# KANSAS CRIMINAL PROCEDURE REVIEW

VOL. 3 1986


## SURVEY OF CRIMINAL PROCEDURE

## SURVEY OF 1985 CASES DECIDED BY:

UNITED STATES SUPREME COURT
KANSAS SUPREME COURT
KANSAS COURT OF APPEALS

## ARTICLE

AN ANALYSIS OF RECENT CHANGES IN KANSAS DRUNK DRIVING LAWS


DAVID J. GOTTLIEB
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UNIVERSITY OF KANSAS SCHOOL OF LAW
CRIMINAL JUSTICE CLINIC

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# KANSAS CRIMINAL PROCEDURE REVIEW

# PREFACE

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

The Review is a survey of criminal procedure emphasizing recent cases. Since it is designed for the Kansas practitioner, only federal and Kansas law is included. The Review is organized according to the chronology of the criminal process. Each chapter includes a brief introduction that gives a general overview of the law and cites significant case law, statutes, and rules. Following the introduction is a survey of relevant 1985 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 1986 Review features the pubication's first article. Professor David J. Gottlieb and Adjunct Clinical Professor Steven R. Zinn examine some of the significant 1985 amendments to Kansas drunk driving laws. The authors analyze the constitutional implications and practical problems surrounding the new laws. Next year the Review will include student notes as well as another faculty article.

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

February 1, 1986 — Emil A. Tonkovich

# KANSAS CRIMINAL PROCEDURE REVIEW

**Volume 3** **1986**

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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.[1] This protection applies to any interest in which an individual has a reasonable expectation of privacy.[2] Generally, searches and seizures must be based on probable cause and made pursuant to a warrant.[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## United States Supreme Court

*New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985).

When public school officials search students, their conduct falls within the fourth amendment's prohibition against unreasonable searches and seizures, but so long as the search is reasonable under all the circumstances, no probable cause or warrant is required.

A teacher reported the defendant, a fourteen-year-old female student, smoking in violation of the school's no-smoking rule. The principal opened the defendant's purse and saw cigarettes and rolling papers. He then searched the purse thoroughly and found marijuana and evidence of drug dealing. The defendant moved to suppress the evidence seized in the search on the ground that it was obtained in violation of the fourth amendment.

The United States Supreme Court held that the search of the defendant's purse was lawful and the evidence admissible. Since students retain a privacy interest in property when they come to school, the fourth amendment applies to administrators' searches of student property. Balancing this interest against a school's need to maintain discipline, the Court concluded that the search need only submit to a two-part reasonableness test. First, the search must be justified at its inception. This is met when the search is based on a reasonable belief that a student has violated the law or a school rule. Second, the search must be reasonable in scope. This is satisfied when the search is related to its objectives and not excessively intrusive in light of the age and sex of the student and the nature of the violation. In this case, the search of the purse was justified at its inception because of the reported smoking violation. The scope of the search was reasonably related to its objectives and not excessively intrusive under the circumstances.

***United States v. Johns***, 105 S. Ct. 881 (1985).

A warrantless search of packages several days after they are seized pursuant to an automobile exception search is not unreasonable within the meaning of the fourth amendment.

During an investigation of a suspected drug smuggling operation, DEA agents followed defendants to a remote airstrip and seized two trucks that they had probable cause to believe contained marijuana. The agents removed packages from the trucks and placed them in a government warehouse. Three days later, without obtaining a search warrant, the agents opened the packages and found

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

marijuana. The defendants moved to suppress the evidence on the ground that the warrantless search of the packages three days after their removal from the vehicle violated the fourth amendment.

The United States Supreme Court held that the search did not violate the fourth amendment. Relying on *United States v. Ross*, 456 U.S. 798 (1982), the Court held that the agents could have lawfully searched the packages when they first seized them at the airstrip. Since the agents lawfully seized the packages and continued to have probable cause to believe they contained contraband, a three day delay in the execution of the warrantless search was not unreasonable. The Court reasoned that it would not further an individual's privacy interests to require a warrant for a subsequent search not conducted at the place of seizure.

***Winston v. Lee***, 105 S. Ct. 1611 (1985).

Government officials cannot compel a suspect to undergo surgery to remove evidence from the suspect's body when the surgical procedure extensively intrudes on personal privacy and bodily integrity, and the government cannot demonstrate a compelling need for the evidence.

During an attempted robbery, the defendant and the victim exchanged gunfire and both were wounded. A bullet lodged under the defendant's collarbone. The two were taken separately to a nearby emergency room. Upon seeing the defendant in the emergency room the victim identified him as the robber and the police arrested him. Because the defendant disputed this identification, prosecutors obtained an order to surgically remove the bullet as evidence of the defendant's guilt. The surgery required general anesthesia. The suspect moved to enjoin the surgery.

The United States Supreme Court held that the surgery would violate the fourth amendment. Relying on *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that when the invasion of a person's body in search of evidence is at issue, courts must weight the individual's interest of privacy and bodily integrity against society's interest in fairly and accurately determining guilt or innocence. In this case, because the surgery required general anesthesia, the defendant would sacrifice all control of his privacy and bodily integrity during the operation. On the other hand, the Government had no compelling need for the bullet because it had substantial evidence of the defendant's guilt. The Government's need for the evidence, therefore, did not outweigh the defendant's interest in privacy and bodily integrity.

***Hayes v. Florida***, 105 S. Ct. 1643 (1985).

The police may not take a suspect from his home and detain him at the stationhouse for fingerprinting when there was no consent, no probable cause to arrest, or no judicial authorization for the detention.

Police considered the defendant to be a principal suspect in a se-

ries of burglary-rapes. Officers went to the defendant's home without a warrant to obtain his fingerprints. When the defendant expressed reluctance to accompany the officers to the police station for fingerprinting, the officers threatened to arrest him. The defendant was then taken to the police station and fingerprinted. When the police determined that the defendant's fingerprints matched those at one of the crime scenes, they formally arrested him. The defendant moved to suppress the fingerprint evidence as the fruit of an illegal fourth amendment detention.

The United States Supreme Court held that the defendant's detention for fingerprinting violated the fourth amendment. The Court reasoned that when the police forcibly removed the defendant from his home and transported him to the police station, the seizure triggered the full protections of the fourth amendment. Such seizures, at least when not under judicial supervision, are sufficiently like arrests to invoke the probable cause requirement. The Court noted, however, that probable cause alone would not permit a warrantless entry into a person's home for the purpose of obtaining fingerprints.

***Tennessee v. Garner***, 105 S. Ct. 1694 (1985).

Police officers may use deadly force against a fleeing felon only if it is necessary to prevent escape and the officers have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Upon arriving at the scene of a reported burglary, police officers saw the burglary suspect (Garner) flee towards a fence. One of the officers aimed his flashlight at Garner and could see no sign of a weapon. When Garner began climbing the fence, the officer believing that he would escape, shot and killed him. Garner's father brought a civil rights action against the officer, police department, and city, claiming that the shooting violated his son's constitutional rights.

The United States Supreme Court held that the police action violated Garner's fourth amendment rights. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the fourth amendment. The test for reasonableness requires balancing the defendant's fundamental interest in life along with society's interest in a judicial determination of guilt and punishment against society's interest in effective law enforcement. Applying this test, the Court concluded that when the suspect poses no immediate threat to the officer or others, the detriment to law enforcement from failing to apprehend him does not justify the use of deadly force. Therefore, the Court found unconstitutional the state statute that allowed police to use deadly force to prevent the escape of all fleeing felons.

***California v. Carney***, 105 S. Ct. 2066 (1985).

The search of a fully mobile motor home parked in a public lot

falls within the automobile exception to the fourth amendment warrant requirement.

DEA agents had information that the defendant was exchanging marijuana for sex in his motor home parked in a public lot. The agents watched the defendant approach a youth who then entered the motor home with the defendant. When the youth emerged, he told the agents that the defendant gave him marijuana in exchange for sexual contacts. The agents convinced the youth to return to the motor home and ask the defendant to come out. When the defendant stepped out, an agent entered the motor home, found marijuana, and arrested the defendant. The defendant moved to suppress the evidence on the ground that the warrantless search violated the fourth amendment.

The United States Supreme Court held that the search did not violate the fourth amendment. The Court found the search lawful under the "automobile exception" to the warrant requirement. The exception is based on the inherent mobility of and the diminished expectation of privacy in an automobile. The Court explained that motor homes, like automobiles, are mobile. Also, there is a diminished expectation of privacy in a motor home that is operated on public roads and in public areas. The Court rejected the argument that the exception did not apply simply because the motor home was equipped to function as a residence. The motor home in this case was licensed to operate on public streets, was serviced in public places, was found in a public parking lot, and was subject to extensive regulation and inspection inapplicable to a residence. The Court refused to create fine distinctions in the automobile exception based on the size of the vehicle and its purported use.

***United States v. Hensley***, 105 S. Ct. 675 (1985).

The "stop and frisk" doctrine of *Terry v. Ohio,* 392 U.S. 1 (1968), extends to investigations of completed crimes. Police may determine reasonable suspicion for a *Terry* stop from an objective reading of a "wanted flyer" issued by another police department that had a reasonable suspicion to justify the stop.

***United States v. Sharpe***, 105 S. Ct. 1568 (1985).

A twenty minute investigative stop under *Terry v. Ohio,* 392 U.S. 1 (1968), is not per se unreasonable. There are no rigid time limits on *Terry* stops. Rather, the length of the detention is reasonable if the police act diligently and take no longer than necessary to confirm or dispel their suspicions.

***Oklahoma v. Castleberry***, 105 S. Ct. 1859 (1985) (per curiam), *aff'g by an equally divided Court* 678 P.2d 720 (Okla. Crim. App. 1984).

If a police officer only has probable cause to believe there is contraband in a specific container in a car, he must detain the container and delay his search until a search warrant is obtained.

***Maryland v. Macon***, 105 S. Ct. 2778 (1985).

When police enter a bookstore and examine materials intentionally exposed to the buying public, they do not infringe on a legitimate expectation of privacy and, therefore, there is no search within the meaning of the fourth amendment. Similarly, their purchase of such materials is not a fourth amendment seizure.

***United States v. Montoya de Hernandez***, 105 S. Ct. 3304 (1985).

When custom agents at the border reasonably suspect that a traveler is smuggling contraband in his digestive system, their detention of him beyond the scope of a routine customs search and inspection is justified at its inception.

## Kansas Supreme Court

***City of Bonner Springs v. Bey***, 236 Kan. 661, 694 P.2d 477 (1985).

In an arrest based upon K.S.A. §§ 12-4212 or 22-2401(b), if a police officer has probable cause to believe an arrest warrant has been issued, the arrest is valid.

***State v. Peterson***, 236 Kan. 821, 696 P.2d 387 (1985).

The validity of a warrantless arrest depends upon whether the arresting officer had probable cause to believe that the arrestee had committed a felony. In a cooperative investigation, the knowledge of one officer is the knowledge of all in determining probable cause to arrest, provided there has been communication between the officers.

***State v. Epperson***, 237 Kan. 707, 703 P.2d 761 (1985).

A "stop and frisk" under K.S.A. § 22-2402 requires that police have a reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime.

***State v. Lambert***, 238 Kan. 444, 710 P.2d 693 (1985).

When police are executing a search warrant, each person on the premises who is neither named nor described in the warrant retains individual protections against an unreasonable search or seizure separate and distinct from the rights of those persons described in the warrant. Under proper circumstances, however, police may search a nonresident visitor or his belongings in the course of executing a warrant for a premises search.

## Kansas Court of Appeals

***State v. Jaso***, 10 Kan. App. 2d 137, 694 P.2d 1305 (1985).

The plain view exception to the search warrant requirement applies when the police's initial intrusion is lawful, their discovery of the evidence is inadvertant, and they have reasonable or probable

cause to recognize immediately that the evidence is incriminating.

***State v. Mayfield***, 10 Kan. App. 2d 175, 694 P.2d 915 (1985).

During a valid "stop and frisk" search, police officers concerned for their safety may lawfully follow a suspect into his home if he volunteers to go there to produce identification. Once in the home, officers are justified in seizing contraband in plain view.

***Hearron v. State***, 10 Kan. App. 2d 229, 696 P.2d 418 (1985).

A magistrate may consider a confidential informant's tape-recorded sworn testimony in determining whether sufficient probable cause exists to issue a search warrant even if the recorded testimony is not transcribed as required by K.S.A. § 22-2502 until a later date.

***Hearron v. State***, 10 Kan. App. 2d 229, 696 P.2d 418 (1985).

When probable cause for a search warrant is in issue, rather than the defendant's guilt or innocence, the State generally need not disclose the identity of the informant.

***State v. Myers***, 10 Kan. App. 2d 266, 697 P.2d 879 (1985).

The seizure of items under the plain view exception is valid if the initial intrusion is lawful, the discovery of the evidence is inadvertent and there is immediate probable cause to believe the evidence is incriminating.

***State v. Gardner***, 10 Kan. App. 2d 408, 701 P.2d 703 (1985).

A police officer may legally conduct a warrantless search of an airplane apparently abandoned on a public runway since the protections of the fourth amendment do not extend to locations where there is no basis for a reasonable expectation of privacy. Furthermore, the inherent mobility of an airplane is sufficient to establish exigent circumstances permitting a warrantless search based upon probable cause.

***State v. Gardner***, 10 Kan. App. 2d 408, 701 P.2d 703 (1985).

When probable cause to arrest is based on an informant's information it need only be reviewed under the "totality of the circumstances" test.

## 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

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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.

amendment right to counsel.[22]

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

The fifth amendment privilege against self-incrimination applies to police custodial interrogations.[25] To mitigate the coercive influences inherent in custodial interrogations, police are required to advise the defendant of the *Miranda* warnings prior to such interrogations.[26] Subsequent to these warnings, if interrogation continues without an attorney present and a statement is taken, the Government has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his rights.[27] The defendant may exercise his rights immediately or at any time during the interrogation.[28] These warnings do not apply to general on-the-scene questioning or to volunteered statements.[29] In addition, under the "public safety" exception, when a police officer questions a suspect to protect himself or the public from immediate danger, he need not give *Miranda* warnings, and any of the suspect's voluntary statements are admissible.[30]

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

## United States Supreme Court

***Oregon v. Elstad***, 105 S. Ct. 1285 (1985).

The initial failure of police officers to give *Miranda* warnings before obtaining an otherwise voluntary confession does not preclude the admission of a subsequent confession made after *Miranda* warnings and a valid waiver.

Police officers went to defendant's home to arrest him for burglary. At the home, the officers conducted a custodial but non-coercive interrogation of the defendant, during which he stated that he

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

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

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

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

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

[27] *Id.* at 475.

[28] *Id.* at 473-74.

[29] *Id.* at 477-78.

[30] New York v. Quarles, 104 S. Ct. 2626, 2633-34 (1984).

[31] Brewer v. Williams, 430 U.S. 387, 398-99 (1977).

[32] Massiah v. United States, 377 U.S. 201, 206 (1964).

was present at the burglary. The officers had failed to give *Miranda* warnings prior to this statement. Later, at the stationhouse, the defendant was given *Miranda* warnings. The defendant waived his *Miranda* rights and signed a written confession. The defendant moved to suppress the written confession on the ground that it was tainted by the initial, unwarned oral statement.

The United States Supreme Court held that the written confession was admissible. The premise of the Court's holding was that *Miranda* warnings are not constitutionally mandated, but are merely procedural safeguards to protect rights. Thus, the failure to give *Miranda* warnings was not a constitutional violation. Consequently, this failure to warn could not taint the warned written confession under the "fruit of the poisonous tree" doctrine. The Court also rejected the defendant's theory that the inadmissible oral confession "let the cat out of the bag," thus compromising his voluntary waiver of the right to remain silent and tainting his subsequent written confession. The Court reasoned that whatever psychological impact the unwarned oral statement may have had on the defendant's willingness to give the subsequent written confession was not constitutionally significant.

***Maine v. Moulton***, 106 S. Ct. 477 (1985).

An indicted criminal defendant's sixth amendment right to counsel is violated if a government informant, participating in an investigation of the defendant's unindicted crimes, elicits incriminating statements from the defendant concerning the indicted charges when counsel is not present.

The defendant and the informant, his codefendant, were charged with theft. The informant told police that the defendant planned to murder one of the state's witnesses. Pursuant to an investigation of the alleged plan, the informant agreed to wear a transmitter to a meeting with the defendant during which the two, without counsel, were to discuss defense strategy on the pending charges. Although the police instructed the informant not to question the defendant concerning his involvement in the theft, the informant's invitations to reminisce about the pair's criminal activities enabled the police to record the defendant's numerous incriminating statements about the theft. The defendant moved to suppress the recorded statements on the ground that they were obtained in violation of his sixth amendment right to counsel.

The United States Supreme Court held that the police action violated the sixth amendment. When seeking evidence pertaining to pending charges against an accused, police investigative powers are limited by the accused's sixth amendment right to counsel. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges notwithstanding the police investigation of other crimes, if, in obtaining these statements the police violate the sixth amendment by knowingly circumventing the accused's right to counsel.

***Shea v. Louisiana***, 105 S. Ct. 1065 (1985).

*Edwards v. Arizona,* 451 U.S. 477 (1980), which 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, applies to cases pending on direct appeal at the time *Edwards* was decided.

***Miller v. Fenton***, 106 S. Ct. 445 (1985).

Although 28 U.S.C. § 2254(d) requires federal courts to consider state court factual findings presumptively correct, it does not change the traditional rule that the voluntariness of a confession is a legal question meriting plenary, independent review in a federal habeas proceeding.

## Kansas Supreme Court

***State v. Zuniga***, 237 Kan. 788, 703 P.2d 805 (1985).

The voluntariness of a confession is determined in light of the totality of the circumstances, including the following: (1) the duration and manner of interrogation; (2) the defendant's ability upon request to communicate with the outside world; (3) the defendant's age, intellect and background; (4) the officers' fairness in conducting the interrogation; and (5) the defendant's fluency in the English language.

***State v. Zuniga***, 237 Kan. 788, 703 P.2d 805 (1985).

An in custody statement in English by a defendant whose primary language is not English is admissible even if given to the police without the presence of an interpreter, if he gave it voluntarily and with full knowledge of his *Miranda* rights.

***State v. O'Neal***, 238 Kan. 183, 708 P.2d 206 (1985).

When a suspect in custody expresses a desire to deal with the police only through counsel or when counsel is present, further interrogation must cease until counsel is present. The police, however, are not precluded from interrogating the suspect if he waives the right to have counsel present or voluntarily initiates further communication.

***State v. O'Neal***, 238 Kan. 183, 708 P.2d 206 (1985).

A suspect in custody can effectively waive the right to have counsel present during a police interrogation. Merely because he previously retained counsel does not necessarily make inadmissible his voluntary statements made in counsel's absence.

***State v. Pursley***, 238 Kan. 253, 710 P.2d 1231 (1985).

In a criminal case there is a presumption of sanity, and if the accused attacks the voluntariness of his confession on the ground of his mental incompetency at the time the confession was given, he must overcome the presumption by substantial competent evidence.

*State v. Pursley*, 238 Kan. 253, 710 P.2d 1231 (1985).

*Miranda* warnings do not apply to situations in which a suspect makes incriminating statements to a private citizen who is not an agent of the police. An agency relationship exists when police intend the private party to act on their behalf and that party intentionally accepts the delegation of authority.

*State v. Pursley*, 238 Kan. 253, 710 P.2d 1231 (1985).

A suspect in custody can effectively waive the right to have counsel present during a police interrogation. Merely because he previously retained counsel does not necessarily make inadmissible his voluntary statements made in counsel's absence.

*State v. Pursley*, 238 Kan. 253, 710 P.2d 1231 (1985).

The admissibility of a defendant's incriminating statement is not affected by a prosecutor's violation of the Code of Professional Responsibility in obtaining those statements.

### Kansas Court of Appeals

*State v. Mooney*, 10 Kan. App. 2d 477, 702 P.2d 328 (1985).

An accused's pretrial statement is involuntary if the police elicit it through coercion or trickery or during a custodial interrogation without *Miranda* warnings and a knowing and intelligent waiver. Volunteered statements, however, are not barred by the fifth amendment and their admissibility is not affected by *Miranda*.

## C. Identification Procedures

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

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

The sixth amendment right to counsel applies to corporeal identification procedures conducted after the initiation of adversarial judicial proceedings.[37] Thus, an attorney's presence is not required at identification procedures that do not require the defendant's pres-

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

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

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

[36] *Id.*

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

ence[38] or that occur prior to indictment or other formal charges.[39]

## D. Exclusionary Rule

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

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

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

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

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[38] United States v. Ash, 413 U.S. 300, 317-21 (1973).
[39] Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion).
[40] *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961).
[41] *Id.* at 656, 659 (1961).
[42] United States v. Calandra, 414 U.S. 338, 349-52 (1974).
[43] United States v. Janis, 428 U.S. 433, 449-54 (1976).
[44] Harris v. New York, 401 U.S. 222, 224-26 (1971).
[45] Massachusetts v. Sheppard, 104 S. Ct. 3424, 3428-30 (1984); United States v. Leon, 104 S. Ct. 3405, 3419-23 (1984).
[46] Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).
[47] *Id.* at 487-88.
[48] *Id.*
[49] *See, e.g.*, Taylor v. Alabama, 457 U.S. 687 (1982); United States v. Crews, 445 U.S. 463 (1980); Dunaway v. New York, 442 U.S. 200 (1979); United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590 (1975).
[50] For all practical purposes, "standing" is an issue only in fourth amendment cases.
[51] Rakas v. Illinois, 439 U.S. 128, 138-40 (1978).
[52] *Id.* at 143, 148-49.

## Kansas Supreme Court

***State v. Epperson***, 237 Kan. 707, 703 P.2d 761 (1985).

Ordinarily, an automobile passenger has no standing to challenge the search of a car that he neither owns nor possesses. A passenger, however, does have standing if the initial stop of the automobile was illegal.

## Kansas Court of Appeals

***State v. Huber***, 10 Kan. App. 2d 580, 704 P.2d 1004 (1985).

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 a search warrant issued by a magistrate, police officers searched defendant's house, observed items in plain view, and seized them. The defendant alleged that some of the statements attributed to an informant in the affidavit supporting the search warrant were false, but did not claim falsity by the police officer affiant. The defendant moved to suppress on the ground that the search was unlawful because the affidavit underlying the search warrant was insufficient to establish probable cause.

The Kansas Court of Appeals adopted the "good faith" exception to the exclusionary rule announced in *United States v. Leon,* 104 S. Ct. 3405 (1984), and upheld the search warrant. Since the defendant did not claim falsity by the police officer affiant but simply disputed the truthfulness of an informant's statement, there was no taint on the appearance of good faith possessed by the police that would undercut the application of *Leon.* Therefore, the court found that the police officers acted in reasonable reliance on the search warrant.

***State v. Huber***, 10 Kan. App. 2d 560, 704 P.2d 1004 (1985).

Standing to claim infringement of fourth amendment rights depends not merely on whether the defendant has a possessory interest in the area searched or items seized, but whether he has a legitimate expectation of privacy in the property searched or seized. The defendant may have such an expectation in property he possesses even though he has no possessory interest in the place in which he possesses it.

# II. PRETRIAL PROCEEDINGS

## A. Prosecutorial Discretion

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

### United States Supreme Court

*Wayte v. United States*, 105 S. Ct. 1524 (1985).

The Government's "passive enforcement" policy, under which it prosecuted only those nonregistrants for the draft who either reported themselves or whom others reported, was not an abuse of prosecutorial discretion.

The defendant was required to, but did not, register for the draft. Instead, he sent to Government officials letters stating his intention not to register and failed to respond to repeated governmental requests to register under its "beg" policy. Out of 674,000 nonregistrants, the Government had identified 285 either because, like the defendant, they reported themselves or because others reported them. The Government responded to nonregistration with a "passive enforcement" policy under which it investigated and prosecuted only these 285 nonregistrants, many of whom, like the defendant, the Government knew to be vocal opponents of the draft. The defendant claimed that his indictment was impermissibly motivated by the Government's desire to suppress his first amendment freedom of speech, and moved to dismiss the indictment on the ground that it constituted selective prosecution in violation of fifth amendment due process.

The United States Supreme Court held that the Government's "passive enforcement" policy together with its "beg" policy did not violate either the first or fifth amendment. Noting that the Government has broad prosecutorial discretion, the Court stated selective prosecution claims should be reviewed under ordinary equal protection standards, which require proof of both a discriminatory effect

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[53] *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).
[54] Blackledge v. Perry, 417 U.S. 21, 28-29 (1974).
[55] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

and purpose. The "passive enforcement" policy did not have a discriminatory effect since the Government prosecuted both those identified nonregistrants who protested and those who did not. Furthermore, the Government's mere awareness that some of those prosecuted would be vocal opponents did not establish a discriminatory purpose. Thus, the defendant failed to show either a discriminatory effect or purpose.

### Kansas Supreme Court

***State v. Berg***, 236 Kan. 562, 694 P.2d 427 (1985).

An attorney hired by a complaining witness to assist the prosecutor pursuant to K.S.A. § 19-717 is not a "special prosecutor" within the meaning of K.S.A. § 22-2202(19) and cannot appeal dismissal of the complaint ordered on the State's motion.

## B. Grand Jury

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

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

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

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

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

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

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

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

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

[62] 18 U.S.C. § 401; 28 U.S.C. § 1826(a).

[63] United States v. Mandujano, 425 U.S. 564, 572 (1976).

[64] 18 U.S.C. § 6002.

[65] Costello v. United States, 350 U.S. 359, 363-64 (1956).

[66] United States v. Calandra, 414 U.S. 338, 351-52 (1974).

## C. Indictments

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

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

### United States Supreme Court

***United States v. Miller***, 105 S. Ct. 1811 (1985).

An indictment that alleges crimes other than the charged crime or other means of committing the charged crime is not defective if it fully and clearly sets out the charged crime and the elements supporting the conviction.

### Kansas Supreme Court

***State v. Hanks,*** 236 Kan. 524, 694 P.2d 407 (1985).

The court may order two or more complaints, informations, or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment.

***State v. Pink,*** 236 Kan. 715, 696 P.2d 358 (1985).

Under K.S.A. § 22-3204, a defendant who fails to request severance waives his right to it.

***State v. Garner,*** 237 Kan. 227, 699 P.2d 468 (1985).

An information that charges an offense in the language of the statute or its equivalent is sufficient. The exact statutory words need not be used if the meaning is clear.

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

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

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

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

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

***State v. Falke,*** 237 Kan. 668, 703 P.2d 1362 (1985).

Separate trials should be granted under K.S.A. § 22-3204 when severance appears necessary to avoid prejudice and ensure a fair trial to each defendant.

***State v. Falke,*** 237 Kan. 668, 703 P.2d 1362 (1985).

When two or more defendants are jointly tried, each defendant has a separate absolute right not to be called as a witness. This right may be waived. In order to be entitled to a severance for the purpose of obtaining the testimony of a codefendant, the movant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed.

***State v. Lewis,*** 238 Kan. 94, 708 P.2d 196 (1985).

In determining whether there is sufficient prejudice to mandate severance, a trial court must consider: (1) whether the defendants have antagonistic defenses; (2) whether important evidence admissible in favor of one of the defendants at a separate trial would be allowed in a joint trial; (3) whether evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) if a confession by one defendant is introduced and proved, whether it would prejudice the jury against the others; or (5) whether one of the defendants who could give evidence for all or some of the other defendants would become a competent and compellable witness on the separate trials of the others.

***State v. Bird,*** 238 Kan. 160, 708 P.2d 946 (1985).

In a felony action, the indictment or information is the jurisdictional instrument upon which the accused stands trial. A conviction based upon an information that does not sufficiently charge the offense for which the accused is convicted is void. Failure of the information to sufficiently state an offense is a fundamental defect that can be raised at any time, even on appeal.

***State v. Bird,*** 238 Kan. 160, 708 P.2d 946 (1985).

The sufficiency of an indictment or information is measured by whether it contains the elements of the offense charged, and sufficiently apprises the defendant of what he must be prepared to meet, and by whether it is specific enough for the defendant to make a plea of double jeopardy. An information which charges an offense in the language of the applicable criminal statute is sufficient.

***State v. Bird,*** 238 Kan. 160, 708 P.2d 946 (1985).

If an information sufficiently charges a crime, a defendant waives any further objections to its definiteness or certainty by failing to request a bill of particulars or raise these objections prior to submission of the case to the jury.

*State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985).

The decision to grant a single defendant a separate trial upon one or more charges lies within the discretion of the trial court and will stand absent an abuse of discretion.

*State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985).

The trial court has discretion to grant or deny a defendant's motion for a bill of particulars.

### Kansas Court of Appeals

*State v. Reineking*, 10 Kan. App. 2d 630, 706 P.2d 483 (1985).

The test for joinder of two or more cases is the same as that for charging two or more defendants in the same complaint, information or indictment, and the determination is within the sound discretion of the trial court.

## D. Initial Appearance and Bail

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

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

The purpose of bail is to assure the defendant's presence at the trial or other criminal proceeding.[77] Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" and violates the eighth amendment.[78] The criteria for bail are primarily set by statute.[79]

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

[73] *Id.*

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

[75] FED. R. CRIM. P. 5(c). *See also* K.S.A. § 22-2901.

[76] FED. R. CRIM. P. 5(c); K.S.A. § 22-2901.

[77] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[78] *Id.* The eighth amendment provides: "Excessive bail shall not be required . . . ." U.S. CONST. amend. VIII.

[79] 18 U.S.C. §§ 3141-3156; K.S.A. §§ 22-2801 to -2818.

## 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.[80] If probable cause is found, the defendant is held to answer in the district court.[81] If not, the complaint is dismissed and the defendant is discharged.[82]

The preliminary examination is scheduled at the initial appearance.[83] It must be held within a specified period of time.[84] A preliminary examination is not held if the defendant waives it or is indicted.[85]

Preliminary examinations are not constitutionally mandated.[86] As a prerequisite to extended post-arrest detention, however, the fourth amendment requires a probable cause determination by a judicial officer either before or promptly after arrest.[87] This fourth amendment requirement may be satisfied by various procedures.[88]

### Kansas Supreme Court

***State v. Matzke,*** 236 Kan. 833, 696 P.2d 396 (1985).

Under K.S.A. § 22-3208, a defendant waives the right to challenge the sufficiency of the evidence presented at a preliminary hearing when he fails to make a pretrial motion to dismiss.

***State v. Myatt,*** 237 Kan. 17, 697 P.2d 836 (1985).

The rules of evidence apply to preliminary examinations.

***State v. Green,*** 237 Kan. 146, 697 P.2d 1305 (1985).

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

***State v. Burrell,*** 237 Kan. 303, 699 P.2d 499 (1985).

When evidence produced at a preliminary examination tends to establish that the offense charged was committed and the defendant committed it, the case must proceed to trial and cannot be dismissed even if the evidence might not support a conviction at trial.

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[80] FED. R. CRIM. P. 5.1(a); K.S.A. § 22-2902(3).
[81] *Id.*
[82] FED. R. CRIM. P. 5.1(b); K.S.A. § 22-2902(3).
[83] FED. R. CRIM. P. 5(c). *See generally* K.S.A. § 22-2901.
[84] FED. R. CRIM. P. 5(c); K.S.A. § 22-2901.
[85] FED. R. CRIM. P. 5(c); K.S.A. § 22-2902(4).
[86] Gerstein v. Pugh, 420 U.S. 103, 120-23 (1975).
[87] *Id.* at 114, 125.
[88] *Id.* at 123-25.

*State v. Leslie,* 237 Kan. 318, 699 P.2d 510 (1985).

At the conclusion of a preliminary hearing, the magistrate can bind the defendant over on a felony charge or enter an order of discharge under K.S.A. § 22-2902(3). A magistrate's order binding a defendant over on a misdemeanor, accepting a guilty plea thereto, and imposing sentence are void orders to which no jeopardy attaches.

*State v. Engle,* 237 Kan. 349, 699 P.2d 47 (1985).

The two objectives of a preliminary examination are to determine whether there is probable cause that a crime was committed and that the defendant committed it.

## F. Arraignment

Arraignments are held in open court. The defendant is informed of the charges against him and is called upon to plead.[89]

## G. Guilty Pleas

Due process requires that guilty pleas be voluntarily and understandingly made.[90] Essentially, the court must inform the defendant of all the critical elements of the charge, question him to determine his understanding of the nature and consequences of the guilty plea, and insure its voluntariness.[91]

A guilty plea is equivalent to a conviction and is an admission of all the elements of the crime charged.[92] A defendant waives several constitutional rights by pleading guilty.[93] Furthermore, a guilty plea forecloses appellate review of nonjurisdictional constitutional claims occurring before the plea.[94] Subsequent to the guilty plea, however, the defendant may appeal claims that relate to the Government's power to prosecute.[95]

### United States Supreme Court

*United States v. Benchimol,* 105 S. Ct. 2103 (1985).

The Government carries out its part of a plea bargain to recommend a particular sentence by making the promised recommenda-

[89] FED. R. CRIM. P. 10; K.S.A. § 22-3205.
[90] Boykin v. Alabama, 395 U.S. 238, 242 (1969).
[91] FED. R. CRIM. P. 11(c)-(d); K.S.A. § 22-3210(3).
[92] McCarthy v. United States, 394 U.S. 459, 466 (1969).
[93] Boykin v. Alabama, 395 U.S. 238, 243 (1969).
[94] Tollett v. Henderson, 411 U.S. 258, 267 (1973).
[95] Blackledge v. Perry, 417 U.S. 21, 30 (1974).

tion. There is no implied-in-law requirement that the Government explain its reasons or make its recommendation "enthusiastically."

### Kansas Court of Appeals

***State v. Snyder,*** 10 Kan. App. 2d 450, 701 P.2d 969 (1985).

A guilty plea induced by fear is not voluntary. A defendant's alleged fear, however, must be supported by substantial objective proof.

***State v. Snyder,*** 10 Kan. App. 2d 450, 701 P.2d 969 (1985).

The trial court must find that there is a factual basis for a guilty plea. A stipulation by the parties that a factual basis exists will not satisfy this requirement.

## H. Discovery

Although no general constitutional right to discovery exists in criminal cases,[96] jurisdictions provide for discovery by statute[97] or rule.[98] Discovery occurs at both the pretrial and trial stages of the criminal process.

Pretrial defense discovery is usually limited to relevant statements made by the defendant, the defendant's prior criminal record, relevant documents and tangible objects, and relevant reports of examinations and tests.[99] Absent a specific showing of materiality to the preparation of the defense, the Government is not required to disclose witness lists.[100] Similarly, a balancing test is employed to determine whether the Government must disclose the identity of informants.[101] The defense also obtains discovery through informal means, including discretionary disclosure by the prosecutor.[102]

The Government is entitled to some pretrial discovery. This discovery is typically limited to certain instances of reciprocal discovery[103] and to notice of alibi[104] and insanity[105] defenses.

After a Government witness testifies on direct examination at trial, the Government must disclose to the defense any relevant pre-

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[96] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).
[97] *E.g.,* K.S.A. § 22-3212.
[98] *E.g.,* FED. R. CRIM. P. 16.
[99] FED. R. CRIM. P. 16(a)(1)(A)-(D); K.S.A. § 22-3212(1)-(2).
[100] *See generally id.*
[101] Roviaro v. United States, 353 U.S. 53, 62 (1957).
[102] Other informal means of defense discovery include preliminary examinations, bills of particulars, subpoenas, and depositions.
[103] FED. R. CRIM. P. 16(b); K.S.A. § 22-3212(3).
[104] FED. R. CRIM. P. 12.1; K.S.A. § 22-3218.
[105] FED. R. CRIM. P. 12.2; K.S.A. § 22-3219.

trial statements made by the witness.[106] Some jurisdictions have expanded this discovery to statements of defense witnesses other than the defendant.[107]

Due process imposes a duty on prosecutors to disclose exculpatory evidence to the defense.[108] This "Brady material" is generally disclosed pretrial, but the Government also has a continuing duty to disclose such evidence.[109] Unless the nondisclosed evidence is material and thereby deprives the defendant of a fair trial, there is no constitutional violation.[110] 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.[111]

## United States Supreme Court

***United States v. Bagley,*** 105 S. Ct. 3375 (1985).

A prosecutor's failure to disclose impeachment evidence that the defense could have used against government witnesses is reversible error only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

The defendant was charged with violations of federal narcotics and firearms statutes. He filed a discovery motion that requested disclosure of any deals, promises, or inducements made to government witnesses in exchange for their testimony. The Government failed to disclose that its two chief witnesses were paid informants, which the defendant discovered after his conviction. The defendant sought reversal on the ground that the Government's nondisclosure violated due process.

The United States Supreme Court held that the prosecution's failure to disclose the impeachment evidence did not require reversal of the conviction unless the defendant, on remand, could show a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. Impeachment evidence, as well as exculpatory evidence, falls within the rule of *Brady v. Maryland,* 373 U.S. 83 (1963), which held that due process requires the Government to disclose evidence favorable to the accused and material to guilt or punishment. The Court emphasized that no distinction should be made between impeachment evidence and exculpatory evidence under the *Brady* rule.

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[106] Jencks v. United States, 353 U.S. 657, 666-69, 672 (1957).

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

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

[109] *See id.*

[110] *Id.*

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

### Kansas Supreme Court

***State v. Pink,*** 236 Kan. 715, 696 P.2d 358 (1985).

A court is generally not required to disclose the identity of an informant whose information is used only to establish probable cause. On the other hand, if a defendant can show that the identity of an informant, who actually participates in or observes criminal activity, is material to his defense, a court will disclose his identity.

## I. Motions and Hearings[112]

Defenses, objections, and requests that are capable of determination without a trial of the general issue may be raised pretrial by motion.[113] Certain motions, including motions to suppress evidence, must be raised prior to trial.[114]

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.[115]

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.[116]

The defendant's testimony at a suppression hearing is not admissible at a subsequent trial in the Government's case-in-chief.[117] Such testimony, however, may be admissible to impeach the defendant.[118] The defendant does not subject himself to cross-examination on other issues,[119] and similarly, his right to cross-examine Government witnesses is narrower than at trial.[120]

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

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

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

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

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

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

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

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

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

### Kansas Supreme Court

***State v. Huninghake,*** 238 Kan. 155, 708 P.2d 529 (1985).

Suppression rulings that seriously impede, but do not technically foreclose, prosecution can be appealed under K.S.A. § 22-3603. Therefore, the State may appeal the suppression of evidence that denies it the introduction of blood alcohol test results and the consequent statutory presumption of K.S.A. § 8-1005(a).

### Kansas Court of Appeals

***State v. Mooney,*** 10 Kan. App. 2d 477, 702 P.2d 328 (1985).

The State may appeal an order suppressing a confession or admission as a matter of right under K.S.A. § 22-3603.

## 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.[121] In addition, fifth amendment due process prohibits intentional and prejudicial Government delays that are used to gain a tactical advantage.[122]

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.[123] Jurisdictions often have speedy trial statutes that provide specific time limitations.[124]

### United States Supreme Court

***United States v. Rojas-Contreras,*** 106 S. Ct. 555 (1985).

The Speedy Trial Act does not require that the 30-day preparation period be restarted upon the filing of a superseding indictment.

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

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

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

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

### Kansas Supreme Court

***State v. Hanks,*** 236 Kan. 524, 694 P.2d 407 (1985).

K.S.A. § 22-3402(4), which gives the prosecution 90 days to retry the defendant "in the event a mistrial is declared," applies when the trial court grants a motion for a new trial.

***State v. Galloway,*** 238 Kan. 100, 708 P.2d 508 (1985).

Under K.S.A. § 22-3603, a delay caused by the State's interlocutory appeal is not counted in determining whether a defendant's constitutional right to a speedy trial has been violated, unless the appeal is taken arbitrarily, negligently, or in bad faith.

***State v. Mills,*** 238 Kan. 189, 707 P.2d 1079 (1985).

The acts of a third party constitute concealment of a crime for purposes of tolling the statute of limitations only when the defendant takes a positive action calculated to conceal the crime and there is a direct connection between the defendant and the third party that results in the concealment.

### Kansas Court of Appeals

***State v. Corrigan,*** 10 Kan. App. 2d 55, 691 P.2d 1311 (1985).

Only continuances that set a trial date past the statutory speedy trial limit are to be considered in determining "the original trial date" under K.S.A. § 22-3402(3)(c).

***State v. Huber,*** 10 Kan. App. 2d 560, 704 P.2d 1004 (1985).

A person charged with a felony or misdemeanor and held on an appearance bond must be brought to trial within 180 days after arraignment.

## K. Double Jeopardy

The fifth amendment double jeopardy clause generally protects against multiple trials and punishments for the same offense.[125] To raise a double jeopardy claim, the defendant must have been subjected to successive criminal prosecutions[126] and placed in jeopardy at the first criminal proceeding.[127]

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.[128] Federal policy[129] and

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[125] 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.

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

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

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

many state statutes,[130] however, have limited the "dual sovereignty" concept.

Double jeopardy issues may arise in a variety of situations. These situations include reprosecution after a mistrial,[131] reprosecution after an acquittal or other decision favorable to the defendant,[132] reprosecution after a conviction,[133] and resentencing after a conviction.[134]

## United States Supreme Court

***United States v. Woodward,*** 105 S. Ct. 611 (1985).

Proof of currency reporting violation does not necessarily include proof of a false statement offense. Therefore, a defendant may receive separate punishments for the two offenses without violating double jeopardy.

***Ball v. United States,*** 105 S. Ct. 1668 (1985).

A convicted felon may be tried both for receiving and possessing a firearm that has traveled in interstate commerce, but he may not be convicted of both offenses when a single act establishes the receipt and possession. If a defendant is found guilty of both offenses, the trial court should enter judgment on only one count.

***Fugate v. New Mexico,*** 105 S. Ct. 1858 (1985) (per curiam), *aff'g by an equally divided Court* 678 P.2d 686 (N.M. 1984).

A defendant's conviction in municipal court of driving while intoxicated and careless driving does not create a double jeopardy bar to his subsequent prosecution, in a higher court, for vehicular homicide based on the same incident.

***Garrett v. United States,*** 105 S. Ct. 2407 (1985).

The continuing criminal enterprise offense (CCE) under 21 U.S.C. § 848 is a separate offense that is punishable in addition to any predicate offenses. Thus, it does not violate double jeopardy to prosecute the CCE offense after a conviction for one of the predicate offenses.

***Pennsylvania v. Goldhammer,*** 106 S. Ct. 353 (1985).

When the appellate court reverses convictions upon which a defendant was sentenced but affirms other convictions for which sentence was suspended, double jeopardy does not bar resentencing on the affirmed charges.

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U.S. 121, 132 (1959).

[129] 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).

[130] *E.g.*, K.S.A. § 21-3108(3).

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

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

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

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

***Heath v. Alabama,*** 106 S. Ct. 433 (1985).

Under the dual sovereignty doctrine, successive prosecutions by two states for the same criminal conduct are not barred by double jeopardy.

## Kansas Supreme Court

***State v. Brueninger,*** 238 Kan. 429, 710 P.2d 1325 (1985).

The test for determining whether a prosecution is barred by a former prosecution for a crime arising out of the same conduct under K.S.A. § 21-3108(2)(a) is whether each of the offenses charged requires proof of an additional fact that the other does not.

***State v. Brueninger,*** 238 Kan. 429, 710 P.2d 1325 (1985).

The compulsory joinder clause, K.S.A. § 21-3108(2)(a), prevents the prosecution from substantially proving a crime in a trial in which that crime is not charged and then retrying the defendant for the same offense in a trial in which it is charged.

## Kansas Court of Appeals

***State v. Hill,*** 10 Kan. App. 2d 607, 706 P.2d 472 (1985).

Multiplicity, the charging of a single offense in several counts, is prohibited because a single wrongful act cannot be the basis for more than one criminal prosecution. If each offense charged requires proof of a fact not required in proving the other, however, the offenses do not merge and 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.[135] Venue refers to the proper place of prosecution and trial.[136]

### Kansas Supreme Court

***State v. Matzke***, 236 Kan. 833, 696 P.2d 396 (1985).

Under 28 U.S.C. § 1446, a state court retains jurisdiction of criminal matters upon the filing of a removal petition in the federal court. Although the state court may continue with the proceedings, it cannot enter a judgment of conviction unless the removal petition has been denied.

***State v. Myatt***, 237 Kan. 17, 697 P.2d 836 (1985).

The venue of an offense is jurisdictional. The State must prove that the offense occurred in the county where it is prosecuted.

***State v. Haislip***, 237 Kan. 461, 701 P.2d 909 (1985).

Change of venue lies within the trial court's discretion and will not be disturbed on appeal without a showing of prejudice to the substantial rights of a defendant. Media publicity alone does not establish prejudice unless it denies a defendant a fair and impartial trial.

### Kansas Court of Appeals

***State v. Gardner***, 10 Kan. App. 2d 408, 701 P.2d 703 (1985).

The state court is without jurisdiction over a criminal defendant unless the criminal act was committed, intended to be committed, or foreseeably could have been committed within the state.

## B. Sixth Amendment Right to Counsel

The sixth amendment provides a defendant with the right to

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[135] 18 U.S.C. §§ 3231-3244; K.S.A. § 22-2601.

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

counsel in criminal cases.[137] This right attaches at the initiation of formal adversarial judicial proceedings.[138] No constitutional right to counsel at trial exists, however, unless the defendant is actually incarcerated as a result of the prosecution.[139]

The right to counsel includes not only the right to retain a lawyer,[140] but also the right to have a court-appointed attorney.[141] Furthermore, implicit in the sixth amendment is the right to self-representation.[142]

The sixth amendment guarantees the right to effective assistance of counsel.[143] To support a claim of ineffective assistance of counsel, a convicted defendant must show that his counsel's performance was deficient and that the deficient performance resulted in prejudice, depriving him of a fair trial.[144] Joint representations may cause conflicts of interest and thereby render the attorney ineffective under the sixth amendment.[145]

## United States Supreme Court

***Evitts v. Lucey***, 105 S. Ct. 830 (1985).

The due process clause of the fourteenth amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right.

***Hill v. Lockhart***, 106 S. Ct. 366 (1985).

When challenging a guilty plea on the ground of ineffective assistance of counsel, a defendant must satisfy the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and show that counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.

## Kansas Supreme Court

***Chamberlain v. State***, 236 Kan. 650, 695 P.2d 468 (1985).

The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. To prevail on such a claim, the

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[137] 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.

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

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

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

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

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

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

[144] *Id.* at 2068.

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

defendant must establish both that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice, depriving him of a fair trial.

The police arrested the defendant in his home without a warrant and obtained incriminating statements from him. The defendant's attorney made no pretrial motion to suppress the incriminating statements, which were later admitted into evidence. The defendant was convicted of first degree murder and aggravated robbery. The defendant sought reversal on the ground that he was denied effective assistance of counsel in violation of the sixth amendment.

The Kansas Supreme Court, adopting *Strickland v. Washington*, 466 U.S. 668 (1984), upheld the conviction. Noting that there is little conflict between *Strickland* and its previously applied standards enunciated in *Schoonover v. State*, 2 Kan. App. 2d 481, 582 P.2d 292 (1978), the court stated that the *Schoonover* standards remain viable guidelines in the application of the *Strickland* test. *Strickland* requires the defendant to show that (1) viewed objectively, counsel's performance was so deficient under the circumstances that it overcomes the presumption of effective assistance, and (2) the deficient performance prejudiced the defense so as to create a reasonable probability that the decision would have been different with effective assistance. Applying this test to the facts of the case, the court found it was not ineffective assistance of counsel to make no suppression motion.

***State v. Pink***, 236 Kan. 715, 696 P.2d 358 (1985).

A defendant, claiming ineffective assistance of counsel, must show that his counsel's performance was deficient and that the deficient performance resulted in prejudice, depriving him of a fair trial. A court need not consider whether counsel's performance was deficient before examining whether a defendant was prejudiced.

***State v. Matzke***, 236 Kan. 833, 696 P.2d 396 (1985).

A criminal defendant has no constitutional right to be represented by a non-attorney.

***State v. Lem'Mons***, 238 Kan. 1, 705 P.2d 552 (1985).

The sixth amendment right to counsel is infringed when appointed counsel or his associate represents another person charged with the same crime and a conflict of interest is shown. A lawyer should not accept or continue representation of a client if his associate would be disqualified from accepting or continuing the same employment because of a conflict of interest or if the representation creates an appearance of impropriety.

***Gilchrist v. City of Osawatomie***, 238 Kan. 202, 708 P.2d 977 (1985).

An accused has a constitutional right to counsel at sentencing, and when he invokes that right, he is entitled to a continuance in order to retain counsel.

*Gilchrist v. City of Osawatomie*, 238 Kan. 202, 708 P.2d 977 (1985).

A defendant who is tried, convicted, and sentenced to imprisonment in municipal court for violation of a municipal ordinance is entitled to assistance of counsel. The right to counsel does not depend upon the character of the court or the nature of the offense.

### Kansas Court of Appeals

*Hearron v. State*, 10 Kan. App. 2d 229, 696 P.2d 418 (1985).

When a criminal defendant asserts a claim of ineffectiveness of counsel, the court should apply the standards announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

## C. Sixth Amendment Right to Jury Trial

The sixth amendment provides a criminal defendant with the right to a jury trial.[146] This right, however, applies only to crimes for which the authorized penalty is greater than six months imprisonment.[147] Although juries in criminal cases typically must have twelve members and must return unanimous verdicts, neither this size[148] nor unanimity[149] is constitutionally mandated. A defendant may waive his right to a jury trial,[150] but he is not constitutionally entitled to be tried by a judge without a jury.[151]

Included in the sixth amendment is the right to be tried by an impartial jury.[152] Although jury impartiality does not require jurors to be ignorant of the facts and issues of the case,[153] adverse publicity either before[154] or during[155] 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.[156] Prior restraints, or "gag orders," on news media coverage of pretrial proceedings violate the first amendment freedom of the press.[157] Pretrial proceedings, however, may be closed to the public and the

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[146] The sixth amendment provides that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." U.S. CONST. amend. VI.
[147] Baldwin v. New York, 399 U.S. 66, 69 (1970) (plurality opinion).
[148] Williams v. Florida, 399 U.S. 78, 86, 103 (1970) (plurality opinion).
[149] Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972).
[150] Duncan v. Louisiana, 391 U.S. 145, 158 (1968).
[151] Singer v. United States, 380 U.S. 24, 34 (1965).
[152] U.S. CONST. amend VI.
[153] Irvin v. Dowd, 366 U.S. 717, 722 (1961).
[154] *Id.* at 725-29.
[155] Sheppard v. Maxwell, 384 U.S. 333, 349-63 (1966).
[156] FED. R. CRIM. P. 21(a); K.S.A. § 22-2616.
[157] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

press.[158] Regarding adverse publicity during trial, the impact on the jury is prevented primarily by sequestering the jury.[159] The right of the public and the press to attend criminal trials is implicit in the first amendment.[160]

## United States Supreme Court

***Wainwright v. Witt***, 105 S. Ct. 844 (1985).

The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror.

## Kansas Supreme Court

***State v. Haislip***, 237 Kan. 461, 701 P.2d 909 (1985).

The substitution of an alternate is allowed if he has not been discharged, but the trial court must instruct the jury to begin deliberations anew.

***State v. Haislip***, 237 Kan. 461, 701 P.2d 909 (1985).

The purpose of a voir dire examination is to select jurors who are competent to determine the facts and issues without bias, prejudice or partiality. The nature and scope of voir dire is within the trial court's discretion.

***State v. Siver***, 237 Kan. 569, 701 P.2d 699 (1985).

A felony case will be tried by jury unless the defendant, the prosecution, and the court agree to a waiver pursuant to K.S.A. § 22-3403(1).

***State v. Kee***, 238 Kan. 342, 711 P.2d 746 (1985).

A juror's reading of newspaper articles pertaining to the trial is not ground for reversal, new trial, or mistrial unless the articles are of such a character that they might have resulted in prejudice.

## Kansas Court of Appeals

***City of Overland Park v. Barnett***, 10 Kan. App. 2d 586, 705 P.2d 564 (1985).

K.S.A. § 22-3609(4) requires that a written request for a jury trial, directed to the court, be on file no later than 48 hours before trial, or that a timely oral request be made on the record.

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[158] Gannett Co. v. DePasquale, 443 U.S. 368, 391 (1979).
[159] United States v. Hall, 536 F.2d 313, 326-27 (10th Cir. 1976).
[160] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).

## D. Other Sixth Amendment Trial Rights

The sixth amendment also includes the following trial rights: (1) the right to a public trial;[161] (2) the right to confront adverse witnesses;[162] and (3) the right to compulsory process of favorable witnesses.[163]

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.[164] Implicit in the first amendment, however, is the right of the press and the public to attend criminal trials.[165]

The right to confrontation is primarily effectuated by the defendant's cross-examination of Government witnesses.[166] Restrictions on the defendant's scope of cross-examination may violate the sixth amendment.[167] The admission of out-of-court statements, such as hearsay, may violate the confrontation clause, unless their necessity and reliability are established.[168] Implicit in the confrontation clause is the defendant's right to be present at every stage of the trial.[169] A defendant, however, may relinquish this right by being voluntarily absent[170] or extremely disruptive.[171]

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.[172] The sixth amendment right to present evidence, however, is not absolute.[173]

### United States Supreme Court

***United States v. Gagnon***, 105 S. Ct. 1482 (1985).

A defendant's right to be present under the sixth amendment confrontation clause does not extend to all meetings between a judge and juror. While the right to be present provided by Rule 43 may be broader than constitutionally mandated, a defendant waives

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

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

[163] 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.

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

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

[166] Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

[167] *Id.* at 316-18.

[168] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[169] Diaz v. United States, 223 U.S. 442, 455 (1912).

[170] Taylor v. United States, 414 U.S. 17, 19-20 (1973) (per curiam).

[171] Illinois v. Allen, 397 U.S. 337, 342-43 (1970).

[172] *See, e.g.*, FED. R. CRIM. P. 17(a)-(b); K.S.A. § 22-3214.

[173] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

that right unless he asserts it.

***Tennessee v. Street***, 105 S. Ct. 2078 (1985).

The Government may use a non-testifying accomplice's confession to rebut a defendant's claim that his confession was a coerced imitation of the accomplice's, and such use does not violate the defendant's sixth amendment right to confrontation.

***Delaware v. Fensterer***, 106 S. Ct. 292 (1985).

The inability of a State's expert witness to remember the basis of his opinion at trial does not render that opinion inadmissible under the sixth amendment confrontation clause.

## Kansas Supreme Court

***State v. Myatt***, 237 Kan. 17, 697 P.2d 836 (1985).

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

The defendant was dating the child victim's mother. The defendant, the mother, and the child all contracted gonorrhea. The child, a six-year-old girl, told police that the defendant hurt her vaginal area. He was charged with taking indecent liberties with a child. At trial, the parties stipulated that the child was incompetent to testify. Based on the testimony of the child's psychiatrist, the trial judge determined that the child's hearsay statements were reliable and admitted them under K.S.A. § 60-460(dd). The defendant appealed his conviction on the ground that the statute on its face and in its application violated the sixth amendment right to confrontation.

The Kansas Supreme Court held the statute constitutional and the hearsay admissible. A hearsay statement of a non-testifying witness is constitutionally admissible when the witness is unavailable and the statement is reliable. (The parties' stipulation in this case satisfied the unavailability requirement.) Reliability can be inferred when the evidence falls within a firmly rooted hearsay exception. Because § 60-460(dd) is not such an exception, the hearsay statement must have adequate indicia of reliability. In determining reliability, the court should consider such factors as the child's age; the child's physical and mental conditions; the circumstances of the alleged event; the language used by the child; the presence of corroborative physical evidence; the relationship of the accused to the child; the child's family, school and peer relationships; any motive to falsify or distort the event; and the reliability of the testifying witness. In this case, the child's statements were corroborated by the medical evidence that she had contracted gonorrhea. In addition, the State's expert witness—a child psychiatrist—could discern no motive to falsify and concluded the child's statements were relia-

ble. The admission of the statements in this case, therefore, did not violate the sixth amendment confrontation clause.

***Carson v. Division of Vehicles***, 237 Kan. 166, 699 P.2d 447 (1985).

A police officer's affidavit that lacks supporting facts cannot be used in an administrative hearing as the sole basis for suspending a driver's license. Without either the presence of the officer at the hearing or an affidavit that gives supporting facts, a suspension violates the sixth amendment right to confrontation.

Six drivers were stopped by police on suspicion of driving while under the influence of alcohol. Each driver refused to submit to a blood alcohol test (BAT). Following each arrest, the arresting officer completed a standard affidavit, which stated that the officer had reasonable grounds to believe the arrestee was driving while intoxicated; that the driver refused to submit to a chemical test; and that the refusal was voluntary. Upon receipt of the affidavits, the Kansas Department of Revenue (KDR) commenced driver's license suspension proceedings under K.S.A. § 8-1001(c). At the drivers' request, the KDR held administrative hearings. The arresting officers did not appear at the hearings, and the KDR submitted the affidavits as its only evidence. Based solely on the affidavits, the hearing examiner found that the drivers had unreasonably refused to submit to a BAT as required by statute and ordered their licenses suspended. All six drivers sought reversal and claimed that the failure of the arresting officer to appear at the administrative hearing was a violation of the due process and confrontation clauses.

The Kansas Supreme Court held that suspensions based solely on the officers' conclusionary affidavits violate the due process and confrontation clauses. The court found that, in the absence of the officer's testimony, the constitution requires that an affidavit articulate the underlying facts supporting probable cause for the arrest and the conclusion that the refusal to take the BAT was unreasonable. Because the affidavits in this case contained none of these supporting facts, they were insufficient. The court noted that affidavits containing these necessary facts will establish a prima facie case if the licensee is provided with a copy of the affidavit and informed that it will be taken as true at the suspension hearing. The burden of proving the affidavit false or insufficient is then shifted to the licensee. If the licensee intends to challenge the affidavit, he must give the KDR timely notice to allow it to subpoena witnesses. Failure to give such notification operates as a waiver of the licensee's right to confrontation.

***State v. Davis***, 236 Kan. 538, 694 P.2d 418 (1985).

Admission of a declarant's out-of-court statement prior to taking the stand does not violate the sixth amendment confrontation clause when the declarant is available and testifies.

***State v. Pink***, 236 Kan. 715, 696 P.2d 358 (1985).

A defendant's sixth amendment right of confrontation is not violated when the court admits an extrajudicial confession of a codefendant in a joint trial if the statement does not implicate or directly allude to the defendant and the court gives a limiting instruction.

***State v. Lanter***, 237 Kan. 309, 699 P.2d 503 (1985).

Before the admission of a child victim's hearsay statements under K.S.A. § 60-460(dd), the court must hold a hearing to determine whether the child is disqualified or unavailable, whether the statement is apparently reliable, and whether the child was induced to make the statement by threats or punishments.

***State v. Lovely***, 237 Kan. 838, 703 P.2d 828 (1985).

A defendant's presence is required at a conference between a trial judge and juror but his absence is reviewed under the harmless error standard.

***State v. Bird***, 238 Kan. 160, 708 P.2d 946 (1985).

The use of a deposition taken pursuant to K.S.A. § 22-3211 does not deprive a defendant of his sixth amendment right to confront witnesses if the defendant was present at the taking of the deposition and had the opportunity to cross-examine the witness.

***State v. Bird***, 238 Kan. 160, 708 P.2d 946 (1985).

Before admitting evidence under a hearsay exception, the court must consider the application of the sixth amendment confrontation clause and section 10 of the Bill of Rights of the Kansas Constitution. This requires that a witness be unavailable and the statement bears adequate indicia of reliability or guarantees of trustworthiness.

### Kansas Court of Appeals

***State v. Corrigan***, 10 Kan. App. 2d 55, 691 P.2d 1311 (1985).

A defendant who procures the absence of a witness waives his sixth amendment right to confront that witness as well as any hearsay objections to that witness' extrajudicial 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.[174] This

[174] The fifth amendment provides that "nor shall any person . . . be compelled in any

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

The Government may overcome a witness' fifth amendment privilege and compel his testimony by granting him use immunity.[180] Use immunity precludes the use of the immunized testimony, or of any information derived from it, against the witness.[181] The Government, however, may prosecute for perjury a witness who testifies falsely under a grant of immunity.[182] Immunity orders are enforced by the court through civil or criminal contempt proceedings.[183]

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,[184] nor may a prosecutor use the defendant's silence pursuant to *Miranda* warnings to impeach his testimony at trial.[185] A defendant's silence either prior to arrest[188] or between arrest and *Miranda* warnings,[187] however, may be used to impeach his trial testimony.

## Kansas Supreme Court

***State v. Pursley***, 238 Kan. 253, 710 P.2d 1231 (1985).

A prosecutor's comments on the defendant's failure to testify violates the defendant's constitutional right against self-incrimination. If harmless, however, such comment does not require reversal.

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criminal prosecution to be a witness against himself." U.S. CONST. amend. V.

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

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

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

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

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

[180] 18 U.S.C. § 6002. *See* Kastigar v. United States, 406 U.S. 441, 448 (1972).

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

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

[183] 18 U.S.C. § 401; 28 U.S.C. § 1826(a).

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

[185] Doyle v. Ohio, 426 U.S. 610, 619 (1976). Such silence, however, may be admissible to impeach a defendant who testifies to an exculpatory version of the events and claims to have told the police the same version upon arrest. *Id.* at 619 n.11.

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

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

# F. Trial Format and Related Issues[188]

## United States Supreme Court

***Francis v. Franklin***, 105 S. Ct. 1965 (1985).

Due process prohibits the use of evidentiary presumptions in a jury instruction that have the effect of relieving the State of its burden of persuasion on an essential element of a crime.

In the defendant's murder trial, the court instructed the jury: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." The court also instructed the jury on the presumption of innocence and the State's burden of proving every element beyond a reasonable doubt. The defendant sought habeas relief on the ground that the jury instruction created a mandatory presumption in violation of the fourteenth amendment due process clause.

The United States Supreme Court held that the jury instruction violated due process by creating a mandatory presumption that relieved the State of its burden of proving intent. A reasonable juror could have understood that the instruction shifted to the defendant the burden of persuasion on the element of intent once the State had proven the predicate acts. Neither the rebuttable presumption language in the instruction nor the court's general instructions on the State's burden and the presumption of innocence dispelled the error. Thus, the instruction was not harmless error.

***United States v. Young***, 105 S. Ct. 1038 (1985).

A reviewing court must examine inappropriate prosecutorial comments within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. The court must weigh not only the impact of the prosecutor's remarks, but must also consider whether defense counsel's comments invited the reply.

***Ake v. Oklahoma***, 105 S. Ct. 1087 (1985).

When an indigent defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that the State provide the defendant access to a psychiatrist's assistance.

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

## Kansas Supreme Court

***State v. Hundley***, 236 Kan. 461, 693 P.2d 475 (1985).

When a homicide defendant's claim of self-defense is based on the deceased's long history of abusing the defendant, "imminent" must be substituted for "immediate" in the pattern self-defense instruction since "immediate" prejudicially restricts the jury's consideration of the deceased's conduct to that conduct just prior to the homicide.

The defendant and the deceased, her husband, were married for ten years during which he severely abused her. After one abusive episode ended, she shot and killed him. At trial, the court instructed the jury, quoting PIK Crim. 2d 54.17, that a person is justified in defending "against [an] . . . aggressor's *immediate* use of unlawful force" (emphasis added). The defendant appealed her involuntary manslaughter conviction on the ground that the instruction prevented the jury from considering the long-term violence of the deceased.

The Kansas Supreme Court held that the instruction was defective and reversed the conviction. The court noted that the deceased's abusive conduct was properly considered by the jury in determining the reasonable use of self-defense. The use of "immediate" in the instruction, however, impermissibly excluded from the jury's consideration the effect of the long-term violence of the deceased on the defendant.

***State v. Hanks***, 236 Kan. 524, 694 P.2d 407 (1985).

Repeated references in the State's closing argument to the defendant as a "rapist" did not cause prejudicial error since the comments were responsive to defense arguments, based upon the evidence, and not inflammatory.

***State v. Davis***, 236 Kan. 538, 694 P.2d 418 (1985).

A trial court must instruct the jury on the law applicable to the theories of all parties when there is evidence to support those theories.

***State v. Davis***, 236 Kan. 538, 694 P.2d 418 (1985).

Evidence merely tending to refute or deny one of the elements of a crime does not necessarily constitute an affirmative defense entitled to a separate instruction.

***State v. Davis***, 236 Kan. 538, 694 P.2d 418 (1985).

A court needs only to give an instruction on a lesser included offense when there is evidence upon which a defendant might reasonably be convicted of the lesser offense.

***State v. Wise***, 237 Kan. 117, 697 P.2d 1295 (1985).

A court's failure to give a jury instruction on the lesser included offenses of homicide is not error when the defendant failed to request the instruction and there was no evidence to support it.

***State v. Wise***, 237 Kan. 117, 697 P.2d 1295 (1985).

A court's failure to give a jury instruction on premeditated murder and felony murder in the alternative is not error when the defendant charged under both theories fails to request the instruction and does not object to separate instructions.

***State v. Martin***, 237 Kan. 285, 699 P.2d 486 (1985).

The trial court has discretion to allow the State to reopen its case-in-chief.

***State v. Corby***, 237 Kan. 387, 699 P.2d 51 (1985).

When the State uses due diligence to secure the attendance of its primary witness, and does not learn that the witness will not appear until after the jury has been sworn and jeopardy has attached, it is an abuse of discretion for the court to deny the State's request for a continuance to secure the witness' attendance.

***State v. Johns***, 237 Kan. 402, 699 P.2d 538 (1985).

A trial court should exclude the testimony of a witness who violates a court order separating witnesses only when the evidence shows that the party who calls the witness knew of and participated in violating the separation order.

***State v. Haislip***, 237 Kan. 461, 701 P.2d 909 (1985).

The decision to grant a continuance lies within the discretion of the trial court and its denial will not be overturned in the absence of a clear abuse of discretion.

***State v. Falke***, 237 Kan. 668, 703 P.2d 1362 (1985).

Antagonism between a co-defendant's counsel and the prosecutor, which does not in fact prejudice the defendant, is not a sufficient ground for a mistrial or separate trial.

***State v. Peck***, 237 Kan. 756, 703 P.2d 781 (1985).

A verdict may not be reversed on the ground of inconsistency.

***State v. Peck***, 237 Kan. 756, 703 P.2d 781 (1985).

A party may not assign as error the trial court's use or refusal of an instruction unless he objects to the instruction and states the specific grounds for the objection at trial. Absent such specificity, an appellate court will reverse only if the instruction is clearly erroneous.

***State v. Peck***, 237 Kan. 756, 703 P.2d 781 (1985).

The trial judge has broad discretion to answer juror questions after deliberations have begun. When the question has been adequately covered by an original instruction, the judge may decline to answer and may direct the jury to re-read the instruction.

***State v. Lovely***, 237 Kan. 838, 703 P.2d 828 (1985).

A bailiff's improper remark to a deliberating jury is harmless when it is not prejudicial and does not compel the jury to reach a verdict.

***State v. Lewis***, 238 Kan. 94, 708 P.2d 196 (1985).

When the damaging effect of prejudicial misconduct cannot be removed by jury admonition or instruction, the trial judge must declare a mistrial.

***State v. Mason***, 238 Kan. 129, 708 P.2d 963 (1985).

Once a trial court has ruled upon the voluntariness of a confession at a *Jackson v. Denno* hearing, the accused is not entitled under the Constitution to have the matter resubmitted and redetermined by the jury.

***State v. Mason***, 238 Kan. 129, 708 P.2d 963 (1985).

A special instruction on the credibility of a confession is not required when the jury is given a general instruction on the credibility of witness testimony.

***State v. Mason***, 238 Kan. 129, 708 P.2d 963 (1985).

The instruction on presumption of intent, formerly PIK Crim. 54.01, creates a permissive presumption and does not shift the burden of proof to the defendant. Unlike the instruction struck down in *Francis v. Franklin*, 105 S. Ct. 1965 (1985), this instruction did not imply a mandatory presumption.

***State v. Mason***, 238 Kan. 129, 708 P.2d 963 (1985).

A trial court is not required to define words that are widely used and readily comprehensible to the average person.

***State v. Yarrington***, 238 Kan. 141, 708 P.2d 524 (1985).

The district court's duty under K.S.A. § 21-3107(3) to instruct the jury on lesser included offenses arises only when the evidence at trial would support a conviction of the lesser offense.

***State v. Bird***, 238 Kan. 160, 708 P.2d 946 (1985).

The prosecutor has considerable latitude in closing argument. There is no prejudicial error when his statements are provoked and made in response to defense arguments.

***State v. Bird***, 238 Kan. 160, 708 P.2d 946 (1985).

When an accomplice testifies, the trial court has no duty to give a cautionary instruction unless it is requested.

***State v. Pursley***, 238 Kan. 253, 710 P.2d 1231 (1985).

A prosecutor's improper remarks during closing argument do not require reversal when the prejudice is cured by a jury instruction.

***State v. Keeler***, 238 Kan. 356, 710 P.2d 1279 (1985).

The trial court must instruct the jury on lesser crimes of which the accused might be convicted under the information or indictment and upon the evidence presented.

***State v. Galloway***, 238 Kan. 415, 710 P.2d 1320 (1985).

The duty of the trial court to instruct the jury on lesser crimes arises only when there is evidence upon which a defendant might reasonably be convicted of the lesser charge.

***State v. Galloway***, 238 Kan. 415, 710 P.2d 1320 (1985).

The granting of a continuance is within the sound discretion of the trial court. Absent a showing of prejudice to the defendant and an abuse of the court's discretion, the ruling will not be disturbed on appeal.

## Kansas Court of Appeals

***State v. Norris***, 10 Kan. App. 2d 397, 699 P.2d 585 (1985).

The trial court commits prejudicial error when it fails to read the instructions to the jury.

***State v. Rambo***, 10 Kan. App. 2d 418, 699 P.2d 542 (1985).

When a defendant appeals an instruction on grounds different from those raised at trial, a reviewing court is limited to a determination of whether the instruction is "clearly erroneous."

***State v. Rambo***, 10 Kan. App. 2d 418, 699 P.2d 542 (1985).

Jury instructions should be general in nature and should not be argumentative or unduly emphasize one particular aspect of the case.

***State v. Hill***, 10 Kan. App. 2d 607, 706 P.2d 472 (1985).

It is error to automatically disqualify a witness from testifying because he violated the court's sequestration order when there is no evidence that the witness' misconduct was with the knowledge or participation of a party or his counsel.

# IV. SENTENCING, PROBATION, AND PAROLE[189]

## United States Supreme Court

***Black v. Romano***, 105 S. Ct. 2254 (1985).

The due process clause does not require a sentencing court to state explicitly why it has rejected alternatives to incarceration before revoking probation.

## Kansas Supreme Court

***State v. Ashley***, 236 Kan. 551, 693 P.2d 1168 (1985).

Under K.S.A. § 21-4608(3), the consecutive sentencing statute, suspended sentences are within the meaning of probation.

***State v. Keeley***, 236 Kan. 555, 694 P.2d 422 (1985).

K.S.A. § 21-4618 prohibits the court from imposing a fine instead of at least the minimum prison sentence when the defendant used a firearm while committing certain enumerated crimes.

***State v. Coley***, 236 Kan. 672, 694 P.2d 479 (1985).

K.S.A. § 21-4618 requires the court to impose at least the minimum sentence when the defendant used a firearm while committing certain enumerated crimes.

***State v. Pink***, 236 Kan. 715, 696 P.2d 358 (1985).

A trial court's finding that the defendant used a firearm in the commission of a crime, within the meaning of K.S.A. § 21-4618, will not be disturbed if it is supported by competent evidence.

***State v. Cunningham***, 236 Kan. 842, 695 P.2d 1280 (1985).

A trial court's sentence will not be disturbed on appeal if it is within the statutory limits, is not abuse of discretion, and is not based on partiality, prejudice, oppression or corrupt motive.

***State v. Dubish***, 236 Kan. 848, 696 P.2d 969 (1985).

Under K.S.A. § 21-4603, a sentencing judge may not manipulate the eligibility date for release of a person sentenced to the custody of the Secretary of Corrections by granting probation on certain convictions and incarceration on others.

***State v. Kerley***, 236 Kan. 863, 696 P.2d 975 (1985).

When a defendant is convicted of a crime that he committed while serving a suspended sentence for a felony conviction, K.S.A. §

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

21-4608(3) requires the sentence to run consecutively with the prior sentence upon revocation of the suspension.

***State v. Meredith***, 236 Kan. 866, 696 P.2d 403 (1985).

Time spent in an in-patient alcohol treatment facility where an individual is not under the custody and control of law enforcement officials does not satisfy the minimum five day sentence required for second-time DUI offenders under K.S.A. § 8-1567(d).

***State v. Baker***, 237 Kan. 54, 697 P.2d 1267 (1985).

An attested copy of a journal entry from any Kansas court is competent evidence of a previous felony conviction for enhancement of sentence under K.S.A. § 21-4504. Copies of court records from other states should be authenticated as well as attested.

***State v. Reed***, 237 Kan. 685, 703 P.2d 756 (1985).

K.S.A. § 21-4608(4) requires consecutive sentences when a defendant commits a felony while released on bond in a prior felony case.

***State v. Zuniga***, 237 Kan. 788, 703 P.2d 805 (1985).

K.S.A. § 21-4618 precludes probation or a suspended sentence only when the defendant commits certain enumerated crimes with a firearm.

***State v. Osbey***, 238 Kan. 280, 710 P.2d 676 (1985).

The failure of the judge to impose a specific term when sentencing the defendant to the Secretary of Corrections for confinement is an "illegal sentence" within the meaning of K.S.A. § 22-3504(1).

***State v. Osbey***, 238 Kan. 280, 710 P.2d 676 (1985).

When a convicted defendant has been illegally sentenced, a legal sentence may later be imposed.

***State v. Keeler***, 238 Kan. 356, 710 P.2d 1279 (1985).

K.S.A. § 21-4608(3), which mandates consecutive sentences in certain cases, does not preclude the granting of probation in appropriate cases.

***State v. Fowler***, 238 Kan. 326, 710 P.2d 1268 (1985).

If a trial court imposes a sentence of commitment and desires to place the defendant in a community corrections center, it may do so only by placing the defendant on probation and making confinement in the community corrections center a condition of his probation.

***State v. Fowler***, 238 Kan. 326, 710 P.2d 1268 (1985).

K.S.A. § 21-4614 does not authorize or require jail time credit for the time a convicted felon, as a condition of probation, resides at a community corrections facility or spends in a county jail work release program.

## Kansas Court of Appeals

***State v. Robinson***, 10 Kan. App. 2d 135, 694 P.2d 482 (1985).

Under K.S.A. § 21-4618, which prohibits granting probation to a defendant convicted of certain enumerated crimes in which he used a firearm, the State need only establish that the firearm was an instrumentality of the crime and not that its use was intentional.

***State v. Evans***, 10 Kan. App. 2d 171, 694 P.2d 912 (1985).

A conviction under a city ordinance for driving with a suspended license cannot be counted in determining whether a person is a first, second, or third time offender for purposes of sentence enhancement under K.S.A. § 8-262(a).

***State v. Sayles***, 10 Kan. App. 2d 180, 694 P.2d 918 (1985).

When a defendant commits a crime while on release pending sentencing for a felony conviction, the trial court may not modify a sentence imposed under K.S.A. § 21-4608(4), which requires the sentences for the two crimes to run consecutively.

***State v. Reed***, 10 Kan. App. 2d 189, 694 P.2d 1329 (1985).

K.S.A. § 21-4608(4), which requires that sentences run consecutively when a defendant commits a crime while on release after a felony conviction, does not mandate the imposition of consecutive sentences when a defendant commits a crime while released on an appearance bond prior to a felony prosecution.

***State v. Myers***, 10 Kan. App. 2d 266, 697 P.2d 879 (1985).

When a defendant files a motion to modify sentence within 120 days under K.S.A. § 21-4603(3), the trial court retains jurisdiction over the motion after the 120 days.

***State v. Myers***, 10 Kan. App. 2d 266, 697 P.2d 879 (1985).

When the defendant admits to prior felony convictions his admission is sufficient evidence for sentence enhancement under K.S.A. § 65-4127(b).

***Olson v. Maschner***, 10 Kan. App. 2d 289, 697 P.2d 893 (1985).

Under K.S.A. § 22-3717(b), the prohibition against deducting good time credits in determining the parole eligibility of an inmate convicted of a class A felony does not deny him equal protection.

***State v. Duke***, 10 Kan. App. 2d 392, 699 P.2d 576 (1985).

If a sentencing court determines that a probationer has made a good faith effort, or is not at fault in failing, to pay fines, court costs or restitution, the court should consider alternatives to imprisonment. The court may imprison a probationer who has made a good faith effort only if the alternative measures are inadequate to meet the State's interests in punishment and deterrence.

***State v. Linsin***, 10 Kan. App. 2d 681, 709 P.2d 988 (1985).

To overcome the statutory presumption of probation in K.S.A. §

21-4606a, the sentencing court may not merely rely upon the nature of the crime committed, but must follow the sentencing objectives of K.S.A. § 21-4601 and include in the record its consideration of additional sentencing factors as set forth in K.S.A. § 21-4606.

***State v. Linsin***, 10 Kan. App. 2d 681, 709 P.2d 988 (1985).

In the absence of special circumstances showing an abuse of discretion, a sentence will not be disturbed on appeal if it is within the statutory limits.

***Niblock v. State***, 11 Kan. App. 2d 30, 711 P.2d 771 (1985).

When one among multiple sentences is vacated, the entire record of the sentencing court is to be considered to determine whether it intended the remaining sentences to run concurrently or consecutively.

# V. REVIEW PROCEEDINGS

## A. Post-Verdict Motions

There are three post-verdict motions. These are motions for judgment of acquittal,[190] new trial,[191] and arrest of judgment.[192] 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.[193] The standard is that the defendant is entitled to an acquittal if reasonable jurors could not conclude that the evidence, taken in the light most favorable to the Government, proved guilt beyond a reasonable doubt.[194]

A motion for new trial may be based on a broad range of alleged trial errors.[195] These allegations are not usually considered unless the defendant timely raised them prior to the verdict.[196] A new trial will be granted if required in the interest of justice.[197] Motions for a new trial may also be based on newly discovered evidence.[198]

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.[199] These allegations are never waived and may be raised at any time during the criminal process.[200]

### Kansas Supreme Court

***State v. Hobson***, 237 Kan. 64, 697 P.2d 1274 (1985).

It is within the trial court's discretion to deny a motion for new trial based on newly discovered evidence when the evidence would not change the outcome of the case.

***State v. Falke***, 237 Kan. 668, 703 P.2d 1362 (1985).

A defendant is not entitled to a judgment of acquittal if a ra-

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

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

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

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

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

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

[196] 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).

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

[198] *Id.*

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

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

tional factfinder might fairly conclude guilt beyond a reasonable doubt.

***State v. Kee***, 238 Kan. 342, 711 P.2d 746 (1985).

The State may not appeal the granting of the defendant's motion for judgment of acquittal at the close of the evidence unless the questions reserved are of statewide interest and vital to a correct and uniform administration of the criminal law.

## B. Appeals

No constitutional right to appellate review exists.[201] 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.[202]

Generally appellate courts only have jurisdiction to review "final decisions" of trial courts.[203] The Government, however, may appeal a pretrial dismissal of an indictment or a suppression of evidence,[204] and the defendant may appeal a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds.[205] Appellate courts may hear an appeal if there is any possibility that the defendant will suffer legal consequences as a result of the challenged conviction.[206]

If the appellate court determines that an error exists, it must then determine whether the error requires reversal. The appellate court will reverse if the error was properly raised in the trial court and the error was not "harmless."[207] 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."[208]

### United States Supreme Court

***Thomas v. Arn***, 106 S. Ct. 466 (1985).

A federal court of appeals may, under its supervisory powers, condition appeal of a district court judgment adopting a magistrate's recommendation upon filing objections with the district court identifying those issues on which further review is desired. The liti-

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[201] McKane v. Durston, 153 U.S. 684, 687 (1894).
[202] North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969).
[203] 28 U.S.C. § 1291; K.S.A. § 22-3601.
[204] 18 U.S.C. § 3731; K.S.A. §§ 22-3602(b), 22-3603.
[205] Abney v. United States, 431 U.S. 651, 659 (1977).
[206] Sibron v. New York, 392 U.S. 40, 57-58 (1943).
[207] "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a).
[208] "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).

gants, however, must have clear notice and an opportunity to seek an extension of time for filing objections.

## Kansas Supreme Court

***State v. Hanks***, 236 Kan. 524, 694 P.2d 407 (1985).

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

***State v. Pink***, 236 Kan. 715, 696 P.2d 358 (1985).

When a defendant appeals on the ground of insufficient evidence, the standard of 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.

***State v. Pink***, 236 Kan. 715, 696 P.2d 358 (1985).

The contemporaneous objection rule does not apply to opening statements. The failure to contemporaneously object to statements in closing arguments, however, precludes review on appeal.

***State v. Brown***, 236 Kan. 800, 696 P.2d 954 (1985).

Questions reserved for appeal by the prosecution must be of statewide interest and vital to a correct and uniform administration of the criminal law.

***State v. Holland***, 236 Kan. 840, 696 P.2d 401 (1985).

Questions presented by the State's appeal in a criminal prosecution, the resolution of which would not provide helpful precedent, will not be entertained merely to demonstrate whether the trial court committed error.

***State v. Myatt***, 237 Kan. 17, 697 P.2d 836 (1985).

When a defendant appeals on the ground of insufficient evidence, the standard of review on appeal is whether the evidence, viewed in a light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

***State v. Tripp***, 237 Kan. 244, 699 P.2d 33 (1985).

The right to appeal is entirely statutory and is not a right vested in the federal or Kansas constitutions.

***State v. Tripp***, 237 Kan. 244, 699 P.2d 33 (1985).

Under K.S.A. §§ 21-4603(3) and 27-3608(1), a defendant has a total of 130 days after imposition of sentence to appeal his original conviction. If after imposition of sentence a defendant is placed on probation that is later revoked more than 130 days after imposition of sentence, the defendant may only appeal the revocation.

***State v. Martin***, 237 Kan. 285, 699 P.2d 486 (1985).

The State is allowed an appeal on a question reserved only if the question is of statewide interest.

***State v. Sanford***, 237 Kan. 312, 699 P.2d 506 (1985).

When a defendant appeals on the ground of insufficient evidence, the standard of review on appeal 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.

***State v. Etape***, 237 Kan. 380, 699 P.2d 532 (1985).

Questions reserved for appeal by the prosecution must be of statewide interest and vital to a correct and uniform administration of the criminal law.

***State v. Falke***, 237 Kan. 668, 703 P.2d 1362 (1985).

A defendant may not appeal an error that he invited at trial.

***State v. Peck***, 237 Kan. 756, 703 P.2d 781 (1985).

When a defendant appeals on the ground of insufficient evidence, the standard of appellate review is whether the evidence, viewed in a light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

***State v. McDaniels***, 237 Kan. 767, 703 P.2d 789 (1985).

The prosecution's right to appeal is strictly statutory; it has no vested or constitutional right to appeal.

***State v. McDaniels***, 237 Kan. 767, 703 P.2d 789 (1985).

The State has no right to appeal a pretrial order denying its motion to revoke diversion.

***State v. Zuniga***, 237 Kan. 788, 703 P.2d 805 (1985).

When a defendant appeals on the ground of insufficient evidence, the proper standard of review is whether the evidence, viewed in the most favorable light to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

***State v. Galloway***, 238 Kan. 100, 708 P.2d 508 (1985).

When the Supreme Court grants a petition for review from the Court of Appeals and finds it has jurisdiction to hear the appeal, it has authority to determine any appropriate issue presented on the appeal.

***State v. Mason***, 238 Kan. 129, 708 P.2d 963 (1985).

When applying the Kansas harmless error rule to a federal constitutional error, a court must find beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial.

***State v. Bird***, 238 Kan. 160, 708 P.2d 946 (1985).

Kansas does not follow the federal "plain error" rule. Therefore, reversible error cannot be predicated upon misconduct of counsel during closing argument when no contemporaneous objection is made.

***State v. O'Neal***, 238 Kan. 183, 708 P.2d 206 (1985).

Constitutional grounds for a reversal of a conviction cannot be first raised on appeal.

***State v. Keeler***, 238 Kan. 356, 710 P.2d 1279 (1985).

When a defendant appeals on the ground of insufficient evidence, the standard of 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.

## Kansas Court of Appeals

***State v. Myers***, 10 Kan. App. 2d 266, 697 P.2d 879 (1985).

Under K.S.A. § 22-3608(1), a defendant has ten days after the journal entry, not the oral ruling, to file a notice of appeal.

***City of Wichita v. Ohlerking***, 10 Kan. App. 2d 638, 707 P.2d 1 (1985).

A defendant may appeal a municipal court conviction for driving under the influence of alcohol to a district court, and neither the terms of the diversion agreement signed by the defendant nor K.S.A. § 12-4416, which governs the use of diversion agreements in alcohol-related offenses, forecloses this right to appeal.

# Case Index

If the case has been analyzed the page number is italicized.

**United States Supreme Court**

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# AN ANALYSIS OF RECENT CHANGES IN KANSAS DRUNK DRIVING LAWS

by David J. Gottlieb*
and Steven R. Zinn**

For the past several years the problem of drunk driving has become of increasingly intense public concern. In response to this concern, the Kansas Legislature has passed major amendments to the drunk driving laws.[1] The most recent amendments[2] passed the legislature in 1985 in conjunction with changes in state liquor laws.[3] The 1985 amendments offer a consolidated package that toughens criminal penalties and limits the opportunity for certain defendants to receive diversion.[4] At the same time, the new laws expand the power of the police to act against persons suspected of drunk driving.[5] These expanded powers affect both the circumstances under which the police can order suspects to undergo tests and the kinds of tests that can be ordered. This Article examines the changes in police procedure required by the new drunk driving laws. The Article first provides a general description of the recent changes and then analyzes some of the constitutional and practical problems those changes raise.

## A. Summary of the New Laws

The new drunk driving laws present several major revisions in police procedure. These revisions center on the statutory doctrine of implied consent. Under this doctrine, a person suspected of drunk driving is deemed to have consented to chemical testing for blood

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[1] *See* Act of April 13, 1984, ch. 37, 1984 Kan. Sess. Laws 313 (codified as amended at K.S.A. §§ 8-254, 8-288, 8-1567); Act of April 21, 1983, ch. 37, 1983 Kan. Sess. Laws 285 (codified as amended at K.S.A. §§ 8-255, 8-285, 8-1001, 8-1005, 8-1567, 22-2908).

[2] *See* Act of May 9, 1985, ch. 50, 1985 Kan. Sess. Laws 340; Act of April 27, 1985, ch. 48, 1985 Kan. Sess. Laws 306.

[3] *See Hearing on S.B. 126-129 Before Senate Committee on Federal and State Affairs*, 1985 Sess. (Feb. 1, 1985); *Hearings Before House Committee on Federal and State Affairs*, 1985 Sess. (Feb. 26-28, 1985).

[4] *See* Act of April 27, 1985, ch. 48, 1985 Kan. Sess. Laws 306, Sec. 9, 11-12, 17 (codified as amended at K.S.A. §§ 8-1567, 12-4415, 12-4416, 22-2909).

[5] *See* Act of May 9, 1985, ch. 50, 1985 Kan. Sess. Laws 340 (codified as amended at §§ 8-1001, 8-1002, 8-1004, 8-1006 (Supp. 1985)).

alcohol content in exchange for exercising the privilege of driving.[6] Although that consent may be withdrawn, the penalty for doing so is suspension of the person's driver's license. The purpose of this scheme is to induce as many drivers as possible to submit to testing[7] and to relieve officers from the necessity of forcibly testing drivers who refuse consent.

One major change under the new laws is that consent is now implied even when a person suspected of drunk driving is not arrested. Under the old statute, consent to blood or breath tests was implied only if an officer arrested or otherwise took a suspect into custody.[8] Under the new statute, however, a motorist gives implied consent when an officer has reasonable grounds to believe that the person was operating the vehicle under the influence of alcohol or drugs and the person either is arrested or has been involved in a motor vehicle accident or collision resulting in property damage, personal injury or death.[9] This change eliminates the need for an actual arrest before requiring chemical tests, as long as probable cause[10] to arrest exists and an accident has occurred. Thus, police may now demand a test from an injured suspect who is being treated at a hospital but who has not yet been arrested.

A second significant change is the expansion of the types of tests permitted under implied consent. Prior to the 1985 amendments, consent was implied only for tests to determine blood alcohol content.[11] The new law permits tests to determine the "presence of al-

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[6] K.S.A. § 8-1001(a) (Supp. 1985).

[7] *See* Comment, *The New Kansas Drunk Driving Law: A Closer Look*, 31 KAN. L. REV. 409, 410 (1983).

[8] K.S.A. § 8-1001(b) (1982) (repealed 1985).

[9] K.S.A. § 8-1001(b) (Supp. 1985).

[10] We recognize that the precise words of the statute require "reasonable grounds" to believe that an offense has occurred rather than "probable cause." However, the two terms have consistently been read as synonymous. Thus, in State v. Giddings, 216 Kan. 14, 531 P.2d 445 (1975), (syllabus of the court, ¶ 4) the court described K.S.A. § 22-2401(c), which requires probable cause to arrest, as permitting arrest when the officer "reasonably believes" the party has committed a felony. Similarly, in United States v. Watson, 423 U.S. 411, 418 (1975) the court described the common law rule permitting an officer to make a warrantless felony arrest as synonymous with a requirement of probable cause. *Id.* at 421. *See also* W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.5, at 141 ("At common law, a peace officer was authorized to arrest a person for a felony without first obtaining an arrest warrant whenever he had 'reasonable grounds to believe' that a felony had been committed and that the person to be arrested had committed it (i.e., *what now constitutes Fourth Amendment probable cause*)" (emphasis supplied)).

While there is little doubt that the legislature has produced a statute requiring probable cause, it is equally clear that they have done so in a confusing manner. The archaic term "reasonable grounds" is not nearly as well-known to lawyers or police as is "probable cause." Indeed the term "reasonable grounds" virtually invites confusion because of its semantic similarity with the lesser standard of "reasonable suspicion" required for a "stop and frisk." *See* K.S.A. § 22-2402. Accordingly, we urge the legislature to amend the statute to substitute the term "probable cause" in place of "reasonable grounds."

Finally, if for some reason we are incorrect in our analysis, and the legislature has intended to permit blood tests or some standard less than probable cause, the statute is clearly unconstitutional. There is no constitutional authority permitting the government to engage in a bodily intrusion such as a blood test on less than probable cause. *See* Schmerber v. California, 384 U.S. 757 (1966).

[11] K.S.A. § 8-1001(a) (1982) (repealed 1985).

cohol or drugs."[12] These tests can now include not only blood and breath tests but also tests of "urine or other bodily substance."[13] The statute contemplates that a police officer will first attempt to measure intoxication by requesting a breath or blood test. If an officer believes, however, that a driver is impaired by a drug not subject to detection by the blood or breath test, the officer may request a urine test.[14] The collection of the urine sample must be supervised by persons of the same sex as the person tested and must be conducted in a private setting.[15] Under the language of the new statute, tests of other bodily fluids, such as saliva, would also be permitted.

A third change to the implied consent statute has no counterpart in the old statute. The new statute requires that a series of warnings be given to a drunk driving suspect when tests are requested. The suspect is to be advised, both orally and in writing, that: (1) there is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to test will result in a six-month driver's license suspension; (3) such refusal may be used against him in any trial on a charge of driving under the influence; (4) if he decides to test, the results of the tests may be used in evidence; and (5) after completing the tests, he has a right to consult with an attorney and may secure additional testing on his own.[16]

A fourth major change is that the statute now explicitly states that police are not required to preserve samples of blood, breath or urine for purposes of independent testing by defendants.[17] Yet the new law allows, as did the prior law, a defendant to challenge the police test. It gives a person who has consented to testing a reasonable opportunity to have additional tests conducted by a physician of his own choice. If the police refuse to permit such additional testing, the results of the police testing cannot be admitted into evidence.[18]

In addition to these changes in police procedure, the new law provides for more severe treatment of drunk driving defendants. A mandatory ninety-day jail sentence is imposed upon a person convicted of driving under the influence if the violation was committed during the time the person's driver's license was suspended or revoked as the result of a previous conviction for driving under the influence.[19] The statute limits the possibility of diversion for certain defendants. If a defendant charged with DUI had a blood alcohol content of .20 percent or more or was involved in a motor vehicle accident resulting in personal injury or death, the new law does not

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[12] K.S.A. § 8-1001(a) (Supp. 1985).
[13] *Id.*
[14] *Id.* § 8-1001(d).
[15] *Id.* A suspect may, however, waive this right to privacy.
[16] *Id.* § 8-1001(f).
[17] *Id.* § 8-1006.
[18] *Id.* § 8-1004.
[19] *Id.* § 8-262(4).

permit the defendant to enter a diversion agreement.[20] When diversion is otherwise permissible, a prosecuting attorney has the express authority to require license suspension or revocation as part of the diversion agreement.[21]

In addition to toughening penalties, the new law broadens the kinds of conduct that may be punished. Whereas the old statute did not directly address such conduct, the new statute extends the crime of driving under the influence to include *attempted* operation of a vehicle.[22] The new statute also criminalizes the act of driving with a blood alcohol content (BAC) of .10 percent or more.[23] Prior to the 1985 amendments, driving with such a BAC was mere prima facie evidence that a defendant was incapable of safely driving. Now, driving with a .10 percent or greater BAC is per se criminal.[24]

The law also modifies the driver's license suspension procedure used when a person refuses to take a requested test. Upon refusal, the officer administering the testing immediately notifies the person of the suspension. The officer then confiscates the person's driver's license and issues a fifteen-day temporary permit. The driver may request an administrative hearing from the division of vehicles. The scope of the hearing is limited to whether (a) reasonable grounds existed for requiring the test; (b) notice was given; (c) the test was refused; and (d) the person was arrested or involved in a motor vehicle accident or collision resulting in property damage, personal injury or death.[25] The minimum length of suspension is six months.

## B. Analysis of the New Statute

### 1. Testing the Unarrested Suspect

The first significant change in the Kansas drunk driving law is the expansion of the implied consent doctrine to permit testing even when police have declined to arrest. Before this change the police could presume implied consent and request a blood test only if a driver was arrested or otherwise taken into custody for driving under the influence.[26] Pursuant to the 1985 amendment, consent is also implied when an officer has reasonable grounds to believe the person was attempting to operate a motor vehicle while under the influence and was involved in an accident resulting in property

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[20] *Id.* § 22-2909(e); *see also* § 12-3315(b)(3)-(4) (municipal court diversion agreements).
[21] *Id.* § 22-2909(e).
[22] *Id.* § 8-1567(a).
[23] *Id.*
[24] *Id.* § 8-1567(a)(1).
[25] *Id.* § 8-1002.
[26] K.S.A. § 8-1001(a) (1982) (repealed 1985).

damage, personal injury or death.[27] Thus, officers can now demand a sample from an injured suspect being treated at a hospital without arresting him.

This change is, undoubtedly, the legislature's response to case law holding that blood alcohol tests taken from unarrested suspects should be suppressed. For example, in *State v. Bruner*[28] and *State v. Gordon*,[29] suspects were taken to a hospital for treatment of injuries, and were given blood alcohol tests prior to arrest. In both cases, the Kansas Supreme Court suppressed the results of the tests on the ground that the tests were searches neither authorized by the implied consent statute nor consented to by the suspects, and were therefore illegal.

The legislature's grant of statutory authority for the police to act in the absence of arrest raises a serious constitutional question: does the fourth amendment permit the police to take a blood test upon probable cause to arrest or search, when they neither have a warrant nor intend to arrest? Various state courts have disagreed on this issue.[30] To the extent Kansas courts have spoken, their language would appear to cast doubt on the new statute's constitutionality.[31]

The constitutional basis for permitting blood tests without a warrant is generally recognized as an outgrowth of the authority of police to search incident to arrest. If police have probable cause to believe a person has committed a crime, they may arrest. Incident to that arrest, they may, without a warrant or probable cause, search the person and the area in his immediate control.[32]

In *Schmerber v. California*,[33] the United States Supreme Court held that under certain circumstances, police may forcibly extract a blood sample from a defendant incident to an arrest for driving under the influence. The defendant argued that the warrantless search into the body could not be justified as a search incident to arrest. The Court recognized that a bodily intrusion, such as a blood test, represented a far greater affront to "human dignity" and privacy than the traditional search incident to arrest of a person for weapons and evidence. Therefore, the Court concluded that a bodily intrusion incident to arrest could not take place "on the mere chance that the desired evidence might be obtained"; rather, the state must show a "clear indication" that the evidence will be found by the test.[34] In *Schmerber*, the evidence of intoxication that established probable cause to arrest also suggested the relevance and

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[27] K.S.A. § 8-1001(b) (Supp. 1985).
[28] 211 Kan. 596, 507 P.2d 233 (1973).
[29] 219 Kan. 643, 549 P.2d 886 (1976).
[30] *See infra* notes 37-42 and accompanying text.
[31] *See infra* notes 43-46 and accompanying text.
[32] *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).
[33] 384 U.S. 757 (1966).
[34] *Id.* at 770.

success of the blood test.

The Court then considered whether such tests could be conducted without a warrant. The Court recognized that the percentage of alcohol in the blood diminishes after drinking stops. Noting that the officer might therefore have concluded that he was confronted with an emergency that required the test to be taken before a warrant could be obtained, the Court found the test to be "an appropriate incident to petitioner's arrest."[35]

*Schmerber* serves as the authority for requiring warrantless and forcible blood alcohol tests for suspects properly arrested for drunk driving offenses. It also provides the justification for those states, like Kansas, that require a license forfeiture, rather than forcible testing, if a suspect refuses to submit to a test.[36]

A number of courts have limited *Schmerber* to its facts and have held that police may not compel a blood test absent a reasonably contemporaneous arrest.[37] For example, in *People v. Superior Court*,[38] a case decided shortly after *Schmerber*, the California Supreme Court upheld the trial court's suppression of evidence of a hospital blood sample taken from an unarrested defendant. The California court rejected the view that an arrest was a mere formality.[39] The court concluded that *Schmerber's* approval of the compulsory seizure of blood was clearly grounded on the premise that it is incident to a lawful arrest. This same conclusion has been reached in numerous other states,[40] and was reaffirmed only recently by the Ninth Circuit in *United States v. Harvey*.[41] In *Harvey*, a blood sample was taken from a hospitalized but unarrested suspect over her objection. The Ninth Circuit reversed the conviction, stating it was "constrained" by *Schmerber* in requiring that a valid formal arrest be made before taking a blood sample.[42]

To the extent Kansas cases have spoken on this issue, they have also noted the need for a valid arrest as a condition precedent to a blood test. In *State v. Bruner*,[43] the Kansas Supreme Court stated that "insofar as the constitution goes, a blood sample could have been taken from the defendant . . . even in the absence of consent—*if he had been arrested.*"[44] In *State v. Williams*,[45] the Kansas Court of Appeals found that the then-existing implied consent law, requiring an arrest precedent to a blood test, stated the constitutional minimum. The court, in a footnote, stated that "the consti-

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[35] *Id.* at 771.
[36] *See, e.g.*, State v. Bruner, 211 Kan. 596, 604, 507 P.2d 233, 237-38 (1973).
[37] *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE § 5.4, at 341-45 (1978).
[38] 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972).
[39] *Id.* at 761, 493 P.2d at 447, 100 Cal. Rptr. at 283.
[40] *See, e.g.*, State v. Davis, 108 N.H. 45, 266 A.2d 873 (1967); Commonwealth v. Hlavsa, 266 Pa. Super. 602, 405 A.2d 1270 (1979).
[41] 701 F.2d 800 (9th Cir. 1983).
[42] *Id.* at 803-04.
[43] 211 Kan. 596, 507 P.2d 233 (1973).
[44] 211 Kan. at 603, 507 P.2d at 239 (emphasis in original).
[45] 4 Kan. App. 2d 651, 610 P.2d 111 (1980).

tution . . . requires a lawful arrest, absent a valid search warrant or voluntary consent, to justify the taking of a blood sample as an incident thereto."[46]

There is, on the other hand, support for the view that police have the authority to take a blood test upon probable cause, even if they do not make a formal arrest. While the United States Supreme Court has not addressed this exact issue, *Cupp v. Murphy*[47] seemingly favors the constitutionality of the new law. In *Cupp*, police took samples of fingernail scrapings from an unarrested homicide suspect. The samples contained traces of skin and blood cells which linked the suspect to the homicide. Although the police possessed probable cause to arrest, the suspect was released after the search and not formally arrested until a month later. In upholding the search the Court indicated that in the absence of a formal arrest, a full search incident to arrest might not be justified. Nevertheless, in the case the Court approved the "very limited search" necessary to preserve the "highly evanescent evidence" found under the suspect's fingernails.[48]

*Cupp* can be read as supporting the general proposition that when police have probable cause to arrest a suspect, they may search for evidence reasonably believed to be in the suspect's possession that might later be unavailable, even if they make no formal contemporaneous arrest.[49] Application of this principle to laws such as the new implied consent provision supports their constitutionality. The police have no authority to search unless they have probable cause to arrest. Moreover, in the blood test situation, the evidence of alcohol concentration will disappear unless the police are permitted to test. In fact, in reliance on *Cupp*, a majority of recent courts considering the issue have held that blood tests should be permitted upon probable cause, even if no arrest occurs.[50]

The better reasoned cases sustain the legality of the searches. The need for an immediate search is not affected in any degree by whether the police formally arrest. Because the percentage of alcohol in the body begins to diminish shortly after drinking stops, the police must act quickly or the evidence will dissipate. The police, therefore, face an emergency that is unaffected by whether the defendant is formally arrested. More significantly, the requirement of a formal arrest does not aid the defendant or protect his privacy. In fact, the arrest requirement forces the police officer, at the outset, to take an extremely intrusive step against the liberty of the suspect. Arrest eliminates the possibility of proceeding by summons or

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[46] 4 Kan. App. 2d at 654 n.2, 610 P.2d at 114 n.2 (citing State v. Garner, 227 Kan. 566, 608 P.2d 1321 (1980)).

[47] 412 U.S. 291 (1973).

[48] *Id.* at 296.

[49] 2 W. LAFAVE, SEARCH AND SEIZURE § 5.4, at 341-44 (1978).

[50] *See, e.g.*, People v. Sutherland, 683 P.2d 1192 (Colo. 1984); State v. Libby, 453 A.2d 481 (Me. 1982); State v. Aguirre, 295 N.W.2d 79 (Minn. 1980); Van Order v. State, 600 P.2d 1056 (Wyo. 1979).

other means to bring the suspect into court.

Policy arguments in support of an arrest requirement are unconvincing. In *United States v. Harvey*, the court stated that an arrest requirement would

> help insure that the police do not arbitrarily violate an individual's privacy. Also, it will sharply delineate the moment at which the police officer determined he or she had probable cause to arrest . . . . Furthermore, the formal announcement of arrest triggers certain responsibilities for the arresting officer and gives rise to certain rights to the accused; for example, those rights delineated in a proper *Miranda* warning.[51]

A mandatory arrest will not insure against arbitrary police violation of individual privacy. With or without arrest, police may not demand a test unless they have probable cause. The request for a test will delineate the moment an officer believes he has probable cause just as distinctly as an invocation of a formal arrest. The fact that the police must, under the statute, inform the suspect of the consequences of refusing a test eliminates the argument that advantages or "rights" are somehow lost if the suspect is not arrested. In short, both the state and suspect should benefit by an implied consent statute triggered by probable cause rather than probable cause plus arrest. Nothing is gained by requiring a policeman who has probable cause to believe that a hospitalized suspect was driving while intoxicated to chant some order of arrest before requesting a blood sample.

2. Testing of Other Bodily Substances for Drugs

A second major change in the statute is the expansion of the testable substances and the means of testing permitted by police. Prior to the 1985 amendment, the police were authorized to demand consent only for tests of "breath or blood" to determine alcohol content.[52] The new law, in addition to these tests, permits tests of "urine or other bodily substance" for alcohol or "drugs."[53] The legislature included these additions following testimony at hearings indicating that numerous drugs other than alcohol can impair driving ability and consideration of studies showing that as many as one-half of the suspects arrested in certain states for driving while impaired had consumed sedative or hypnotic drugs.[54] The law contemplates that police officers will first attempt to measure intoxication by requesting a breath or blood test. If, however, an officer has reasonable grounds to believe that an impairment is caused by a drug not detectable by a breath or blood test, a urine test may be requested. The test must be supervised by persons of the same sex as

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[51] 701 F.2d at 805 (9th Cir. 1983).
[52] K.S.A. § 8-1001(a) (1982) (repealed 1985).
[53] K.S.A. § 8-1001(a) (Supp. 1985).
[54] *Hearings Before House Committee on Federal and State Affairs*, Feb. 26, 1985 (testimony of Dr. Tim Rohrig, Kansas Bureau of Investigation).

the person being tested.[55] Presumably, tests of other bodily fluids, such as saliva, are also permitted. No warrant is required for collection of the sample.

The new section may present a constitutional issue. Under *Schmerber*, blood tests and other intrusions into the body are permissible without a warrant because the state can show a need for an immediate search—unless the police move quickly the percentage of alcohol in the suspect's blood will diminish.[56] If a urine sample is regarded as an intrusion into the body similar to a blood test, the state will need to show a similar justification for proceeding without a warrant.

A threshhold question is whether the collection of a urine sample should be regarded as an intrusion into the body, or whether, like fingerprinting, it is a "routine" search that generally can be conducted incident to an arrest. At present, the authorities are not consistent on this question. In *People v. Williams*[57] the Colorado Supreme Court concluded that a lawful custodial arrest does not alone justify the taking of a urine sample. The court found no difference in the degree of bodily intrusion surrounding a blood test and the compelled production of bodily fluids required in urinalysis. A contrary view is held by Professor LaFave, who believes urinalysis does not involve a bodily intrusion requiring any special requirement beyond a lawful arrest.[58]

The Kansas courts have not directly addressed the question. In a recent case, however, the Kansas Court of Appeals required that police obtain a warrant before taking evidence from the defendant's body. In *State v. Gammill*,[59] a sheriff plucked some 20-25 pubic hairs from an incarcerated defendant. In striking down the search, the court found the search a "needless indignity" and concluded:

> Neither can it be claimed that the warrantless search was necessary because of exigent circumstances. Pubic hairs may be expected to remain where they are for a considerable period of time—certainly long enough to obtain a valid warrant or court order.[60]

If a urine specimen is subject to the same rules as a blood test, a warrantless search will be constitutional only if urine specimens, like tests for alcohol, must be taken quickly before the suspected presence of the drug diminishes. The answer to that question is by no means as certain in urinalysis tests for drugs as it is for alcohol. Some drugs, marijuana for example, will remain in the body for days or longer.[61] Thus, an officer who believes a driver has used

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[55] K.S.A. § 8-1001(d) (Supp. 1985).
[56] Schmerber v. California, 384 U.S. 757, 760-61 (1966).
[57] 192 Colo. 249, 557 P.2d 399 (1976).
[58] 2 W. LAFAVE, SEARCH AND SEIZURE § 5.3, at 323 (1978).
[59] 2 Kan. App. 2d 627, 585 P.2d 1074 (1978).
[60] *Id.* at 628, 585 P.2d at 1077.
[61] *See, e.g.*, McBay, Dubowski & Finkle, *Urine Testing for Marijuana Use*, 249 J.A.M.A. 881 (Feb. 18, 1983) (letter to the editor).

marijuana would arguably have little justification for proceeding before a warrant can be obtained. On the other hand, if an officer believes other drugs are involved, the justification may exist for immediately requiring a urine specimen to accurately ascertain the presence of those drugs. In any event, where the officer is uncertain of the intoxicating drug that the suspect has consumed, it would seem unrealistic to require the officer to first obtain a warrant before obtaining a urine specimen.

Beyond any constitutional questions, the testing of urine specimens raises serious practical difficulties which will be encountered when law enforcement officials attempt to determine the quantity and duration of a drug's presence in a suspect's urine. The new statute provides for "all qualitative and quantitative tests for alcohol and drugs."[62] While there are well-accepted and easily administered tests to determine the quantity of alcohol in the blood, similar tests to measure the quantity of drugs in urine are less well-established. Commonly used tests such as thin-layer chromatography merely determine whether a particular drug is present in the urine.[63] Similar problems surround tests to determine how long a drug has been in a suspect's body. Unlike alcohol, which is quickly metabolized, certain drugs, such as marijuana, will remain in the body for a prolonged period. Complex testing procedures requiring analysis of multiple specimens taken at different times are needed to determine the duration of a drug's presence in a suspect's system. At the present time it is questionable whether most police officers have the necessary training to conduct such tests.

Since the use of purely qualitative urinalysis testing will simply reveal whether a particular drug has been used at an undetermined time, serious evidentiary questions surround the use of such test results in a DUI prosecution. In prosecutions involving the use of marijuana, which may remain in a suspect's system for a prolonged period,[64] the prejudicial effect of such evidence arguably outweighs its probative value.[65] Yet even for drugs which metabolize rapidly after consumption, purely qualitative evidence, standing alone, will be of limited evidentiary value.

Even when the presence of a drug in a person's system can be

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[62] K.S.A. § 8-1001(a) (Supp. 1985).

[63] Unless otherwise noted, all medical information discussed in this Article was obtained through telephone conversations on February 5, 1986, with Dr. Aryeh Hurwitz, Professor of Clinical Pharmacology at the University of Kansas Medical Center; Morris Fairman, Professor of Pharmacology and Toxicology at the University of Kansas; and Joyce Generali, Association Professor of Pharmacy Practice and Administrative Director of the Drug and Poison Information Center at the University of Kansas Medical Center.

[64] *See supra* note 61 and accompanying text. An additional problem may exist in the use of purely qualitative tests for the detection of marijuana and hashish in light of recent studies revealing that cannabinoids may be detected in individuals who have been only passively exposed to such substances. *See* Morland, Bugge, Skuterud, Steen, Wethe & Kjeldsen, *Cannabinoids in Blood and Urine after Passive Inhalation of* Cannabis *Smoke*, 30 J. FORENSIC SCI. 997 (1985).

[65] *See* K.S.A. 60-445; State v. Davis, 213 Kan. 54, 515 P.2d 802 (1973).

quantitatively measured, the legislature has failed to set forth any standards for determining what quantity of a particular drug is deemed to render a person incapable of driving safely.[66] This failure is likely due to the fact that there currently are no medically accepted standards for such a determination. Even if quantitative standards existed, a quantitative measurement of the presence of a drug may have little correlation to the degree of driving impairment. This is particularly true when therapeutic drugs are involved.[67] Many prescription and over-the-counter drugs, including frequently used products such as antihistamines, have sedative side effects. When such medication is used for a prolonged period, tolerance develops. Consequently, a high concentration of such a drug in a person's system may have little effect on that person's ability to drive safely.[68] Because there are no currently accepted standards for determining impairment caused by drugs other than alcohol, it may not be feasible for the legislature to delineate specific standards for determining when a driver is deemed incapable of driving safely. Yet without such standards, even quantitative evidence of the presence of a drug may be inadequate to establish persuasive evidence of impairment.

3. Warning the DUI Suspect

The 1985 amendments to the drunk driving laws require police officers to give a series of warnings prior to requesting a driver to submit to chemical tests. Officers must provide both oral and written notice that:

> (A) There is no right to consult with an attorney regarding whether to submit to testing; (B) refusal to submit to testing will result in six months' suspension of the person's driver's license; (C) refusal to submit to testing may be used against the person at any trial on a charge involving driving while under the influence of alcohol or drugs, or both; (D) the results of the testing may be used against the person at any trial on a charge involving driving while under the influence of alcohol or drugs, or both; and (E) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from hospitals, medical laboratories and physicians.[69]

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[66] K.S.A. § 8-1005(a)(3) (Supp. 1985) simply provides that:

> [i]f there was present in the defendant's bodily substance any narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safety driving a vehicle, that fact may be considered to determine if the defendant was under the influence of drugs, or both alcohol and drugs, to a degree that renders the defendant incapable of driving safely.

[67] *Id.* § 8-1567(c).

[68] Under K.S.A. § 8-1567(b) (Supp. 1985), it is unlawful for any person who is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug to operate or attempt to operate a motor vehicle. Under subsection (c) of that statute, it is not a defense that the person is legally entitled to use the drug. Thus, it is seemingly illegal for an individual regularly using prescription medication with similar side effects to operate a motor vehicle.

[69] K.S.A. § 8-1001(f)(1).

Although these warnings should help some suspects better understand their rights, they become yet another obligation for an investigating officer and may create a new defense to DUI charges.

The new statutory warnings are, in essence, a codification of the Kansas Supreme Court's holding in *Standish v. Department of Revenue*.[70] In *Standish*, the court held that a DUI suspect has no fifth amendment right to consult with an attorney before deciding whether to submit to a blood alcohol test.[71] The fifth amendment privilege against self-incrimination protects an accused from being compelled to reveal testimonial or communicative evidence to the police. To protect that privilege a suspect must, upon request, be provided an attorney before being subjected to station house questioning. Blood and breath tests, being neither testimonial nor communicative, are not covered by the fifth amendment privilege.[72] Because there is no constitutional privilege to refuse a blood test, the court held that a driver has no right to consult with counsel in determining whether to submit to a test.[73]

While deciding against a right to consult with counsel, the *Standish* court recognized a problem faced by the arrested suspect. The DUI suspect had been informed of his *Miranda* rights at the time of the arrest. Under *Miranda*,[74] a suspect is told that he has a right to consult with an attorney before being subjected to custodial questioning by the police.[75] The *Standish* court found the DUI sus-

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[70] 235 Kan. 900, 683 P.2d 1276 (1984).

[71] 235 Kan. at 904, 683 P.2d at 1281.

[72] Schmerber v. California, 384 U.S. 757, 765 (1966).

[73] 235 Kan. at 904, 683 P.2d at 1281. The following year, in State v. Bristor, 236 Kan. 313, 691 P.2d 1 (1984), the court addressed the right to counsel under the sixth amendment, which provides the accused with the right to counsel for all critical stages of the prosecution. The court found that the decision to submit to testing is not a critical stage of the "prosecution" for sixth amendment purposes because it is made before the filing of a complaint, when, in Kansas, adversary judicial proceedings are initiated and the right to counsel attaches. The court also found the decision to submit to a Blood Alcohol Test (BAT) is not a "critical stage" because the driver has already impliedly consented to testing and has no constitutional right to refuse testing.

[74] Miranda v. Arizona, 384 U.S. 436 (1966).

[75] *Id.* at 471. In Berkemer v. McCarty, 104 S. Ct. 3138 (1984), the United States Supreme Court held that *Miranda* warnings must be given prior to any custodial interrogation of a suspect arrested for a misdemeanor offense, such as driving under the influence of alcohol or drugs, as well as for felony offenses. An interesting question arises in light of the provision in the amendment to the Kansas drunk driving laws which permits testing of a suspect who is not formally arrested but has been involved in an accident involving property damage, personal injury or death. While the new statutory notice clearly must be given to such a person, it is less clear whether the *Miranda* warnings likewise must be given before the person is subjected to police interrogation. It would seem that when blood or urine tests are required, *Miranda* must be given. K.S.A. § 8-1001(c) (Supp. 1985) provides that blood tests may be administered only by qualified medical personnel. Under K.S.A. § 8-1001(d), privacy requirements attach to the administration of urinalysis examinations. Thus, such tests must necessarily be administered at a location away from the scene of the accident. Transporting a suspect to the testing location constitutes such a significant curtailment of the suspect's freedom of action that the suspect is in custody, even if not formally under arrest. While the mere administration of the test would not invoke *Miranda* because there is no interrogation, any question accompanying the testing, such as questions calculated to determine the nature or quantity of the alcohol or drugs consumed by the suspect, would bring *Miranda* into play. On the other hand, the adminis-

pect's refusal to submit to testing understandable in light of the confusion caused by giving *Miranda* without specifying the inapplicability of the right to counsel in determining whether to take a blood alcohol test.[76] To alleviate such confusion, the court stated that when giving *Miranda* warnings an officer "should also tell" an arrested suspect of the implied consent law and that there is no right to consult with counsel before deciding to take a test.[77] The court added that the officer "could well add" that the suspect's refusal to take the test may be used as evidence against the suspect in a subsequent DUI prosecution and will probably result in a suspension of his driving privileges.[78] Although the conditional nature of the language used in *Standish* did not clearly establish that the latter two warnings are mandatory, a year later in *State v. Bristor*,[79] the court construed *Standish* as affirmatively requiring that a person arrested for DUI be informed of the consequences of a refusal to submit to testing.[80]

Any remaining ambiguity about the mandatory nature of such warnings is removed by the statutory notice requirements contained in the 1985 amendments. Although the statute provides that the question of whether the statutory notice was given is one of only four issues that may be raised at an administrative license suspension hearing,[81] it is silent as to the consequences of a police officer's failure to give the warnings in a DUI prosecution. Such failure, however, will apparently render test results inadmissible in a DUI prosecution. This conclusion is largely premised on the mandatory language of the statute, which expressly provides that the notice "shall be given."[82] Inadmissibility of unwarned test results is the only practical way to insure that the warnings are actually given. A contrary result would make the new requirements virtually meaningless, for no purpose is served by requiring the notice if test results are admissible even if the warnings are not given.[83]

The new law provides that failure to understand the warnings because of intoxication or injury resulting from such intoxication does not constitute a defense in a DUI prosecution.[84] Nevertheless,

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tration of a breath test at the scene of the accident would not require *Miranda* warnings before similar questioning can be conducted. Such questioning would fall far short of custodial interrogation, but would rather constitute mere roadside questioning, which does not require *Miranda* warnings. *See Berkemer*, 104 S. Ct. at 3144.

[76] 235 Kan. at 905, 683 P.2d at 1281-82.

[77] *Id.* at 904-05, 683 P.2d at 1281-82.

[78] *Id.* at 905, 683 P.2d at 1281.

[79] 236 Kan. 313, 691 P.2d 1 (1984).

[80] 236 Kan. at 319, 691 P.2d at 6.

[81] K.S.A. § 8-1002(d) (Supp. 1985).

[82] *Id.* § 8-1001(f)(1).

[83] The statutory amendments also provide that "[n]othing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant." K.S.A. § 8-1001(g) (Supp. 1985). Thus, failure to give the statutory notice will not render test results inadmissible if the test was conducted with a warrant.

[84] K.S.A. § 8-1001(f)(2) (Supp. 1985).

a suspect must be given both oral and written notice even if unconscious or intoxicated to the extent of being incapable of understanding the warnings.[85] A suspect's inability to comprehend the notice has no constitutional implications since, under *Schmerber*, a DUI suspect has no constitutional right to refuse a blood alcohol test.[86] Providing the statutory notice to a suspect who is incapable of understanding may be a hollow formality, but it is a requirement which nevertheless must be followed. The requirement that the notice be in writing will establish that it was in fact given to a suspect who was so intoxicated he cannot remember receiving the oral recitation.

The new statutory notice requirement includes one provision which was not mentioned in *Standish* and which the Kansas Court of Appeals had previously held not to be required.[87] The officer must now inform a suspect of the right to secure additional testing from an independent source.[88] This information is particularly important in light of the 1985 amendment to K.S.A. § 8-1006, which provides that test samples need not be preserved and furnished to a suspect for independent testing. Without the added warning, a suspect may be unaware of his rights, and thus lose any opportunity to independently challenge the result of the state's tests.

In summary, the new notice requirement imposes a more extensive obligation upon an investigating officer than previously required by the Kansas courts. Failure to give the notice, even to a suspect incapable of understanding it, should preclude the admissibility of the results of a test administered to the suspect. Despite the new obligations imposed upon law enforcement officers, the notice requirement serves the salutary purpose of clarifying any ambiguity concerning the right to counsel which may result from the *Miranda* warnings and provides a DUI suspect with the information necessary to make an informed decision whether to submit to testing.

4. Preserving the Evidence of the Test

Finally, the new drunk driving law explicitly states that samples of blood, breath or urine need not be preserved or furnished to the suspect for independent testing.[89] While preserving such samples for a defendant is probably neither technically infeasible nor unduly burdensome for law enforcement officers, the constitutionality of this provision, at least as to breath samples, finds support in a re-

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[85] In State v. Garner, 227 Kan. 566, 608 P.2d 1321 (1980), the court held that the implied consent law applies even to an unconscious defendant who is incapable of making a knowing and intelligent response to a request for testing. Regardless of his condition, it is incumbent upon the suspect to make an express refusal.

[86] Schmerber v. California, 384 U.S. 757, 765-66 (1966). The Court concluded the suspect's fifth and sixth amendment rights had not been violated despite the suspect's adamant refusal, on counsel's advice, to submit to a blood test.

[87] City of Shawnee v. Gruss, 2 Kan. App. 2d 131, 576 P.2d 239 (1978), *petition for rev. denied*, 225 Kan. 843 (1978).

[88] K.S.A. § 8-1001(f)(1)(E) (Supp. 1985).

[89] *Id.* § 8-1006.

cent decision of the United States Supreme Court. In *California v. Trombetta*,[90] the Court reversed a lower court's ruling that due process requires law enforcement officials to preserve breath samples tested by a breath testing device for the use of the defendant.[91] The Court noted that it was the test results, not the actual breath sample, that is presented as evidence.[92] The significant questions surrounding such evidence are the accuracy of the testing device, which can be determined without preservation of the defendant's breath sample, and the propriety of the administration of the test, which can be challenged through cross-examination of the operator of the testing device.[93]

While *Trombetta* only addressed the absence of a requirement that breath samples be preserved, its rationale supports the conclusion that samples of blood, urine and other bodily fluids likewise need not be preserved. The Court in *Trombetta* noted that it would be technically feasible to preserve breath samples but nevertheless found that due process did not mandate such preservation.[94] Such reasoning would be applicable to any bodily substance which can be extracted and tested. Further, as with breath testing devices, defendants will be able to inquire into the accuracy of the type of testing system and the quality of the test administration.

Finally, the absence of a preservation requirement will not be prejudicial to a DUI suspect in light of the new requirement that an officer must notify a suspect of his right to obtain independent testing.[95] Such testing will enable a DUI suspect to gauge the accuracy of the test administered by the state. While under *Trombetta* notification of the right to obtain independent testing is not a constitutional prerequisite to the validity of the provision that samples not be preserved,[96] such notification adds weight to the fairness of that provision.

## Conclusion

While the new Kansas drunk driving laws increase the ability of

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[90] California v. Trombetta, 104 S. Ct. 2528 (1984).

[91] People v. Trombetta, 142 Cal. App. 3d 138, 190 Cal. Rptr. 319 (1983).

[92] California v. Trombetta, 104 S. Ct. at 2533.

[93] *Id.* at 2534. Prior to the decision in *Trombetta*, the Kansas Supreme Court had reached the same result, though on substantially different grounds, in State v. Young, 228 Kan. 355, 614 P.2d 441 (1980).

[94] California v. Trombetta, 104 S. Ct. at 2535. The Kansas court, conversely, relied upon evidence that breath samples are expanded in the testing process and are thus not readily preservable as a factor in its decision that failure to preserve such samples does not violate due process. *Young*, 228 Kan. at 361, 614 P.2d at 445-46.

[95] K.S.A. § 8-1004 (Supp. 1985). A DUI suspect also has the right to have a report of the testing results made available to him. *Id.* § 8-1001(h).

[96] *Cf.* California v. Trombetta, 104 S. Ct. at 2535 n.11 (no due process violation in failure to preserve breath samples in spite of no showing defendants were aware of right to independent testing under California law).

the police to gather information on both alcohol and drug intoxication, they also create significant constitutional and practical issues. The Kansas Supreme Court will surely be required to resolve whether the constitution permits the taking of a blood test upon probable cause when the police have declined to arrest the suspect. Similarly, the court will need to explore the consequences of a failure by the police to adequately warn suspects about the blood test. The expansion of testing from those measuring alcohol content to those determining the presence of drugs will require prosecutors and defense attorneys alike to examine unfamiliar scientific testing procedures. As the problem of driving while intoxicated has increased, so too has the range of legal issues confronting the criminal practitioner.