

---

[151] U.S. CONST. amend. VI.
[152] Irvin v. Dowd, 366 U.S. 717, 722 (1961).
[153] *Id.* at 725-29.
[154] Sheppard v. Maxwell, 384 U.S. 333, 349-63 (1966).
[155] FED. R. CRIM. P. 21(a); K.S.A. § 22-2616.
[156] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).
[157] Gannett Company v. Depasquale, 443 U.S. 368, 391 (1979).
[158] United States v. Hall, 536 F.2d 313, 326-27 (10th Cir. 1976).
[159] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).
[160] The sixth amendment provides that "the accused shall enjoy the right to a . . . public trial. . . ." U.S. CONST. amend. VI.
[161] The sixth amendment provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.
[162] The sixth amendment provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. CONST. amend. VI.
[163] Gannett Company v. DePasquale, 443 U.S. 368, 393-94 (1979).

ever, is the right of the press and the public to attend criminal trials.[164]

The right to confrontation is primarily effectuated by the defendant's cross-examination of Government witnesses.[165] Restrictions on the defendant's scope of cross-examination may violate the sixth amendment.[166] The admission of out-of-court statements, such as hearsay, may violate the confrontation clause, unless their necessity and reliability are established.[167] Implicit in the confrontation clause is the defendant's right to be present at every stage of the trial.[168] A defendant, however, may relinquish this right by being voluntarily absent[169] or extremely disruptive.[170]

The compulsory process clause gives criminal defendants the right to subpoena favorable witnesses and physical evidence. All jurisdictions have statutes or court rules authorizing the defense to use the court's subpoena power.[171] The sixth amendment right to present evidence, however, is not absolute.[172]

United States Supreme Court

Rushen v. Spain, 104 S. Ct. 453 (1983).

Violation of a defendant's right to be present during all critical stages of the proceeding is subject to the harmless error analysis, unless the violation, by its very nature, cannot be harmless.

Court of Appeals for the Tenth Circuit

United States v. Monaco, 700 F.2d 577 (10th Cir. 1983).

A court has no obligation to determine the admissibility of possible hearsay at the pretrial stage.

United States v. Valentine, 706 F.2d 282 (10th Cir. 1983).

Limiting the extent of cross-examination is within the trial court's discretion and will not lead to reversal on sixth amendment confrontation grounds, unless a clearly prejudicial abuse of discretion is shown.

Kansas Supreme Court

State v. Stellwagen, 232 Kan. 744, 659 P.2d 167 (1983).

Excluding irrelevant evidence of a rape victim's prior sexual

---

[164] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).
[165] Davis v. Alaska, 415 U.S. 308, 315-16 (1974).
[166] *Id.* at 316-18.
[168] Diaz v. United States, 223 U.S. 442, 455 (1912).
[169] Taylor v. United States, 414 U.S. 17, 19-20 (1973) (per curiam).
[170] Illinois v. Allen, 397 U.S. 337, 342-43 (1970).
[171] FED. R. CRIM. P. 17(a) and (b); K.S.A. § 22-3214.
[172] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

activity with the defendant does not deny the defendant his sixth amendment right to elicit evidence in his defense.

State v. Garcia, 233 Kan. 589, 644 P.2d 1343 (1983).

Violation of a defendant's right to be present in court at every stage of his trial is harmless error if the reviewing court finds, beyond a reasonable doubt, that the effect of the violation on the jury was slight.

State v. Lashley, 233 Kan. 620, 644 P.2d 1358 (1983).

When a witness who has testified at the defendant's preliminary hearing subsequently claims a valid privilege and refuses to testify at trial, the defendant's right of confrontation is not violated by admitting into evidence the transcript of the witness' preliminary hearing testimony if the defendant was provided an opportunity to cross-examine the witness at the preliminary hearing.

State v. Thrasher, 233 Kan. 1016, 666 P.2d 722 (1983).

A defendant's sixth amendment confrontation right is satisfied when he has had an opportunity to cross-examine the witnesses against him.

State v. Knapp, 234 Kan. 170, ____ P.2d ____ (1983).

Under section 22-3405 of the Kansas Statutes, the defendant's presence is required at all times when the jury is present or at other proceedings when the defendant's presence is essential to a fair and just determination of a substantial issue. When an in-chambers conference concerns only questions of law, an accused's presence is not crucial and he is not prejudiced by his absence.

State v. Handley, 234 Kan. 454, ____ P.2d ____ (1983).

A defendant's right of confrontation is satisfied when he has had an opportunity to cross-examine the witnesses against him.

Kansas Court of Appeals

State v. Rodriquez, 8 Kan. App. 2d 353, 657 P.2d 79 (1983), *petition for review denied* (April 8, 1983).

When a four-year old victim is incompetent to testify, but the court finds that the child's out-of-court statements bear adequate indicia of reliability and trustworthiness, permitting the mother to testify about the child's statements does not violate the defendant's right of confrontation.

E. Fifth Amendment Privilege Against Self-Incrimination

The fifth amendment protects individuals from the introduction into a criminal proceeding of self-incriminating evidence that is

compelled by the Government and is testimonial in nature.[173] This privilege against self-incrimination applies not only at trial, but also at all stages of the criminal process, including custodial interrogations.

Essentially, five criteria must be met before a person may validly invoke his fifth amendment privilege. These criteria are: (1) the privilege must be personal to the individual;[174] (2) the proceeding must be criminal or have criminal consequences;[175] (3) the information must be self-incriminating;[176] (4) the information must be compelled by the Government;[177] and (5) the information must be testimonial in nature.[178]

The Government may overcome a witness' fifth amendment privilege and compel his testimony by granting him use immunity.[179] Use immunity precludes the use of the immunized testimony, or of any information derived from it, against the witness.[180] The Government, however, may prosecute for perjury a witness who testifies falsely under a grant of immunity.[181] Immunity orders are enforced by the court through civil or criminal contempt proceedings.[182]

The Government's use of a defendant's "silence" may violate the fifth amendment privilege against self-incrimination. A prosecutor may not comment on a defendant's failure to testify at trial.[183] Nor may a prosecutor use the defendant's silence pursuant to *Miranda* warnings to impeach his testimony at trial.[184] However, a defendant's silence either prior to arrest[185] or between arrest and *Miranda* warnings[186] may be used to impeach his trial testimony.

United States Supreme Court

Pillsbury Company v. Conboy, 103 S. Ct. 608 (1983).

A witness who testified under a grant of immunity in a criminal proceeding and asserts his fifth amendment privilege against self-incrimination in a subsequent civil proceeding may not be compelled to testify absent a separate grant of immunity.

---

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

[174] United States v. White, 322 U.S. 694, 698 (1944).

[175] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

[176] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[177] United States v. Washington, 431 U.S. 181, 187 (1977).

[178] Schmerber v. California, 384 U.S. 757, 761 (1966).

[179] 18 U.S.C. § 6002; Kastigar v. United States, 406 U.S. 441, 448 (1972).

[180] Kastigar, 406 U.S. at 460-62.

[181] United States v. Apfelbaum, 445 U.S. 115, 130-31 (1980).

[182] 18 U.S.C. § 401; 28 U.S.C. § 1826(a).

[183] Griffin v. California, 380 U.S. 609, 615 (1965).

[184] Doyle v. Ohio, 426 U.S. 610, 619 (1976). However, such silence may be admissible to impeach a defendant's testimony that he cooperated with the police upon arrest or told the police the same exculpatory statement. *Id.* at 619 n.11.

[185] Jenkins v. Anderson, 447 U.S. 231, 240 (1980).

[186] Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam).

A witness gave immunized testimony before a grand jury pursuant to 18 U.S.C. § 6002. He was subsequently subpoenaed to testify at a civil deposition. No further assurance of immunity was given to the witness. The questions asked at the deposition would have elicited answers similar to those the witness gave before the grand jury. When questioned, the witness asserted his fifth amendment privilege against self-incrimination and was held in contempt of court.

The United States Supreme Court, in a plurality opinion, held that the defendant's assertion was a valid exercise of his fifth amendment privilege because the deposition testimony would not have been immunized within the meaning of § 6002. The Court reasoned that testimony at a subsequent deposition is a statement of a deponent's current, independent memory of events and, thus, would not be protected by a prior grant of immunity. Although the Court recognized the need for evidence in civil proceedings, it found this need must be subordinated to the Government's interest in limiting the scope of an immunity grant and to the deponent's certainty of fifth amendment protection. The Court feared that extending a prior grant of immunity to subsequent civil proceedings, in which the witness' testimony might bring out new information, could give the deponent transactional immunity, which Congress intended to prohibit by enacting § 6002. Furthermore, unless use immunity is specifically granted at a civil proceeding, compelling a witness to testify at that proceeding creates a substantial risk of future criminal prosecution. The Court concluded that compelling a witness to give incriminating testimony for the benefit of a private litigant is not justified when the Government has not granted the witness immunity.

South Dakota v. Neville, 103 S. Ct. 916 (1983).

A defendant's refusal to submit to a lawfully requested blood-alcohol test may be admitted into evidence without violating his fifth amendment privilege against self-incrimination.

Police officers stopped the defendant for a minor traffic violation. Officers smelled alcohol on the defendant's breath and observed the defendant stagger upon exiting his car. Suspecting that the defendant was intoxicated, the officers gave him several field sobriety tests which he failed. The officers arrested the defendant and read him the *Miranda* warnings. The officers then requested that the defendant submit to a blood-alcohol test; he refused. This refusal was subsequently admitted into evidence at his trial for driving while intoxicated. The defendant objected to the admission of his refusal, contending that it violated his fifth amendment privilege against self-incrimination.

The United States Supreme Court held that a person's refusal to submit to a lawfully requested blood-alcohol test is admissible as evidence. The Court reasoned that the fifth amendment prohibits a state only from compelling a defendant to incriminate himself. In this case, the police officers left the decision whether to submit or to refuse

the blood-alcohol test entirely to the defendant. No coercion was exerted on the defendant compelling him to refuse the test. Since the defendant's refusal was freely exercised, its admission at trial did not violate the fifth amendment privilege against self-incrimination.

United States v. Hasting, 103 S. Ct. 1974 (1983).

Courts reviewing a prosecutor's comments that violate the defendant's fifth amendment privilege against self-incrimination shall not reverse a defendant's conviction if the comments were harmless error.

The defendants were tried for kidnapping, conspiracy, and violation of the Mann Act. Substantial proof of guilt was offered by the State, including the victims' identification of the defendants. None of the defendants testified. In the prosecutor's closing argument, he alluded to "evidence" the defendants had failed to present. The defense objected on the ground that the prosecutor's comments violated the defendants' fifth amendment privilege against self-incrimination.

The United States Supreme Court acknowledged that prosecutorial comment on the defendant's failure to testify at trial violates the fifth amendment. *Griffin v. California,* 380 U.S. 609 (1965). The Court held, however, that an appellate court must apply the harmless error doctrine. The Court determined that the error in the instant case was harmless. Although the Court recognized that prosecutorial misconduct should be disciplined, it concluded that reversal of convictions for harmless error was neither an appropriate nor efficient means of discouraging such misconduct.

United States v. Rylander, 103 S. Ct. 1548 (1983).

In a civil contempt proceeding for failure to produce records for Internal Revenue Service inspection, a defendant does not meet his burden of production regarding his present inabilty to comply with the production order by asserting his fifth amendment privilege against self-incrimination.

Court of Appeals for the Tenth Circuit

In the Matter of Grand Jury Subpoena Duces Tecum, 697 F.2d 277 (10th Cir. 1983).

The attorney-client privilege will not bar production of material subpoenaed from an attorney by a grand jury, unless the attorney's client could assert a fifth amendment privilege against self-incrimination regarding the material.

United States v. Crawford, 707 F.2d 447 (10th Cir. 1983).

A defendant is not denied a fair trial when the prosecutor, in order to avoid a potential mistrial, informs the court and defense counsel that several of the defendant's witnesses are targets of criminal

investigations and, therefore, may assert their fifth amendment privilege against self-incrimination.

United States v. Wilson, 719 F.2d 1491 (10th Cir. 1983).

Requiring a defendant during trial to stand, remove his glasses, and face prosecution witnesses for identification purposes, does not violate the fifth amendment privilege against self-incrimination.

United States v. Janoe, 720 F.2d 1156 (10th Cir. 1983).

When a defendant challenges the voluntariness of his confession, a court's failure to hold a *Jackson v. Denno* hearing to determine the voluntariness of the confession is not harmless error.

Kansas Supreme Court

State v. Nott, 234 Kan. 34, ____ P.2d ____ (1983).

If a defendant testifies at his own trial and offers an alibi defense, the State may attack the defendant's credibility by inquiring into his previous assertion of the fifth amendment privilege against self-incrimination at an earlier trial of his codefendants. Under these circumstances, a defendant's prior assertion of the fifth amendment privilege is impeachable as a statement inconsistent with his trial testimony.

The defendant and four others were charged with burglary and theft. Two defendants entered pleas, two were ordered to be tried jointly, and the defendant was ordered to be tried separately. The defendant was called as a defense witness at the trial of the codefendants, but invoked his fifth amendment privilege and refused to answer questions. At his subsequent trial, the defendant took the stand and presented an alibi defense. The court refused to allow the State to inquire into the defendant's refusal to testify at the prior trial. The defendant was acquitted. On appeal of the reserved question, the State challenged the court's order prohibiting impeachment based upon the defendant's assertion of the fifth amendment.

The Kansas Supreme Court, citing *Grunewald v. United States,* 353 U.S. 391 (1957), held that a defendant may be cross-examined concerning his assertion of the fifth amendment privilege at a prior judicial proceeding. Before such cross-examination is permissible, however, the trial judge must find that a "true inconsistency" exists between the prior silence and the subsequent testimony.

State v. Lashley, 233 Kan. 620, 664 P.2d 1358 (1983).

When a witness who claims a privilege from testifying has given a prior statement, hearings to determine both the validity of the privilege and the admissibility of the statement must be conducted outside the presence of the jury.

State v. Compton, 233 Kan. 690, 664 P.2d 1370 (1983).

A defendant's refusal to submit to a lawfully requested blood-alcohol test may be admitted into evidence without violating the fifth amendment or Kansas' coextensive counterpart, section 10 of the Bill of Rights of the Kansas Constitution.

F. Trial Format and Related Issues[187]

United States Supreme Court

Connecticut v. Johnson, 103 S. Ct. 969 (1983).

A jury instruction that may reasonably have been interpreted to require a conclusive presumption on the issue of intent may not be considered harmless.

The defendant was charged with attempted murder, kidnapping, robbery, and sexual assault. The court, in its instructions to the jury, stated that "a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." 103 S. Ct. at 973. In describing the elements of the crimes the court again mentioned conclusive presumption with respect to the attempted murder charge and mentioned intent with respect to the kidnapping charge. The defendant was convicted of all four crimes. He appealed, asserting that the jury instruction language about conclusive presumptions was unconstitutional.

The United States Supreme Court upheld the kidnapping and sexual assault convictions and reversed the convictions for attempted murder and robbery. The Court explained that some constitutional errors may be considered harmless if proof beyond a reasonable doubt establishes that the error did not contribute to the verdict. The Court relied, however, on its decision in *Sandstrom v. Montana,* 442 U.S. 510 (1979), and stated that a conclusive presumption on intent functions as a directed verdict on that issue. In this case, the jurors could have reasonably interpreted the court's instruction as a conclusive presumption on intent. This interpretation could have led them to ignore other evidence that might have demonstrated the State's failure to prove guilt beyond a reasonable doubt. Because jurors may have disregarded other evidence of intent, the Court refused to hold that the instruction did not contribute to the verdict. The jury instruction, therefore, was not harmless error.

Rushen v. Spain, 104 S. Ct. 453 (1983).

A juror may testify about any mental bias in matters unrelated to the specific issues the jury was asked to decide, and about any

---

[187] The cases in this section relate to miscellaneous criminal procedure issues that arise during trial. These issues include jury selection and jury instructions.

extraneous prejudicial information improperly brought to the jury's attention. A juror may not, however, testify about the mental process by which the verdict was reached.

Rushen v. Spain, 104 S. Ct. 453 (1983).

Although the substance of *ex parte* communications between the judge and a juror regarding some aspect of the trial should be disclosed to counsel for both parties, failure to make such disclosure is subject to harmless error analysis.

Court of Appeals for the Tenth Circuit

United States v. Franklin, 700 F.2d 1241 (10th Cir. 1983).

A defendant is entitled to supplemental *voir dire* if he timely objects to jurors' possible interim jury service in similar cases after their selection for his trial.

United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983).

When evidence in the record of a criminal case supports the defendant's theory, the jury instructions, taken as a whole, must sufficiently submit to the jury the issue presented by the defense.

United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983).

Absent any showing of systematic exclusion of blacks from juries, the Government's use of a peremptory challenge to strike the only black member of a jury panel is not unconstitutional.

United States v. Thoma, 713 F.2d 604 (10th Cir. 1983).

A presumption of intent instruction does not violate due process if it is permissive and the conclusions can rationally be inferred from the facts.

United States v. Gabriel, 715 F.2d 1447 (10th Cir. 1983).

Attorneys may not express their personal beliefs concerning the evidence or the witnesses. A prosecutor's repeated use of the phrase "I think" during closing argument fell into the category of a mannerism of the prosecutor's presentation rather than into the category of personal comments that are testimonial in nature, and thus such statements did not require a reversal.

United States v. Hopkins, 716 F.2d 739 (10th Cir. 1983).

A defendant is entitled to adequate jury instructions on his theory of defense, provided there is evidence to reasonably support the theory. The trial court has a responsibility, however, to instruct on the fundamental issues, even if a specific instruction is not requested. The sufficiency of the instructions must be determined by viewing the instructions as a whole.

United States v. Ainesworth, 716 F.2d 769 (10th Cir. 1983).

Although the practice is not condoned, it is not reversible error if a

prosecutor states that based on the evidence he believes the defendant is guilty.

United States v. Ainesworth, 716 F.2d 769 (10th Cir. 1983).

Absent a clear showing of abuse, the conduct and substance of *voir dire* is a matter within the discretion of the trial court.

United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983).

A prosecutor's closing argument, in which he stated: "no, ladies and gentlemen of the jury, on this evidence, I am telling you that we're here today to see that [the defendant] gets what he's got coming to him, and I submit to you that this evidence will support that," did not warrant a new trial.

United States v. Jones, 707 F.2d 1169 (10th Cir.), *cert. denied,* 104 S. Ct. 184 (1983).

A trial court does not abuse its discretion in refusing to grant a new trial when, after a trial, a juror realizes that he knew the defendant, and nothing in the record indicates that the juror was biased, actually or inherently, towards the defendant.

United States v. Primrose, 718 F.2d 1484 (10th Cir. 1983).

A prosecutor's statement in closing argument that there would not have been a prosecution if only one person had told the FBI that the defendant had taken kickbacks, was little more than a reminder to the jury that it had heard more than one witness testify against the defendant, and was not improper vouching for witnesses.

United States v. Primrose, 718 F.2d 1484 (10th Cir. 1983).

Attorneys may not express their personal beliefs concerning the evidence or the witnesses.

United States v. Primrose, 718 F.2d 1484 (10th Cir. 1983).

A trial judge's general questions about juror exposure to publicity and about their ability to be fair and impartial were adequate.

United States v. Whitt, 718 F.2d 1494 (10th Cir. 1983).

Voir dire is within the trial court's sound discretion, and the court's exercise of the discretion will not be disturbed absent a clear showing of abuse.

United States v. Boston, 718 F.2d 1511 (10th Cir. 1983).

A trial court's *voir dire* examination that consisted of general questions about juror exposure to pretrial publicity, followed by individual questions to jurors whose responses aroused concern, and basic questions as propounded in most cases was adequate.

Mason v. United States, 719 F.2d 1485 (10th Cir. 1983).

Prosecutorial misconduct must be grave to constitute plain error. The stronger the case against the defendant, the less likely it is that the misconduct constitutes plain error.

United States v. Salazar, 720 F.2d 1482 (10th Cir. 1983).

To show selective prosecution, a defendant must prove first, that he was singled out for prosecution while others similarly situated generally have not been prosecuted and second, that the Government's selection of him for prosecution was invidious or in bad faith and was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights.

United States v. Rothbart, 723 F.2d 752 (10th Cir. 1983).

A defendant is entitled to jury instructions that fairly present his theory of the case, but the exact instructions he requests need not be given. Instructions are adequate if, taken as a whole, they give an accurate statement of the law.

Kansas Supreme Court

State v. Johnson, 233 Kan. 981, 666 P.2d 706 (1983).

A rebuttable statutory presumption is a rule of evidence and is constitutional, but the jury must be clearly instructed that the presumption does not shift the burden of proof to the defendant.

The defendant was convicted on four counts of writing worthless checks. On appeal, he claimed that one of the jury instructions was clearly erroneous. The instruction stated that the writing of a check without sufficient funds is prima facie evidence of intent to defraud. "Prima facie" was defined in the instruction as "evidence that on its face is true, but may be overcome by evidence to the contrary." 233 Kan. at 983.

The Kansas Supreme Court held that the instruction was clearly erroneous and reversed the conviction. The court explained that a rebuttable statutory presumption is constitutional if the jury is clearly instructed about the nature of the presumption. An instruction, however, that shifts the burden of proof or persuasion to the defendant is clearly erroneous. An instruction violates the fourteenth amendment due process clause if it could reasonably lead the jury to believe that a presumption is conclusive or if it shifts the burden to disprove an element of a crime to the defendant. The instruction given by the trial court could have led the jury to believe that the defendant had the burden of rebutting the presumption of intent to defraud.

State v. Rainey, 233 Kan. 13, 660 P.2d 544 (1983).

Juror qualification is a matter for the trial court's determination and will not be disturbed on appeal, unless the determination is clearly erroneous or is an abuse of discretion.

State v. Bourne, 233 Kan. 166, 660 P.2d 565 (1983).

The court may properly refuse to give specific instructions re-

quested by the defendant when other instructions adequately cover the same subject matter.

State v. Lashley, 233 Kan. 620, 664 P.2d 1358 (1983).

A court's duty when instructing the jury is to define the offense charged by stating the essential elements of the crime.

State v. Lashley, 233 Kan. 620, 664 P.2d 1358 (1983).

The propriety of jury instructions is gauged by considering each instruction in conjunction with the others.

State v. Kendig, 233 Kan. 890, 666 P.2d 684 (1983).

A new trial must be granted when judicial misconduct during trial prejudices a party's substantial rights.

State v. Jackson, 234 Kan. 84, ____ P.2d ____ (1983).

In criminal cases a trial court has broad discretion in controlling the *voir dire* examination. Absent a showing of an abuse of discretion and prejudice, a trial court's rulings limiting a defendant's *voir dire* of jurors will not be grounds for reversal.

State v. Crispin, 234 Kan. 104, ____ P.2d ____ (1983).

An appellate court, when considering a trial court's refusal to give the defendant's requested instructions, must consider the evidence supporting those instructions in the light most favorable to the defendant.

State v. Martin, 234 Kan. 115, ____ P.2d ____ (1983).

In examining the sufficiency of jury instructions, all of the instructions must be considered together and as a whole.

State v. Knapp, 234 Kan. 170, ____ P.2d ____ (1983).

The standard for determining prosecutorial misconduct for commenting on the defendant's silence prior to trial is whether the comment was manifestly intended, or was of such a character that the jury would naturally and necessarily understand it, to be a comment on the failure of the accused to testify.

State v. Mitchell, 234 Kan. 185, ____ P.2d ____ (1983).

When a defendant requests jury selection procedure pursuant to section 22-3411(a) of the Kansas Statutes, the mandatory language of that statute is binding on trial courts in exercising peremptory jury challenges.

State v. Mitchell, 234 Kan. 185, ____ P.2d ____ (1983).

A juror may not divulge the considerations that influenced the jury in arriving at its verdict. A juror may not testify that the verdict was reached by considering matters the jury was instructed to disregard.

State v. Royal, 234 Kan. 218, ____ P.2d ____ (1983).

An appellate court, when considering a trial court's refusal to give the defendant's requested instructions, must consider the evidence

supporting those instructions in the light most favorable to the defendant.

State v. Reeves, 234 Kan. 250, ____ P.2d ____ (1983).

The statutory jury selection process is directory in nature, not mandatory. Absent corruption, serious misconduct, or palpable disregard of the law, a defendant may not successfully challenge the jury panel for mere irregularities in its selection process.

State v. Haislip, 234 Kan. 329, ____ P.2d ____ (1983).

Reversal of a criminal conviction is required when a trial court gives a clearly erroneous jury instruction which is prejudicial to the defendant.

State v. Maxwell, 234 Kan. 393, ____ P.2d ____ (1983).

The grant or denial of a continuance in a criminal case is within the trial court's discretion. The trial court's ruling will not be disturbed on appeal absent a showing of prejudice to the defendant and an abuse of the trial court's discretion.

State v. Maxwell, 234 Kan. 393, ____ P.2d ____ (1983).

A jury instruction is clearly erroneous when a reviewing court reaches a firm conviction that, if the instruction had not been given, there was a real possibility that the jury would have returned a different verdict.

State v. Coy, 234 Kan. 414, ____ P.2d ____ (1983).

In a motion to discharge a jury panel under section 23-3407 of the Kansas Statutes, the moving party has the duty to go beyond a mere claim of discrimination and state some factual basis for the claim that the jury panel was improperly selected or drawn.

State v. Cantrell, 234 Kan. 426, ____ P.2d ____ (1983).

Mere violation of a court order sequestering or separating witnesses does not disqualify a witness from testifying.

State v. Cantrell, 234 Kan. 426, ____ P.2d ____ (1983).

If a defendant fails to object to jury instructions when they are given, he may not claim error on appeal unless the instructions were clearly erroneous.

State v. Handley, 234 Kan. 454, ____ P.2d ____ (1983).

Violation of a court order sequestering or separating witnesses does not ordinarily disqualify a witness from testifying.

Kansas Court of Appeals

State v. Heck, 8 Kan. App. 2d 496, 661 P.2d 798 (1983).

The manner in which peremptory challenges are made is within the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion.

State v. Heiskell, 8 Kan. App. 2d 667, 666 P.2d 207 (1983).

When instructing a jury, it is the duty of the trial court to define the offense charged by stating the essential elements of the crime either in the language of the statute or in appropriate and accurate words of its own.

State v. Heiskell, 8 Kan. App. 2d 667, 666 P.2d 207 (1983).

A defendant is entitled to an instruction on his theory of the case even though the supporting evidence is slight.

IV. SENTENCING, PROBATION, AND PAROLE[188]

United States Supreme Court

Solem v. Helm, 103 S. Ct. 3001 (1983).

The eighth amendment prohibition against cruel and unusual punishment proscribes a life sentence without the possibility of parole for a defendant's seventh non-violent felony conviction.

The defendant was convicted in state court of issuing a "no account" check for $100. The maximum punishment for the offense was five years imprisonment and a $5,000 fine. The defendant was, however, sentenced to life imprisonment without the possibility of parole under the state's recidivist statute. The life sentence was based on the defendant's six prior felony convictions—three for third degree burglary, and one each for obtaining money under false pretenses, grand larceny, and driving while intoxicated. The governor was authorized to commute prisoners' sentences, but no other relief from a life sentence was available. The defendant sought habeas corpus relief, contending that his sentence constituted cruel and unusual punishment under the eighth and fourteenth amendments.

The United States Supreme Court, noting that the eighth amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences disproportionate to the crimes committed, found no basis for the State's assertion that the principle of proportionality did not apply to felony prison sentences. The Court determined that sentences should be reviewed under the eighth amendment by considering objective factors, including the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. Applying this analysis, the Court found the defendant's punishment disproportionate to the crime committed.

In declaring the defendant's life sentence unconstitutional, the Court noted several facts. First, the offense committed did not involve violence or the threat of violence. The defendant's prior felonies were relatively minor and did not involve violence or crimes against persons. Second, the defendant's sentence was the most severe that could be imposed under state law. The defendant was sentenced more

---

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

severely than other criminals in the state who were convicted of violent or more serious crimes. Last, only one other state authorized a life sentence without parole under these circumstances, and there was no indication that such a sentence had ever been imposed.

The Court distinguished *Rummel v. Estelle,* 445 U.S. 263 (1980). In *Rummel,* the Court upheld a mandatory life sentence for three non-violent felony convictions. Under the state law governing that conviction, however, parole was possible within 12 years. No such opportunity existed under the instant facts.

Bearden v. Georgia, 103 S. Ct. 2064 (1983).

If a probationer has made all reasonable efforts to pay the fine or restitution imposed, but is unable to do so, it is fundamentally unfair to automatically revoke his probation without considering whether adequate alternative methods of punishing the probationer are available.

Court of Appeals for the Tenth Circuit

Herzfeld v. United States District Court for the District of Colorado, 699 F.2d 503 (10th Cir.), *cert. denied,* 104 S. Ct. 70 (1983).

The authority to create a receivership is implicit in a court's power to order restitution, when the receivership will aid in the payment of the restitution.

United States v. Thurber, 709 F.2d 632 (10th Cir. 1983).

A trial court does not abuse its discretion in denying probation to a defendant convicted of participating in a kickback scheme while he was a government official, when it places great significance on the defendant's breach of public trust.

United States v. Perry, 709 F.2d 1348 (10th Cir. 1983).

An appellate court is without power to modify a sentence for being excessive if the sentence is within statutory limits.

United States v. Perry, 709 F.2d 1348 (10th Cir. 1983).

Probation is a matter of grace, not right, and an order denying probation is not reviewable absent a showing of arbitrary or capricious action amounting to a clear abuse of discretion.

United States v. Ainesworth, 716 F.2d 769 (10th Cir. 1983).

A court's denial of access to a presentence report does not deprive the defendant of due process.

United States v. Thompson, 718 F.2d 977 (10th Cir. 1983).

The application of the Young Adult Offenders Act to the defendant, who was twenty-six when he entered his guilty plea, but twenty-five at the time of the offense, did not deprive him of due process.

Sotelo v. Hadden, 721 F.2d 700 (10th Cir. 1983).

A United States Parole Commission's decision should not be disturbed by the courts, unless there is a clear showing of arbitrary or capricious action or an abuse of discretion.

Nunez-Guardado v. Hadden, 722 F.2d 618 (10th Cir. 1983).

A United States Parole Commission's decision should not be disturbed by a reviewing court, unless the decision is arbitrary and capricious or is an abuse of discretion.

Robinson v. Hadden, 723 F.2d 59 (10th Cir. 1983).

In making a parole determination, the United States Parole Commission may consider evidence of offenses charged in dismissed counts, unless such consideration would violate a plea agreement or a representation made by the Government.

Kansas Supreme Court

State v. Stellwagen, 232 Kan. 744, 659 P.2d 167 (1983).

A sentence within statutory limits will not be disturbed on appeal absent special circumstances showing an abuse of the trial court's discretion.

State v. Calderon, 233 Kan. 87, 661 P.2d 781 (1983).

Under section 21-4614 of the Kansas Statutes, a sentencing court must give a defendant credit for time spent in jail solely for, or as a direct result of, the offense for which the defendant is being sentenced.

State v. Coberly, 233 Kan. 100, 661 P.2d 383 (1983).

A sentence will not be disturbed on the ground that it is excessive, if it is within statutory limits, unless the sentence is a result of partiality, prejudice, oppression, or corrupt motives.

State v. Miles, 233 Kan. 286, 662 P.2d 1227 (1983).

A prior drug conviction in another jurisdiction may be used to enhance sentencing in a subsequent Kansas drug conviction, if the prior conviction was for an offense of the character specified in the Kansas Uniform Controlled Substances Act and the prior conviction was of the same class as the Kansas conviction.

State v. Green, 233 Kan. 1007, 666 P.2d 716 (1983).

A defendant's direct appeal of a sentence following his guilty plea is permissible. However, the identical issue may not be raised again in a subsequent proceeding under section 60-1507 of the Kansas Statutes, in the absence of changed or unusual circumstances.

State v. Jackson, 234 Kan. 84, ____ P.2d ____ (1983).

A defendant who appears *pro se* in a probation revocation proceeding has both a constitutional and a statutory right to present witnesses

and other evidence on his behalf. A trial court should assist the defendant in obtaining subpoenas for defense witnesses necessary for a fair presentation of the defendant's position at the hearing.

State v. Crispin, 234 Kan. 104, ____ P.2d ____ (1983).

If a trial court imposes a sentence that is within the statutory limits, is within the realm of the trial court's discretion, and is not a result of partiality, prejudice, oppression, or corrupt motive, an appellate court will not disturb the sentence on the ground that it is excesive.

State v. Coy, 234 Kan. 414, ____ P.2d ____ (1983).

When an erroneous original sentence of imprisonment has been vacated and set aside, a new sentence imposed in the defendant's absence is void.

Kansas Court of Appeals

Mitchell v. Rayl, 8 Kan. App. 2d 690, 665 P.2d 1117 (1983).

Section 22-3717(a) of the Kansas Statutes, allowing good time credits to inmates serving mandatory terms for firearm offenses under section 21-4618 of the Kansas Statutes, is to be applied prospectively from its effective date (July 1, 1982).

V. REVIEW PROCEEDINGS

A. Post-Verdict Motions

There are three post-verdict motions. These are motions for judgment of acquittal,[189] new trial,[190] and arrest of judgment.[191] Post-verdict motions are made to the trial judge and usually are prerequisites to appeal.

A motion for judgment of acquittal alleges that the evidence is ELsufficient to sustain a conviction.[192] The review standard is that the defendant is entitled to an acquittal if reasonable jurors could not conclude that the evidence, taken in the light most favorable to the Government, proved guilt beyond a reasonable doubt.[193]

A motion for new trial may be based on a broad range of alleged trial errors.[194] These allegations are not usually considered unless the defendant timely raised them prior to the verdict.[195] A new trial will be granted if required in the interest of justice.[196] Motions for a new trial may also be based on newly discovered evidence.[197]

A motion in arrest of judgment alleges either that the indictment failed to charge an offense or that the court lacked jurisdiction over the offense charged.[198] These allegations are never waived and may be raised at any time during the criminal process.[199]

Court of Appeals for the Tenth Circuit

United States v. Lee, 700 F.2d 424 (10th Cir. 1983).

Newly discovered evidence that an eyewitness who made an in-court identification had been, at the time of the trial, a part-time

---

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

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

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

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

[193] Goff v. United States, 446 F.2d 623, 624 (10th Cir. 1971); State v. Gustin, 212 Kan. 475, 478-79, 510 P.2d 1290, 1294 (1973).

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

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

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

[197] *Id.*

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

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

undercover police agent, is not a proper ground for a new trial when the evidence would have been merely impeaching or cumulative and probably would not have brought about an acquittal.

United States v. Marsh, 700 F.2d 1322 (10th Cir. 1983).

A motion to reconsider an order denying a new trial does not toll the running of the time to file a notice of appeal.

Kansas Supreme Court

State v. Shepherd, 232 Kan. 614, 657 P.2d 1112 (1983).

The trial court must determine whether to grant a new trial when a prosecution witness recants his testimony after the defendant's conviction and when a witness, having not actually testified against the defendant at trial, changes the story he has previously given on record.

State v. Hill, 233 Kan. 648, 664 P.2d 840 (1983).

A court may deny a motion for judgment of acquittal if it determines that a rational fact-finder, able to evaluate witness credibility, weigh evidence, and draw justifiable inferences from that evidence, might fairly conclude that the defendant is guilty beyond a reasonable doubt.

State v. Handley, 234 Kan. 454, ____ P.2d ____ (1983).

In considering a motion for judgment of acquittal, a trial court must determine whether based upon the evidence, a rational trier of fact might fairly conclude that the defendant is guilty beyond a reasonable doubt.

B. Appeals

There is no constitutional right to appellate review.[200] If, however, a jurisdiction grants appellate review (which all do), the review cannot be conditioned so that it violates equal protection or due process.[201]

Generally, appellate courts only have jurisdiction to review "final decisions" of trial courts.[202] The Government, however, may appeal a pretrial dismissal of an indictment or a suppression of evidence,[203] and the defendant may appeal a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds.[204] Appellate courts may

---

[200] McKane v. Durston, 153 U.S. 684, 687 (1894).
[201] North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969).
[202] 28 U.S.C. § 1291; K.S.A. § 22-3601.
[203] 18 U.S.C. § 3731; K.S.A. § 22-3602(b) and § 22-3603.
[204] Abney v. United States, 431 U.S. 651, 659 (1977).

review an appeal if there is a possibility that any legal consequences will be imposed on the basis of the challenged conviction.[205]

If the appellate court determines that an error exists, it must then determine whether the error requires reversal. The appellate court will reverse if the error was properly raised in the trial court and the error was not "harmless."[206] If, however, the defendant failed to properly raise the error in the trial court, the appellate court will reverse only if it was "plain error."[207]

Court of Appeals for the Tenth Circuit

United States v. Neal, 718 F.2d 1505 (10th Cir. 1983).

An appellate court will view all the evidence, direct and circumstantial, together with all reasonable inferences therefrom, in the light most favorable to the Government.

United States v. Wilson, 719 F.2d 1491 (10th Cir. 1983).

An appellate court must view the evidence in the light most favorable to the Government. The court must determine whether there is sufficient substantial proof, direct and circumstantial, together with reasonable inferences drawn therefrom, on which the defendant could be found guilty beyond a reasonable doubt.

Kansas Supreme Court

State v. Matlock, 233 Kan. 1, 660 P.2d 945 (1983).

An appellate court will reverse a conviction if the evidence, viewed in the light most favorable to the prosecution, would not lead a rational fact-finder to find the defendant guilty beyond a reasonable doubt.

State v. Coberly, 233 Kan. 100, 661 P.2d 383 (1983).

When a defendant contends that the evidence at trial was insufficient to sustain a conviction, the standard for review is whether the evidence, viewed in the light most favorable to the prosecution, convinces the appellate court that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt.

State v. Zimmerman, 233 Kan. 151, 660 P.2d 960 (1983).

When the district court dismisses a complaint, the State may either refile the complaint or appeal the dismissal. The State is not required to refile the complaint before appealing the dismissal order.

---

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

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

[207] "Plain errors or defects affecting substantial rights may be noticed although they were ot brought to the attention of the court." FED. R. CRIM. P. 52(b).

State v. Walter, 234 Kan. 78, ____ P.2d ____ (1983).

When the sufficiency of the evidence in support of a conviction is challenged on appeal, the question for the reviewing court is: Does the evidence, viewed in the light most favorable to the prosecution, convince the appellate court that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt?

State v. Crispin, 234 Kan. 104, ____ P.2d ____ (1983).

Trial error is harmless when the appellate court is able to declare beyond a reasonable doubt that the error did not change the outcome of the trial.

State v. Knapp, 234 Kan. 170, ____ P.2d ____ (1983).

When a trial court conducts a full pretrial hearing on the admissibility of an accused's extrajudicial statement and determines that the statement was freely, voluntarily, and knowingly given, and admits the statement into evidence at trial, the appellate court should accept that determination if it is supported by substantial competent evidence.

State v. Knapp, 234 Kan. 170, ____ P.2d ____ (1983).

In determining that a federal constitutional error is harmless, a court must find, beyond a reasonable doubt, that the error had little, if any, likelihood of changing the result of the trial.

State v. Mitchell, 234 Kan. 185, ____ P.2d ____ (1983).

Failure to submit a written instruction does not preclude an appellate court from reviewing it if the record clearly reflects the requested instruction, the objection, and the grounds for the objection.

State v. Pondexter, 234 Kan. 208, ____ P.2d ____ (1983).

In considering the sufficiency of evidence to sustain a conviction, the reviewing court looks only to the evidence in favor of the verdict, it does not weigh the evidence, and if the essential elements of the charge are sustained by any competent evidence, the conviction must stand.

State v. Royal, 234 Kan. 218, ____ P.2d ____ (1983).

When a defendant contends that the evidence is insufficient to sustain the conviction, the standard of review on appeal is: Does the evidence, viewed in the light most favorable to the prosecution, convince the appellate court that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt?

State v. Williams, 234 Kan. 233, ____ P.2d ____ (1983).

When the sufficiency of the evidence in support of a conviction is challenged on appeal, the question for the reviewing court is: Does the evidence, viewed in the light most favorable to the prosecution, convince the appellate court that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt?

State v. Freeman, 234 Kan. 278, ____ P.2d ____ (1983).

Absent statutory authority, no right to appeal exists in a criminal case.

State v. Freeman, 234 Kan. 278, ____ P.2d ____ (1983).

The State may not appeal the dismissal of some of the counts of a complaint, information, or indictment while the case remains pending before the trial court on all or a portion of the remaining counts.

State v. Chamberlain, 234 Kan. 422, ____ P.2d ____ (1983).

A claim of ineffective assistance of counsel will not be considered on appeal until the trial court has had an opportunity to consider and rule upon it.

State v. Cantrell, 234 Kan. 426, ____ P.2d ____ (1983).

When a defendant contends that the evidence at trial was insufficient to sustain a conviction, the standard for review is whether the evidence, viewed in the light most favorable to the prosecution, convinces the appellate court that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt.

State v. Handley, 234 Kan. 454, ____ P.2d ____ (1983).

Issues not raised before the trial court ordinarily will not be considered for the first time on appeal.

State v. Bickford, 234 Kan. 507, ____ P.2d ____ (1983).

Absent statutory authority, no right to appeal exists in a criminal case.

State v. Bickford, 234 Kan. 507, ____ P.2d ____ (1983).

The State may not appeal the dismissal of some of the counts of a complaint, information, or indictment while the case remains pending before the trial court on all or a portion of the remaining counts.

State v. Bickford, 234 Kan. 507, ____ P.2d ____ (1983).

An appellate court must consider an objection based on the lack of subject matter jurisdiction, even if the objection was not raised prior to appeal and may raise such an objection on its own motion.

City of Overland Park v. Barron, 234 Kan. 522, ____ P.2d ____ (1983).

An appellate court has jurisdiction to hear a claim that the trial court did not have subject matter jurisdiction, even if the claim is first raised on appeal.

Kansas Court of Appeals

City of Wichita v. Mesler, 8 Kan. App. 2d 710, 666 P.2d 1209 (1983).

A municipal court order reducing a legal sentence imposed at an earlier date is not appealable under section 22-3609 of the Kansas Statutes since the order, rather than creating a new sentence, modifies the old sentence.

Case Index

If the case has been analyzed the page number is italicized.

United States Supreme Court

Court of Appeals for the Tenth Circuit

Kansas Supreme Court

Kansas Court of Appeals