KANSAS
CRIMINAL PROCEDURE
REVIEW

Vol. 2
1985

SURVEY OF CRIMINAL PROCEDURE

SURVEY OF 1984 CASES DECIDED BY:

UNITED STATES SUPREME COURT
KANSAS SUPREME COURT
KANSAS COURT OF APPEALS

UNIVERSITY OF KANSAS SCHOOL OF LAW
CRIMINAL JUSTICE CLINIC
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PREFACE

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

The 1985 Review is a survey of criminal procedure emphasizing recent cases. Since it is designed for the Kansas practitioner, only federal and Kansas law is included. The Review is organized according to the chronology of the criminal process. Each chapter includes a brief introduction that gives a general overview of the law and cites significant case law, statutes, and rules. Following the introduction is a survey of relevant 1984 cases decided by the United States Supreme Court, the Kansas Supreme Court, and the Kansas Court of Appeals. The major cases are analyzed and the holdings of the other cases are listed.

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

March 1, 1985

Emil A. Tonkovich
## KANSAS CRIMINAL PROCEDURE REVIEW

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The Kansas Criminal Procedure Review is published annually by the University of Kansas School of Law, Lawrence, Kansas 66045. Inquiries should be made to 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. This protection applies to any interest in which an individual has a reasonable expectation of privacy. Generally, searches and seizures must be based on probable cause and made pursuant to a warrant.

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

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

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

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1 The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
3 U.S. CONST. amend. IV.
5 See generally id. at 417-18.
9 U.S. CONST. amend. IV.
12 Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).
searches,\textsuperscript{16} "plain view" searches,\textsuperscript{17} inventory searches,\textsuperscript{18} and consent searches.\textsuperscript{19}

\textbf{United States Supreme Court}


When reasonable expectations of privacy remain in fire-damaged premises, the warrant requirement of the fourth amendment applies and, absent exigent circumstances, any official entry must be made pursuant to a warrant. If the primary objective of the search is to determine the origin of a recent fire, an administrative warrant will suffice. If, however, the primary objective of the entry is to gather evidence of criminal activity, a criminal search warrant is necessary.

A fire erupted at the defendants' home in their absence. When a fire investigation team arrived some hours later, a work crew was securing the premises at the defendants' request. Without a warrant, the fire investigators searched the basement of the home, where they gathered evidence indicating that the fire had been set deliberately. They proceeded to the upstairs area, where an extensive search revealed additional incriminating evidence. The defendants moved to suppress all of the evidence seized in the warrantless searches on the ground that it was obtained in violation of the fourth amendment.

The United States Supreme Court held that the post-fire searches of the basement and the upstairs area were unlawful. Because the defendants made a reasonable effort to secure their fire-damaged home after the blaze was extinguished, they retained a reasonable privacy interest in the residence. The warrantless entry by fire investigators some hours after the blaze was neither justified by the exigency of any future fire hazard nor made pursuant to the homeowners' consent. Thus, the post-fire investigations were subject to the warrant requirement. Since the primary purpose of the basement search was to determine the origin of the fire, the Court held that an administrative search warrant would have been sufficient. Even if the search of the basement had been a valid administrative search, however, it would not have justified the upstairs search. Because the basement search revealed evidence of arson, the later upstairs search was necessarily a search to gather further evidence of criminal activity and thus required a criminal warrant.


After a package has been searched by an unauthorized private party, a search of that package by a government agent does not

\textsuperscript{16} Terry v. Ohio, 392 U.S. 1, 30-31 (1968).
\textsuperscript{17} Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion).
violate the fourth amendment when the scope of the government's search does not exceed that of the private search.

Employees of a freight company opened a box containing a cylinder that held a series of plastic bags. Within the innermost bag was a white powder that the employees suspected were drugs. They placed the bags and the cylinder back into the box and notified law enforcement officials. A federal agent reopened the cylinder, removed the bags, and tested the powder. The field test indicated that the powder was cocaine. After securing a warrant to search the addressee's house, the agent resealed the box and delivered it to the addressee, who was arrested. The defendant moved to suppress the evidence on the ground that it was obtained in violation of the fourth amendment.

The United States Supreme Court held that the agent's search did not violate the fourth amendment. The Court noted that unauthorized private searches do not violate the fourth amendment because that amendment protects citizens from searches by the government, not from searches by private parties. Because the freight company's search eliminated the defendant's reasonable expectation of privacy, the agent's subsequent search could violate the defendant's protected privacy rights only if it exceeded the scope of the private search. Since the agent's search was entirely within the scope of the private search, no constitutionally protected rights were infringed.


The fourth amendment protections accorded to people in their "persons, houses, papers and effects" do not extend to open fields.

Narcotics agents received reports that the defendant was raising marijuana on his farm. The agents conducted a warrantless search of the farm area and found a marijuana field over a mile from the defendant's home. The field was secluded and could not be seen from any point of public access. The defendant had locked the central entrance gate to his farm and posted "no trespassing" signs. The defendant moved to suppress evidence of the discovery of the marijuana field, arguing that the steps he had taken to ensure his privacy raised a reasonable expectation of privacy in the field. Thus, he argued that the warrantless search violated the fourth amendment.

The United States Supreme Court held that the search was lawful, concluding that no legitimate expectation of privacy exists in open fields per se. Fourth amendment protections against unreasonable searches and seizures extend only to the "curtilage," the land immediately surrounding and associated with the home. The Court reaffirmed the "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1924), which held that police officers may enter and search a field without a warrant. The expectation of privacy in an open field is not one that society is prepared to recognize as reasonable. Therefore, although the defendant treated his secluded mari-
juana field as an area of private use, erecting barriers and "no trespassing" signs, those actions could not convert his subjective expectation of privacy into a legitimate interest protected by the fourth amendment.

**Thompson v. Louisiana, 105 S. Ct. 409 (1984).**

Because no "murder scene" exception exists to the search warrant requirement, homicide investigators who arrive at a murder scene after police have been called to aid the suspected killer must obtain a warrant before searching the area.

Police were called to a murder scene by the defendant's daughter who told police that the defendant had murdered her husband and then attempted suicide. The defendant had called her daughter for help, and the daughter had gone to the defendant's home to admit police. The police transported the defendant to a hospital and secured the house. Thirty-five minutes later, homicide investigators entered the house without a warrant and made a general search of the house for evidence. The search lasted two hours and uncovered several incriminating items. The defendant moved to suppress the evidence on the ground that it was obtained in violation of the fourth amendment.

The United States Supreme Court unanimously held that the warrantless search violated the fourth amendment. Relying on **Mincey v. Arizona, 437 U.S. 385 (1978)**, the Court held that although police may make warrantless entries when they believe that a victim or suspect is in need of immediate aid and may make a quick warrantless search to see if other victims or the killer are on the premises, no general "murder scene" exception exists to the search warrant requirement. The homicide investigators did not enter the house to aid a person nor did they search only to see if other victims were present. The search was clearly an investigatory search to discover evidence concerning the murder and, thus, a warrant was required. The Court rejected the state court's attempt to distinguish this case from **Mincey**. Although the search in **Mincey** lasted four days, the Court held that this two-hour general search was equally intrusive. Furthermore, the defendant did not manifest a diminished expectation of privacy in her home by seeking help. Thus, a warrant was required.

**Donovan v. Lone Steer, Inc., 104 S. Ct. 769 (1984).**

The fourth amendment does not require an administrative officer to obtain a warrant before entering the public lobby of a building to serve a subpoena duces tecum. A subpoenaed employer may, however, bring a district court action to challenge the reasonableness of the subpoena on other grounds without suffering any penalties for noncompliance with the subpoena.

**Immigration and Naturalization Service v. Delgado, 104 S. Ct. 1758 (1984).**

When, pursuant to a warrant, INS agents question factory work-
ers to determine whether any illegal alien employees are present, the questioning does not constitute a seizure under the fourth amendment. The questioning is not the equivalent of a seizure of the entire work force because it is only a brief encounter, and the employees have no reasonable belief that their freedom to continue to work or to move about the factory is restricted.

Police may search a car pursuant to the “automobile exception” to the fourth amendment even after they have impounded the car.

When reviewing the sufficiency of an affidavit based on an informant’s tip under the totality of the circumstances test of *Illinois v. Gates*, 103 S. Ct. 2317 (1983), an appellate court should consider the entire affidavit, weighing each relevant piece of information and balancing the relative weights of all the various indicia of reliability attending the tip. An affidavit provides a substantial basis for issuing a warrant when the informant’s story and the surrounding facts possess an internal coherence that supports the magistrate’s probable cause determination.

When there is probable cause to believe that only a minor offense has been committed, the “exigent circumstances” exception to the rule requiring police to obtain a warrant before entering a home rarely applies.

The fourth amendment does not apply to prison cell searches because a prisoner has no reasonable expectation of privacy in his cell.

An unannounced, random “shakedown” search of a pretrial detainee’s cell during his absence does not violate the due process clause of the fourteenth amendment because the search is a reasonable response to legitimate security concerns.

The installation of a beeper in a container with the consent of the original owner is not a search or seizure within the meaning of the fourth amendment. The warrantless monitoring of a beeper in a private residence, however, violates the fourth amendment rights of those who have a justifiable expectation of privacy in the residence.

When police have an articulable suspicion that an individual in an airport has committed or is about to commit a crime, no fourth amendment interest is implicated when the suspect agrees to step aside and talk with police. Assuming that a “seizure” for purposes of the fourth amendment occurred when the suspect agreed to a search, under the facts of the case, the seizure was justified by the
articulable suspicion.

**Kansas Supreme Court**


Police may lawfully monitor and record cordless telephone conversations heard over an ordinary FM radio without a warrant or the user's consent, provided the user knows or should have known of the telephone's radio broadcasting properties.

An informant notified law enforcement authorities of certain suspicious conversations pertaining to drug trafficking, which he had overheard while operating his AM/FM radio. These conversations were broadcast by the defendants as they used their cordless telephone. The authorities provided the informant with a tape recorder and tapes, instructing him to record the conversations. Police obtained neither a warrant to record the conversations nor the consent of the defendants. The police also failed to obtain the consent of the other parties to the conversations, who were using conventional telephones. The defendants moved to suppress the tapes and evidence subsequently seized pursuant to a search warrant based upon the tapes.

The Kansas Supreme Court, recognizing that Title III of the Omnibus Crime Control Act, 18 U.S.C. §§ 2510-20, controlled, held that the conversations were lawfully monitored and recorded. Title III distinguishes between wire and oral communications. A "wire communication" is protected regardless of the speaker's privacy expectations. Section 2510(1) defines wire communications as those "made in whole or in part . . . by the aid of wire." The court rejected the argument that conversations involving a cordless telephone and a conventional telephone qualify as communications made in part by wire. Thus, the conversations were oral communications which are protected only if the speaker has a reasonable expectation that the communication is not subject to interception. The court recognized that, because cordless telephone conversations can be intercepted by anyone using an ordinary FM radio, a cordless telephone user who knows or should know of those broadcasting properties, through the owner's manual or otherwise, has no reasonable expectation of privacy. The court concluded that the police lawfully monitored and recorded the conversations. Thus, the conversations were admissible against the cordless telephone users and the subsequent search warrant was valid.


Any party to a private conversation may consent to waive fourth amendment protection under the Kansas criminal eavesdropping statute, K.S.A. § 21-4001. The nonconsenting party has no fourth amendment or statutory right to challenge the waiver.

Police officers sought the help of an informant to gain evidence of
the defendant's suspected marijuana dealing. The informant agreed to cooperate and contacted the defendant to arrange a marijuana purchase. Fitted with a bodypack transmitter, the informant met with the defendant in his home. Officers listened to and recorded a conversation transmitted by the bodypack. The defendant moved to suppress the conversation, tapes, and evidence subsequently seized pursuant to a search warrant based upon the intercepted conversation, on the ground that K.S.A. § 21-4001 had been violated.

The Kansas Supreme Court held that the police did not violate the eavesdropping statute. Construing the language of the statute, the court found that the legislature intended that protection under the statute could be waived by either party to a private conversation. In this case, the informant consented to the monitoring of his conversation with the defendant and thus waived the statutory protection.


When a vehicle is lawfully impounded, officers may make a warrantless inventory search of the personal property within the vehicle, including the glove box and trunk, provided the vehicle or its contents are not damaged.

Police arrested the defendant for driving while under the influence. After towing and impounding the car, officers searched the passenger compartment, the glove box, and the locked trunk. The trunk was opened with the defendant's keys, which he had left on the car's roof before he passed out and was arrested. Pursuant to police policy, the officers removed all personal belongings from the car. One item removed from the trunk was later determined to be property stolen in a burglary. After being charged with burglary, the defendant moved to suppress the stolen property on the ground that the inventory search violated the fourth amendment.

The Kansas Supreme Court held that the warrantless inventory search was proper and that the evidence was admissible. Relying on *South Dakota v. Opperman*, 428 U.S. 364 (1976), the court reasoned that an inventory search of an impounded vehicle is clearly justified for the protection of the vehicle, its contents, and the police. The court found that the vehicle was lawfully in police custody. Because the defendant had passed out and could not drive his car, police had no choice but to impound the car. In such a case, the governmental interests in protecting the defendant's property, in protecting the police from claims for loss or damage, and in protecting the police and public from possible danger outweigh the defendant's privacy interests in the vehicle.


The existence and voluntariness of consent to a search and seizure must be proved by a preponderance of the evidence.

Under K.S.A. § 22-2401, a law enforcement officer may make an arrest when he has either an arrest warrant or probable cause to believe that any arrest warrant has been issued in Kansas. When an officer makes an arrest based on probable cause that a warrant has been issued in another jurisdiction, the officer must have probable cause to believe that a felony warrant, not merely a misdemeanor warrant, has been issued by that jurisdiction.


When issuing a search warrant, a magistrate should make a practical, common-sense decision that, under the totality of the circumstances, a fair probability exists that contraband or evidence of a crime will be found in a particular place.


When a search warrant affidavit contains false statements that were knowingly or recklessly included, the reviewing judge must disregard these statements and determine probable cause from the excised affidavit. The defendant bears the burden of proving that the false statements were knowingly or recklessly included.


Before issuing an arrest or search warrant, a neutral and detached magistrate must find probable cause based upon the totality of the circumstances test of *Illinois v. Gates*, 103 S. Ct. 2317 (1983).


The scope of the constitutional protections afforded by section 15 of the Kansas Constitution Bill of Rights is identical to that of the fourth amendment of the United States Constitution.


The plain view doctrine applies only when the following elements are present: (1) the initial intrusion allowing authorities to observe the evidence in plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the item is immediately apparent.

**Kansas Court of Appeals**


Incident to a lawful custodial arrest of the occupant of an automobile, police may contemporaneously search the passenger compartment of the automobile and its contents. If during such a search the police find evidence establishing probable cause that the automobile contains contraband, they may make a warrantless search of every area of the vehicle and the vehicle’s contents that might reasonably contain the contraband.
The defendant's automobile was stopped by a police officer who suspected that the defendant was driving while intoxicated. When the defendant failed a field sobriety test, he was read his *Miranda* rights, arrested, handcuffed, and placed in the patrol car. The officer searched the passenger compartment of the car and discovered marijuana and drug paraphernalia. He then searched the trunk and found more marijuana. The defendant moved to suppress the evidence on the grounds that the search of the automobile was not incident to arrest and that the officer had no probable cause to believe the car contained contraband.

The Kansas Court of Appeals held that the search was lawful. Relying on *New York v. Belton*, 453 U.S. 454 (1981), the court held that the search of the passenger compartment was a valid search incident to arrest. The justification for such a search lies in the need to ensure the officer's safety and preserve evidence. Even though at the time of the search the defendant was handcuffed, arrested and without access to his vehicle, the court held that a broad reading of *Belton* justified the warrantless search of the passenger compartment and its contents. The court further held that the search of the trunk was proper under *United States v. Ross*, 456 U.S. 798 (1982). Because police had lawfully discovered evidence of contraband in the passenger compartment, they had probable cause to believe that the defendant's car contained other contraband.


Under K.S.A. § 22-2401, a law enforcement officer may make a warrantless arrest when he has probable cause to believe a suspect has committed or is committing a misdemeanor and that the suspect will not be apprehended unless immediately arrested. The latter requirement is satisfied when a criminal suspect identifies himself to a law enforcement officer in the course of a criminal investigation but is unable to verify his given identity in any way.

**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 proce-

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\(^{20}\) The fifth amendment provides that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

\(^{21}\) The fifth amendment provides that "nor shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

\(^{22}\) The sixth amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his Defence." U.S. CONST. amend. VI.
dures and requires that statements be given voluntarily. The test for voluntariness is whether, in light of the totality of the circumstances, the Government obtained the statement by coercion or improper influence.

The fifth amendment privilege against self-incrimination applies to police custodial interrogations. To mitigate the coercive influences inherent in custodial interrogations, police are required to advise the defendant of the Miranda warnings prior to such interrogations. 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. The defendant may exercise his rights immediately or at any time during the interrogation. These warnings do not apply to general on-the-scene questioning or to volunteered statements.

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

**United States Supreme Court**


A voluntary statement made by a probationer to his probation officer in a noncustodial setting, without prior Miranda warnings, is admissible in a subsequent criminal proceeding.

The defendant pleaded guilty to a sex-related charge, was given a suspended sentence, and placed on probation. The terms of his probation required that he participate in a treatment program, report to his probation officer, and be truthful with the officer in all matters. He was told that failure to comply with those conditions could result in a hearing to revoke his probation. During a treatment program session, the defendant admitted to his counselor that he had committed a rape and murder. The counselor informed the defendant’s probation officer of the confession. In a subsequent meeting, the probation officer informed the defendant that she was aware of the confession. The defendant admitted to the rape and murder. After he was indicted for first degree murder, he sought to suppress the confession made to his probation officer on the ground that it

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26 Id. at 444, 467-73.
27 Id. at 475.
28 Id. at 473-74.
29 Id. at 477-78.
was obtained in violation of his fifth amendment privilege against self-incrimination.

The United States Supreme Court held that the confession was admissible under the fifth amendment. The Court concluded that the defendant's obligation to appear and answer truthfully his probation officer's questions did not compel him to incriminate himself. A probationer is in the same position as any witness who is confronted with questions that both he and the Government reasonably expect to elicit incriminating answers. Thus, the probationer must assert the fifth amendment privilege against self-incrimination and if he chooses to answer, his statements will be considered voluntary. The Court distinguished between a probation interview and a custodial interrogation, rejecting the argument that *Miranda* warnings must be given to protect the probationer's fifth amendment privilege. A probation interview, arranged by appointment at a mutually convenient time, is not as coercive as an interrogation conducted pursuant to arrest. Additionally, a probationer has not been formally arrested nor has his freedom of movement been significantly restrained. The Court rejected the argument that the defendant was deterred from claiming his fifth amendment privilege by a reasonably perceived threat of revocation of probation because the defendant had no reason to believe that his probation would have been revoked had he asserted the privilege. Therefore, his failure to assert the privilege resulted in admissible disclosures.  

When a police officer questions a suspect to protect himself or the public from immediate danger, he need not give *Miranda* warnings, and any of the suspect's voluntary statements are admissible. This "public safety" exception to *Miranda* is narrowly applied.

A woman approached two police officers and told them she had just been raped. She described her assailant, explained that he had a gun, and that he had just entered a nearby grocery store. As one of the officers entered the store, the defendant ran toward the back of the building. The officer pursued the defendant, but lost sight of him for a few seconds. When the officer saw the defendant again, he ordered him to stop and place his hands over his head. He frisked the defendant and found an empty shoulder holster. After handcuffing the defendant, the officer asked where the gun was located. Nodding in the direction of some empty cartons, the defendant said that the gun was in one of them. The officer retrieved the gun, placed the defendant under arrest, and read him his *Miranda* rights. The defendant moved to suppress the gun and his statement on the ground that they were obtained in violation of *Miranda*.

The United States Supreme Court held that the gun and the statement were admissible. Noting that the fifth amendment prohibits only coerced incriminating statements, the Court reiterated that *Miranda* warnings are not constitutionally mandated, but are merely procedural safeguards that protect a suspect's fifth amend-
ment privilege. When exigent circumstances exist, the threat to public safety outweighs a suspect’s protections under *Miranda*. In these circumstances, spontaneous questions to preserve public safety are not the type of coercive interrogations that *Miranda* addresses. The officer in this case had a reasonable belief that the defendant was armed. He needed to know the location of the gun to preserve public safety since the gun could have been used by an accomplice or found by an employee or customer. Because the officer acted to protect public safety, he was not required to give *Miranda* warnings.


A person subjected to custodial interrogation is entitled to *Miranda* warnings, regardless of the nature or severity of the offense of which he is suspected or arrested. The roadside questioning of a motorist detained pursuant to a routine traffic stop, however, is not a custodial interrogation for *Miranda* purposes.

Upon observing the defendant’s erratic driving, a police officer stopped the car and asked the defendant to get out. Seeing that he had difficulty standing, the officer immediately decided that the defendant would be charged with a traffic offense and would not be permitted to leave the scene. The officer then gave the defendant a field sobriety test, which he failed. When asked if he had used intoxicants, the defendant made an incriminating statement, and the officer arrested him. At the jail, the officer again questioned the defendant, who made further incriminating statements. The defendant was never informed of his *Miranda* rights. He was charged with driving under the influence, a misdemeanor offense. The defendant moved to suppress the incriminating statements on the ground that they were obtained in violation of his fifth amendment rights.

The United States Supreme Court held that the defendant’s statements made in response to roadside questioning were admissible, but the subsequent statements were not. *Miranda* warnings must be given prior to custodial interrogations, regardless of the offense, because all custodial interrogations are inherently coercive. Roadside questioning pursuant to a routine traffic stop, however, is not a custodial interrogation to which *Miranda* applies. The atmosphere surrounding a typical traffic stop is brief, public, and less police-dominated than the interrogations at issue in *Miranda*. Once a suspect’s freedom is curtailed to a degree associated with formal arrest, *Miranda* applies. A police officer’s unspoken intention to arrest a suspect, however, does not trigger *Miranda*. Thus, in this case, the officer was not required to give *Miranda* warnings until he arrested the defendant.


The rule of *Edwards v. Arizona*, 451 U.S. 477 (1980), does not apply retroactively. This rule prohibits police from questioning a suspect who has invoked his right to counsel under *Miranda* unless
the suspect initiates the conversation or his attorney is present.


Once a suspect clearly invokes his Miranda right to counsel during interrogation, nothing the suspect says in response to further questioning may be used to cast doubt on that invocation. The suspect's responses are, however, relevant to the distinct issue of waiver.

Kansas Supreme Court


In addition to giving Miranda warnings, police must inform a D.U.I. arrestee that he has no constitutional right to consult an attorney when deciding whether to take a blood alcohol test.

A police officer observed the defendant driving his car in an erratic manner. After stopping the defendant, the officer immediately noticed the odor of alcohol on his breath. The officer gave the defendant a field sobriety test, which he failed. The officer then read the defendant the Miranda warnings and asked him to take a breathalyzer test. The defendant responded that he would first like to talk to his lawyer. The officer then placed the defendant in the police car and took him to the police station, where the defendant attempted to telephone his attorney but was unable to reach him. Again, the defendant stated his desire to talk to his attorney before taking the breathalyzer test. The officer took the defendant to the county jail and returned to duty. Approximately fifteen to thirty minutes later, the defendant indicated to the jailer that he wanted to take the breathalyzer test, but was told it was too late. A refusal report was filed. An administrative law judge found that the defendant had refused to submit to the breathalyzer test and suspended his driving privileges for 120 days. On appeal, the district court found that the defendant had effectively rescinded his refusal and, therefore, reversed the order suspending his driving privileges. The Department of Revenue appealed the district court order.

The Kansas Supreme Court held that the defendant's refusal to take the blood alcohol test (B.A.T.) was reasonable. Although the defendant did not effectively rescind his refusal under the court's five-part test, the court reasoned that the defendant was confused when police gave him the Miranda warnings without explaining the inapplicability of the right to counsel when he was deciding whether to submit to the B.A.T. Citing Berkemer v. McCarty, 104 S. Ct. 3138 (1984), the court found that the police officer properly gave the Miranda warnings. The court held, however, that because of the implied consent statute, a D.U.I. arrestee has no constitutional right to consult an attorney when deciding whether to take a B.A.T. Thus, Miranda warnings alone are confusing to a D.U.I. arrestee.
To remedy this problem, the court stated that in addition to *Miranda* warnings, the police should tell the D.U.I. arrestee:

Kansas law provides that a person who drives a motor vehicle shall be deemed to have given consent to submit to a chemical test of breath or blood, to determine the alcoholic content of the person's blood, whenever the person is arrested or taken into custody for operating a motor vehicle under the influence of alcohol.

Your right to consent or refuse to take a chemical test is not a constitutional right. You have no constitutional right to consult with an attorney as to whether or not you will take the test. 235 Kan. at 905.

The court also stated that the police could well add:

If you refuse to take the test, the fact of your refusal can be used against you in any trial for driving under the influence of alcohol. Also, if you refuse to take the test, your driver's license will probably be suspended for a period of not less than 120 days and not more than one year. *Id.*


A person arrested for driving under the influence has no sixth amendment right to consult with counsel to determine whether to submit to a blood alcohol test.

A police officer arrested the defendant for driving under the influence and informed him of his *Miranda* rights. The officer then took the defendant to the police station where the officer asked him to submit to a blood alcohol test (B.A.T.). The defendant asked to telephone his attorney before deciding whether to take the test, but his request was refused. He then agreed to take the test. The defendant moved to suppress the results of the B.A.T. on the ground that police obtained his consent to the test in violation of his sixth amendment right to counsel.

The Kansas Supreme Court held that a suspect arrested for driving under the influence has no sixth amendment right to consult with counsel to determine whether to take a B.A.T. The court reasoned that the decision whether to submit to a B.A.T. is not a critical stage of the criminal proceeding requiring the sixth amendment right to counsel. Furthermore, the court reasoned that the defendant had no right to counsel because adversarial judicial criminal proceedings had not yet been initiated. An arrest for driving under the influence does not, in itself, initiate the criminal proceedings. Not until after the test has been administered does the State initiate the prosecution. Citing *Standish v. Department of Revenue*, 235 Kan. 900, 683 P.2d 1276 (1984), the court reiterated that an officer who arrests a person for driving under the influence should, in addition to reading the suspect his *Miranda* warnings, read the suspect a statement that he has no constitutional right to consult with counsel in deciding whether to submit to a B.A.T.
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 reliability 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 identification procedures that do not require the defendant's presence\(^{37}\) or that occur prior to indictment or other formal charges.\(^{38}\)

**Kansas Supreme Court**


A photographic identification is admissible unless, under the totality of the circumstances, it is so impermissibly suggestive that it gives rise to a substantial likelihood of irreparable misidentification.

**Kansas Court of Appeals**


A defendant voluntarily absent from trial may be identified from a photograph if the identification procedure is not irreparably suggestive.

D. Exclusionary Rule

The exclusionary rule is a judicially created remedy that prohibits the use of evidence obtained by the police through means that violate the defendant's fourth, fifth, or sixth amendment rights.\(^{39}\) The purpose of the rule is to deter illegal police conduct and to

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\(^{32}\) 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.


\(^{35}\) Id.


\(^{38}\) Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion).

maintain judicial integrity.\textsuperscript{40}

Limitations on the exclusionary rule prevent its strict application. These limitations apply to situations in which the cost to society of losing probative evidence outweighs the deterrent effect of the rule. Under this balancing test, the exclusionary rule has been held inapplicable in several situations, including grand jury proceedings,\textsuperscript{41} civil proceedings,\textsuperscript{42} and impeachment at trial.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45} Unless sufficiently attenuated, the evidence will be excluded.\textsuperscript{46} The "fruit of the poisonous tree" doctrine is applied in a variety of situations.\textsuperscript{47}

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

\textbf{United States Supreme Court}


When the Government can prove by a preponderance of the evidence that illegally obtained information ultimately or inevitably would have been discovered by lawful means, the "inevitable discovery" exception to the exclusionary rule applies.

A young girl was abducted in Des Moines, Iowa, and search parties were organized to find her. Evidence indicated that the defendant had abducted her. The defendant surrendered to police in Davenport, Iowa, and was arraigned. While transporting the defendant back to Des Moines, a police detective initiated a conversation with the defendant concerning the location of the girl's body. In response, the defendant told the detective where to find the body and led him to it. The defendant was convicted of murder. On ap-

\textsuperscript{40} Id. at 656, 659 (1961).
\textsuperscript{43} Harris v. New York, 401 U.S. 222, 224-26 (1971).
\textsuperscript{44} Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).
\textsuperscript{45} Id. at 487-88.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{49} For all practical purposes, "standing" is an issue only in fourth amendment cases.
peal, the United States Supreme Court held that the defendant's statements leading police to the body were inadmissible because they violated the defendant's sixth amendment right to counsel. The Court, however, noted that the discovery of the body might be admissible if it would have been discovered without the defendant's statements. When the defendant was retried, the state trial court admitted evidence concerning the location and condition of the body, reasoning that the body would have been discovered within a short time in essentially the same condition. The defendant appealed.

The United States Supreme Court held that the "inevitable discovery" exception to the exclusionary rule applies and that the evidence of the body's location and condition was properly admitted. The Court reasoned that the purpose of the exclusionary rule is to deter illegal police conduct that puts the prosecution in a better position than it would have been without the illegal conduct. When a court admits evidence that inevitably would be discovered, the prosecution gains no advantage. Furthermore, the prosecution is not required to prove the absence of bad faith on the part of the officers. To do so would put the prosecution in a worse position than had the unlawful activity not occurred. When evidence inevitably would be discovered, the need to admit probative evidence outweighs society's interest in deterring unlawful police conduct. In this case, the Court found that search parties were approaching the location of the body and inevitably would have discovered it without the defendant's assistance. Thus, the evidence of the location and condition of the body was admissible.


The "good faith" exception to the exclusionary rule permits the admission of evidence seized by police officers acting in reasonable reliance on a facially valid search warrant that subsequently is found to be unsupported by probable cause.

Acting on information from an unproven confidential informant, police officers initiated surveillance of the defendants' drug-trafficking activities. Based upon an affidavit containing the informant's information and a summary of the extensive police surveillance, a state court judge issued a facially valid search warrant. Acting pursuant to the warrant, police seized large quantities of drugs. The defendants were indicted for federal drug offenses and moved to suppress the evidence. The district court suppressed the evidence because the affidavit supporting the warrant was insufficient to establish probable cause. Although the court found that the police acted in good faith, it refused to recognize a "good faith" exception to the exclusionary rule.

The United States Supreme Court held that because the police acted in reasonable reliance on a search warrant, the evidence was admissible. In recognizing the "good faith" exception, the Court emphasized that the exclusionary rule is not constitutional in origin,
but is rather a judicially created remedy designed to protect fourth amendment rights through its deterrent effect. A cost-benefit analysis is used in the application of the exclusionary rule. The cost of losing reliable and probative evidence is weighed against the benefit of deterring fourth amendment violations. After noting that the exclusionary rule is not directed at judicial misconduct, the Court reasoned that the rule cannot deter objectively reasonable law enforcement activity. This is particularly true when a police officer has obtained a search warrant from a judge and acted within its scope. Thus, the Court concluded that the application of the exclusionary rule to these situations cannot logically deter fourth amendment violations. In this case, the search warrant affidavit contained the results of an extensive investigation that arguably might have established probable cause. Under these circumstances, the officers' reliance on the magistrate's erroneous determination of probable cause was objectively reasonable. Accordingly, the application of the exclusionary rule to this case was inappropriate.


The “good faith” exception to the exclusionary rule permits the admission of evidence seized by police officers acting in reasonable reliance on a technically defective search warrant.

A police detective drafted a search warrant affidavit based on information gathered in a homicide investigation. The affidavit requested authority to search the defendant's residence for certain described items, including the victim's clothing and a blunt instrument that might have been the murder weapon. Because it was Sunday, the detective could not find an appropriate warrant application form and, therefore, used a controlled substances form. After making some changes in the form, the detective presented it and the affidavit to a judge at his residence. The detective told the judge that the warrant form might need further modifications. The judge found that the affidavit established probable cause and told the detective that the necessary changes in the warrant form would be made. The judge made some changes, but the warrant continued to authorize a search for controlled substances and failed to incorporate the affidavit. After signing the warrant, the judge returned it and the affidavit to the detective, assuring him that it was proper in form and content. The search of the defendant's residence was limited to the items listed on the affidavit and several pieces of incriminating evidence were seized. The defendant was charged with first degree murder and moved to suppress the evidence on the ground that the warrant did not particularly describe the items to be seized. The trial court agreed, but denied the motion because the police acted in good faith. At trial, the defendant was convicted. On appeal, the state supreme court refused to recognize the “good faith” exception and reversed.

The United States Supreme Court held that because the police acted in reasonable reliance on a search warrant, the evidence was
admissible. Citing the rationale in *United States v. Leon*, 104 S. Ct. 3405 (1984), the Court reaffirmed the “good faith” exception and stated that the only issue in this case was whether the police reasonably believed that the search was authorized by a valid warrant. The Court found that the police took every step that could reasonably be expected of them to ensure the validity of the warrant. Thus, the application of the exclusionary rule in this case was inappropriate.

Evidence discovered pursuant to a valid search warrant executed the day after an illegal entry is not “fruit of the poisonous tree” when the search warrant is based on information wholly unrelated to the illegal entry and constitutes an independent source for the discovery of the evidence.

The exclusionary rule does not apply in civil deportation hearings held by the INS.

**Kansas Supreme Court**

The “fruit of the poisonous tree” doctrine does not apply absent a showing of police misconduct.

The exclusionary rule does not apply in a civil action in which neither the state nor its officers are parties.
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.\textsuperscript{61} 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,\textsuperscript{62} or selective prosecution, which is a denial of equal protection.\textsuperscript{63}

\textit{United States Supreme Court}


When a defendant is indicted on felony charges while appealing a misdemeanor conviction arising out of the same act, a presumption of prosecutorial vindictiveness arises.

\textit{Kansas Supreme Court}


When a county attorney requests the Attorney General to prosecute a case in the trial court, the Attorney General may file a complaint and prosecute the case to its conclusion independent of any court order. Once the Attorney General enters the case, he controls the prosecution and may not be removed except for cause.


When a district court dismisses a criminal complaint, the complaining witness has no standing to appeal the dismissal because a private citizen has no right to prosecute a crime or control a criminal prosecution.


The Attorney General may commence and prosecute an action in district court when the county attorney expresses no opposition.

\textsuperscript{63} \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 373-74 (1886).
Kansas Court of Appeals


When a defendant fails to raise the defense of discriminatory and selective law enforcement in a pretrial motion, as required by K.S.A. § 22-3208(3), the right to raise that issue on appeal is waived.

B. Grand Jury

The fifth amendment guarantees all persons accused of a federal felony the right to a grand jury indictment. This right does not apply to state prosecutions. The purpose of a grand jury is to decide whether criminal proceedings should be instituted. Grand juries are summoned and regulated by the district court. The prosecution supervises and conducts grand jury proceedings. A grand jury may subpoena witnesses for questioning and require them to bring documents. A witness who refuses to comply with a grand jury subpoena may be held in contempt and imprisoned until the end of the grand jury term. Although a grand jury witness may invoke the fifth amendment privilege against self-incrimination, the privilege is removed if the witness is granted use immunity.

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

United States Supreme Court


Discrimination in the selection of a grand jury foreman who performs essentially clerical duties does not warrant dismissal of an indictment issued by that grand jury.

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84 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.
85 Hurtado v. California, 110 U.S. 516, 538 (1884).
87 FED. R. CRIM. P. 6(a).
88 See generally FED. R. CRIM. P. 6(d)-(e), 7(c)(1).
C. Indictments

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

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

Kansas Supreme Court


In seeking a reversal for failure to grant a severance under K.S.A. § 22-3204, a defendant must show that the trial judge clearly abused his discretion in refusing to grant a severance.


When a defendant commits offenses at different times and places, the offenses do not arise out of a single wrongful act and the defendant may be charged separately for each offense.


The court in its discretion may order two or more complaints, informations, or indictments against a single defendant to be tried together if the charges could have been joined in a single complaint, information, or indictment under K.S.A. § 22-3203.


Similar offenses committed during one criminal episode, but perpetrated at different times, are properly chargeable as separate offenses and need not be merged and tried as one charge.

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.
69 FED. R. CRIM. P. 13-14.
Kansas Court of Appeals


In theft cases, when there is a question as to what the evidence will disclose at trial, the prosecutor should charge in the alternative under those subsections of K.S.A. § 21-3701 that may be established by the evidence.


A district court should freely grant leave to amend a criminal complaint at any time before a verdict is rendered unless the leave to amend will result in prejudice to the substantial rights of the defendant.


If a complaint fails to state the alleged violation of law and include each essential element of the crime, the complaint is fatally defective.

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. If the arrest is made without a warrant, the Government must promptly file a complaint with the magistrate. At the initial appearance the magistrate makes a probable cause review of the complaint.

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

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

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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).
73 FED. R. CRIM. P. 5(c). See also K.S.A. § 22-2901.
74 FED. R. CRIM. P. 5(c); K.S.A. § 22-2901.
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.
United States Supreme Court


Due process does not prohibit the pretrial detention of a juvenile when there is a serious risk that the juvenile might commit an act that, if committed by an adult, would constitute a crime. Preventive detention serves a legitimate state objective and is proper when procedural safeguards are adequate to protect the juvenile's rights.

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. If probable cause is found, the defendant is held to answer in the district court. If not, the complaint is dismissed and the defendant is discharged.

The preliminary examination is scheduled at the initial appearance. It must be held within a specified period of time. A preliminary examination is not held if the defendant waives it or is indicted.

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. Preliminary examinations, however, are not constitutionally mandated. The fourth amendment requirement may be satisfied by various procedures.

Kansas Supreme Court


The rules of evidence contained in the Kansas Code of Civil Procedure apply in preliminary examinations, except to the extent they may be relaxed by court rules or statutes. Thus, hearsay evidence is generally inadmissible in preliminary examinations.


The purpose of a preliminary examination is to determine whether sufficient evidence exists to support probable cause that a
crime was committed and that the defendant committed it. The evidence need not be sufficient to support a conviction.

F. Arraignment

Arraignments are held in open court. The defendant is informed of the charges against him and is called upon to plead.\textsuperscript{87}

G. Guilty Pleas

Due process requires that guilty pleas be voluntarily and understandingly made.\textsuperscript{88} 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.\textsuperscript{89}

A guilty plea is equivalent to a conviction and is an admission of all the elements of the crime charged.\textsuperscript{90} A defendant waives several constitutional rights by pleading guilty.\textsuperscript{91} Furthermore, a guilty plea forecloses appellate review of nonjurisdictional constitutional claims occurring before the plea.\textsuperscript{92} Subsequent to the guilty plea, however, the defendant may appeal claims that relate to the Government's power to prosecute.\textsuperscript{93}

\textit{United States Supreme Court}


Following the withdrawal of the prosecutor's original plea bargain offer, a defendant who voluntarily and intelligently pleads guilty pursuant to a less favorable plea agreement may not successfully attack his plea on the ground that the first agreement should be specifically enforced.

The defendant was convicted of burglary, assault, and murder. The murder conviction was set aside and plea negotiations ensued prior to retrial on that charge. The prosecutor first offered to recommend a twenty-one year sentence to run concurrently with the defendant's burglary and assault sentences. The prosecutor, however, withdrew the offer after the defendant accepted it but before

\textsuperscript{87} FED. R. CRIM. P. 10; K.S.A. § 22-3205.
\textsuperscript{89} FED. R. CRIM. P. 11(c)-(d); K.S.A. § 22-3210(3).
\textsuperscript{90} McCarthy v. United States, 394 U.S. 459, 466 (1969).
\textsuperscript{93} Blackledge v. Perry, 417 U.S. 21, 30 (1974).
any plea was entered. The prosecutor then agreed to recommend a
twenty-one year sentence to run consecutively with the defendant's
other sentences. The defendant accepted this second offer and was
sentenced. He sought habeas corpus relief on the ground that due
process prevented the prosecutor from withdrawing the plea propo-
sal once it had been accepted.

The United States Supreme Court held that a guilty plea may be
challenged under the due process clause only if the defendant is not
fairly apprised of the consequences of his plea. The Court found
that the defendant was aware of the consequences of his second
plea agreement and understood that the prosecutor would recom-
mand a consecutive, rather than a concurrent, sentence. The defen-
dant's guilty plea did not rest on an unfulfilled promise, was made
with the advice of competent counsel, and was voluntarily and intel-
ligently made. Because the withdrawal of the original plea offer did
not affect the voluntariness or intelligence of the subsequent plea,
the defendant lacked constitutional grounds to demand enforcement
of the prosecutor's original offer.

H. Discovery

Although no general constitutional right to discovery exists in
criminal cases,94 jurisdictions provide for discovery by statutes95 or
rules.96 Discovery occurs at both the pretrial and trial stages of the
criminal process.

Pretrial defense discovery is usually limited to relevant state-
ments made by the defendant, the defendant's prior criminal record,
relevant documents and tangible objects, and relevant reports
of examinations and tests.97 Absent a specific showing of material-
ity to the preparation of the defense, the Government is not re-
quired to disclose witness lists.98 Similarly, a balancing test is em-
ployed to determine whether the Government must disclose the
identity of informants.99 The defense also obtains discovery through
informal means, including discretionary disclosure by the
prosecutor.100

The Government is entitled to some pretrial discovery. This dis-
covery is typically limited to certain instances of reciprocal discov-
ery101 and to notice of alibi102 and insanity103 defenses.

95 E.g., K.S.A. § 22-3212.
96 E.g., FED. R. CRIM. P. 16.
97 FED. R. CRIM. P. 16(a)(1) (A)-(D); K.S.A. § 22-3212(1)-(2).
98 See generally id.
100 Other informal means of defense discovery include preliminary examinations, bills
of particulars, subpoenas, and depositions.
101 FED. R. CRIM. P. 16(b); K.S.A. § 22-3212(3).
102 FED. R. CRIM. P. 12.1; K.S.A. § 22-3218.
103 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 pre-trial statements made by the witness. Some jurisdictions have expanded this discovery to statements of defense witnesses other than the defendant.

Due process imposes a duty on prosecutors to disclose exculpatory evidence to the defense. This "Brady material" is generally disclosed pretrial, but the Government also has a continuing duty to disclose such evidence. Unless the nondisclosed evidence is material and thereby deprives the defendant of a fair trial, there is no constitutional violation. 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.

United States Supreme Court


Under Brady v. Maryland, 373 U.S. 83 (1963), a law enforcement official has a duty not to destroy exculpatory evidence. Due process, however, does not require law enforcement agencies to preserve breath samples of suspected drunk drivers for the results of breathalyzer tests to be admissible at trial.

Kansas Supreme Court


A defendant may be granted a new trial on the ground that the prosecution withheld or suppressed evidence if the evidence is clearly exculpatory and is so material that the defendant's case was prejudiced by its absence.


Under K.S.A. § 8-1002, the State has a duty to deliver results of a blood alcohol test to the defendant upon request, and a court may order suppression of the results under certain circumstances. Suppression, however, is not justified when the failure to disclose the results is inadvertent, counsel fails to make a direct request for disclosure, and no surprise to the defendant results.

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107 See id.
108 Id.
I. Motions and Hearings

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

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.

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

J. Speedy Trial

"Speedy trial" protections apply to two time periods. These periods encompass the time between the commission of the crime and the indictment, and the time between the indictment (or arrest) and the trial.

The primary protections against preindictment delay are the statutes of limitation. In addition, fifth amendment due process pro-

110 Those cases generally related to pretrial motions and hearings are categorized in other sections that deal with the subject matter of the motion. See, e.g., Part I.A., Arrest, Search and Seizure.
111 FED. R. CRIM. P. 12(b); K.S.A. §§ 22-3215 to -3216.
112 FED. R. CRIM. P. 12(b) (1)-(5); K.S.A. §§ 22-3215 to -3216.
114 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.
115 FED. R. EVID. 104(d).
hibits intentional and prejudicial Government delays that are used to gain a tactical advantage.\textsuperscript{120}

An indictment or arrest triggers the sixth amendment speedy trial right. To determine whether there is a speedy trial violation the following factors are balanced: (1) the length of delay; (2) the reasons for delay; (3) the degree to which the defendant asserted his speedy trial right; and (4) the degree of actual prejudice to the defendant.\textsuperscript{121} Jurisdictions often have speedy trial statutes that provide specific time limitations.\textsuperscript{122}

\textit{Kansas Supreme Court}


The 180-day speedy trial limitation contained in the Interstate Agreement on Detainers, K.S.A. §§ 22-4401 to -4408 commences upon receipt of a prisoner's notice and request for final disposition of a charge by the proper Kansas authorities that filed the detainer. The burden of complying with this act rests with the defendant when there is no evidence of wrongdoing on the part of custodial officials.


An unauthorized interlocutory appeal taken by the State during a criminal proceeding does not toll the 180-day speedy trial period under K.S.A. § 22-3402 and is chargeable to the State in determining whether the 180-day period has run.


When calculating the 180-day speedy trial period, delays caused by the victim's personality conflicts with the defense psychiatrist are not charged to the State if the State neither encouraged nor requested the victim not to cooperate with the psychiatrist.


When calculating the 180-day speedy trial period, delays resulting from the "application or fault" of the defendant are not counted.


A delay of sentencing after a defendant's guilty plea or a guilty verdict does not deprive the defendant of the right to a speedy trial.


The State bears the burden of bringing an accused to trial within the 180-day time frame of K.S.A. § 22-3402. A defendant is not required to take affirmative action to see that his right to a speedy trial is observed.

\textsuperscript{120} \textit{Marion}, 404 U.S. at 324.

\textsuperscript{121} \textit{Barker v. Wingo}, 407 U.S. 514, 530 (1972).

\textsuperscript{122} 18 U.S.C. §§ 3161-3174; K.S.A. § 22-3402.
K.S.A. § 22-3402 requires that a defendant be brought to trial within 180 days of arraignment. In determining whether the statutory time period has elapsed, those delays that are caused by the "application or fault" of the accused are not counted.

An accused may waive his right to be brought to trial within 180 days under K.S.A. § 22-3402 by requesting or acquiescing in the grant of a continuance that places the trial date beyond the statutory time limit.

Kansas Court of Appeals

A continuance granted within the statutory speedy trial limit is not restricted under K.S.A. § 22-3402, regardless of the reason for or length of the continuance.

For purposes of applying K.S.A. § 22-3402, which extends the commencement of a trial beyond the 180-day speedy trial limit, only a continuance that fixes a trial date past the statutory speedy trial limit is considered in determining the "original trial date."

K. Double Jeopardy

The fifth amendment double jeopardy clause generally protects against multiple trials and punishments for the same offense. To raise a double jeopardy claim, the defendant must have been subjected to successive criminal prosecutions and placed in jeopardy at the first criminal proceeding. 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. Federal policy and many state statutes, however, have limited the "dual sovereignty" concept.

Double jeopardy issues may arise in a variety of situations. These

\[123\] The fifth amendment provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.


\[127\] 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).

\[128\] E.g., K.S.A. § 21-3108(3).
situations include reprosecution after a mistrial,\textsuperscript{129} reprosecution after an acquittal or other decision favorable to the defendant,\textsuperscript{130} reprosecution after a conviction,\textsuperscript{131} and resentencing after a conviction.\textsuperscript{132}

**United States Supreme Court**


The double jeopardy clause does not prohibit the Government from prosecuting greater offenses that the lower court had dismissed after accepting a guilty plea to lesser charges over the prosecution's objections.

The defendant was indicted on counts of murder, involuntary manslaughter, aggravated robbery, and grand theft. Over the prosecution’s objections, the trial court accepted the defendant’s guilty plea on the counts of involuntary manslaughter and grand theft. The defendant then moved to dismiss the murder and aggravated robbery charges on double jeopardy grounds, arguing that he had pleaded guilty to lesser included charges.

The United States Supreme Court held that the double jeopardy clause did not prohibit the State from continuing its prosecution of the defendant on the charges of murder and aggravated robbery. Accepting a guilty plea to a lesser included offense, when charges of a greater offense remain pending, is not the equivalent of the “implied acquittal” that results when a jury considers all of the charges and convicts only on the lesser offense. In this case, the defendant had resolved only those charges to which he had pleaded guilty. Noting that the prosecution should have one fair and full opportunity to present its case, the Court concluded that the defendant should not be allowed to use the double jeopardy clause as a sword to prevent the State from completing its prosecution on the remaining charges.


Double jeopardy does not prevent the Government from bringing an in rem forfeiture action, remedial and civil in nature, pursuant to the Gun Control Act, 18 U.S.C. § 924(d), after the defendant has been acquitted of related criminal charges.


Under a state’s two-tier system, a defendant’s retrial de novo without any judicial determination of the sufficiency of the evidence

\textsuperscript{129} United States v. Dinitz, 424 U.S. 600, 609-11 (1976).
\textsuperscript{131} See Burks v. United States, 437 U.S. 1, 18 (1978).
at his prior bench trial does not violate double jeopardy.


When a state’s capital sentencing proceeding is comparable to a trial, a sentence of life imprisonment constitutes an acquittal of the death penalty. Thus, the double jeopardy clause prevents the State from imposing the death penalty after the initial sentence is set aside on appeal, even though the death penalty would have been appropriate.


The fifth amendment protection against double jeopardy does not bar a second trial when the jury fails to reach a verdict or when the trial court declares a mistrial following a hung jury. Neither event terminates the original jeopardy that attached when the jury was empaneled.

**Kansas Supreme Court**


No double jeopardy violation occurs when a trial court accepts a defendant’s guilty plea to a lesser or included offense while charges on the greater offense remain pending.

The defendant was involved in an automobile accident in which a passenger in the other car was killed. He was charged with involuntary manslaughter, vehicular homicide, failure to yield the right-of-way, and speeding. The defendant pleaded not guilty to all but the failure to yield charge and moved to dismiss the first two charges on double jeopardy grounds.

The Kansas Supreme Court held that no double jeopardy violation occurred. To reach this conclusion the court interpreted K.S.A. § 21-3107(2), which provides that “[u]pon prosecution for a crime, the defendant may be convicted of either the crime charged or an included crime, but not both.” The statute defines a lesser offense as an “included” crime. Relying on **Ohio v. Johnson**, 104 S. Ct. 2536 (1984), the court refused to allow the defendant to use the double jeopardy clause to prevent the State from completing its prosecution on the greater charges. The trial court’s acceptance of the guilty plea to a lesser included offense while charges on the greater offenses remain pending has none of the implications of an “implied acquittal” that would result if the jury convicted the defendant only on the lesser included offense. Thus, because the double jeopardy clause does not apply unless the defendant has been acquitted or convicted, no double jeopardy violation could have occurred.


Charges of possession of marijuana with intent to sell and sale of marijuana are not multiplicitous when the offenses were separately
and severally committed at different times and involved separate contraband.


When two charges arise out of the same overt act they are multiplicitous and the defendant may be convicted and sentenced under only one charge.


The fact that a defendant is charged with multiplicitous crimes is not of itself a violation of the double jeopardy clause.


The double jeopardy clause protects a defendant against a second prosecution for the same offense after acquittal or conviction.


The following elements must be present to bar a subsequent prosecution under K.S.A. § 21-3108: (1) the prior prosecution resulted in a conviction or acquittal; (2) evidence of the present crime was introduced in the prior prosecution; and (3) the charge in the second prosecution could have been charged as an additional count in the prior case.

**Kansas Court of Appeals**


When a defendant is charged with multiple offenses, each of which requires proof of a fact not required by the other offense, the charges are not multiplicitous.
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. Venue refers to the proper place of prosecution and trial.

United States Supreme Court

Absent clear legislative intent to diminish the boundaries of an Indian reservation, congressional acts that open Indian lands to non-Indian settlement do not diminish the reservation. Crimes committed in the opened areas remain under federal jurisdiction pursuant to 18 U.S.C. § 1153.

Kansas Supreme Court

A defendant moving for a change of venue has the burden of establishing prejudice by showing specific facts which demonstrate that it is practically impossible to obtain an impartial jury in the original county. Media coverage alone does not establish prejudice per se.

A trial court loses jurisdiction over a case when the notice of appeal is filed.

A trial court has discretion to deny a defendant’s motion for a change of venue. A denial will be upheld if supported by competent evidence unless the defendant affirmatively shows that prejudice in the community makes it reasonably certain that he will not receive a fair trial.

A trial court may grant a change of venue in a criminal case when the defendant establishes that community prejudice exists to

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134 FED. R. CRIM. P. 18; K.S.A. §§ 22-2602 to -2615.
the degree that a fair and impartial trial is impossible. Media publicity alone does not amount to prejudice per se.

Kansas Court of Appeals


Venue in a criminal action is jurisdictional. To proceed in a district court that lacks venue is error.


The State must file a complaint to confer jurisdiction upon a municipal court. When a district court takes an appeal from a municipal court it does not acquire original jurisdiction.

B. Sixth Amendment Right to Counsel

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

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

The sixth amendment guarantees the right to effective assistance of counsel. Joint representations may cause conflicts of interest and thereby render the attorney ineffective under the sixth amendment.

United States Supreme Court


To support a claim of ineffective assistance of counsel under the sixth amendment, a convicted defendant must show that his counsel’s performance was deficient and that the deficient performance

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185 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.
resulted in prejudice, depriving him of a fair trial.

The defendant was indicted on numerous counts, including three murder charges. He confessed to one murder before counsel was appointed. Later, against the advice of counsel, the defendant confessed to the other murders, pleaded guilty to all charges, and waived his right to a jury at the sentencing hearing. At the plea colloquy, the defendant claimed that he had committed the crimes under extreme stress caused by his inability to support his family. His lawyer argued that the defendant's remorse and acceptance of responsibility for the crimes justified sparing him from the death penalty. Based upon his own perception of the trial judge's attitude that it was important for a convicted defendant to "own up" to his crime, and upon the possibility of potentially damaging rebuttal evidence, the defense attorney chose not to call character witnesses or introduce psychiatric examinations in mitigation of the death penalty. The judge sentenced the defendant to death on each of the murder counts. The defendant sought relief on numerous grounds, including ineffective assistance of counsel at the sentencing hearing.

The United States Supreme Court held that the defense attorney's strategy at the sentencing hearing was reasonable and, thus, the defendant was not denied effective assistance of counsel. Even assuming that the attorney's conduct was unreasonable, the defendant suffered insufficient prejudice to warrant reversal of his conviction. The Court stated that the proper sixth amendment standard for assessing an attorney's performance is one of reasonably effective assistance under all the circumstances. Because no inflexible set of rules can take into account the variety of circumstances or the range of legitimate decisions that a defense counsel might encounter in representing his client, a court must presume that a defense counsel's conduct falls within the wide scope of reasonable professional assistance. A defendant may overcome this presumption only by pointing to specific unreasonable acts and omissions by his attorney. In addition to showing that counsel was deficient, the defendant must show that the deficiencies were prejudicial to his defense. Prejudice is presumed when there is actual or constructive denial of assistance of counsel altogether. Otherwise, the defendant must prove that defense counsel's errors resulted in prejudice. Specifically, the defendant must show that, but for counsel's deficient performance, a reasonable probability existed that the result of the proceeding would have been different. Applying these standards, the Court in this case found that the attorney acted reasonably and that no prejudice resulted since no evidence that he could have presented was likely to have altered the sentence.


A *pro se* defendant's sixth amendment right to conduct his own defense is not violated by unsolicited participation of standby counsel when the defendant has a fair chance to present his case in his own way and counsel's participation does not destroy the jury's per-
ception that the defendant is representing himself.


Ineffectiveness of counsel is not presumed merely from the attorney’s lack of experience in criminal trials or from the lack of time given to prepare a defense. A court must look to the attorney’s actual performance during the trial unless circumstances make it likely that no lawyer could have rendered effective assistance.


The sixth amendment right to counsel attaches upon initiation of adversarial judicial criminal proceedings. Thus, prison inmates suspected of committing murder in prison are not constitutionally entitled to appointment of counsel merely upon placement in administrative segregation.

**Kansas Supreme Court**


When a criminal defendant asserts an insanity defense, he has neither a sixth amendment right to have counsel present at the State’s psychiatric examination nor a right to prior notice of the time and place of the exam.


The effectiveness of an attorney’s representation must be measured by the totality of that representation, not by single instances analyzed in isolation.

**Kansas Court of Appeals**


A defendant’s assertion of the right to self-representation is waived unless clear and unequivocal. Because waiver is not presumed, the defendant may assert the right to self-representation only by waiving the right to counsel.

**C. Sixth Amendment Right to Jury Trial**

The sixth amendment provides a criminal defendant with the right to a jury trial. The sixth amendment provides that “the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .” U.S. CONST. amend. VI.
Although juries in criminal cases typically must have twelve members and must return unanimous verdicts, neither this size nor unanimity is constitutionally mandated. A defendant may waive his right to a jury trial, but he is not constitutionally entitled to be tried by a judge without a jury.

Included in the sixth amendment is the right to be tried by an impartial jury. Although jury impartiality does not require jurors to be ignorant of the facts and issues involved in the case, adverse publicity either before or during 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. Prior restraints, or "gag orders," on news media coverage of pretrial proceedings violate the first amendment freedom of the press. Pretrial proceedings, however, may be closed to the public and the press. Regarding adverse publicity during trial, the impact on the jury is prevented primarily by sequestering the jury. The right of the public and the press to attend criminal trials is implicit in the first amendment.

United States Supreme Court


The passage of time between a first and second trial may serve to rebut any presumption of partiality or prejudice created by adverse publicity surrounding the first trial.

Following his confession, the defendant was convicted for the first degree murder and rape of an eighteen-year-old high school student. The case was retried four years later after it was held on appeal that confessions used in the first trial were obtained without adequate Miranda warnings. Before and during voir dire of the second trial, the defendant moved for a change of venue, arguing that adverse publicity from the first trial prevented him from obtaining an impartial jury. The trial court denied the motion and he was convicted of second degree murder. The defendant sought habeas

149 U.S. CONST, amend. VI.
151 Id. at 725-29.
153 FED. R. CRIM. P. 21(a); K.S.A. § 22-2616.
156 United States v. Hall, 536 F.2d 313, 326-27 (10th Cir. 1976).
corpus relief on the ground that the adverse publicity from the first trial denied him a fair trial.

The United States Supreme Court held that the trial court did not commit "manifest error" in concluding that the jury as a whole was impartial. The Court distinguished *Irvin v. Dowd*, 366 U.S. 717 (1961), which held that adverse pretrial publicity can create a presumption of prejudice. In *Irvin*, the adverse publicity occurred during the six or seven months immediately preceding the trial. In this case, the adverse publicity surrounded the first trial, four years before the jury was chosen for the second trial. Publicity prior to the second trial was generally limited to brief announcements of the trial dates and scheduling. Furthermore, the record did not reveal the barrage of inflammatory publicity immediately prior to trial that was found in *Irvin*. The passage of time was a significant factor, clearly rebutting any presumption of partiality or prejudice that existed at the time of the first trial.

**Kansas Court of Appeals**


Waiver of the right to a jury trial may not be presumed but must be in writing or made in open court for the record. To obtain a jury trial for a misdemeanor offense, a defendant must make a written request forty-eight hours prior to trial unless he is indigent and has not been given the assistance of counsel before the forty-eight hour period.

**D. Other Sixth Amendment Trial Rights**

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

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

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180 The sixth amendment provides that “the accused shall enjoy the right to a . . . public trial. . . .” U.S. CONST. amend. VI.
159 The sixth amendment provides that “the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .” U.S. CONST. amend. VI.
158 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.
criminal trials.\textsuperscript{162}

The right to confrontation is primarily effectuated by the defendant's cross-examination of Government witnesses.\textsuperscript{163} Restrictions on the defendant's scope of cross-examination may violate the sixth amendment.\textsuperscript{164} The admission of out-of-court statements, such as hearsay, may violate the confrontation clause, unless their necessity and reliability are established.\textsuperscript{165} Implicit in the confrontation clause is the defendant's right to be present at every stage of the trial.\textsuperscript{166} A defendant, however, may relinquish this right by being voluntarily absent\textsuperscript{167} or extremely disruptive.\textsuperscript{168}

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.\textsuperscript{169} The sixth amendment right to present evidence, however, is not absolute.\textsuperscript{170}

\textit{United States Supreme Court}


A court may not close the \textit{voir dire} examinations of prospective jurors without specifically articulating findings supporting closure and considering alternatives to closure.

The trial court ordered closure of the \textit{voir dire} examinations preceding a rape and murder trial. Prior to the examinations, the petitioner, a news service, had moved that the \textit{voir dire} be opened to the public and press. The trial court opened only the "general" \textit{voir dire} to the petitioner. Thus, all but three days of the six weeks of \textit{voir dire} were closed. When the jury was empaneled, the petitioner moved for the court to release the complete \textit{voir dire} transcripts. The court refused to grant the motion, declaring that the privacy interests of the prospective jurors prevailed over the defendant's right to an open trial.

The United States Supreme Court held that the sixth amendment right to a public trial includes the \textit{voir dire} examinations of prospective jurors in criminal trials. The right of the accused to fairness in the selection of jurors is a compelling interest; the presumption of openness in criminal proceedings promotes fairness by

\textsuperscript{162} Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).
\textsuperscript{164} \textit{Id.} at 316-18.
\textsuperscript{165} Ohio v. Roberts, 448 U.S. 56, 66 (1980).
\textsuperscript{166} Diaz v. United States, 223 U.S. 442, 455 (1912).
\textsuperscript{167} Taylor v. United States, 414 U.S. 17, 19-20 (1973) (per curiam).
\textsuperscript{169} See, e.g., FED. R. CRIM. P. 17(a)-(b); K.S.A. § 22-3214.
\textsuperscript{170} Chambers v. Mississippi, 410 U.S. 284, 295 (1973).
protecting the rights of the accused and the public. This presumption may be overcome only if closure is essential to protect an overriding interest and is tailored to the specific interest. When voir dire questioning involves sensitive personal matters, a prospective juror may have a legitimate interest in keeping information from the public. In those circumstances, the trial judge must inform a prospective juror that he may request an in camera conference for consideration of his privacy interest. Counsel must be present and the conference must be on the record. After weighing the juror's reasons for seeking to avoid public disclosure, the judge may decide whether to excuse the juror or order limited closure. When closure is ordered, the trial judge must specifically state why privacy is warranted. He must also explain what alternatives to closure were considered, such as withholding the name of the prospective juror or sealing limited parts of the voir dire transcript. In this case, the Court noted that the trial judge failed to articulate his findings supporting closure or to review alternatives to closing the proceedings and suppressing the transcript. Thus, closure of the voir dire examinations was unconstitutional.


A defendant's sixth amendment right to a public trial is not violated when a suppression hearing is closed, despite the defendant's objection, if the following tests are met: the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced; the closure is no broader than necessary to protect that interest; the trial court considers reasonable alternatives to closing the proceeding; and the trial court makes findings adequate to support the closure.

Pursuant to court-authorized wiretaps and a search warrant, police uncovered evidence of illegal gambling activities. The defendant was indicted on gambling charges and moved to suppress the wiretaps and the seized evidence. The State then moved to close the suppression hearing. To protect the privacy interests of those persons indicted but not then on trial, the court granted the State's motion. The closed suppression hearing, which lasted seven days, included less than two and one-half hours of taped phone conversations. The conversations involved only persons named in the indictment. During these conversations, only one unindicted person was mentioned. In the subsequent jury trial the defendant was convicted. On appeal, he argued that closure of the suppression hearing violated his sixth amendment right to a public trial.

The United States Supreme Court held that closure of the suppression hearing was unconstitutional. The Court looked to previous cases extending the right to public trial beyond the trial itself. In each of these cases, the Court had held that the presumption favoring open trial may be overcome only when necessary to protect the defendant's right to a fair trial or the government's interest in protecting sensitive information. The presumption in favor of public
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trial exists to ensure that the defendant obtains a fair trial and that the judge and prosecutor act responsibly. A public trial also encourages witnesses to come forward and discourages perjury. The Court noted that these sixth amendment values are no less important in a suppression hearing. Any closure of a suppression hearing, therefore, must be specifically justified and narrowly applied. The court must use the same safeguards established for protecting the right to open trial. Applying this analysis to the instant case, the Court held that the State’s proffer of evidence as to whose privacy interests might be infringed was not specific; the closure was far more extensive than necessary; the trial court did not consider alternatives to immediate closure of the entire hearing; and its findings were broad and general. Thus, the closure of the entire suppression hearing was unjustified and violated the defendant’s sixth amendment right to a public trial.

Kansas Supreme Court

An in-chambers conference dealing with legal or procedural matters is not a stage of trial at which a defendant’s presence is required.

A trial court may close a preliminary hearing only if dissemination of information from the hearing would create a clear and present danger to the trial’s fairness and the prejudicial effect of the information could not be avoided by any reasonable alternative means.

A criminal defendant is not prejudiced by absence from an in-chambers conference when the court is ruling only on matters of law. Even though a defendant has a right to be present when a court communicates with the jury, the defendant’s absence may be harmless error when there is no reasonable possibility of prejudice from his absence.

Kansas Court of Appeals

The admission of a hearsay statement of a child victim, pursuant to K.S.A. § 60-460(dd), does not violate the sixth amendment right to confrontation when the extrajudicial statement is shown to be reliable and the child victim is found incompetent to testify.

The defendant exposed himself to two boys, ages seven and eleven, and offered them money to perform a sexual act. He showed
them pictures of nude women and asked the older boy to undress. Within two hours of these events, the seven-year-old returned home and volunteered to his mother what had happened. The defendant was subsequently charged with aggravated indecent solicitation. During the trial, the judge determined that although the child's statements were reliable, he was incompetent to testify because he could not logically relate the sequence of events that gave rise to the criminal charge. The court, however, allowed the child's mother to testify concerning her son's statements pursuant to K.S.A. § 60-460(dd), a hearsay exception for statements made by a child to prove a crime or show deprivation. The defendant argued that his sixth amendment right to confrontation was violated because the child's statements were not subject to cross-examination and because the court did not find adequate indicia of reliability surrounding the hearsay statements.

The Kansas Court of Appeals held that the admission of the child's hearsay statements did not violate the sixth amendment. The right to confrontation under the sixth amendment is not absolute, and courts admit hearsay testimony when it is shown to be both necessary and reliable. To satisfy these constitutional limitations, K.S.A. § 60-460(dd) allows the admission of a child victim's statement only after a hearing in which the court determines that the child is unavailable as a witness and his statement is reliable. In this case, the trial court determined the necessity for the admitted hearsay after finding the child victim incompetent as a witness and, therefore, unavailable. The showing of the statements' reliability rested on the following factors: the child victim made the statements to his parent shortly after the crime occurred and while he still showed signs of being upset by the occurrence; the child victim related the occurrence at his first opportunity to do so; the child's statements were corroborated by other trial testimony; and the trial judge evaluated the trustworthiness of the child victim in determining his unavailability as a witness. The court noted that cross-examination is merely one means employed to measure reliability and is not the sole criterion by which the admissibility of hearsay is tested. The admission of the statements in this case, therefore, did not violate the sixth amendment confrontation clause.


When a defendant charged with a noncapital offense voluntarily absents himself from his trial after proceedings have begun, the trial may continue without him.


When a defendant causes the absence of a trial witness, he waives both his sixth amendment right to confront that witness and his right to object to the admission of the witness's extrajudicial hearsay statements.
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.¹⁷¹ 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;¹⁷² (2) the proceeding must be criminal or have criminal consequences;¹⁷³ (3) the information must be self-incriminating;¹⁷⁴ (4) the information must be compelled by the Government;¹⁷⁵ and (5) the information must be testimonial in nature.¹⁷⁶

The Government may overcome a witness’ fifth amendment privilege and compel his testimony by granting him use immunity.¹⁷⁷ Use immunity precludes the use of the immunized testimony, or of any information derived from it, against the witness.¹⁷⁸ The Government, however, may prosecute for perjury a witness who testifies falsely under a grant of immunity.¹⁷⁹ Immunity orders are enforced by the court through civil or criminal contempt proceedings.¹⁸⁰

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,¹⁸¹ nor may a prosecutor use the defendant’s silence pursuant to Miranda warnings to impeach his testimony at trial.¹⁸² A defendant’s silence either prior to arrest¹⁸³ or between arrest and Miranda warnings,¹⁸⁴ however, may be used to impeach his trial testimony.

¹⁷¹ 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.
¹⁷⁸ Kastigar, 406 U.S. at 460-62.
¹⁸² Doyle v. Ohio, 426 U.S. 610, 619 (1976). Such silence, however, 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.
United States Supreme Court


When a defendant's self-prepared documents are subpoenaed, the contents of the documents are not protected by the fifth amendment privilege against self-incrimination because the documents are not compelled testimony. A court, however, may not require a defendant to produce these documents without a grant of use immunity because the act of producing the documents may have testimonial aspects and incriminating effects.

Kansas Court of Appeals


A grant of immunity from prosecution under K.S.A. § 17-1265(d) extends only to natural individuals compelled under the statute to produce personal documents or testimony. It does not extend to corporate records or documents in an individual's possession, even when those records or documents might incriminate the individual.

F. Trial Format and Related Issues

United States Supreme Court


A court may not deny a defendant's request for jury guidance merely because the request is called an "admonition" to the jury rather than an "instruction."


A jury may acquit a defendant of a predicate felony and at the same time convict on a compound felony, even though the verdicts are inconsistent. Thus, a conviction need not be reversed when a jury acquits a defendant of conspiracy to possess and possession of cocaine and at the same time convicts him of using the telephone to facilitate those same offenses.

185 The cases in this section relate to miscellaneous criminal procedure issues that arise during trial.
Kansas Supreme Court

Jury instructions must define the charged offense and its essential elements in either the language of the applicable statute or the appropriate and accurate language of the court.

A court need not give an instruction on a lesser included offense when neither the defendant nor the State has supplied sufficient evidence to support an instruction for a lesser charge.

A court's failure to give an eyewitness-identification jury instruction is not error when the identity of the defendant is not at issue or when the defendant failed to request such an instruction at trial.

When an eyewitness identification is not critical to the prosecution's case, or when no serious question concerning the reliability of the identification exists, a trial court need not give a cautionary instruction regarding the factors to consider in weighing the credibility of eyewitness identification testimony.

In deciding whether jury instructions are objectionable, the court must consider the instructions taken as a whole rather than the propriety of a single instruction.

The presumption that a person intends the ordinary consequences of his acts is a rule to assist the jury. An instruction regarding this presumption merely establishes a permissive inference and does not shift the burden of proof.

A defendant is not denied a fair trial when a court prevents him from explaining "reasonable doubt" to the jury, because no explanation can make the concept clearer than the words themselves.

A jury instruction on reasonable doubt, as applied to all kinds of evidence, provides an appropriate standard to measure the probative force of circumstantial evidence. An additional instruction cautioning the jury against finding the defendant guilty unless the circumstantial evidence excludes every reasonable hypothesis of innocence is unnecessary.

A trial court must instruct a jury on the law applicable to both parties' theories of the case when evidence exists to support each theory.

A criminal defendant is entitled to an attempt instruction only if some evidence exists to show that the crime was not completed.


No error is committed when a trial court refuses to give an instruction if the substance of the instruction is adequately covered in other instructions.


Error is committed when a prosecutor injects personal opinion into his closing argument. Such remarks are harmless error if the court is able to declare, beyond a reasonable doubt, that the error had little, if any, likelihood of changing the result of the trial.


When the M'Naughton test for insanity has been affirmatively and consistently adopted as the standard for mental capacity, a trial court’s refusal to give the defendant’s requested jury instruction on the doctrine of diminished capacity does not constitute error.


Jury instructions should be confined to the charges contained in the information. Instructions given in violation of this rule may be harmless when the substantial rights of the defendant have not been prejudiced.


When a defendant is charged with felony murder, the rule requiring the court to give instructions on lesser included offenses does not apply.

**Kansas Court of Appeals**


A trial court has discretion in giving jury instructions, and, upon appeal, the instructions will be upheld when, viewed in their entirety, they reflect the law as applied to the facts in the case.


The presumption of intent instruction of PIK Crim. 2d 54.01 does not impermissibly shift the burden of proof from the State to the accused.
IV. Sentencing, Probation, and Parole

United States Supreme Court


When a defendant is retried and convicted following an appeal, the sentencing authority may justify an increased sentence by identifying relevant conduct or events that occurred after the original sentencing.

The defendant was indicted on four counts of mail fraud. Prior to trial on these charges he was convicted of knowingly and willfully making false statements in a passport application. At the sentencing hearing, the court stated that it would be inappropriate to consider the pending fraud charge in imposing sentence. The defendant later pleaded nolo contendere in the mail fraud case. He then appealed his first conviction involving the passport application and the case was remanded for a new trial. He was tried before the same court and was again convicted. At the sentencing following retrial on the passport charges, the judge stated that it was then proper to consider the conviction for mail fraud arising from the nolo contendere plea, and he increased the sentence for the passport conviction. The judge carefully explained, for the record, his reasons for the enhanced sentence. The defendant argued that only conduct on his part occurring at or after the first sentencing could be considered as a basis for sentence enhancement and that his intervening conviction did not constitute such conduct.

The United States Supreme Court held that although an increase in sentencing after a second trial following a successful appeal gives rise to a presumption of vindictiveness, this presumption was rebutted by the court’s clear statement on the record of its reasons for increasing the sentence. A court is not limited to considering only a defendant’s conduct between sentencing hearings, but may also consider events such as the intervening conviction in this case. As long as the information upon which the court relies, whether conduct or events, supports a nonvindictive motive for the increased sentence, it may be considered prior to the imposition of the sentence after retrial. Because the Court concluded that consideration of a criminal conviction obtained between an original sentencing and a sentencing after retrial is manifestly legitimate, the increased sentence was justified.

186 Death penalty cases were omitted because they are not relevant to Kansas practitioners.
Kansas Supreme Court

A defendant's sentence will not be disturbed on appeal as excessive if the sentence is within the statutory limits and is not the result of partiality, prejudice, oppression, or corrupt motive.

When a sentence is within the statutory limits set by the legislature it will not be disturbed on appeal absent special circumstances showing an abuse of discretion.

Prior convictions for driving under the influence of alcohol are sentencing considerations and not elements of the offense. Thus, these prior convictions need not be stated in a complaint charging the defendant with driving under the influence pursuant to K.S.A. § 8-1567.

Consideration of a prior diversion agreement as a conviction for purposes of sentence enhancement does not violate due process.

Absent a showing of abuse of judicial discretion, a sentence is not excessive when it falls within statutory limits.

When a criminal defendant is convicted of an offense punishable by imprisonment, the defendant must be present at the time sentence is pronounced.

A void sentence may be corrected by the substitution of a new and valid sentence, and the reviewing court must remand the prisoner to the district court.

A trial court has complete discretion to refuse to commit a convicted defendant to a mental institution in lieu of sentencing. The defendant may not appeal the refusal.

The sentencing criteria in K.S.A. § 21-4606 apply to a court's decision whether to impose consecutive or concurrent sentences.

At a resentencing hearing a trial court may consider any prior felony conviction that could have been established and considered at the original sentencing hearing.

Under K.S.A. § 21-4603(3), a defendant in a criminal
proceeding has 120 days after his direct appeal has been finally
determined in which to file a motion to modify his sentence. The
time to file such a motion is not extended by filing a collateral
proceeding pursuant to K.S.A. § 60-1507.

Kansas Court of Appeals

A prior conviction may not serve as the necessary base conviction
for an enhanced sentencing statute when, in the prior prosecution,
the defendant neither had nor waived any right to counsel under the
sixth amendment.

The pronouncement of sentence in a criminal case is the
judgment of the court.

When a defendant raises the issue of excessive or
disproportionate sentencing on appeal, he must show special
circumstances indicating an abuse of discretion at the trial court
level to warrant appellate review.

The mandatory provisions of K.S.A. § 21-4614 require that a
criminal defendant sentenced to a jail term be given credit for time
spent in custody on a charge for which he is later sentenced.

Under K.S.A. § 21-4614, a criminal defendant who spends time
in custody awaiting disposition of a probation revocation proceeding
must be given credit for that time if probation is revoked and he is
sentenced to a jail term.

When a criminal defendant receives consecutive indeterminate
sentences for unrelated offenses, the total number of days spent in
custody on all charges for which he is sentenced must be credited
against his jail sentence as required by K.S.A. § 21-4608.
V. REVIEW PROCEEDINGS

A. Post-Verdict Motions

There are three post-verdict motions. These are motions for judgment of acquittal,187 new trial,188 and arrest of judgment.189 Post-verdict motions are made to the trial judge and usually are prerequisites to appeal.

A motion for judgment of acquittal alleges that the evidence is insufficient to sustain a conviction.190 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.191

A motion for new trial may be based on a broad range of alleged trial errors.192 These allegations are not usually considered unless the defendant timely raised them prior to the verdict.193 A new trial will be granted if required in the interest of justice.194 Motions for a new trial may also be based on newly discovered evidence.195

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.196 These allegations are never waived and may be raised at any time during the criminal process.197

Kansas Supreme Court


When deciding a motion attacking the sufficiency of evidence, the trial court will use the same standard as it uses in deciding a motion for judgment of acquittal. The court must determine whether, based upon the evidence, a rational trier of fact might fairly conclude guilt beyond a reasonable doubt.

187 FED. R. CRIM. P. 29(c); K.S.A. § 22-3419.
188 FED. R. CRIM. P. 33; K.S.A. § 22-3501.
189 FED. R. CRIM. P. 34; K.S.A. §§ 22-3502 to -3503.
191 Goff v. United States, 446 F.2d 623, 624 (10th Cir. 1971); Gustin, 212 Kan. at 478-79, 510 P.2d at 1294 (1973).
192 FED. R. CRIM. P. 33; K.S.A. § 22-3501.
193 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).
194 FED. R. CRIM. P. 33; K.S.A. § 22-3501.
195 FED. R. CRIM. P. 33; K.S.A. § 22-3501.
196 FED. R. CRIM. P. 34; K.S.A. §§ 22-3502 to -3503.
197 FED. R. CRIM. P. 12(b)(2); K.S.A. § 22-3208(3).

When deciding a motion for judgment of acquittal, the trial court must determine whether, based upon the evidence, a rational factfinder could have found the defendant guilty beyond a reasonable doubt.


A new trial should not be granted on the basis of new evidence that merely tends to impeach or discredit the testimony of a witness.

**Kansas Court of Appeals**


When deciding a motion for judgment of acquittal, the trial court must determine whether, based upon the evidence, a rational trier of fact might fairly conclude guilt beyond a reasonable doubt.


When evidence is insufficient to sustain a conviction, the court should enter a judgment of acquittal. When deciding a motion for acquittal, the trial judge must determine whether, based upon the evidence, a rational trier of fact might fairly conclude guilt beyond a reasonable doubt.

**B. Appeals**

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

Generally, appellate courts only have jurisdiction to review “final decisions” of trial courts. The Government, however, may appeal a pretrial dismissal of an indictment or a suppression of evidence; and the defendant may appeal a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds. Appellate courts may review an appeal if there is a possibility that any legal consequences will be imposed on the basis of the challenged conviction.

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

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188 McKane v. Durston, 153 U.S. 684, 687 (1894).
and the error was not "harmless." 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."

**United States Supreme Court**

An appellate court has no jurisdiction to review a pretrial disqualification of defense counsel before entry of final judgment.

A defendant must have testified at trial to appeal a trial court ruling denying his motion to bar the prosecution's use of his prior conviction for impeachment purposes.

**Kansas Supreme Court**

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 factfinder could have found the defendant guilty beyond a reasonable doubt.

When reviewing the sufficiency of evidence, an appellate court determines whether, based on all of the evidence, viewed in the light most favorable to the prosecution, a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

Under K.S.A. § 22-3603, the State may take an interlocutory appeal from a district court's pretrial order that excludes the State's evidence when the exclusion substantially impairs the State's ability to prosecute the case.

When reviewing the sufficiency of evidence, an appellate court determines whether, based on all of the evidence, viewed in the light most favorable to the prosecution, a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

To be appealable, oral orders must be on the record and should expressly state that announcement alone is intended to constitute

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204 "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a).
205 "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).
entry of the order.

When considering the sufficiency of evidence to sustain a conviction, a court will look only to the evidence in favor of the verdict. If the charge is sustained by any competent evidence, the court will uphold the conviction.

When a defendant alleges that the cumulative effect of trial errors requires reversal of his conviction, the standard of review is whether the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial.

When, prior to the preliminary hearing, a district court dismisses criminal charges following arguments upon a motion to suppress evidence, and the State has failed to appeal the order of dismissal, the Kansas Supreme Court has no jurisdiction to hear the State's attempted interlocutory appeal under K.S.A. § 22-3603.

When, in a full pretrial hearing, a trial court determines that an extrajudicial statement by the accused was given freely, voluntarily, and knowingly, the appellate court should accept that determination if supported by substantial competent evidence.

A trial court's finding that the defendant was sane and that his confessions were knowingly and voluntarily made is binding on appeal if supported by substantial competent evidence.

Because a criminal defendant is entitled to a fair trial, but not a perfect one, the erroneous admission of evidence during a trial does not require reversal when the admission is harmless error.

Because K.S.A. § 22-3602(b) sets no time limit for the prosecution to appeal, the time specified under the rules of civil procedure applies. Thus, the prosecution has thirty days from the entry of judgment to file an appeal.

An order finding a defendant guilty may not be appealed until the defendant is sentenced or the sentence is suspended.

On appeal, the test to determine sufficiency of the evidence supporting a guilty verdict is whether the evidence, considered in the light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

The standard for appellate review is whether the evidence was sufficient to form a basis for a reasonable inference of guilt. In considering the sufficiency of evidence to sustain a conviction, the court will look only to the evidence in favor of the verdict, and if the essential elements of the charge are sustained by any competent evidence, the conviction will be upheld.


The State may not take an interlocutory appeal from a pretrial order suppressing evidence unless the order substantially impairs the State's ability to prosecute the case.

Kansas Court of Appeals


When an appellate court reviews the sufficiency of the evidence, the test is whether the evidence, viewed in the light most favorable to the prosecution, convinces the court that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.


To appeal an evidentiary issue, the defendant must make a timely objection on the trial court record and clearly state the specific grounds for the objection.


A convicted defendant who is a fugitive from justice is deemed to have waived the right to appeal.


Evidence is sufficient to support a verdict when, viewed in the light most favorable to the prosecution, it convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.


When a complaint fails to charge a crime, the defect is jurisdictional, and the reviewing court has a duty to address the issue on its own motion.


Because appellate jurisdiction is statutory, dismissal is required when the record discloses a lack of jurisdiction.


Before a defendant may appeal, there must be a criminal judgment against him.
A defendant must be convicted and sentenced before there is a judgment constituting an appealable order.

Because reversal and remand of a municipal court order by a district court in a criminal case is not a determination of the underlying charges, an appellate court has no jurisdiction to entertain an appeal.

When the evidence, viewed in the light most favorable to the prosecution, could convince a rational factfinder of guilt beyond a reasonable doubt, the appellate court will hold that the evidence is sufficient.
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