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1986-87

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Visiting Law School Rice Professor. B.A. 1936, Parsons College; J.D. 1939, Northwestern.

Dennis D. Prater
Associate Professor of Law and Director, Legal Aid Clinic. B.A. 1969, Kansas; J.D. 1973, Kansas.

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

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Visiting Associate Professor of Law. B.A. 1980, Michigan; J.D. 1983, Michigan.

Ellen E. Sward
Associate Professor of Law. B.A. 1970, Cincinnati; J.D. 1979, Harvard.

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

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

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

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Charles H. Oldfather

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

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

Earl B. Shurtz

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

Paul E. Wilson

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

KANSAS CRIMINAL PROCEDURE REVIEW

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 1986 cases decided by the United States Supreme Court, the Kansas Supreme Court, and the Kansas Court of Appeals.

The 1987 *Review* features an article I have written that surveys significant trends in search and seizure law, including a review of recent United States Supreme Court decisions. The *Review*, for the first time, also includes three student notes that analyze 1986 United States Supreme Court opinions.

In the first student note, John Corse examines the decision announced in *California v. Ciraolo.* The Court held in *Ciraolo* that a warrantless aerial observation from public airspace, of activities conducted within the backyard of a home, is not a search prohibited by the fourth amendment. In the second note, Bryan Wright analyzes the Court's decision in *Moran v. Burbine.* In *Moran*, the Court held that a suspect's waiver of his *Miranda* rights is not invalidated when police continue their interrogation of the suspect without informing him of telephone calls from an attorney hired by another on his behalf. In the third note, Christy Cattaneo examines the decision in *Batson v. Kentucky.* The Court held in *Batson* that a prosecutor's use of peremptory challenges to exclude from a jury members of the defendant's race, when done solely on racial grounds, violates equal protection.

This is a transition year, with the student editors assuming more control of and responsibility for the *Review*'s production. Beginning with next year's *Review*, I will become the faculty advisor for the *Review* and the editor-in-chief position will be filled by a student. I would like to thank and acknowledge the editors and staff for their diligent efforts during this transition period, as well as express my gratitude to Ana Porras and Joan Wellman for their help in preparing the manuscripts. I would also like to thank Bert Nunley, Associate Editor, for his efforts in coordinating this year's *Review.*

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

February 1, 1987 Emil A. Tonkovich

KANSAS CRIMINAL PROCEDURE REVIEW

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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 York v. Class, 106 S. Ct. 960 (1986).

A citizen has no reasonable expectation of privacy in a vehicle identification number. Thus, government officials, without probable cause, may make a warrantless search of a car to discover the number based solely on a reasonable suspicion of criminal activity.

New York v. P.J. Video, Inc., 106 S. Ct. 1610 (1986).

Although the seizure of materials presumptively protected by the first amendment raises special concerns, a higher standard of probable cause for search warrants is not necessary.

California v. Ciraolo, 106 S. Ct. 1809 (1986).

The naked-eye aerial observation from public airspace of activities conducted within the curtilage of the home is not a search prohibited by the fourth amendment. Thus, although the defendant fenced his backyard, his subjective expectation of privacy was not reasonable. [See case note at page 57].

Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986).

Photographing a commercial facility from public airspace with a conventional aerial camera is not a search prohibited by the fourth amendment. [See *Ciraolo* case note at page 57].

Kansas Supreme Court

State v. Breazeale, 238 Kan. 714, 714 P.2d 1356, ***cert. denied***, 107 S. Ct. 164 (1986).

The rule that a search warrant affidavit is presumed valid unless a defendant can show it either contains false information, the absence of which leaves the affidavit insufficient to support probable cause, or has a deliberate omission of material facts, is now extended to arrest warrant affidavits. An omission is material if the original affidavit, modified by the addition of the omitted information, would not support a finding of probable cause.

State v. Strauch, 239 Kan. 203, 718 P.2d 613 (1986).

The validity of a warrantless arrest depends upon whether the arresting officer had probable cause to believe the suspect committed a felony. In deciding whether probable cause to arrest exists, the arresting officer may use all information in his possession, fair

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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).

inferences therefrom, and facts that might not be admissible on the issue of guilt.

State v. Baker, 239 Kan. 403, 720 P.2d 1112 (1986).

For a valid stop and frisk search under the fourth amendment and K.S.A. § 22-2402(1), the police officer must have a reasonable and articulable suspicion, based upon facts known prior to the stop, that the individual stopped has committed, is committing, or is about to commit a crime. To determine whether a police officer had sufficient facts to justify a stop and frisk search, the court must consider the totality of the circumstances existing at the time.

State v. Spaulding, 239 Kan. 439, 720 P.2d 1047 (1986).

In the absence of a statutory requirement, when a judge makes a probable cause finding and intentionally issues a search warrant, his failure to sign the warrant does not prejudice the defendant. The Kansas statute does not specifically require a search warrant to be signed.

State v. Walker, 239 Kan. 635, 722 P.2d 556 (1986).

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

State v. Alexander, 240 Kan. 273, 729 P.2d 1126 (1986).

The state bears the burden of proving by a preponderance of the evidence whether the defendant voluntarily consented to a search. The existence and voluntariness of the consent to search is a question of fact to be decided by the trial court in light of all the circumstances.

Kansas Court of Appeals

State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347 (1986).

If a defendant establishes by a preponderance of the evidence the falsity of statements in the warrant affidavit, these statements will be removed from the affidavit and the court will reexamine the remaining statements to determine whether probable cause existed under the totality of the circumstances.

State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347 (1986).

When probable cause is based on information received from a confidential informant and the informant's reliability or credibility is lacking, corroborating evidence obtained from an independent police investigation may be utilized to establish the accuracy of the information.

State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347 (1986).

Because the constitutional protections afforded by section fifteen of the Kansas Bill of Rights and the fourth amendment to the

United States Constitution are identical, a Kansas court may look to United States Supreme Court decisions for guidance in resolving constitutional search and seizure issues.

B. Interrogation Procedures

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

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

The fifth amendment privilege against self-incrimination applies to police custodial interrogations.[25] To mitigate the coercive influences inherent in custodial interrogations, police are required to advise the defendant of the *Miranda* warnings prior to such interrogations.[26] Subsequent to these warnings, if interrogation continues without an attorney present and a statement is taken, the government must 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

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

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

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

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

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

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

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

[27] *Id.* at 475.

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

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

[30] New York v. Quarles, 467 U.S. 649, 656-60 (1984).

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

attorney.[32]

United States Supreme Court

Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

The government's reference in closing argument to a defendant's silence pursuant to *Miranda* warnings to overcome his plea of insanity, violates the fourteenth amendment due process clause.

Moran v. Burbine, 106 S. Ct. 1135 (1986).

Failure of police to inform a suspect of telephone calls from an attorney, who unknown to the suspect had been hired on his behalf, before continuing their interrogation of the suspect, did not invalidate the suspect's waiver of his *Miranda* rights. Further, the police statement to the attorney that no additional interrogation would take place until the following morning, when, in fact, custodial interrogation continued, did not deprive the suspect of fundamental due process. [See case note at page 69].

Michigan v. Jackson, 106 S. Ct. 1404 (1986).

A defendant's assertion of his sixth amendment right to counsel during arraignment creates an absolute bar to subsequent uncounseled, police-initiated interrogation. Unless the defendant initiates the questioning, a waiver of the right to counsel will be invalid.

Crane v. Kentucky, 106 S. Ct. 2142 (1986).

Evidence concerning the manner in which a confession is secured is admissible since it bears not only on the voluntariness of the confession, but also on its credibility. To prohibit its admission at trial by a defendant violates the sixth amendment confrontation clause.

Kuhlman v. Wilson, 106 S. Ct. 2616 (1986).

To prove a sixth amendment right to counsel violation, an indicted defendant, who is deliberately confined in a cell with a police informant, must demonstrate that the informant took some action, beyond mere listening, that was designed to deliberately elicit incriminating statements from the defendant in the absence of counsel.

Colorado v. Connelly, 107 S. Ct. 515 (1986).

Coercive police activity is a necessary predicate to a finding that a confession is not voluntary within the meaning of the due process clause. Absent such police conduct, the defendant's mental condition is not a sufficient basis for concluding that he has been deprived of due process. Further, in a motion to suppress a statement allegedly obtained in violation of *Miranda*, the state need only prove waiver by a preponderance of the evidence.

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

Kansas Supreme Court

State v. Waugh, 238 Kan. 537, 712 P.2d 1243 (1986).

The voluntariness of a defendant's confession is determined under the totality of the circumstances, including the following factors: (1) the duration and manner of interrogation; (2) the accused's ability upon request to communicate with the outside world; (3) the accused's age, intellect, and background; and (4) the officers' fairness in conducting the interrogation. Overall, the court must determine on a case-by-case basis whether the defendant's will was overborne at the time of the confession.

State v. Waugh, 238 Kan. 537, 712 P.2d 1243 (1986).

The sixth amendment right to counsel does not attach until after the initiation of adversary judicial criminal proceedings. An arrest, in itself, does not initiate adversary judicial criminal proceedings.

State v. Waugh, 238 Kan. 537, 712 P.2d 1243 (1986).

A suspect in custody may assert his right to remain silent at any time during interrogation and may selectively assert his right to remain silent. Once the suspect makes a valid waiver, questioning by officers may continue until he revokes his waiver.

State v. Strauch, 239 Kan. 203, 718 P.2d 613 (1986).

The test for voluntariness of a confession is whether the defendant's will was overborne by either physical or mental coercion. Neither lying by interrogators about information they obtained from other suspects, nor the interrogators' raised voices, is sufficient to overbear the suspect's will without a showing that such actions rise to the level of a threat that directly results in a confession.

State v. Ransom, 239 Kan. 594, 722 P.2d 540 (1986).

A defendant's statement made to an officer shortly after arrest is admissible when the defendant had twice been read his *Miranda* rights, was not being interrogated, had not requested a lawyer, and was simply commenting on an opinion expressed by the officer.

State v. Alexander, 240 Kan. 273, 729 P.2d 1126 (1986).

A court must employ a case-by-case evaluation to determine whether coercion resulted in an involuntary confession. The court must determine whether the defendant's will was overborne at the time of the confession.

Kansas Court of Appeals

In re Hamstead, 11 Kan. App. 2d 527, 729 P.2d 461 (1986).

When requested to submit to a blood alcohol test, a driver's silence may constitute an express refusal to submit to the test. A trial court's finding of refusal will not be disturbed on appeal if supported by substantial competent evidence.

C. Identification Procedures

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

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

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

Kansas Supreme Court

State v. Slansky, 239 Kan. 450, 720 P.2d 1054 (1986).

A reliable in-court identification may be admissible despite a suggestive pretrial confrontation. The reliability of a courtroom identification will be reviewed in light of the following factors: (1) the opportunity of the witness to view the accused at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the accused; (4) the level of certainty displayed by the witness at the confrontation; and (5) the length of time between the crime and confrontation.

State v. Slansky, 239 Kan. 450, 720 P.2d 1054 (1986).

While it is a better practice to photograph lineups, a defendant has no constitutional right to have a lineup photographed.

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

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

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

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

[36] *Id.*

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

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

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

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

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]

Kansas Court of Appeals

State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347 (1986).

The exclusionary rule should not be applied to suppress evidence when a court issues a warrant without probable cause as long as the police acted in good faith and did not obtain the warrant by a false statement.

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[41] *Id.* at 656, 659.
[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, 468 U.S. 981, 987-91 (1984); United States v. Leon, 468 U.S. 897, 922-26 (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.

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]

Kansas Supreme Court

State v. Puckett, 240 Kan. 393, 729 P.2d 458 (1986).

A criminal action is between the state and the accused, and the wishes or actions of the victim do not control whether a prosecution should be pursued.

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-incrimina-

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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).
[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).

tion,[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]

United States Supreme Court

Vasquez v. Hillery, 106 S. Ct. 617 (1986).

A conviction of a defendant, subsequent to an indictment by a grand jury from which members of his own race were systematically excluded, requires mandatory reversal.

United States v. Mechanik, 106 S. Ct. 938 (1986).

Any error in a grand jury charging decision stemming from a violation of Federal Rule of Criminal Procedure 6(d) is harmless when a subsequent petit jury renders a guilty verdict.

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. Lane, 106 S. Ct. 725 (1986).

Misjoinder of indictments under Federal Rule of Criminal Proce-

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[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).

[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.

dure 8 is not reversible error per se, but is subject to the harmless error rule.

Kansas Supreme Court

State v. Holley, 238 Kan. 501, 712 P.2d 1214 (1986).

An order for separate trials of codefendants must be based upon some ground sufficient to establish prejudice. The granting of a separate trial lies within the sound discretion of the trial court and, absent an abuse of discretion, its action will not be set aside on appeal.

State v. Armstrong, 238 Kan. 559, 712 P.2d 1258 (1986).
State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986).

Under K.S.A. § 22-3201(4), a trial court may permit a complaint or information to be amended at any time before a verdict or finding if no additional or different crime is charged and if the substantial rights of the defendant are not prejudiced. Thus, the time of commission of the offense may be amended unless it is an indispensable ingredient of the offense.

State v. Armstrong, 238 Kan. 559, 712 P.2d 1258 (1986).

When charges in an information are sufficiently clarified by facts brought out at a preliminary hearing, there is no need for amplification by a bill of particulars, absent a showing of surprise or prejudice.

State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).

The endorsement of additional witnesses on an information is a matter of judicial discretion and will not be the basis for reversal absent an abuse of discretion. The test is whether the defendant's rights were unfairly prejudiced by the late endorsement.

State v. Breazeale, 238 Kan. 714, 714 P.2d 1356, *cert. denied*, 107 S. Ct. 164 (1986).

Under K.S.A. § 22-3203(1), joinder in the same complaint or information is proper if the crimes charged are: (1) of the same or similar character; (2) based on the same act or transaction; or (3) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

State v. Slansky, 239 Kan. 450, 720 P.2d 1054 (1986).

When a conviction is based upon an information or indictment that does not sufficiently charge every element of the offense for which the accused was convicted, the trial court lacks jurisdiction, and the conviction is void.

State v. Jackson, 239 Kan. 463, 721 P.2d 232 (1986).
State v. Bird, 240 Kan. 288, 729 P.2d 1136 (1986).

Sufficiency of an indictment or information is determined by whether it contains the elements of the offense charged and suffi-

ciently apprises the defendant of what he must be prepared to meet, and whether it is specific enough to make a plea of double jeopardy possible.

State v. Barncord, 240 Kan. 35, 726 P.2d 1322 (1986).

An indictment or information that charges an offense based on the language of the statute or its equivalent is sufficient. It is not necessary to use the exact words of the statute if the meaning is clear.

State v. Barncord, 240 Kan. 35, 726 P.2d 1322 (1986).

Unnecessary allegations in an indictment or information are surplusage and failure to prove the exact nature of those allegations is not a fatal defect.

Kansas Court of Appeals

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

Multiple charges stemming from a single transaction are not multiplicitous if one offense requires proof of an element not necessary to prove the other offense.

State v. Scherer, 11 Kan. App. 2d 362, 721 P.2d 743 (1986).

Under K.S.A. § 22-3201(4), a trial court does not have jurisdiction over additional offenses charged by an amended complaint that prejudice substantial rights of the defendant.

State v. Dodd, 11 Kan. App. 2d 513, 728 P.2d 402 (1986).

An oral amendment to an information made on the record is binding. The failure to file an amended information in writing is not reversible error.

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 exami-

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

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

[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.

nation 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]

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. Puckett, 240 Kan. 393, 729 P.2d 458 (1986).

When probable cause is established at a preliminary hearing, it is the judge's duty to bind the defendant over for prosecution, regardless of the wishes of the alleged victim or the judge's personal assessment of the action's merits.

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[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.
[80] FED. R. CRIM. P. 5.1(a); K.S.A. § 22-2902(3).
[81] FED. R. CRIM. P. 5.1(a); K.S.A. § 22-2902(3).
[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.

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 ensure 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]

Kansas Supreme Court

State v. Alsup, 239 Kan. 673, 722 P.2d 1100 (1986).

Failure to strictly comply with K.S.A. § 22-3210, governing pleas of guilty or nolo contendere, is harmless error if the plea is knowingly and voluntarily made and the purpose of the statute is served.

State v. Alsup, 239 Kan. 673, 722 P.2d 1100 (1986).

A plea is knowing and voluntary when the record shows that the trial court addressed the defendant personally and determined the plea was voluntary after examining the factual basis for the plea and questioning the defendant regarding his understanding of the nature of the charges and the potential consequences of the plea.

Noble v. State, 240 Kan. 162, 727 P.2d 473 (1986).

The guidelines established by K.S.A. § 22-3210 for acceptance of a plea of guilty or nolo contendere need not be strictly complied with if, upon review of the entire record, it can be determined the plea was made knowingly and voluntarily. It is mandatory that the

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[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*, 395 U.S. at 243.
[94] Tollett v. Henderson, 411 U.S. 258, 267 (1973).
[95] Blackledge v. Perry, 417 U.S. 21, 30 (1974).

trial court record the entire proceeding so that a transcript will be available to the appellate court on review.

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 pretrial 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

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

and on the type of evidence requested.[111]

Kansas Supreme Court

State v. Winter, 238 Kan. 530, 712 P.2d 1228 (1986).
State v. Schilling, 238 Kan. 593, 712 P.2d 1233 (1986).

Dismissal of a criminal case for failure to provide discovery should only be used in extreme circumstances. The court should impose the least drastic sanctions necessary to accomplish the objectives of discovery, but not to punish.

State v. Schilling, 238 Kan. 593, 712 P.2d 1233 (1986).

A defendant must show that the informant's identity is material to his defense before disclosure of the identity will be ordered. Speculation and suspicion concerning how an informant might testify are not sufficient to require disclosure.

State v. Barncord, 240 Kan. 35, 726 P.2d 1322 (1986).

Evidence not disclosed to the defendant before trial is not considered suppressed or withheld by the state if the defendant has personal knowledge thereof, or if the facts become available to him during trial and he is not prejudiced in defending against these new facts.

State v. Barncord, 240 Kan. 35, 726 P.2d 1322 (1986).

When a police officer's field notes are materially incorporated into a formally prepared report, copies of which are available to the defendant prior to the preliminary exam, no prejudice results to the defendant.

State v. Carmichael, 240 Kan. 149, 727 P.2d 918 (1986).

A prosecutor's failure to disclose clearly exculpatory evidence to the defendant violates the defendant's fourteenth amendment due process rights if: (1) the evidence tends to disprove a fact in issue that is material to guilt or punishment; and (2) the defendant was materially prejudiced by the unavailability of the evidence. The state is under an affirmative duty, independent of court order, to disclose exculpatory evidence to the defendant. To justify a reversal for failure to disclose such evidence, the evidence must be clearly exculpatory and withholding of the evidence must be clearly prejudicial to the defendant.

Kansas Court of Appeals

State v. Dressel, 11 Kan. App. 2d 552, 729 P.2d 1245 (1986).

When a specific request for pretrial discovery is denied, a new

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[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).

trial should be granted if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would be different. A reasonable probability is one that undermines confidence in the outcome.

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]

Kansas Court of Appeals

State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347 (1986).

Under K.S.A. § 22-3216, it is within the trial court's discretion to reentertain a motion to suppress evidence presented at the prelimi-

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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* pt. 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), -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." *Id.* at 394.

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

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

nary hearing.

State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347 (1986).

A defendant has a constitutional right to a hearing on a motion to suppress evidence if he makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard, was included in the warrant affidavit and the allegedly false statement is necessary to the finding of probable cause. A defendant's sworn affidavit and offer of proof that includes specific allegations of false statements are sufficient to satisfy his preliminary burden and to trigger a hearing.

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. Loud Hawk, 106 S. Ct. 648 (1986).

Neither public knowledge of the government's desire to prosecute a defendant nor a court order requiring a defendant to appear at an evidentiary hearing are sufficient to trigger the sixth amendment speedy trial guarantee, which applies only to the time period during which a defendant is either under indictment or subject to actual restraints on his liberty. Delays caused by a defendant's meritorious interlocutory appeal ordinarily will not weigh in favor of his speedy trial claim. A defendant with a meritorious appeal bears the heavy

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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.

burden of showing the unreasonable delay was caused by the prosecution on appeal or by an appellate court's wholly unjustifiable delay.

Henderson v. United States, 106 S. Ct. 1871 (1986).

Excludable delay under the Speedy Trial Act includes delay resulting from any pretrial motion and is not limited to reasonably necessary delay. Time after a pretrial motion hearing, when the district court awaits additional necessary filings for prompt disposition of the motion, is also excludable delay.

Kansas Supreme Court

State v. Dreher, 239 Kan. 259, 717 P.2d 1053 (1986).

Under K.S.A. § 22-3402(2), the state bears the burden of bringing the defendant to trial within the prescribed time and the defendant is not required to take any affirmative action to see that his right is observed. Delays caused by the application or fault of the defendant are not to be counted when determining whether his speedy trial right has been violated.

State v. Dreher, 239 Kan. 259, 717 P.2d 1053 (1986).

Delay in rescheduling a trial, when such delay is caused by the application or fault of the defendant, should be limited to a reasonable time as measured by the particular circumstances of the case.

State v. Bentley, 239 Kan. 334, 721 P.2d 227 (1986).

Exceptions to the statute of limitations are to be construed narrowly, or strictly, against the state. As an exception to the statute of limitations, K.S.A. § 21-3106(3)(c) provides that the period within which the prosecution must be commenced does not include any period in which the fact of the crime was concealed. In a sexual abuse case, a defendant's threat to his child victim not to reveal what happened is not concealment.

State v. Ransom, 239 Kan. 594, 722 P.2d 540 (1986).

Factors to be considered in determining whether there was a violation of a defendant's constitutional right to a speedy trial are: length of delay, reason for the delay, defendant's assertion of his right, and prejudice to the defendant.

State v. Houck, 240 Kan. 130, 727 P.2d 460 (1986).

A parolee's voluntary absence from the state with the consent of parole officers is excludable under K.S.A. § 21-3106(3) and tolls the statute of limitations for prosecution of a subsequent criminal act.

State v. Houck, 240 Kan. 130, 727 P.2d 460 (1986).

In determining whether preindictment delay violates due process, the court must examine three principles: (1) the defendant is not necessarily deprived of due process even if his defense might have

been somewhat prejudiced by the delay; (2) the court must consider the reasons for the delay as well as the prejudice to the accused; and (3) prosecutorial delay solely to gain tactical advantage over the defendant would violate due process.

Kansas Court of Appeals

State v. Potts, 11 Kan. App. 2d 95, 713 P.2d 967 (1986).

In order to establish a fifth amendment due process violation based on pre-accusation delay, the defendant must show that actual prejudice resulted from the delay *and* that the delay was intentionally designed to gain a tactical advantage. (Emphasis added). [This synopsis of the court's holding reflects the language of the decision, but not the contradictory language contained in syllabus ¶ 1].

State v. Miller, 11 Kan. App. 2d 410, 722 P.2d 1131 (1986).

In a sexual abuse case, a defendant's threat to his child victim not to reveal what happened is not concealment under K.S.A. § 21-3106(3)(c).

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 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] re-

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[125] The fifth amendment provides that "nor shall any person be subject for the same offence 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 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).

prosecution after a conviction,[133] and resentencing after a conviction.[134]

United States Supreme Court

Morris v. Mathews, 106 S. Ct. 1032 (1986).

When a jeopardy-barred conviction is reduced to a conviction for a lesser included offense that is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the lesser included offense absent the presence of the jeopardy-barred offense.

Smalis v. Pennsylvania, 106 S. Ct. 1745 (1986).

The double jeopardy clause prohibits a postacquittal appeal by the prosecution not only when it may result in a second trial, but also if reversal would lead to further proceedings resolving a factual issue going to elements of the offense charged. Thus, a ruling on the defendant's demurrer holding that evidence was insufficient to establish factual guilt is an acquittal under the double jeopardy clause and bars the state's appeal.

Poland v. Arizona, 106 S. Ct. 1749 (1986).

The fifth amendment double jeopardy clause does not bar a second capital sentencing proceeding when, on appeal from a death penalty sentence, the appellate court finds the evidence insufficient to support the only aggravating factor on which the trial judge relied, but when the appellate court finds the evidence sufficient to support the death penalty based upon a different aggravating factor.

Kansas Supreme Court

State v. Lowe, 238 Kan. 755, 715 P.2d 404 (1986).

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

State v. Puckett, 240 Kan. 393, 729 P.2d 458 (1986).

The discharge of a defendant at a preliminary hearing is not a double jeopardy bar to a subsequent prosecution on the same charges.

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[133] *See* Burks v. United States, 437 U.S. 1, 18 (1978).
[134] *See* North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

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. Nioce, 239 Kan. 127, 716 P.2d 585 (1986).

Under 18 U.S.C. § 3243, Congress intended to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The United States, however, retains concurrent jurisdiction with Kansas over crimes listed in the Federal Major Crimes Act, 18 U.S.C. § 1153. *State v. Mitchell*, 231 Kan. 144, 642 P.2d 981 (1982), is therefore, overruled.

State v. McKibben, 239 Kan. 574, 722 P.2d 518 (1986).

Under K.S.A. § 22-2611, when the cause of death is inflicted in one county and death occurs in another county, venue is proper in either county.

State v. McKibben, 239 Kan. 574, 722 P.2d 518 (1986).
State v. Alexander, 240 Kan. 273, 729 P.2d 1126 (1986).
State v. Bird, 240 Kan. 288, 729 P.2d 1136 (1986).

To obtain a change of venue under K.S.A. § 22-2616(1), the defendant bears the burden of establishing prejudice as a demonstrable reality, not as a matter of speculation. The defendant must produce specific facts and circumstances indicating a practical impossibility for him to obtain a fair and impartial trial in that county. Media publicity alone will not establish prejudice.

B. Sixth Amendment Right to Counsel

The sixth amendment provides a defendant with the right to counsel in criminal cases.[137] This right attaches at the initiation of

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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.
[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.

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

Nix v. Whiteside, 106 S. Ct. 988 (1986).

A defendant's sixth amendment right to effective assistance of counsel is not violated when his attorney uses strong measures to dissuade him from giving perjured testimony at his trial. By complying with the ethical code, the attorney's conduct falls within the standards of reasonable, professional conduct. Further, a defendant's inability to commit perjury is not prejudicial.

Darden v. Wainwright, 106 S. Ct. 2464 (1986).

A defendant's sixth amendment right to effective assistance of counsel was not violated when, at sentencing, his attorney reasonably decided to simply rely upon a plea for mercy because other possible strategies would have opened the door for rebuttal evidence from the state.

Kansas Supreme Court

State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986).
State v. McKibben, 239 Kan. 574, 722 P.2d 518 (1986).

A defendant cannot assert an ineffective assistance of counsel claim for the first time on appeal. Language to the contrary in *State v. Pink*, 236 Kan. 715, 696 P.2d 358 (1985), is overruled. If appellate counsel desires to raise the issue for the first time on ap-

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[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, 466 U.S. 668, 686 (1984).
[144] *Id.* at 690-94.
[145] *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

peal, the defendant may seek a remand of the case to the trial court for an initial determination of the issue.

State v. Turner, 239 Kan. 360, 721 P.2d 255 (1986).

When a question of waiver of the right to counsel arises, K.S.A. § 22-3426 requires some written evidence in the record showing that the defendant was fully advised of his right to appointed counsel.

State v. Walker, 239 Kan. 635, 722 P.2d 556 (1986).

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

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

Holbrook v. Flynn, 106 S. Ct. 1340 (1986).

In determining whether a courtroom arrangement is so inherently prejudicial as to deny a defendant a fair trial, a court may only look at the scene presented to the jurors. The mere presence of four uniformed state troopers at a trial is not so inherently prejudicial that a defendant is denied his right to a fair trial.

Kansas Supreme Court

State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).

To establish a violation of the sixth amendment right to an impartial jury trial, a defendant must show that the media coverage in the courthouse prevented him from presenting his defense or affected the jury's ability to judge him fairly.

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 defen-

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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).

[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).

dant'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. Inadi, 106 S. Ct. 1121 (1986).

The sixth amendment confrontation clause does not require a showing of unavailability as a condition to admission of out-of-court statements of a nontestifying co-conspirator when the statements otherwise satisfy Federal Rule of Evidence 801(d)(2)(E).

Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986).

The sixth amendment confrontation clause does not prevent a trial judge from imposing reasonable limits on a defense counsel's inquiry into potential bias of a prosecution witness. Further, a constitutionally improper denial of such inquiry is subject to the harmless error rule.

Lee v. Illinois, 106 S. Ct. 2056 (1986).

Absent sufficient indicia of reliability or an opportunity for defense cross-examination, a codefendant's confession inculpating the accused violates the sixth amendment confrontation clause.

Press-Enterprise Co. v. Superior Court of Cal., 106 S. Ct. 2735 (1986).

The qualified first amendment right of access to criminal proceedings applies to preliminary hearings as conducted in California. Thus, such proceedings cannot be closed unless specific, on-the-record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

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[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).

Kansas Supreme Court

State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).

The decision of whether the jury was or possibly could have been influenced by spectator presence or conduct resulting in denial of a fair trial is left to the sound discretion of the trial court, which will not be disturbed unless it appears that prejudice resulted.

State v. Salton, 238 Kan. 835, 715 P.2d 412 (1986).

Under K.S.A. § 22-3405, a trial may proceed when, at its commencement, the defendant knowingly and voluntarily waives his right to be present. The statute, however, does not give the defendant the right to absent himself from trial.

State v. Bell, 239 Kan. 229, 718 P.2d 628 (1986).

Hearsay evidence may be admissible in a criminal trial, under certain exceptions to the hearsay rule, without violating the confrontation clause.

State v. Baker, 239 Kan. 403, 720 P.2d 1112 (1986).

The introduction of a codefendant's extrajudicial statements that do not implicate the defendant do not violate the sixth amendment confrontation clause.

State v. Jackson, 239 Kan. 463, 721 P.2d 232 (1986).

The weight and credit to be given a child's hearsay statement under K.S.A. § 60-460(dd) is solely a jury determination and expert testimony cannot be used to determine the truthfulness of the statement.

State v. Hicks, 240 Kan. 302, 729 P.2d 1146 (1986).

Under K.S.A. § 60-460(a), statements previously made by a person who is "present at the hearing and available for cross-examination" with respect to the statements are excepted from the hearsay rule. The key factor is the witness' availability and the statute does not require that the witness be physically present in the courtroom at the time the hearsay testimony is given.

State v. Johnson, 240 Kan. 326, 729 P.2d 1169 (1986).

A witness' out-of-court statement is admissible and does not violate the defendant's confrontation right if the witness is unavailable and the statement has adequate indicia of reliability. Videotaped recordings of child victims' extrajudicial statements, made in compliance with K.S.A. §§ 22-3433 and 22-3434, do not per se violate the sixth amendment confrontation clause.

Kansas Court of Appeals

State v. Fondren, 11 Kan. App. 2d 309, 721 P.2d 284 (1986).

Admission at trial of an absent witness' prior testimony from a

preliminary hearing, when the defendant was afforded the opportunity to cross-examine the witness in the prior proceeding, does not violate the confrontation clause.

State v. Clark, 11 Kan. App. 2d 586, 730 P.2d 1104 (1986).

K.S.A. § 60-460(dd), which provides for the admission of a child's out-of-court statement, does not violate the sixth amendment confrontation clause.

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 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*

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

[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).

warnings to impeach his testimony at trial.[185] A defendant's silence either prior to arrest[186] or between arrest and *Miranda* warnings,[187] however, may be used to impeach his trial testimony.

United States Supreme Court

Allen v. Illinois, 106 S. Ct. 2988 (1986).

A defendant must clearly show that a state "civil" proceeding is punitive, either in purpose or effect, so as to negate the state's intention that the proceeding be civil, before the right against self-incrimination attaches. Merely showing that the state proceeding contains procedural safeguards that are usually found in criminal trials and involves a committal to a maximum security institution that provides psychiatric care is insufficient to invoke the right.

Kansas Supreme Court

State v. Lowe, 238 Kan. 755, 715 P.2d 404 (1986).

A prosecutor may not comment on or present evidence regarding a defendant's refusal to testify or his invocation of the right to remain silent. If no improper motive or conduct on the part of the prosecutor is reflected, however, it is not an abuse of discretion for the trial court to deny a motion for mistrial.

Kansas Court of Appeals

State v. Jagger, 11 Kan. App. 2d 350, 720 P.2d 673 (1986).

K.S.A. § 60-439 prohibits comment by the prosecutor and the court on a defendant's privilege not to testify. Only comments that fail to meet the federal standard of harmless error, defined as a belief beyond a reasonable doubt that the error did not contribute to the verdict, require reversal.

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[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.

[186] 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

Turner v. Murray, 106 S. Ct. 1683 (1986).

A capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The defendant must specifically request such an inquiry and the court retains discretion as to the form and number of questions and the manner in which they are asked.

Batson v. Kentucky, 106 S. Ct. 1712 (1986).

A prosecutor's use of peremptory challenges to exclude members of the defendant's race from a jury solely on racial grounds violates equal protection. Prosecutors must explain peremptory jury challenges that appear to be motivated solely by racial considerations. Furthermore, a defendant does not need to go outside the facts of his case to establish a prima facie case of discrimination in the exercise of peremptories. [See case note at page 79].

Lockhart v. McCree, 106 S. Ct. 1758 (1986).

In a capital case in which the same jury determines guilt and imposes sentence, potential jurors who indicate an inability to follow the law and impose the death sentence when the law requires may be excluded "for cause" from the jury panel. Excluding those potential jurors from the guilt phase of the trial, even though their bias relates to sentencing, does not impair the defendant's sixth amendment right to trial by an impartial jury drawn from a representative cross-section of the community.

Darden v. Wainwright, 106 S. Ct. 2464 (1986).

Determining whether a trial court's decision that a juror's views of capital punishment would prevent or substantially impair the performance of his duties requires an examination of the context surrounding the juror's exclusion.

Darden v. Wainwright, 106 S. Ct. 2464 (1986).

For a prosecutor's improper closing argument to be fundamentally unfair, it must so infect the trial as a whole with unfairness as to make the resulting conviction a denial of due process.

Allen v. Hardy, 106 S. Ct. 2878 (1986).

The decision in *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), which changed the standard for proving unconstitutional abuse of peremptory challenges, will not be applied retroactively on collateral review of convictions that became final before *Batson* was

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

announced.

Rose v. Clark, 106 S. Ct. 3101 (1986).

When the accused receives a full opportunity to put on evidence, be represented by counsel, be tried by a fairly selected jury, and be supervised by an impartial judge, there is a strong presumption that any error occuring during trial is subject to the harmless error standard. When the above conditions exist, an instruction that impermissibly shifts the burden of proof of malice in a murder prosecution may be harmless error if the jury was clearly instructed that it had to find guilt beyond a reasonable doubt as to every element of the crime.

Kansas Supreme Court

State v. Holley, 238 Kan. 501, 712 P.2d 1214 (1986).
State v. Houck, 240 Kan. 130, 727 P.2d 460 (1986).

A court's failure to give a jury instruction is not error unless the party objects to the instruction at trial, stating the specific grounds for the objection. Absent such an objection, an appellate court may reverse only if the trial court's failure to give the instruction was clearly erroneous.

State v. Armstrong, 238 Kan. 559, 712 P.2d 1258 (1986).
State v. Houck, 240 Kan. 130, 727 P.2d 460 (1986).

When instructing the jury, it is the trial court's duty to define the offense charged, stating to the jury the essential elements of the crime, either in the language of the statute or in other appropriate and accurate language.

State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).

The propriety of jury instructions is to be gauged by considering the instructions as a whole.

State v. Roberts-Reid, 238 Kan. 788, 714 P.2d 971 (1986).

A trial court need not instruct the jury on a term that is widely used or easily comprehended by individuals of common intelligence.

State v. Jackson, 238 Kan. 793, 714 P.2d 1368, *cert. denied*, 107 S. Ct. 88 (1986).

A jury instruction that fails to specifically instruct the jury that the burden of proof never shifts to the defendant is not constitutional error when its effect is harmless and the instruction emphasizes the state's burden of proof.

State v. Hodges, 239 Kan. 63, 716 P.2d 563 (1986).

A self-defense jury instruction that uses the word "immediate" instead of the statutory word "imminent" is clearly erroneous and constitutes reversible error.

State v. Strauch, 239 Kan. 203, 718 P.2d 613 (1986).

When giving jury instructions in a felony murder trial, the court is not required to give instructions on lesser included offenses unless the evidence of the underlying felony is weak, inconclusive, or conflicting.

State v. Bell, 239 Kan. 229, 718 P.2d 628 (1986).

When a jury instruction adequately and accurately states the relevant law, no error results from the trial court's denial of an additional instruction.

State v. Ransom, 239 Kan. 594, 722 P.2d 540 (1986).

An intent instruction that creates a permissible inference, rather than a rebuttable presumption, is constitutional.

State v. Wheaton, 240 Kan. 345, 729 P.2d 1183 (1986).

Juror misconduct is not grounds for reversal, new trial, or mistrial unless the party claiming such misconduct shows that his rights were substantially prejudiced. When juror misconduct is known by a party or his counsel before the verdict and they fail to make an objection, the party cannot later assert the misconduct as grounds for a new trial.

Kansas Court of Appeals

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

Jury instructions should be confined to the charge in the information and should be neither broader nor narrower. A violation of this general rule, however, may be excused when the jury instructions, considered as a whole, are adequate and, thus, do not violate the substantial rights of a defendant.

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

State v. Clark, 11 Kan. App. 2d 586, 730 P.2d 1104 (1986).

A court's failure to give a jury instruction is not error unless the party objects to the instruction at trial, stating the specific grounds for the objection. Absent such an objection, an appellate court may reverse only if the trial court's failure to give the instruction was clearly erroneous.

State v. Fondren, 11 Kan. App. 2d 309, 721 P.2d 284 (1986).

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

State v. Miller, 11 Kan. App. 2d 410, 722 P.2d 1131 (1986).

In the absence of insincerity or falsehood on the part of the juror, when faced with a claim that he could not hear material testimony,

the court must discharge the juror "for cause," and absent a waiver by the defendant, declare a mistrial.

State v. Clark, 11 Kan. App. 2d 586, 730 P.2d 1104 (1986).

When instructing the jury that it must determine the weight and credit to be given a child's hearsay statement, pursuant to K.S.A. § 60-460(dd), the court must also instruct the jury of additional factors to be considered as enumerated in PIK Crim. 2d 52.21.

IV. SENTENCING, PROBATION, AND PAROLE[189]

United States Supreme Court

Texas v. McCullough, 106 S. Ct. 976 (1986).

A judge may increase a defendant's sentence on retrial if he states on the record a logical and nonvindictive reason for the increased sentence, based upon significant new evidence.

Skipper v. South Carolina, 106 S. Ct. 1669 (1986).

Exclusion from the sentencing hearing of testimony by jailers and visitors regarding the capital defendant's good behavior during imprisonment denied him the right to present relevant evidence in mitigation of punishment.

McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986).

A defendant has no sixth amendment right to jury sentencing, even when the sentence turns on specific findings of fact.

Kelly v. Robinson, 107 S. Ct. 353 (1986).

Any conditions a criminal court imposes as part of a defendant's sentence, including all restriction obligations, are excepted from discharge in bankruptcy proceedings by 11 U.S.C. § 523(a)(7).

Kansas Supreme Court

State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).
State v. Roberts-Reid, 238 Kan. 788, 714 P.2d 971 (1986).
State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986).
State v. Johnson, 239 Kan. 124, 716 P.2d 192 (1986).
State v. Strauch, 239 Kan. 203, 718 P.2d 613 (1986).
State v. Slansky, 239 Kan. 450, 720 P.2d 1054 (1986).
State v. Alsup, 239 Kan. 673, 722 P.2d 1100 (1986).
State v. Jennings, 240 Kan. 377, 729 P.2d 454 (1986).

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

State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).
State v. Bowers, 239 Kan. 417, 721 P.2d 268 (1986).

Under K.S.A. § 21-4603(2), the trial court may not sentence a

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[189] Death penalty cases are omitted because they are not relevant to Kansas practitioners. Future editions will review these cases if Kansas passes a death penalty statute.

defendant to imprisonment and also require him to pay immediate restitution.

State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986).

A trial court does not have the power to impose a sentence below the statutory minimum.

State v. Johnson, 239 Kan. 124, 716 P.2d 192 (1986).

In the exercise of judicial discretion, a judge is not bound by what another judge has determined is an appropriate sentence for a codefendant.

State v. Starbuck, 239 Kan. 132, 715 P.2d 1291 (1986).

Allegations of judicial misconduct during a probation revocation hearing must be decided on the particular facts and circumstances surrounding the alleged misconduct. In order to grant a new hearing, it must affirmatively appear that the conduct prejudiced the probationer's substantial rights.

State v. Strauch, 239 Kan. 203, 718 P.2d 613 (1986).
State v. Louis, 240 Kan. 175, 727 P.2d 483 (1986).

Whether separate sentences should be concurrent or consecutive is within the trial court's discretion.

State v. Thomas, 239 Kan. 457, 720 P.2d 1059 (1986).

An "illegal sentence" is: (1) a sentence imposed by a court lacking jurisdiction; (2) a sentence that does not conform to the statutory provisions, either in the character or the term of punishment authorized; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served.

State v. Harrold, 239 Kan. 645, 722 P.2d 563 (1986).

A defendant who pleads guilty or nolo contendere is not precluded by K.S.A. § 22-3602 from taking a direct appeal from the sentence imposed. Moreover, in order to present a justiciable issue, an appellant is not required to allege that the sentence was the result of partiality, prejudice, corrupt motive, or that it exceeds the statutory limits. The contrary holding in *State v. Haines*, 238 Kan. 478, 712 P.2d 1211 (1986), is overruled.

State v. Priest, 239 Kan. 681, 722 P.2d 576 (1986).

A sentence for a DUI conviction cannot be enhanced based upon a prior DUI diversion agreement, unless the record shows that the defendant had the benefit of counsel or that he had waived his right to counsel prior to entering the agreement.

State v. Kitzman, 240 Kan. 191, 727 P.2d 491 (1986).

The mandatory minimum fine imposed by K.S.A. § 8-1567(e) upon second-time DUI offenders cannot be waived, remitted, suspended, or "paroled" by the trial court.

State v. Jennings, 240 Kan. 377, 729 P.2d 454 (1986).

Under K.S.A. § 21- 4603(3), a defendant has no right to a hear-

ing on a motion to modify sentence or to be present at the consideration of such motion.

State v. Jennings, 240 Kan. 377, 729 P.2d 454 (1986).

Since K.S.A. § 21-4601 simply expresses the current objectives of the correctional process, it need not be expressly considered by the sentencing judge.

Kansas Court of Appeals

Tucker v. State, 11 Kan. App. 2d 51, 711 P.2d 1343 (1986).

Under K.S.A. § 22-3717(j), a sentencing court should make a finding as to the amount of restitution owed by the defendant to the aggrieved party at the time the sentence is imposed, clearly specifying that the restitution is for parole or probation purposes.

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

Under K.S.A. § 21-4603(2), the trial court may not sentence a defendant to imprisonment and also require him to pay immediate restitution.

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

The mere testimony of a court services officer that the defendant has a prior conviction is not sufficient competent evidence to enhance the defendant's sentence under K.S.A. § 21-4504(e).

State v. Potts, 11 Kan. App. 2d 95, 713 P.2d 967 (1986).

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

State v. Potts, 11 Kan. App. 2d 95, 713 P.2d 967 (1986).

Whether separate sentences should be concurrent or consecutive is within the trial court's discretion.

Andrews v. State, 11 Kan. App. 2d 322, 720 P.2d 227 (1986).

When a defendant is granted probation in reliance upon misrepresentations made to the court by or on behalf of the defendant, probation may be revoked without evidence that the terms or conditions of probation have been violated.

Andrews v. State, 11 Kan. App. 2d 322, 720 P.2d 227 (1986).

K.S.A. § 22-3716(2), which authorizes resentencing upon revocation of probation, does not authorize imposition of a greater sentence than the one originally imposed.

State v. Scherer, 11 Kan. App. 2d 362, 721 P.2d 743 (1986).

The prohibition against excessive fines contained in section nine of the Kansas Bill of Rights restricts a court's discretion in imposing fines. Moreover, under K.S.A. § 21-4607(3), the trial court

must consider the financial burden on the defendant when imposing a fine.

State v. Scherer, 11 Kan. App. 2d 362, 721 P.2d 743 (1986).

A defendant cannot be punished for continuing violations alleged to have occurred after his trial, but before sentencing, until he has been convicted of those violations.

State v. Jones, 11 Kan. App. 2d 428, 724 P.2d 146 (1986).

The manpower costs incurred in capturing an escaped prisoner are not subject to a court recommendation that the defendant reimburse the state for such costs pursuant to K.S.A. § 22-3717(k).

State v. Dodd, 11 Kan. App. 2d 513, 728 P.2d 402 (1986).

K.S.A. § 21- 4504(4)(a), the Habitual Criminal Act, may not be invoked to enhance a felony sentence if a necessary element of the felony is a prior felony conviction.

State v. Chappell, 11 Kan. App. 2d 546, 729 P.2d 1241 (1986).

Once placed on diversion, a defendant's obligation to appear in court on the underlying charge is indefinitely suspended until criminal proceedings are resumed pursuant to K.S.A. § 22-2911.

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 for 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]

United States Supreme Court

Kelly v. Robinson, 107 S. Ct. 353 (1986).

Any conditions a criminal court imposes as part of a defendant's sentence, including all restitution obligations, are excepted from discharge in bankruptcy proceedings by 11 U.S.C. § 523(a)(7).

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

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

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

[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).

Kansas Supreme Court

State v. Holley, 238 Kan. 501, 712 P.2d 1214 (1986).
State v. Ransom, 239 Kan. 594, 722 P.2d 540 (1986).
State v. Munyon, 240 Kan. 53, 726 P.2d 1333 (1986).
State v. Bird, 240 Kan. 288, 729 P.2d 1136 (1986).
State v. Johnson, 240 Kan. 326, 729 P.2d 1169 (1986).

Under K.S.A. § 22-3501(1), it is within the trial court's discretion to grant a new trial based on newly discovered evidence. A new trial, however, should be granted only if the newly discovered evidence is of such materiality that it would be likely to produce a different result upon retrial.

State v. Holley, 238 Kan. 501, 712 P.2d 1214 (1986).
State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986).

Under K.S.A. § 22-3419(3), a motion for judgment of acquittal should be granted only if the trial judge concludes from the evidence that a reasonable mind could not conclude that the defendant was guilty beyond a reasonable doubt.

Kansas Court of Appeals

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

Under K.S.A. § 22-3419(3), a motion for judgment of acquittal should be granted only if the trial judge concludes from the evidence that a reasonable mind could not conclude that the defendant was guilty beyond a reasonable doubt.

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

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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), -3603.
[205] Abney v. United States, 431 U.S. 651, 659 (1977).

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]

Kansas Supreme Court

State v. Holley, 238 Kan. 501, 712 P.2d 1214 (1986).
State v. Jackson, 238 Kan. 793, 714 P.2d 1368, *cert. denied*, 107 S. Ct. 88 (1986).
State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986).
State v. Bell, 239 Kan. 229, 718 P.2d 628 (1986).
State v. Baker, 239 Kan. 403, 720 P.2d 1112 (1986).
State v. Bird, 240 Kan. 288, 729 P.2d 1136 (1986).

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. Lowe, 238 Kan. 755, 715 P.2d 404 (1986).
State v. Bell, 239 Kan. 229, 718 P.2d 628 (1986).

When substantial justice has been done, errors that do not affirmatively appear to have prejudicially affected the substantial rights of a defendant do not require reversal.

State v. McKibben, 239 Kan. 574, 722 P.2d 518 (1986).

When considering the sufficiency of circumstantial evidence to sustain a conviction on appeal, the appellate court's function is limited to ascertaining whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

State v. Ransom, 239 Kan. 594, 722 P.2d 540 (1986).

A defendant has no vested right to have his case decided on rehearing by the same judges who heard the initial appeal.

State v. Alexander, 240 Kan. 273, 729 P.2d 1126 (1986).

The reviewing court must not substitute its view of the evidence when the trial court's findings on a motion to suppress are based upon substantial evidence.

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[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).

State v. Willcox, 240 Kan. 310, 729 P.2d 451 (1986).

Questions reserved by the state in a criminal prosecution will not be entertained on appeal merely to demonstrate whether error has been committed by the trial court in its rulings adverse to the state.

State v. Johnson, 240 Kan. 326, 729 P.2d 1169 (1986).

When constitutional grounds for reversal are asserted for the first time on appeal, they are not properly before the appellate court for review.

Kansas Court of Appeals

Tucker v. State, 11 Kan. App. 2d 51, 711 P.2d 1343 (1986).

An appellate court should give great weight to the trial court's interpretation of its own judgment. Moreover, a judgment capable of more than one interpretation should be given an interpretation that makes the judgment valid.

Gonzales v. State, 11 Kan. App. 2d 70, 713 P.2d 489 (1986).

Under the mootness doctrine, a court will not render opinions when the judgment could have no practical effect on the controversy. Even when its judgment is not enforceable, the court will proceed to judgment whenever dismissal of an appeal adversely affects a party's vital rights.

State v. Hicks, 11 Kan. App. 2d 76, 714 P.2d 105, *aff'd*, 240 Kan. 302, 729 P.2d 1146 (1986).

State v. Dodd, 11 Kan. App. 2d 513, 728 P.2d 402 (1986).

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. Scherer, 11 Kan. App. 2d 362, 721 P.2d 743 (1986).

An appellate court need not consider hearsay exceptions raised for the first time on appeal.

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Kansas Court of Appeals

SURVEY OF TRENDS IN SEARCH AND SEIZURE LAW

Emil A. Tonkovich*

This article surveys significant trends in search and seizure law.[1] Recent United States Supreme Court decisions are reviewed. The scope of this survey is limited to the following four areas: (1) fourth amendment protected interests; (2) the probable cause requirement; (3) the automobile exception to the warrant requirement; and (4) the "good faith" exception to the exclusionary rule. These four areas were selected because of their practical and doctrinal significance.

I. FOURTH AMENDMENT PROTECTED INTERESTS

The fourth amendment protects individuals against unreasonable searches and seizures by the government.[2] In the landmark case of *Katz v. United States*,[3] the United States Supreme Court held that this protection applies to any interest in which an individual has a reasonable expectation of privacy. The expectation of privacy must be both subjective and one that society recognizes as reasonable.[4] The *Katz* decision shifted the focus of constitutional protection from physical areas to privacy interests. Thus, the fourth amendment "protects people, not places."[5] During the past two years, the Court has decided several cases involving the fundamental issue of protected interests.

In *Oliver v. United States*,[6] the Court considered whether, under the *Katz* test, fourth amendment protections extend to open fields.

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

[1] Excerpts from other publications written by the author are included in this article.

[2] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[3] 389 U.S. 347, 351-53 (1967).

[4] *Id.* at 361 (Harlan, J., concurring).

[5] *Id.* at 351. The Court later conformed its fourth amendment standing test to *Katz* by rejecting property concepts and requiring defendants to have a legitimate expectation of privacy in the area searched or the object seized. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

[6] 466 U.S. 170 (1984).

In *Oliver,* narcotics agents received reports that the defendant was raising marijuana on his farm. The agents conducted a warrantless search on foot of the farm area and found a marijuana field over a mile from the defendant's home. The field was secluded and could not be seen from any point of public access. The defendant had locked the entrance gate to his farm and posted "no trespassing" signs.[7]

The Court held that the search was lawful, concluding that no legitimate expectation of privacy per se exists in open fields.[8] The expectation of privacy in an open field is not one that society is prepared to recognize as reasonable. Therefore, although the defendant treated his secluded marijuana field as an area of private use, erecting barriers and "no trespassing" signs, those actions could not convert his subjective expectation of privacy into a legitimate interest protected by the fourth amendment.[9]

During its last term, in the companion cases of *California v. Ciraolo*[10] and *Dow Chemical Co. v. United States,*[11] the Court considered the impact of aerial surveillance on privacy expectations. Both cases were analyzed under the *Katz* test.

In *Ciraolo,* police received a tip that the defendant was growing marijuana in his backyard. The backyard was completely enclosed by two tall fences. The police flew over the yard in public airspace and, without visual assistance, observed vegetation that appeared to be marijuana plants. This led to the issuance of a search warrant and the subsequent seizure of the plants.[12]

The Court held that the search was lawful because the defendant's expectation of privacy was not objectively reasonable. The defendant demonstrated his subjective expectation of privacy under the *Katz* test by fencing his marijuana crop. The Court reasoned, however, that the defendant's expectation was unreasonable because anyone flying in the same public airspace could have seen the marijuana plants.[13]

In *Dow,* the Court held that it was not a fourth amendment search to engage in conventional aerial photography of the outdoor areas of a large industrial complex.[14] The Court, however, hinted that the result might be different if the surveillance involved highly sophisticated equipment.[15] Furthermore, the Court's emphasis on the lower expectation of privacy in commercial facilities indicated that even conventional aerial photography, which enhances the na-

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[7] *Id.* at 173-74.

[8] *Id.* at 182-83. Thus, the Court reaffirmed the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), which held that police officers may enter and search a field without a warrant.

[9] *See* 466 U.S. at 182-83.

[10] 106 S. Ct. 1809 (1986).

[11] 106 S. Ct. 1819 (1986).

[12] 106 S. Ct. at 1809-10.

[13] *Id.* at 1813.

[14] 106 S. Ct. at 1827.

[15] *Id.* at 1826.

ked eye, might be prohibited in *Ciraolo*-type private residence searches.[16]

Oliver, Ciraolo, and *Dow* demonstrate the Court's adherence to the *Katz* test. Although the conclusions in these cases may be disputed,[17] the Court's analyses are consistent with *Katz*. Thus, the fourth amendment protection continues to apply to any interest in which an individual has a reasonable expectation of privacy.

II. PROBABLE CAUSE REQUIREMENT

Generally, searches and seizures must be based on probable cause and made pursuant to a warrant.[18] Probable cause to search exists when there are sufficient facts, given the totality of the circumstances, to lead a reasonable person to believe that there is a fair probability that the items sought are connected with criminal activity and will be present at the time and place of the search.[19] This traditional standard has been reaffirmed by the Court in recent decisions.

In *Illinois v. Gates,*[20] the Court examined whether the strict *Aguilar-Spinelli*[21] test should be replaced by the traditional "totality of the circumstances" standard when evaluating informant information for probable cause. In *Gates,* the Bloomingdale, Illinois Police Department received an anonymous letter that stated the defendants were selling illegal drugs. The letter described in detail the routine the defendants followed in traveling to Florida, picking up the drugs, and returning to Bloomingdale where they sold them. According to the letter, the defendants transported over $100,000 in drugs per trip. The informant further claimed that the defendants had over $100,000 in drugs in the basement of their home.[22]

On the basis of the information in the letter, police corroboration of many of its details, and police surveillance of the defendants' suspected drug-buying trip to Florida, a search warrant was issued for the defendants' car and residence. The searches revealed 350 pounds of marijuana in the car, and marijuana, weapons, and other contraband in the home. All of these items were eventually suppressed on the ground that the affidavit for the search warrant failed the *Aguilar-Spinelli* test for probable cause.[23]

The Court rejected the strict interpretation of the *Aguilar-*

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[16] *See id.*

[17] For a critical analysis of these cases, see Note, *Aerial Surveillance and the Fourth Amendment, infra* at page 57.

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

[19] Illinois v. Gates, 462 U.S. 213, 238 (1983).

[20] 462 U.S. 213 (1983).

[21] Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[22] 462 U.S. at 225-28.

[23] *Id.*

Spinelli test and reversed the lower court's suppression of the evidence. The *Aguilar-Spinelli* test required that an affidavit establish the means by which the informant acquired his information and the veracity of the informant or the reliability of his information. The Court abandoned the *Aguilar-Spinelli* test, refusing to bind the concept of probable cause to such a strict set of rules. The Court explained that veracity or credibility should not be analyzed separately, but should be considered with the basis of knowledge in a practical, common sense analysis of the totality of the circumstances.[24]

In *New York v. P.J. Video, Inc.*,[25] the Court next examined the impact of first amendment considerations on the "fair probability" probable cause standard. *P.J. Video* involved the seizure of allegedly pornographic films pursuant to a search warrant. The supporting affidavit described "patently offensive" sex acts depicted in the films.[26]

Although the seizure of materials presumptively protected by the first amendment raises special concerns, the Court held that the "fair probability" standard of probable cause is sufficient.[27] The Court emphasized, however, that the defendant is entitled to a prompt postseizure judicial determination of probable cause and that a warrant for presumptively protected materials requires more than the officer's conclusions that the materials are obscene.[28]

Gates and *P.J. Video* demonstrate the Court's reaffirmation of the traditional probable cause standard. Although these cases raise distinctive issues, the Court reasoned that a higher standard of probable cause was unwarranted.

III. AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT

Probable cause searches of vehicles generally do not require a warrant. This long-standing exception to the warrant requirement is justified on two grounds. First, the inherent mobility of vehicles often creates exigent circumstances that make obtaining a warrant impractical.[29] Second, there is a lower expectation of privacy in

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[24] *Id.* at 238. The Court, however, stated that the "reliability" and "basis of knowledge" prongs of the *Aguilar-Spinelli* test are highly relevant factors in the "totality of the circumstances" analysis. *Id.* Thus, while the Court has relaxed these requirements, the two factors should not be completely disregarded when analyzing probable cause.

[25] 106 S. Ct. 1610 (1986).

[26] *Id.* at 1613 (quoting People v. P.J. Video, Inc., 65 N.Y.2d 566, 570-71, 493 N.Y.S.2d 988, 992, 483 N.E.2d 1120, 1124 (1985)).

[27] *Id.* at 1615-16 (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983)). *See also supra* text accompanying notes 18-19.

[28] 106 S. Ct. at 1614 (citing Heller v. New York, 413 U.S. 483 (1973)).

[29] Carroll v. United States, 267 U.S. 132, 151 (1925).

vehicles.[30]

Automobile exception searches are often poorly executed by police. This is due, in part, to the unsettled law in this relatively confusing area.

In the 1982 decision of *United States v. Ross*,[31] the Court attempted to clarify the scope of these searches. The Court held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[32] Thus, *Ross* extended the scope of the automobile exception beyond the vehicle's integral parts to include containers within the vehicle.

Although *Ross* clarified the scope of automobile exception searches, the search of containers pursuant to this exception remains unsettled. The Court in *Ross* clearly stated that if the probable cause is *directed at the vehicle*, police may search containers that may conceal the object of the search.[33] Furthermore, the Court reaffirmed that the automobile exception does not apply to situations in which the probable cause is *directed at a container* that is *subsequently* placed in a vehicle.[34] The Court, however, has not specifically addressed whether the automobile exception applies to situations in which the probable cause is directed solely at a container that is *already* in a vehicle.[35]

In 1985, the Court decided two automobile exception cases. The first case, *United States v. Johns*,[36] involved a delayed automobile exception search of packages. *Johns* offered insight into the Court's position on the scope of container searches pursuant to the automobile exception. The second case, *California v. Carney*,[37] resulted in a controversial decision involving the types of vehicles covered under the automobile exception.

In *Johns*, DEA agents followed the 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 marijuana.[38]

The Court held that the search did not violate the fourth amendment. Relying on *Ross*, the Court held that the agents could have

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[30] *See id.* at 151-62.

[31] 456 U.S. 798 (1982).

[32] *Id.* at 824.

[33] *Id.* at 820-24.

[34] *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977). In these situations, police may seize the container, but must obtain a warrant to search it. 442 U.S. at 766-67; 433 U.S. at 13-14.

[35] In Oklahoma v. Castleberry, 105 S. Ct. 1859 (1985) (per curiam), an equally divided Court affirmed a decision that in this situation police must detain the container and delay the search until a warrant is obtained.

[36] 469 U.S. 478 (1985).

[37] 471 U.S. 386 (1985).

[38] 469 U.S. at 480-81.

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.[39]

On the surface, *Johns* merely extended *Chambers v. Maroney*[40] to the search of containers. The decision, however, also shed light on the unsettled scope of container searches pursuant to the automobile exception. The Court in *Johns* stressed that the search was within the automobile exception because the probable cause was directed at not only the packages but also the vehicles themselves.[41] Thus, by implication, the automobile exception does not apply to situations in which the probable cause is directed solely at a container that is *already* in a vehicle.

In *Carney,* the other 1985 case, the Court attempted to define the types of vehicles covered under the automobile exception. 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 to ask the defendant to come out. When the defendant stepped out, an agent entered the motor home, found marijuana, and arrested the defendant.[42]

The Court held that the search did not violate the fourth amendment, finding it lawful under the "automobile exception" to the warrant requirement. 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. In this case, the motor home 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 not applicable 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.[43]

The variety of vehicles combined with a myriad of factual situa-

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[39] *Id.* at 486-87.

[40] 399 U.S. 42 (1970). The Court in *Chambers* held that a vehicle may be searched pursuant to the automobile exception after it has been impounded at the police station. *Id.* at 52. Thus, *Johns* updated the *Chambers* decision to conform with the search of containers permitted in *Ross.*

[41] 469 U.S. at 486.

[42] 471 U.S. at 387-88.

[43] *Id.* at 390-94.

tions will undoubtedly create gray areas as to the types of vehicles covered under the automobile exception. *Carney,* however, has provided guidelines that will assist in analyzing these gray areas.[44]

IV. "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE

The exclusionary rule is a judicially created remedy that prohibits the use of evidence obtained by police through means that violate the defendant's fourth amendment rights.[45] Limitations on the controversial rule prevent its strict application. The "good faith" exception is the most recent limitation on the rule.

In the companion cases of *United States v. Leon*[46] and *Massachusetts v. Sheppard,*[47] the Supreme Court adopted the "good faith" exception to the exclusionary rule. The "good faith" exception set forth in these cases is limited to search warrant situations. Although the practical impact of these cases is speculative, from a doctrinal standpoint they are perhaps the most significant criminal cases decided by the Burger Court.

In *Leon,* police successfully searched the defendants' residences and automobiles for drugs pursuant to a facially valid search warrant. The affidavit contained both specific information from a confidential informant of unproven reliability and extensive surveillance that indicated drug trafficking.[48]

The defendants were indicted for federal drug offenses and moved to suppress the evidence seized pursuant to the warrant. The district court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause. Although the court found that the police had acted in good faith, it rejected the Government's suggestion to recognize a "good faith" exception to the exclusionary rule. The court of appeals affirmed, also refusing to recognize the exception. The Government's petition for certiorari presented only the question whether a "good faith" exception to the exclusionary rule should be recognized. The Supreme Court granted certiorari, recognized the "good faith" exception, and ac-

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[44] We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

Id. at 394 n.3.

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

[46] 468 U.S. 897 (1984).

[47] 468 U.S. 981 (1984).

[48] 468 U.S. at 901-02.

cordingly, reversed the decision of the court of appeals.[49]

Underlying the Court's recognition of the "good faith" exception was its basic conception of the exclusionary rule. The Court emphasized that the rule is not constitutional in origin, but rather a judicially created remedy designed primarily to protect fourth amendment rights through its deterrent effect.[50] Accordingly, the Court has restricted the rule's application to those situations in which its deterrent purpose is effectively served.[51] Using a cost-benefit analysis in applying the rule,[52] the Court weighs the cost of losing reliable and probative evidence against the benefit of deterring fourth amendment violations.[53] Applying this cost-benefit analysis, the Court has rejected the application of the rule in a variety of situations.[54]

The Court employed the cost-benefit analysis to support its recognition of the "good faith" exception in search warrant cases.[55] After noting that the exclusionary rule is not directed at judicial conduct, the Court reasoned that the rule cannot deter objectively reasonable law enforcement activity.[56] This is particularly true when a police officer acting with objective good faith has obtained a search warrant from a judge and acted within its scope.[57] Thus, the Court concluded that the application of the exclusionary rule to these situations cannot logically deter fourth amendment violations.[58]

Applying these principles, the Court in *Leon* found the "good faith" exception appropriate. Despite the lower courts' findings of no probable cause, the search warrant affidavit contained the results of an extensive investigation that arguably may have established probable cause.[59] Under these circumstances, the officers' reliance on the magistrate's erroneous determination of probable cause was

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[49] *Id.* at 902-05.

[50] *Id.* at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

[51] *Id.* at 909.

[52] *Id.* at 906-07.

[53] *See id.* at 909-10.

[54] *Id.* at 909. For example, the exclusionary rule has been held not applicable to grand jury proceedings, United States v. Calandra, 414 U.S. 338, 349-52 (1974); civil proceedings, United States v. Janis, 428 U.S. 433, 449-54 (1976); and impeachment at trial, Harris v. New York, 401 U.S. 222, 224-26 (1971). Furthermore, the Court has applied the cost-benefit analysis to procedurally limit the impact of the exclusionary rule. For example, the Court drastically limited fourth amendment federal habeas relief, Stone v. Powell, 428 U.S. 465, 489-95 (1976), and limited standing to invoke the rule in fourth amendment cases to defendants who have actually suffered a violation of their own rights, Rakas v. Illinois, 349 U.S. 128, 138-40 (1978).

[55] 468 U.S. at 913.

[56] *Id.* at 916.

[57] *Id.* at 920.

[58] *Id.* at 921. The Court emphasized that the "good faith" exception is not applicable under any of the following circumstances: the judge issuing the warrant was misled by false information in the affidavit that was knowingly or recklessly included by the police; the issuing judge abandoned his neutral and detached role; the affidavit was so lacking in probable cause as to render belief in its existence entirely unreasonable; or the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the police cannot reasonably presume it to be valid. *Id.* at 923.

[59] *Id.* at 925-26.

objectively reasonable.[60] Accordingly, the application of the exclusionary rule to this case was inappropriate.[61]

Sheppard, on the other hand, involved the application of the "good faith" exception to a situation in which the search warrant established probable cause but was technically defective. Based on information gathered in a homicide investigation, a police detective drafted a search warrant affidavit. The affidavit requested authority to search the defendant's residence for certain described items, including the victim's clothing and a blunt instrument that might have been the murder weapon. The district attorney and his first assistant approved the affidavit. Because it was Sunday, the detective could not find an appropriate warrant application form and, consequently, used a controlled substances form. After making some changes in the form, the detective presented it and the affidavit to a judge at his residence. The detective told the judge that the warrant form might need further modifications. The judge found that the affidavit established probable cause and told the detective that the necessary changes in the warrant form would be made.[62]

Although the judge made some further changes, the warrant continued to authorize a search for controlled substances and failed to incorporate the affidavit. After signing the warrant, the judge returned it and the affidavit to the detective, assuring him that it was proper in form and content. The search of the defendant's residence was limited to the items listed on the affidavit, and police seized several pieces of incriminating evidence.[63]

After being charged with first-degree murder, the defendant moved to suppress the evidence on the ground that the warrant did not particularly describe the items to be seized. The trial court agreed, but denied the motion because the police acted in good faith. At the subsequent trial, the defendant was convicted. On appeal, the state supreme court refused to recognize the "good faith" exception and reversed. The United States Supreme Court granted certiorari, applied the "good faith" exception, and accordingly, reversed.[64]

Having recognized the "good faith" exception in *Leon,* the only issue before the Court in *Sheppard* was whether the police reasonably believed that the search was authorized by a valid warrant.[65] It was undisputed that the officers believed the warrant was valid.[66] Regarding the objective reasonableness of the officers' belief, the Court found that they "took every step that could reasonably be expected of them."[67] The Court concluded that to suppress the evi-

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[60] *Id.* at 926.
[61] *Id.*
[62] 468 U.S. at 984-86.
[63] *Id.* at 986-87.
[64] *Id.* at 987, 991.
[65] *Id.* at 987-88.
[66] *Id.* at 988.
[67] *Id.* at 989.

dence because of the judicial error demonstrated in this case would not serve the exclusionary rule's deterrent function.[68] Thus, application of the exclusionary rule was inappropriate.[69]

The "good faith" exception set forth in *Leon* and *Sheppard* is a logical extension of the Court's cost-benefit approach to the judicially created exclusionary rule. Suppression of evidence obtained by police through objective good faith reliance on a search warrant does not effectively serve the rule's deterrent purpose. Critics of the "good faith" exception, on the other hand, believe that the cost-benefit approach is illusory because the exclusionary rule is implicit in the fourth amendment and, therefore, constitutional in nature. Unless the cost-benefit analysis is applied, however, the exclusionary rule would be rigidly enforced. It is illogical to rigidly apply the rule to situations in which its deterrent purpose is not appreciably served. Irrational applications of the rule do not promote constitutional rights, but rather, generate disrespect for the criminal justice system.

The exclusionary rule, even when rationally applied, impedes the truth-finding process by excluding probative and reliable evidence and occasionally permits the guilty to go free. Application of the rule to situations in which the police have relied in objective good faith on a defective search warrant is not only illogical, but also grants an unwarranted windfall to criminal defendants. Consequently, the narrow "good faith" exception set forth in *Leon* and *Sheppard* is a logical and necessary limitation on the exclusionary rule.[70]

V. CONCLUSION

The cases in these four areas reflect the trend in search and seizure law. Fundamental fourth amendment doctrine has returned to the basics. Protected interests are now founded on fourth amendment principles of privacy rather than arcane principles of property. The traditional standard of probable cause has been reaffirmed. In specific areas, such as the automobile exception, the Court has attempted to clarify the law—usually in favor of law enforcement. Finally, and perhaps most importantly, the Court has taken a pragmatic approach to the exclusionary rule and has limited the rule's impact by applying a cost-benefit analysis.

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[68] *Id.* at 990-91.

[69] *Id.* at 991.

[70] If, contrary to logical expectations, the "good faith" exception results in a significant increase in fourth amendment violations, the Court should reconsider its decisions in *Leon* and *Sheppard*. *See Leon*, 468 U.S. at 928 (Blackmun, J., concurring). It is unlikely, however, that violations will significantly increase. Furthermore, it is possible that fourth amendment violations will actually decrease because police have an additional incentive to obtain search warrants under the "good faith" exception.

AERIAL SURVEILLANCE AND THE FOURTH AMENDMENT—*California v. Ciraolo**

I. INTRODUCTION

Law enforcement officials have increasingly turned to aerial surveillance as a means of combating crime.[1] Aerial surveillance often enables police to view areas that they otherwise would be unable to view without a warrant. Consequently, considerable conflict has developed over whether this means of surveillance constitutes a search under the fourth amendment.[2] In *California v. Ciraolo*,[3] the United States Supreme Court held that naked-eye aerial observations of the curtilage of a home, when made from navigable airspace, do not constitute a search protected by the fourth amendment.[4]

Ciraolo is significant not only for the resulting impact on individuals and law enforcement officials, but also because it underscores the Court's continuing trend toward narrowing the scope of the fourth amendment.[5] This Note analyzes the Court's opinion in *Ciraolo* and concludes that, although the Court applied the reasonable expectation of privacy test enunciated in *Katz v. United States*,[6] it overlooked the central thrust of the second prong of the test, and thus failed to properly balance the individual's privacy interest against the utility of the governmental surveillance. As a result, *Ciraolo* constitutes a distorted interpretation of *Katz* that fails to adequately preserve fourth amendment protections against developments in governmental surveillance.

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* John D. Corse

[1] INTELLIGENCE REQUIREMENTS FOR THE 1980'S: ELEMENTS OF INTELLIGENCE (R. Godson ed. 1979); Recent Developments, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAND. L. REV. 409 (1982).

[2] *Compare, e.g.*, People v. Agee, 153 Cal. App. 3d 1169, 200 Cal. Rptr. 827 (1984) *with* State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977).

[3] 106 S. Ct. 1809 (1986).

[4] *Id.* at 1813. The Court's holding is limited to naked-eye observations made from navigable airspace. Observations aided by technology that disclose objects or activities otherwise imperceptible to the naked eye may well be invasive. *See id.* at 1813-14 n.3. *See also* Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986).

[5] Oliver v. United States, 466 U.S. 170 (1984); Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976).

[6] 389 U.S. 347 (1967).

II. THE CURTILAGE AND THE FOURTH AMENDMENT

*A. Pre-*Katz *Era*

For a number of years the Supreme Court reasoned there was no fourth amendment search unless there was a physical intrusion into a "constitutionally protected area."[7] The protected areas were deemed to be those enumerated in the fourth amendment itself: persons, houses, papers, and effects.[8] Under this literal pre-*Katz* approach, the protections afforded to one's "house" encompassed not only the interior of the house but also all structures and land within its curtilage.[9] As a result, the curtilage doctrine became an important common law property doctrine used in evaluating fourth amendment challenges.

The curtilage at common law was defined essentially as it is today. In short, a common sense approach was adopted wherein the land and buildings within reasonable proximity to the home were included, while land and buildings remote from the home were not part of the curtilage.[10] Thus, under the pre-*Katz* physical intrusion approach, a search was unconstitutional if the police trespassed on the curtilage, but if no intrusion on the curtilage occurred, there was no fourth amendment violation.[11]

B. Katz *Era*

In *Katz v. United States,*[12] the Supreme Court removed the trespass requirement as a prerequisite to a fourth amendment violation.[13] In *Katz,* the FBI attached an electronic listening device to the exterior of a public telephone booth in order to listen to the defendant's telephone conversation. Although the parties characterized the issue as whether a public telephone booth is a constitutionally protected area, the Court rejected this approach because:

> [T]his effort to decide whether or not a given area, viewed in the abstract, is constitutionally protected deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

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[7] *See, e.g.,* Silverman v. United States, 365 U.S. 505 (1981).
[8] Olmstead v. United States, 277 U.S. 438, 465 (1928).
[9] Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968).
[10] 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 559 (W. Stokes & E. Ingersoll 1847).
[11] Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956); Hobson v. United States, 226 F.2d 890, 894 (8th Cir. 1955).
[12] 389 U.S. 347 (1967).
[13] *Id.* at 353.

> . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[14]

The Court concluded that "the reach of the [fourth amendment] cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[15] The Court held that the government's electronic eavesdropping violated the privacy upon which the defendant justifiably relied.[16] As a result, the government's eavesdropping constituted an unreasonable search in violation of the fourth amendment.[17]

In his noteworthy concurring opinion, Justice Harlan set forth a two-pronged test for determining the extent of fourth amendment protection. According to Harlan, the prerequisites for a reasonable expectation of privacy included "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[18] The Supreme Court subsequently adopted Harlan's two-pronged test.[19]

By basing fourth amendment analysis on the protection of people, rather than on the protection of places, the Court aligned the scope of the fourth amendment with its underlying purpose of protecting people from unreasonable governmental intrusions. A rigid, literal approach had been replaced by a more flexible, policy-oriented approach. This new test suggested a fundamental expansion of the fourth amendment.

The first prong of the Harlan test has not proved particularly troublesome for the courts. Courts have focused on the individual's conduct in order to determine if he exhibited an actual, subjective expectation of privacy.[20] In general, courts have only required individuals to protect against observations from commonly expected vantage points in order to have manifested a subjective expectation of privacy.[21] In short, satisfaction of the first prong of the Harlan test is dependent upon the facts of each particular case.

The second prong of the Harlan test has proved more elusive and troublesome. In *United States v. White*,[22] Justice Harlan indicated that the second prong must "be answered by assessing the nature of a particular practice and the likely extent of its impact on the indi-

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[14] *Id.* at 351-52.
[15] *Id.* at 353.
[16] *Id.* at 352.
[17] *Id.* at 359.
[18] *Id.* at 361 (Harlan, J., concurring).
[19] Smith v. Maryland, 442 U.S. 735, 740 (1979).
[20] *See, e.g., id.* at 740.
[21] *See* State v. Pointer, 95 Idaho 707, 711-13, 578 P.2d 969, 973-74 (1974) (defendant had no reasonable expectation of privacy where curtilage only surrounded by a low picket fence). *Cf.* Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970) (where occupants had drawn curtains so as to preclude ground level observations, court held it a search for officers to climb onto a second-story trellis and peer into defendant's hotel room).
[22] 401 U.S. 745 (1971) (Harlan, J., dissenting).

vidual's sense of security balanced against the utility of the conduct as a technique of law enforcement."[23] As one commentator noted, "the ultimate issue under *Katz* is a value judgment, namely, whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[24]

Katz made it apparent that the curtilage doctrine would no longer act as a barrier to limit the scope of the fourth amendment. Under the reasoning of *Katz,* it would be possible to have a reasonable expectation of privacy in an area outside the curtilage. *Katz* thus signaled a decline in the importance of the curtilage doctrine, and many courts deemed it unwise to undertake a curtilage analysis after *Katz.*[25]

C. Oliver *Era*

In *Oliver v. United States,*[26] the Court stated that "the special protection accorded by the fourth amendment . . . is not extended to the open fields."[27] The Court held that the open fields approach was consistent with *Katz* because "an individual may not legitimately demand privacy for activity conducted out of doors in fields, except in the area immediately surrounding the home."[28] The bright line rule adopted in *Oliver* was contrary to the thrust of *Katz,* which rejected such an approach in favor of a case-by-case analysis. Implicitly recognizing this deviation from *Katz,* the *Oliver* majority concluded that a case-by-case approach would make it too "difficult for the policeman to discern the scope of his authority."[29]

Regardless of the wisdom of *Oliver,* it signaled a renewed significance in the curtilage doctrine when the courts face an open fields issue. If the area is found to be an open field, then the fourth amendment does not protect activities conducted therein and the two-part *Katz* analysis is unnecessary. What remained to be decided was the extent of protection the *Katz* test would provide for activities conducted within the curtilage.

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[23] *Id.* at 786. In Delaware v. Prouse, 440 U.S. 648, 654 (1979), the Court adopted Harlan's balancing formula.

[24] Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 403 (1974).

[25] *See, e.g.,* United States v. Arboleda, 633 F.2d 985 (2d Cir. 1980); People v. Sneed, 32 Cal. App. 3d 535, 541, 108 Cal. Rptr. 146, 149 (1973).

[26] 466 U.S. 170 (1984).

[27] *Id.* at 176.

[28] *Id.* at 178.

[29] *Id.* at 181.

III. *California v. Ciraolo*

A. Facts and Case History

Acting upon an anonymous telephone tip, the Santa Clara police went to the defendant's house to determine if marijuana was, in fact, growing in his backyard. The police were unable to observe the contents of defendant's backyard from ground level because of two fences that completely enclosed the yard. Later that day, the police flew over the defendant's home in a private plane for the express purpose of observing and photographing his backyard. At an altitude of 1000 feet, the police were able to observe, without visual aids, marijuana plants growing in the backyard. On the basis of this naked-eye observation, the police obtained a search warrant and seized the marijuana plants.[30]

The defendant moved to suppress the evidence based on the grounds that: (1) the warrantless aerial observation of the curtilage violated the fourth amendment; and (2) the evidence seized was the direct result of the unlawful search.[31] The trial court denied the suppression motion and the defendant pled guilty to a charge of cultivation of marijuana.[32]

The California Court of Appeals reversed on the ground that the warrantless aerial observation of the backyard violated the fourth amendment.[33] The appellate court began by distinguishing open field observations from curtilage observations. Relying on *Oliver*,[34] the court reasoned that, although an individual cannot have an expectation of privacy in an open field, he is entitled to demand privacy for activities conducted in the area immediately surrounding his home.[35] Thus, the court noted that cases upholding aerial surveillance of open fields were inapposite to the present dispute.[36] Finally, the court distinguished routine aerial patrols from police aircraft focusing on a particular home.[37] The latter violated an individual's reasonable expectation of privacy while the former may not.[38] As a result, the court concluded that the warrantless aerial observation of the defendant's backyard constituted an unreasona-

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[30] *Ciraolo*, 106 S. Ct. at 1810-11. The probable cause determination was based only on the officer's testimony about his observations. An aerial photo depicting the backyard was attached to the affidavit, but it did not support the warrant since it failed to reveal the nature of the plants. *Id.* at 1812 n.1.

[31] *See* People v. Ciraolo, 161 Cal. App. 3d 1081, 1085-86, 208 Cal. Rptr. 93, 94-95 (1984).

[32] California v. Ciraolo, 106 S. Ct. 1809, 1811 (1986).

[33] *Ciraolo*, 161 Cal. App. 3d at 1090, 208 Cal. Rptr. at 98.

[34] 466 U.S. 170 (1984).

[35] *Ciraolo*, 161 Cal. App. 3d at 1087, 208 Cal. Rptr. at 96.

[36] *Id.* at 1088-89, 208 Cal. Rptr. at 97.

[37] *Id.* at 1089, 208 Cal. Rptr. at 97-98.

[38] *Id.*

ble search and reversed the conviction.[39]

After being denied review in the California Supreme Court, the State gained review in the United States Supreme Court. The United States Supreme Court, in an opinion written by Chief Justice Burger, reversed the California appellate court.

B. United States Supreme Court

Relying on *Katz*,[40] the Supreme Court noted that a person has a constitutionally protected reasonable expectation of privacy if: (1) the individual has manifested a subjective expectation of privacy in the object of the search; and (2) the expectation is one that society is willing to recognize as reasonable.[41]

Despite asserting that the defendant clearly manifested a subjective expectation of privacy,[42] the Court nevertheless raised the issue of whether such a finding was warranted. The Court noted that "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a 2-level bus."[43] Thus, the Court reasoned that whether the defendant "manifested a subjective expectation of privacy from *all* observations of his backyard, or instead manifested merely a hope that no one would observe his unlawful gardening pursuits is not entirely clear in these circumstances."[44] Since, however, the lower court's finding was not challenged, the Court did not reach a conclusion on the issue.[45]

Turning to the second prong of the *Katz* test, the Court began by noting that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home . . . where privacy expectations are most heightened."[46] The Court, however, added that merely because the observed area is within the curtilage does not itself bar all police observation: "The Fourth Amendment . . . has never been extended to require law enforcement to shield their eyes when passing by a home on public thoroughfares."[47] Relying on *United States v. Knotts*,[48] the Court concluded that just because "an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."[49] Applying this rationale to the facts of *Ciraolo*, the Court

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[39] *Id.* at 1090, 208 Cal. Rptr. at 98.
[40] 389 U.S. 347 (1967).
[41] *Ciraolo*, 106 S. Ct. at 1811.
[42] *Id.*
[43] *Id.* at 1812.
[44] *Id.*
[45] *Id.* at 1811-12.
[46] *Id.* at 1812.
[47] *Id.*
[48] 460 U.S. 276 (1983).
[49] *Ciraolo*, 106 S. Ct. at 1812.

noted that, since anyone could observe the defendant's backyard from navigable airspace, the defendant's expectation of privacy from such observations was not one society was willing to recognize as reasonable.[50] Thus, the Court reinstated the conviction.[51]

IV. ANALYSIS

The Supreme Court's decision in *Ciraolo* reflects the Court's continuing trend toward narrowing the scope of the fourth amendment.[52] Despite utilization of the two-pronged *Katz* test, the Court's analysis is inconsistent with the spirit of *Katz*. The central premise underlying the *Ciraolo* decision is that an officer's observations from a public vantage point do not constitute a fourth amendment search. The Court bolsters this conclusion with language from *Katz*, stating that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[53] Neither of these general principles are objectionable in theory, yet a closer examination of the Court's application of these principles to *Ciraolo* reveals some deficiencies in the Court's analysis.

A. Subjective Expectation of Privacy

The Court's suggestion that the defendant might not have possessed a subjective expectation of privacy from *all* views, since a policeman perched on a double decker bus might have been able to see into the defendant's backyard, is troubling. Such logic suggests an unusually high burden for satisfying the first prong of the *Katz* test. An individual should not be required to protect against observations from vantage points not ordinarily utilized by the public. Although it is not a search for a policeman to engage in observations from a public street,[54] a neighbor's property,[55] or the "normal means of access to and egress from the house,"[56] courts have consistently held that it is a search when police resort to unusual means to gain a view of another's property.[57] *Katz* should not be interpreted as requiring an individual to take extraordinary precautions

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[50] *Id.* at 1813.
[51] *Id.*
[52] *See supra* note 5 and accompanying text.
[53] *Ciraolo*, 106 S. Ct. at 1812 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).
[54] People v. Wright, 41 Ill. 2d 170, 242 N.E.2d 180 (1968).
[55] Turner v. State, 499 S.W.2d 182 (Tex. Ct. App. 1973).
[56] Lorenzana v. Superior Court, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).
[57] *See, e.g.*, Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970) (holding it was a search for officers to climb onto a second-story trellis so they could see over the drawn curtains of defendant's hotel room).

to manifest a subjective expectation of privacy. Hopefully, the Court's hypothetical of a policeman perched on top of a double decker bus represents only an unfortunate overstatement by the Court.

Perhaps the Court intended to suggest that an individual's subjective expectation of privacy from aerial surveillance should be evaluated by his conduct *vis a vis* observations from the air (hereinafter referred to as the aerial approach). Although some courts have adopted such a view,[58] the better approach would be to use the individual's efforts to prevent observations from ground level or nearby structures as a measure of the individual's subjective expectation of privacy (hereinafter referred to as the ground-level approach).

To begin with, the overwhelming number of observations by the public of curtilage activities are made from the ground. There is no reason for a homeowner to suspect that ordinary airplane passengers are viewing his backyard activities. Thus, the ground-level approach is consistent with the view that an individual should only be required to protect against the commonly expected types of observations in order to manifest a subjective expectation of privacy from all views.[59]

Moreover, adoption of the aerial approach would eliminate the possibility of an individual ever being able to exhibit a subjective expectation of privacy from aerial observations of the outdoor activities within the curtilage. Individuals would be required to erect roofs over their yards in order to exhibit a subjective expectation of privacy from aerial observations. Such a technologically imposed change would seem contrary to the spirit of *Katz,* which sought to preserve the fourth amendment protections against developments in governmental surveillance.

B. Reasonable Expectation of Privacy

Turning to the second prong of the *Katz* test, the Court relied on the "open view" doctrine[60] as the sole basis for concluding that the defendant's subjective expectation of privacy was not one that society was willing to recognize as reasonable. Under the open view doctrine, observations of clearly visible objects made from a public vantage point do not constitute a fourth amendment search.[61] Applying this rationale to *Ciraolo,* the Court concluded the defen-

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[58] *See, e.g.,* State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977).

[59] *See supra* notes 54-57 and accompanying text.

[60] The open view doctrine should be distinguished from the plain view doctrine. The latter allows the warrantless seizure of objects if there is: (1) a valid prior intrusion; and (2) inadvertent discovery of the incriminating objects. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). The open view doctrine, however, addresses whether there has been a fourth admendment search at all, and the *Coolidge* requirements are irrelevant.

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

dant's "expectation that his garden was protected from aerial observation is unreasonable and is not an expectation that society is prepared to honor."[62]

The Court's mechanical application of the open view doctrine in *Ciraolo* represents a superficial treatment of the issues and overlooks the underlying objectives of the second prong of the *Katz* test. The Court relied solely on *United States v. Knotts*[63] as authority for applying the open view doctrine.[64] *Knotts* involved ground level surveillance of activities on public streets and is not convincing precedent for extending the open view doctrine to aerial observations of the private areas adjoining the home. An individual's privacy interest for activites conducted on a public street is ordinarily not comparable to that involved for activities conducted within the curtilage.

Despite the unpersuasiveness of *Knotts,* there are cases holding that observations into the curtilage or the interior of the home do not constitute a search if made from a public vantage point.[65] The issue arises, however, as to whether the use of aerial surveillance should distinguish *Ciraolo* from this line of cases. Surveillance from public airspace allows the police to observe many activities that probably would not otherwise be exposed to the public, whereas surveillance from the ground only allows the police to observe activities that probably have already been exposed to the public. In addition, aerial surveillance can pose new threats to a person's sense of security.[66] In short, the Court failed to fully address the extension of the open view doctrine and instead merely assumed that the doctrine should apply to aerial surveillance.

Even more troublesome is the Court's reasoning that application of the open view doctrine necessitates the conclusion that Ciraolo's expectation of privacy was not one that society is willing to recognize as reasonable. As Justice Harlan explained, the second prong of the *Katz* test should "be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."[67] The Court, however, failed to balance these competing issues, thereby overlooking the central objective of the second prong of the *Katz* test. Instead, the Court concluded that the open view doctrine, by itself, justified the conclusion that the defendant's subjective expectation of privacy was not one that society is prepared to honor.[68]

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[62] *Ciraolo,* 106 S. Ct. at 1813.
[63] 460 U.S. 276 (1983).
[64] 106 S. Ct. at 1812.
[65] *See supra* notes 54-56 and accompanying text.
[66] *See* NORML v. Mullen, 608 F. Supp. 945 (N.D. Cal. 1985). In that case, a federal court found that the use of helicopters by police to warrantlessly observe homes and curtilages "at best disturb, and at worst terrorize, the hapless residents below." *Id.* at 957.
[67] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).
[68] *Ciraolo,* 106 S. Ct. at 1813.

One need only return to the Court's decision in *Oliver* to fully appreciate the deficiencies in the *Ciraolo* Court's reasonable expectation analysis. Although the *Oliver* Court mentioned that open fields were generally open to public view, as support for its conclusion that the defendant's expectation of privacy was not one that "society recognizes as reasonable,"[69] it did not rely exclusively on this rationale. The Court also noted that "open fields do not provide the setting for those intimate activities that the [fourth amendment] is intended to shelter from government interference or surveillance" and that "[t]here is no societal interest in protecting the privacy of those activities . . . that occur in open fields."[70] Based on *all* of these reasons, the *Oliver* Court held that "the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable."[71]

In contrast, *Ciraolo* involved observation of activities occurring within the curtilage of the home. This area provides the type of setting for personal activities that the fourth amendment is intended to shelter from unreasonable governmental surveillance. Even the *Ciraolo* Court noted that individuals' privacy expectations "are most heightened" for activities occurring within the curtilage.[72] Furthermore, given the limited size of the curtilage, the law enforcement benefits derived from aerial surveillance of curtilage activities would seem to be significantly less than the benefits derived from surveillance of open fields.

In light of these circumstances, a strong argument can be made that, under the *Katz* balancing formula, an individual's expectation of privacy for curtilage activities is one that society should be prepared to recognize as reasonable. In fact, in an aerial surveillance case decided the same day as *Ciraolo,* the Court appeared to agree when it stated that "[t]he curtilage area immediately surrounding a private house has long been given protection as a place where occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept."[73] Nevertheless, the Court reached the opposite result in *Ciraolo* by relying exclusively on the mechanical application of the open view doctrine. Such jurisprudence constitutes an unwise departure from the *Katz* balancing analysis because it fails to focus on the truly significant issues at stake.

V. CONCLUSION

The Supreme Court's decision in *Ciraolo* reflects the Court's con-

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[69] Oliver v. United States, 466 U.S. 170, 179 (1984).
[70] *Id.*
[71] *Id.*
[72] *Ciraolo,* 106 S. Ct. at 1812.
[73] Dow Chemical Co. v. United States, 106 S. Ct. 1819, 1825 (1986).

tinuing trend toward narrowing the scope of the fourth amendment.[74] Individuals will no longer be able to demand privacy from naked-eye aerial observations of their outdoor activities, when the observations are made from navigable airspace,[75] even though the observed activities occur within the curtilage of the home. As police departments increasingly resort to aerial observations as a means of law enforcement, the privacy previously enjoyed for outdoor activities within the curtilage will be greatly reduced. Such a result is at odds with the spirit of *Katz,* which sought to preserve fourth amendment protections against developments in governmental surveillance.

Despite recognizing that privacy expectations "are most heightened" for activities occurring within the curtilage, the Court failed to analyze why law enforcement interests outweigh the individual's privacy interest in those activities. As a result, the Court overlooked the central thrust of the second prong of the *Katz* test. Instead, it relied exclusively on the mechanical application of the open view doctrine to the area of aerial surveillance as support for its conclusion that Ciraolo's subjective expectation of privacy was not one that society is prepared to honor. This mechanical jurisprudence has reduced the scope of the fourth amendment and ignores the importance of the curtilage doctrine with respect to aerial observations from navigable airspace.[76] If the activity is outside the curtilage, the aerial surveillance is per se constitutional under the *Oliver* open fields doctrine, and if the outdoor activity is within the curtilage, the aerial surveillance is per se constitutional under the open view doctrine as applied in *Ciraolo.*

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[74] *See supra* note 5 and accompanying text.

[75] *But see* People v. Sabo, 185 Cal. App. 3d 626, 108 Cal. Rptr. 585 (1986) (naked-eye aerial observations made from other than navigable airspace held impermissible and the rule of *Ciraolo* is not applicable to such observations).

[76] The Courts decision in *Dow Chemical Co.,* reaffirming the curtilage doctrine, was issued the same day as *Ciraolo.* 106 S. Ct. 1819 (1986). *Dow Chemical Co.,* however, is factually distinguishable from *Ciraolo* because it involved a commercial facility and the Court analogized the 2,000 acre industrial complex to an open field, while distinguishing it from homes or offices. *Id.* at 1823, 1825-26. Neither case creates a rule of law applicable to aerial observations of activities conducted within a structure.

INTERROGATIONS AND POLICE DECEPTION—*Moran v. Burbine**

I. INTRODUCTION

The United States Supreme Court recently addressed the issue of whether police officers' failure to inform a suspect of his attorney's efforts to reach him would deprive the suspect of information essential to his ability to knowingly waive his fifth amendment rights under *Miranda*.[1] The Court also considered the effect of the officers' misinforming the suspect's attorney about their plans to interrogate the suspect. Finally, the Court decided whether the officers' actions violated the suspect's sixth amendment right to counsel and fourteenth amendment guarantee of due process.[2] In *Moran v. Burbine*,[3] the Court held that the officers' conduct did not violate the suspect's fifth, sixth, or fourteenth amendment rights.[4]

In *Moran*, the police read the suspect the *Miranda* warnings and secured a waiver of these rights prior to his arraignment.[5] After being subjected to a custodial interrogation, the suspect signed a written confession.[6] Between the time the suspect was read his *Miranda* warnings and the time he signed the confession, a public defender, who was called in by the suspect's sister, telephoned the police to inquire into the status of the interrogation.[7] The attorney was informed by an unidentified officer that all interrogations had ceased and that the suspect would not be interrogated further until the next morning. In fact, police detectives continued the interrogation that evening. Furthermore, the detectives failed to inform the defendant of the attorney's efforts to contact him.[8] This Note will examine the Court's opinion in *Moran*, addressing the constitutional issues raised by the defendant and focusing on the three constitutional provisions that the Court addressed.

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* Bryan L. Wright

1 Miranda v. Arizona, 384 U.S. 436 (1966).

2 Moran v. Burbine, 106 S. Ct. 1135, 1142, 1145-48 (1986).

3 106 S. Ct. 1135 (1986).

4 *Id.* at 1145, 1147-48.

5 *Id.* at 1138.

6 *Id.* at 1139.

7 *Id.*

8 *Id.*

II. BACKGROUND

A. The Fifth Amendment Privilege Against Self-Incrimination

Miranda warnings must be given to suspects prior to custodial interrogations.[9] These judicially created warnings are procedural safeguards designed to protect a suspect's fifth amendment privilege against self-incrimination[10] during inherently coercive custodial interrogations.[11]

After receiving the *Miranda* warnings, a suspect may terminate the interrogation at any time. The interrogation must cease if the suspect indicates at any time prior to or during questioning that he wishes to remain silent, or if he indicates that he wants an attorney present.[12] The suspect may waive these rights, provided the waiver is voluntarily, knowingly, and intelligently made.[13] The government has the burden to demonstrate by a preponderance of the evidence that the suspect waived his rights.[14] Furthermore, the Court has indicated that certain types of police "trickery" against a suspect could vitiate his waiver.[15]

B. The Sixth Amendment Right to Counsel

Absent a valid waiver, a defendant has a sixth amendment right[16] to have an attorney present during interrogations occurring after the initiation of adversarial judicial proceedings.[17] Adversarial judicial proceedings commence when prosecution is undertaken by way of formal charge, preliminary hearing, indictment, information, or arraignment.[18] Once the right has attached, the police may not interfere with the efforts of the attorney to represent the defendant during the interrogation.[19]

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[9] Miranda v. Arizona, 384 U.S. 436, 467-76 (1966).

[10] 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.

[11] Prior to the initiation of questioning, police must inform a suspect of the state's intention to use his statements against him to secure a conviction. Included in the warnings are the rights to remain silent and to have an attorney present at the interrogation. The Court imposed these procedural obligations after noting that custodial interrogations are inherently coercive. *Miranda*, 384 U.S. at 467-70.

[12] *Id.* at 473-74; *see also* Edwards v. Arizona, 451 U.S. 477 (1981).

[13] *Miranda*, 384 U.S. at 475.

[14] Colorado v. Connelly, 107 S. Ct. 515, 523 (1986).

[15] *Miranda*, 384 U.S. at 476.

[16] 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.

[17] Brewer v. Williams, 430 U.S. 387, 401 (1977).

[18] *Id.* at 398 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1971)).

[19] Maine v. Moulton, 106 S. Ct. 477, 487 (1985).

C. *The Fourteenth Amendment Due Process Clause*

The due process clause of the fourteenth amendment[20] guarantees that the government will treat its citizens with fundamental fairness. In the context of custodial interrogations, the Court has held that confessions procured by means "revolting to the sense of justice" cannot be used to secure a conviction.[21] The Court has stressed that, even though the fifth amendment privilege against self-incrimination applies in the context of custodial interrogations, the Court will continue to subject confessions to the scrutiny of the due process clause.[22]

III. *Moran v. Burbine*

A. *Facts and Case History*

In *Moran*, the defendant was arrested in connection with a breaking and entering charge in Cranston, Rhode Island.[23] While the defendant was in custody, Cranston police officers obtained evidence suggesting he might have been responsible for the murder of a woman in Providence.[24] The Providence police were notified and arrived at the Cranston police headquarters at approximately 6:00 p.m. in order to question the defendant about the murder.[25]

That evening, the defendant's sister telephoned the public defender's office to obtain legal assistance for him concerning the breaking and entering charge. His sister was unaware that he was a murder suspect.[26] At 8:15 p.m., an assistant public defender telephoned the Cranston Police Department and stated that she would act as the defendant's counsel if the police intended to question him.[27] The attorney was informed the police did not intend to question the defendant until the next day and she was not informed that the Providence police were there, or that he was suspected of murder.[28] Less than one hour later, at approximately 9:00 p.m., the Providence police gave the defendant his *Miranda* warnings and questioned him about the murder.[29] The defendant signed three waivers and three confessions.[30] The defendant did not request an

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[20] The fourteenth amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.
[21] Brown v. Mississippi, 297 U.S. 278, 286 (1936).
[22] Mincey v. Arizona, 437 U.S. 385, 402 (1978).
[23] *Moran*, 106 S. Ct. at 1138.
[24] The murder occurred a few months before the breaking and entering incident. *Id.*
[25] *Id.* at 1138-39.
[26] *Id.* at 1139.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

attorney during the interrogations. He was, however, completely unaware of his sister's efforts to retain counsel for him and of the attorney's telephone call to the police station.[31]

The defendant moved to suppress the confessions. The trial court denied the motion and found that the defendant had validly waived his privilege against self-incrimination and his right to counsel.[32] The defendant was subsequently convicted of first-degree murder.[33] The Rhode Island Supreme Court affirmed the conviction, rejecting the defendant's arguments.[34]

The defendant unsuccessfully sought habeas corpus relief in federal district court.[35] The First Circuit Court of Appeals reversed, holding that the failure of the police to inform the defendant of the attorney's call had fatally tainted the waiver of his *Miranda* rights.[36] The First Circuit found it unnecessary to address the sixth and fourteenth amendment arguments and based its decision entirely upon the fifth amendment.[37] The United States Supreme Court, in an opinion written by Justice O'Connor, reversed the First Circuit's decision.[38]

B. United States Supreme Court

The Court stated a waiver of fifth amendment rights is valid as a matter of law when it has been determined "a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction."[39] The Court had no doubt that the defendant knowingly and voluntarily waived his right to remain silent and to the presence of counsel.[40] The record clearly showed the police did not resort to any sort of physical or psychological pressure to elicit the statements.[41] Additionally, the record reflected that the defendant fully comprehended his rights under *Miranda* and the potential consequences of a waiver of his rights.[42]

The defendant argued he was deprived of knowledge essential to make a knowing and intelligent waiver because he was not informed of his attorney's efforts to contact him and because the police mis-

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[31] *Id.*
[32] State v. Burbine, 451 A.2d 22, 24 (R.I. 1982).
[33] *Id.* at 22.
[34] *Id.* at 31.
[35] Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984), *rev'd*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).
[36] Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).
[37] 753 F.2d at 178.
[38] *Moran*, 106 S. Ct. at 1148.
[39] *Id.* at 1142.
[40] *Id.* at 1141.
[41] *Id.*
[42] *Id.*

informed his attorney.[43] The Court reasoned that a person's capacity to comprehend and knowingly waive a constitutional right cannot depend upon events which are unknown to him and which occur outside of his presence.[44]

Although the *Miranda* decision noted that certain types of police "trickery" could vitiate an otherwise valid waiver,[45] the *Moran* Court reasoned that the failure to inform the defendant of his attorney's telephone call was not the sort of "trickery" anticipated in the *Miranda* decision. Similarly, misinforming the defense attorney about the continuation of the interrogation was not the sort of "trickery" that would vitiate the waiver.[46] The majority opinion did not elucidate the types of police "trickery" that might be sufficient to vitiate a waiver.

The Court further determined that the state of mind of the police in dealing with the defendant and his attorney was irrelevant to whether the defendant intelligently waived his *Miranda* rights. The Court stated that "even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident."[47] Although the act of deliberately withholding information from a suspect is "objectionable as a matter of ethics," such conduct will affect the constitutional validity of the suspect's waiver of his fifth amendment rights only if "it deprives a [suspect] of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[48]

The Court reaffirmed that *Miranda* warnings are not themselves constitutional rights, but rather, are measures to ensure that the suspect's right against compulsory self-incrimination is protected. Thus, their objective is not to mold police conduct or mandate a police code of behavior wholly unconnected to any federal right.[49]

The Court next considered the defendant's alternative argument that *Miranda* should be extended to prohibit the police officers' deceptive conduct. Relying on policy considerations, the Court rejected a proposed requirement that police inform a suspect of an attorney's efforts to reach him. The Court relied heavily upon "[o]ne of the principal advantages"[50] of the *Miranda* warnings—the "ease and clarity of its application."[51] The Court believed that the defendant's proposed modification would spawn numerous new legal questions[52] and would undermine the decision's central

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[43] *Id.*
[44] *Id.*
[45] *Miranda*, 384 U.S. at 476.
[46] *Moran*, 106 S. Ct. at 1142.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1143.
[50] *Id.* (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).
[51] *Id.*
[52] The Court listed some legal questions which might arise if it were to adopt a rule requiring that the police inform a suspect that an attorney has been retained on his behalf.

"virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."[53]

In addition to the problem of clarity in the application of the *Miranda* warnings, the Court reasoned that extending *Miranda* to require the police to inform a suspect of an attorney's efforts to reach him would work a "substantial" and "inappropriate shift in the subtle balance struck in that decision."[54] Competing concerns are present in every custodial interrogation. The court must weigh "the need for police questioning as a tool for effective enforcement of criminal laws"[55] against the inherently coercive atmosphere of custodial interrogations.[56]

The *Moran* Court noted that the *Miranda* Court, while attempting to establish a balance of these competing concerns, failed to adopt the more extreme position proposed by the American Civil Liberties Union, which would have required the actual presence of an attorney at every custodial interrogation in order to dispel the inherent coercion.[57] Instead, the *Miranda* Court struck a balance that allows police to continue an interrogation as long as a suspect clearly understands the rights he is waiving.[58]

The *Moran* Court apparently believed that extending *Miranda* in any manner would serve to destabilize the balance struck between society's need to capture and convict criminals and an individual's right to be free of coercion in custodial interrogations. In the Court's opinion, "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."[59] The Court stated that "a rule requiring the police to inform a suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all,"[60] and further stated it "would come at a substantial cost to society's legitimate

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For example, the Court questioned:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?

Id.

[53] *Id.* at 1143-44 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)).

[54] *Id.* at 1144.

[55] *Id.* (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

[56] The Court has previously recognized that custodial interrogations are inherently coercive, creating a substantial risk that police officers will inadvertently cross the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Id.* at 1144 (citing New York v. Quarles, 467 U.S. 649 (1984)).

[57] *Id.*

[58] *Id. See also* Edwards v. Arizona, 451 U.S. 477, 482 (1981); *Miranda*, 384 U.S. at 474.

[59] *Moran*, 106 S. Ct. at 1144.

[60] *Id.*

and substantial interest in securing admissions of guilt."[61]

IV. ANALYSIS

A. The Fifth Amendment

The *Miranda* Court recognized the inherently coercive atmosphere surrounding custodial interrogations, stating "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[62] The government has the burden of proving the validity of a waiver of *Miranda* rights[63] and should not be able to meet this burden when they have withheld information from the suspect[64] regarding the attorney's attempt to contact him.[65]

The *Moran* decision is contrary to prior decisions of most state courts that have considered this issue.[66] The Court thus rejected many carefully reasoned state decisions that have come to the opposite conclusion.[67] The majority's opinion also clearly disregards the American Bar Association's Standards for Criminal Justice,[68] which recommend that a person in custody should be placed in communication with a lawyer at the earliest possible opportunity.[69] The majority rejected this position in spite of the American Bar Association's expressed concerns about the potential effect of a contrary rule in police stations around the country.[70]

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[61] *Id.*

[62] *Miranda*, 384 U.S. at 455.

[63] "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Id.* at 475; *see also* Brewer v. Williams, 430 U.S. 383, 404 (1977).

[64] This Note does not examine the police officers' misinforming the attorney under the fifth amendment because *Miranda* is designed to guard against violations of the suspect's rights and not against violations of the attorney's rights.

[66] Since the Court's decision in *Moran*, some state courts have failed to follow its rationale. *See, e.g.*, People v. Holland, 147 Ill. App. 3d 323, 497 N.E.2d 1230 (1986) (the Illinois Supreme Court's holding in People v. Smith, 93 Ill. 2d 179, 442 N.E.2d 1325 (1982), that police have a duty to inform a defendant undergoing custodial interrogation when an attorney is seeking to advise him, and that any confession obtained must be suppressed if they fail to do so, remains good law under state constitution); *see also* People v. Houston, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (a suspect who has waived his *Miranda* rights must be allowed to reconsider if his attorney shows up at the place of interrogation and offers assistance, and the police must interrupt the interrogation and ask the suspect whether or not he wants to confer with his attorney, and they may not deliberately mislead or delay the attorney in his efforts to reach the client).

[66] *See Moran*, 106 S. Ct. at 1159 (Stevens, J., dissenting).

[67] The American Bar Association has summarized the relevant state case law on this subject. *See id.* at 1151 n.10.

[68] *Id.* at 1151.

[69] *Id.* at 1151-52 n.11 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 5-7.1 (2d ed. 1980)).

[70] *Id.* at 1152.

Prior to the *Moran* decision, the Supreme Court of Oregon was one of the state courts to have reached an opposite conclusion on this issue.[71] In *State v. Haynes*,[72] the Oregon court held that the prosecution cannot use a suspect's statements obtained during a custodial interrogation after the police, but not the suspect, knew that an attorney sought to consult with him.[73] Before the police may proceed with the interrogation, the suspect "must be informed when counsel actually seeks to consult with him and must voluntarily and intelligently have rejected that opportunity."[74] The court reasoned that "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice."[75] Perhaps what the *Moran* Court feared was that suspects will exercise their fifth amendment privilege against self-incrimination after consulting with an attorney.[76] The Court has previously stated, however, that "[n]o system worth preserving should have to *fear* that if an accused is permitted to consult with his lawyer, he will become aware of, and exercise, these rights."[77]

The majority's alternative cost-benefit analysis[78] reflects the Court's fear that an individual may exercise his rights. In previous cases, however, the Court has favored protecting the interest in individual liberty when threatened by incommunicado interrogation. The *Miranda* Court "apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege."[79]

Adoption of a rule requiring police to inform a suspect that an attorney has been retained for him would not destroy the balance achieved by the Court in the *Miranda* decision. Such a rule need not go so far as to require that counsel be present in every custodial interrogation. The suspect would still retain the discretion to proceed without the assistance of counsel. Additionally, the rule would have a limited application because it would only apply to those situations in which the police are aware that an attorney has been retained for the suspect.

By determining that police may deliberately withhold information from a suspect,[80] the Court is promoting deceptive law enforce-

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[71] State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).
[72] *Id.*
[73] *Id.* at 61, 602 P.2d at 273.
[74] *Id.*
[75] *Id.* at 72, 602 P.2d at 278.
[76] The majority admitted that "[n]o doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess." *Moran*, 106 S. Ct. at 1142.
[77] Escobedo v. Illinois, 378 U.S. 478, 490 (1964).
[78] *See supra* notes 54-61 and accompanying text.
[79] New York v. Quarles, 467 U.S. 649, 656-57 (1984).
[80] *See Moran*, 106 S. Ct. at 1142.

ment practices.[81] The Court reasoned that, although "objectionable as a matter of ethics," such conduct will affect the constitutional validity of the suspect's waiver of his fifth amendment rights only if "it deprives a [suspect] of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[82] Under this rationale, police may deliberately choose not to inform the suspect about the retention of counsel. The net result is that police are free to deceive suspects in order to carry on inherently coercive incommunicado interrogations.

B. The Sixth Amendment

Absent a valid waiver, a defendant has a sixth amendment right to the presence of an attorney during any interrogation occurring after adversarial judicial proceedings have commenced.[83] In *Moran*, the interrogations occurred before the initiation of adversarial judicial proceedings.[84]

The defendant, nevertheless, argued that, although adversarial judicial proceedings had not commenced, the "right to the noninterference with an attorney's dealing with a criminal suspect . . . arises the moment that the relationship is formed."[85] The Court rejected this theory and found that as a clear matter of precedent, its decisions "foreclose any reliance on . . . the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings."[86]

The *Moran* Court correctly disposed of the defendant's sixth amendment arguments. Since adversarial judicial proceedings had not yet commenced against the defendant, his sixth amendment rights had not attached at the time in question. Since his rights had not yet attached, he had no basis to argue that they were violated.

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[81] "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo*, 378 U.S. at 489 (citations omitted); *see also* Haynes v. Washington, 373 U.S. 503, 519 (1962) ("Official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement."); Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . .") (quoting Spano v. New York, 360 U.S. 315, 320-21 (1959)).

[82] *Moran*, 106 S. Ct. at 1142.

[83] Brewer v. Williams, 430 U.S. 387, 401 (1977).

[84] Adversarial judicial proceedings commence when prosecution is undertaken by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Moran*, 106 S. Ct. at 1145 (quoting United States v. Gouveia, 467 U.S. 180, 187 (1984)).

[85] *Id.*

[86] *Id.*

C. *The Fourteenth Amendment*

The defendant challenged the police officers' conduct under the due process clause of the fourteenth amendment, focusing on their communicating false information to his attorney.[87] The Court dismissed the claim, stating merely that "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the states."[88] The Court noted, however, that "on facts more egregious than those presented here police deception might rise to a level of a due process violation."[89]

The summary disposition of the due process issue is unusual. Without analysis, the Court simply stated that its conscience was not shocked. Prior Supreme Court decisions, however, have given more careful consideration to the requirements of due process.[90] The Court in *Moran* should have given the same careful consideration to this issue.

V. CONCLUSION

In *Moran*, the Court addressed police officers' withholding of information from a suspect concerning an attorney's efforts to contact him, and officers' misinforming the attorney about the continuation of interrogations, under the fifth, sixth, and fourteenth amendments. The sixth amendment right to counsel issue was correctly disposed of in *Moran* because adversarial judicial proceedings had not yet commenced at the time in question.[91] The Court, however, should continue to measure confessions against due process requirements as it has previously done, and not as it did in *Moran*.[92] Finally, the fifth amendment privilege should be interpreted to require police to inform a suspect that an attorney has been retained for him.[93]

Adoption of a rule that police must inform a suspect of the retention of counsel for him would not destroy the balance achieved by the Court in *Miranda*. Furthermore, such a rule would also be consistent with the decisions of most of the states that have considered this issue. By determining, however, that police may deliberately withhold information from a suspect, the Court is promoting deceptive law enforcement practices.

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[87] *Id.* at 1147.
[88] *Id.* at 1148.
[89] *Id.* at 1147.
[90] *See, e.g.*, Wainwright v. Greenfield, 106 S. Ct. 634 (1986) (use of petitioner's post-arrest, post-*Miranda* warnings silence as evidence of his sanity violated due process).
[91] *See supra* notes 83-86 and accompanying text.
[92] *See supra* notes 87-90 and accompanying text.
[93] *See supra* notes 62-82 and accompanying text.

THE THREATENED FUTURE OF PEREMPTORY CHALLENGES—*Batson v. Kentucky**

I. INTRODUCTION

The United States Supreme Court has rendered numerous decisions in its effort to eliminate racial discrimination from the selection of juries.[1] In *Strauder v. West Virginia*,[2] an 1879 case, the Supreme Court first considered racial discrimination in jury composition. The Court held in *Strauder* that a black defendant was denied his fourteenth amendment right of equal protection when he was tried before a jury from which members of his race were purposefully excluded by statute.[3]

The next major decision in this area was in 1965, when the Court, in *Swain v. Alabama*,[4] announced a "systematic exclusion" test. The test provided that, to prove a violation of a defendant's right to equal protection, the defendant had the burden of showing that the prosecutor systematically used peremptory challenges over a period of time to exclude blacks from the jury.[5] Lower courts strictly interpreted the *Swain* "systematic exclusion" requirement,[6] and defendants found the burden virtually impossible to satisfy.[7]

Two federal appellate courts responded to the defendant's unwieldy burden by reasoning that the *Swain* rule did not apply to the fair cross-section requirement of the sixth amendment.[8] Other courts declined to adopt this theory and strictly followed the *Swain* requirements.[9]

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* M. Christine Cattaneo

[1] The Supreme Court has consistently held that defendants are denied equal protection if they are indicted by a grand jury or tried by a petit jury from which members of their race have been excluded. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Texas, 177 U.S. 442 (1900); Neal v. Delaware, 103 U.S. 370 (1880); Strauder v. West Virginia, 100 U.S. 303 (1879).

[2] 100 U.S. 303 (1879).

[3] *Id.* at 310.

[4] 380 U.S. 202 (1965).

[5] *Id.* at 222-24.

[6] *See, e.g.*, United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982); United States v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971); Jackson v. State, 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

[7] *See, e.g.*, McCray v. Abrams, 750 F.2d 1113, 1120 n.2 (2d Cir. 1984).

[8] Brooker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).

[9] *See, e.g.*, United States v. Childress, 715 F.2d 1313, 1318 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); United States v. Whitfield, 715 F.2d 145, 146-47 (4th Cir. 1983).

In *Batson v. Kentucky*,[10] the Court addressed the discord regarding the requirements for a successful appeal based on the alleged discriminatory use of peremptory challenges. The *Batson* Court modified *Swain* by allowing the defendant to establish a prima facie case of discrimination in the exercise of peremptory challenges without going beyond the facts of his case.[11] This Note will review the Court's decisions in peremptory challenge cases and assess the *Batson* decision with respect to the principles enumerated in earlier cases.

II. HISTORY

A. Discrimination in Jury Selection

Discrimination in petit jury selection may occur during three distinct phases,[12] when: (1) the legislature establishes juror qualifications; (2) qualified individuals are selected for the master jury list; and (3) the petit jury panel (venire) is selected from the master list[13] through the exercise of peremptory challenges.[14]

The first time the Court addressed a jury selection discrimination issue, it struck down a West Virginia law depriving defendants of equal protection in the first phase of the process.[15] In *Strauder v. West Virginia*,[16] the challenged statute provided that "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ."[17] The statute deprived the defendant of equal protection under the fourteenth amendment[18] through its exclusion of black men.[19] States complied with *Strauder* by including black citizens on the list of potential jurors. In some states, however, their names were marked or listed separately so the names of black and white individuals were readily distinguishable.[20] Thus, although *Strauder* remedied discrimination in the first phase, controversy arose when all-white juries were selected as a result of abuse in the second phase.

Responding to abuse in the second phase of the selection process,

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[10] 106 S. Ct. 1712 (1986).

[11] *Id.* at 1723.

[12] *See* Recent Development, *Racial Discrimination in Jury Selection—Limiting the Prosecutor's Right of Peremptory Challenges to Prevent a Systematic Exclusion of Blacks from Criminal Trial Juries*, 41 ALB. L. REV. 623, 624 (1977).

[13] *Id.*

[14] *See id.*

[15] *Strauder*, 100 U.S. at 303.

[16] 100 U.S. 303 (1879).

[17] *Id.* at 305.

[18] *Id.* at 310.

[19] Women were not yet eligible to vote in 1880, so only race became an issue. The statute specified "white" males, thereby excluding blacks. *Id.*

[20] *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972); Arnold v. North Carolina, 376 U.S. 773 (1964); Avery v. Georgia, 345 U.S. 559 (1953).

the Court noted that the Constitution requires courts to look beyond the statutes to actual procedures used in excluding persons from the venire.[21] The Court found unconstitutional the practice of listing potential jurors by race.[22] As a result, blacks were included in the venire, however, they could still be struck by the prosecutor's exercise of peremptory challenges. Discrimination had, therefore, been effectively banned in the first two stages of jury selection, but it still remained a potential problem in the third.

Prospective jurors may be removed from the venire in the third stage by two types of challenges, which are available to both the prosecution and the defense. The first, challenges "for cause," are used under specified circumstances that indicate the juror would probably be biased.[23] The second, peremptory challenges, have been recognized as an important defense tool,[24] although nothing in the United States Constitution requires Congress or the states to provide for their use.[25] This challenge allows attorneys to eliminate those individuals they believe might be partial, but who are not articulably "biased" for purposes of a "for cause" challenge. The goal of peremptory challenges is to ensure an impartial jury.[26]

Traditionally, peremptory challenges have not required a stated reason or inquiry and were not subject to the court's control.[27] The challenge was exercised "for any reason at all, as long as that reason is related to [the attorney's] view concerning the outcome" of the case.[28] Attorneys were allowed independent discretion because it was often difficult to know or verbalize their belief that an individual may be biased. They were not required to state any reason for exercising the peremptory challenge, therefore, it provided means to discriminate. When systematically used, the peremptory challenge became a tool "capable of obstructing the sixth amendment's guarantee of an impartial jury,"[29] the very problem it was designed to eliminate.[30] Such use also deprived the defendant of equal protection.[31]

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[21] Norris v. Alabama, 294 U.S. 587, 589 (1935); *see also* Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).

[22] *See Alexander*, 405 U.S. at 630; *Arnold*, 376 U.S. at 774; *Avery*, 345 U.S. at 562.

[23] *See* Swain v. Alabama, 380 U.S. 202, 220 (1965).

[24] Pointer v. United States, 151 U.S. 396, 408 (1894).

[25] *See* Stilson v. United States, 250 U.S. 583, 586 (1919); *see also* McCray v. Abrams, 750 F.2d 1113, 1130 (2d Cir. 1984).

[26] An impartial jury is one that reaches its decision based on the evidence, rather than on subjective bias. *Swain*, 380 U.S. at 219.

[27] Hayes v. Missouri, 120 U.S. 68, 70 (1887).

[28] United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976).

[29] Brooker v. Jabe, 775 F.2d 762, 771 (6th Cir. 1985).

[30] *Id.* In an ideal situation, the peremptory challenge will be exercised by both sides to eliminate those individuals thought to be partial to the other side. The resulting jury will then be composed of the least biased prospective jurors.

[31] *See Swain*, 380 U.S. at 204.

B. The Equal Protection Ban on Discrimination

The Supreme Court attempted to dissuade the discriminatory use of peremptory challenges on equal protection grounds in *Swain v. Alabama*.[32] The Court held that the defense has the burden of proving that the prosecutor's abuse of peremptory challenges violated equal protection.[33] Under *Swain*, the presumption is that "the prosecutor is using the State's challenges to obtain a fair and impartial jury,"[34] and "[t]he presumption is not overcome . . . by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."[35] The Court, however, noted in *Swain*:

> [W]hen the prosecutor, in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.[36]

These guidelines developed into a strict set of requirements, with the burden on the defense to show long-term, systematic discrimination in the exercise of peremptory challenges.[37] Few defendants were able to prove discrimination under the *Swain* interpretation,[38] therefore, some state courts began to explore ways to circumvent the strict requirements.[39]

C. The Response to Swain

Courts, finding the *Swain* equal protection guidelines burdensome for the defendant, turned to the fair cross-section requirement. Although a defendant is not entitled to have members of his race represented on the grand or petit juries,[40] the sixth amendment entitles a defendant to a jury drawn from a representative cross-section of the community.[41] In *Duncan v. Louisiana*,[42] decided three years after *Swain*, the Court held that the sixth amendment right to a jury

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[33] 380 U.S. 202 (1965).
[33] *See id.* at 226.
[34] *Id.* at 222.
[35] *Id.*
[36] *Id.* at 223.
[37] *See, e.g.*, United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982).
[38] *See* McCray v. Abrams, 750 F.2d 1113, 1120 n.2 (2d Cir. 1984).
[39] *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).
[40] Martin v. Texas, 200 U.S. 316, 317 (1906).
[41] *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
[42] 391 U.S. 145 (1968).

trial is binding on the states through the fourteenth amendment.[43] Seven years later, in *Taylor v. Louisiana*,[44] the Court held that a fair cross-section of the community on venires, panels, or lists from which the petit jury is drawn, is essential under the sixth amendment.[45]

Two federal appellate courts and some state courts found the *Duncan* and *Taylor* decisions helpful in avoiding the strict requirements of *Swain*. These courts held that the use of peremptory challenges to strike black jurors in a particular case violated the sixth amendment.[46] Thus, they were able to avoid the *Swain* standards.

In *McCray v. Abrams*,[47] for example, the Second Circuit Court of Appeals noted that it could not decide the case on equal protection principles, but that *Swain* did not immunize peremptory challenges from all other federal constitutional inquiry.[48] The *McCray* court also pointed out that the sixth amendment right to an impartial jury differs from equal protection because it exists in all criminal prosecutions, and can be violated and successfully challenged on the basis of actions in a particular case.[49] Justices Marshall and Brennan dissented from the Court's denial of certiorari in *McCray* on the basis that *Swain* was decided before the sixth amendment was applied to the states through the fourteenth amendment.[50]

In *Brooker v. Jabe*,[51] the Sixth Circuit Court of Appeals noted that, although it disagreed with *Swain*, it was required to follow the Supreme Court's authority.[52] The court also pointed out, however, that because the sixth amendment was not applicable to the states at the time *Swain* was decided, *Swain* does not exempt peremptory challenges from review under the sixth amendment.[53] The *Brooker* court, concerned about the use of peremptory challenges in the composition of the petit jury, noted that the resulting jury may be biased.[54] An impartial jury guards against the exercise of arbitrary power and maintains public confidence in the fairness of the crimi-

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[43] *Id.* at 149.

[44] 419 U.S. 522 (1975).

[45] *Id.* at 526, 530.

[46] *See, e.g.*, Brooker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984). The Supreme Courts of California and Massachusetts paved the way for the *Brooker* and *McCray* decisions by finding that their state constitutions prohibited the use of peremptory challenges to exclude members of racial, ethnic, and religious groups from the jury. *See* People v. Wheeler, 22 Cal. 3d 258, 283, 583 P.2d 748, 766, 148 Cal. Rptr. 890, 907 (1978); Commonwealth v. Soares, 377 Mass. 461, 491, 387 N.E.2d 499, 518, *cert. denied*, 444 U.S. 881 (1979).

[47] 750 F.2d 1113 (2d Cir. 1984).

[48] *Id.* at 1124.

[49] *Id.* at 1130-31.

[50] McCray v. New York, 461 U.S. 961, 967 (1983) (Marshall & Brennan, JJ., dissenting).

[51] 775 F.2d 762 (6th Cir. 1985).

[52] *Id.* at 767.

[53] *Id.* The Court applied the sixth amendment to the states in 1968. *Duncan*, 391 U.S. at 149. *Swain* was decided three years earlier in 1965.

[54] *Brooker*, 775 F.2d at 771.

nal justice system.[55] The *Brooker* court concluded that, "not only the jury list and the members of the venire, but also each individual criminal petit jury must be the product of selection methods that provide a fair possibility for obtaining a representative cross-section of the community."[56]

The California courts also chose to circumvent the *Swain* rule. In *People v. Wheeler*,[57] the California Supreme Court stated that challenging group members because of fear of their bias frustrates the main goal of the fair cross-section requirement.[58] Although the defendant is not entitled to a jury that reflects the proportional racial make-up of society,[59] the defendant is entitled to demand that the state not deliberately and systematically deny members of his race the right to participate as jurors.[60] Excluding group members upsets the demographic balance and frustrates the purpose of the cross-section requirement—"to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences."[61]

The *Brooker* and *Wheeler* courts set forth tests, similar to the one later adopted in *Batson*, under which the court must first presume that both the prosecuting and defense attorneys are exercising the peremptory challenges in a nondiscriminatory manner.[62] The party asserting the improper use of the peremptory challenges must establish a prima facie case that a cognizable community group was excluded. Further, the party must demonstrate a substantial likelihood that the challenges leading to exclusion were made on the basis of the prospective juror's group affiliation, rather than on his ability to decide the case on the basis of evidence presented.[63] Once these have been shown, the burden shifts. If the other party cannot rebut the allegations, the court must declare a mistrial and quash the jury.[64] The *Brooker* and *Wheeler* decisions helped lay the groundwork for *Batson*, although the Supreme Court decided *Batson* on equal protection grounds,[65] not on the issue of the defendant's right to trial by an impartial jury.

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[55] *Id.* at 770.

[56] *Id.* at 770-71.

[57] 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[58] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

[59] Akins v. Texas, 325 U.S. 398, 403 (1945) (quoting Virginia v. Rives, 100 U.S. 313, 322-23 (1880)); *see also* Thomas v. Texas, 212 U.S. 278, 282 (1909).

[60] *See* Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972).

[61] *Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

[62] *See Brooker*, 775 F.2d at 772; *Wheeler*, 22 Cal. 3d at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904.

[63] *See Brooker*, 775 F.2d at 773; *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

[64] *See Brooker*, 775 F.2d at 773; *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

[65] *Batson*, 106 S. Ct. at 1716 n.4.

III. *Batson v. Kentucky*

A. Facts and Case History

Batson, a black defendant, was indicted in Kentucky for second-degree burglary and receipt of stolen goods. The prosecutor exercised his peremptory challenges to strike each of the four black persons from the venire, and an all-white jury resulted. The defense moved to discharge the jury before it was sworn on the ground that the removal of the black veniremen violated the defendant's rights to a jury drawn from a fair cross-section of the community under the sixth and fourteenth amendments, and to equal protection under the fourteenth amendment. The trial court denied the motion, reasoning that the cross-section requirement applied only to the selection of the venire and not to the selection of the petit jury.[66]

After being convicted by the jury on both counts, the petitioner urged the Supreme Court of Kentucky to hold that the prosecutor's use of the peremptory challenges violated his right to a jury drawn from a cross-section of the community.[67] The defendant conceded that *Swain* foreclosed an equal protection claim due to the lack of a long "pattern" of discriminatory conduct, but contended that a sufficient "pattern" existed in his case alone.[68] The Supreme Court of Kentucky affirmed the convictions, refusing to adopt the "fair cross-section" decisions of other states.[69] The United States Supreme Court, in an opinion written by Justice Powell, reversed the convictions.[70]

B. United States Supreme Court

The Court's majority announced the rule that, in order to establish an equal protection violation, it is sufficient for the defendant to show that the prosecutor discriminatorily used peremptory challenges in the defendant's particular case.[71] The Court decided the case on equal protection grounds,[72] noting that a state's privilege to strike individual jurors with peremptory challenges is subject to equal protection requirements.[73] The Court declined, however, to

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[66] *Id.* at 1715.

[67] *Id.* He also urged them to find a violation under section 11 of the Kentucky Constitution. *Id.*

[68] *Id.*

[69] *Id.* at 1715-16.

[70] *Id.* at 1725.

[71] *Id.* at 1723.

[72] *Id.* at 1716 n.4. Batson's attorney relied on the sixth amendment, not equal protection. *See id.* at 1731 (Burger, C.J., dissenting).

[73] *Id.* at 1718. In Hill v. Texas, 316 U.S. 400 (1942), the Court noted that the fourteenth amendment protects the defendant throughout the proceedings. *Id.* at 406. That

decide whether the Constitution limits the defense counsel's exercise of peremptory challenges.[74]

Recognizing the lower court interpretations of *Swain*, requiring proof of long-term, systematic exclusion to establish an equal protection violation, the Court reasoned this interpretation placed a "crippling burden of proof" on defendants.[75] The *Batson* rule is designed to relieve this burden. To support its new rule, requiring evidence only from the defendant's case, the Court relied on one of its earlier cases that had found a prima facie case of purposeful discrimination in the composition of the venire from which the jury was drawn.[76] Evidentiary requirements that " 'several must suffer discrimination' before one could object . . . would be inconsistent with the promise of equal protection to all."[77] The Court then listed the facts the defendant must show to establish a prima facie case of purposeful discrimination in the selection of the petit jury.[78]

Under *Batson*, the defendant must first establish he is a "member of a cognizable racial group," and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire.[79] The Court noted that the defendant may rely on the fact that peremptory challenges permit "those to discriminate who are of a mind to discriminate,"[80] and that proof of systematic exclusion might raise an inference of purposeful discrimination.[81] "Finally, the defendant must show that these facts and any other relevant circumstances [if any] raise an inference that the prosecutor used [the peremptory challenges] to exclude the veniremen from the petit jury on account of their race."[82]

If the defendant establishes a prima facie case, the burden shifts to the state to present a neutral explanation for eliminating the black jurors.[83] The Court stated that the prosecutor's explanation need not be as precise as the justification required for challenges "for cause." It is not enough, however, for the prosecutor to simply state that in his opinion the individuals he excused would have been partial to the defendant because of their race.[84] The Court re-

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includes challenging potential jurors. "[T]he State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Batson*, 106 S. Ct. at 1727-28 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[74] *Batson*, 106 S. Ct. at 1718 n.12. This issue was not properly before the Court.

[75] *Id.* at 1720-21.

[76] *Id.* at 1722. *See* Whitus v. Georgia, 385 U.S. 545 (1967); *see also* Castaneda v. Partida, 430 U.S. 482 (1977); Washington v. Davis, 426 U.S. 229 (1976); Alexander v. Louisiana, 405 U.S. 625 (1972).

[77] *Batson*, 106 S. Ct. at 1722 (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting)).

[78] *Id.* at 1723.

[79] *Id.*

[80] *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[81] *Id.*

[82] *Id.* The court advised the trial courts to examine all relevant circumstances in deciding whether a defendant has made a sufficient showing. *Id.*

[83] *Id.*

[84] *Id.*

manded the case for further proceedings consistent with its opinion.[85]

Four concurring opinions, in which five justices participated, were filed in *Batson*;[86] two justices dissented.[87] In his concurring opinion, Justice Marshall cited the dissent in *Swain* that stated: "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."[88] Although he concurred, Justice Marshall would abolish the challenge completely for both the state and the defendant rather than attempt to limit discrimination by specifying rules which people "of a mind to discriminate" can circumvent.[89]

IV. ANALYSIS

The *Batson* decision is consistent with the Court's holding in *Village of Arlington Heights v. Metropolitan Housing Corp.*[90] One of the most important propositions articulated in *Arlington Heights* was that an equal protection violation does not require a consistent pattern of racial discrimination.[91] Rather, a single act is not "immunized by the absence of such discrimination in the making of other comparable decisions."[92]

In meeting the requirements for establishing equal protection violations based on racial discrimination, the first step for the defendant is that he must be a member of a "cognizable racial group," and the prosecutor must have used peremptory challenges to excuse members of that group from his jury.[93] This step is a significant change from the proposition announced in the *Swain* line of cases. The *Swain* Court noted that deliberately denying blacks the right to participate as jurors violated equal protection,[94] yet the decision allowed the prosecutor in any given case to exclude blacks if he thought that they would be partial to the black defendant, even if that belief was based on their shared race.[95] This type of activity

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[85] *Id.* at 1725.

[86] Justices White, Marshall, Stevens, Brennan and O'Connor concurred with the majority opinion.

[87] Chief Justice Burger and Justice Rehnquist dissented.

[88] *Batson*, 106 S. Ct. at 1726, 1728 (Marshall, J., concurring) (quoting *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting)).

[89] *See id.* at 1729.

[90] 429 U.S. 252 (1977).

[91] *Id.* at 266 n.14.

[92] *Id.*

[93] *Batson*, 106 S. Ct. at 1723.

[94] *Swain*, 380 U.S. at 203-04.

[95] *Id.* at 220-22. The *Swain* Court felt that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge." *Id.* at

was actually insulated from inquiry because the peremptory challenges exercised in a particular case were presumed valid.[96]

Batson, on the other hand, specifically holds that the prosecutor may not rebut the defendant's prima facie case merely by explaining that he challenged the jurors on his intuition or his assumption that they would be partial to the defendant because of their shared race.[97] "The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race."[98] Although the Court has altered its position, it downplays this change by stating in the first line of the opinion that it will "reexamine" the *Swain* decision only with respect to the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection" by the state's use of the peremptory challenge.[99] The inconsistent aspects of *Swain* are overruled in a footnote.[100] In addition to lessening the defendant's evidentiary burden, the Court abandoned a fundamental principle of peremptory challenges—that they may be exercised without a stated reason.[101] Thus, the Court has severely limited the prosecution's ability to challenge jurors. The prosecutor must now state a reason for peremptory challenges on the record once the defendant makes a prima facie showing that they were based on racial grounds.[102]

The Court provides few guidelines for the adequate responses. The reason stated need not rise to the level of specificity required for challenges "for cause," but the prosecutor may not rebut the discrimination claim by merely stating that he did not have discriminatory motives, or that he used good faith.[103] The Court has opened the door to a grey area. In many situations, prosecutors may have a difficult time justifying their decisions to exercise peremptory challenges. The trial court may have to question them until they give an acceptable explanation. This may prompt some prosecutors to come up with a set of "canned" responses.

Courts will also need to determine the steps to be followed after a defendant's timely objection. The *Batson* Court specifically declined to rule on this issue because of the "variety of jury selection practices followed in our state and federal trial courts."[104] Courts will probably require the prosecutor to come forward on the record with evidence of acceptable reasons.

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[96] *Id.* at 222.

[97] *Batson*, 106 S. Ct. at 1723.

[98] *Id.*

[99] *Id.* at 1714.

[100] *Id.* at 1725 n.25.

[101] *Swain*, 380 U.S. at 220.

[102] *Batson*, 106 S. Ct. at 1723.

[103] *Id.*

[104] *Id.* at 1724 & n.24.

Furthermore, when an individual court finds a violation, it will need to determine whether to dismiss the venire and select a new jury from a new panel, or to disallow the discriminatory challenges and continue with those jurors reinstated.[105]

Judges should require attorneys to exercise peremptory challenges at a side bar. This practice would allow the defense attorney to immediately raise and discuss the issue of discrimination before the court without alerting the potential jurors. If the court finds a prima facie case of discrimination and the prosecutor cannot adequately rebut it, the court could disallow the challenge. This procedure would save time and allow the court to continue with jury selection without being required to select the jury from a new venire.

Batson applies only to race discrimination.[106] It should, however, be extended to other identifiable groups. The Court in *Swain* noted that the "constitutional command forbidding intentional exclusion . . . applies to any identifiable group in the community which may be the subject of prejudice."[107] In *Hernandez v. Texas*,[108] the Court recognized that, because community prejudices change, when the existence of a distinct "class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."[109] The California courts, since the *Wheeler* fair cross-section decision, have found Hispanics[110] and black females[111] to constitute cognizable groups. The equal protection clause is still violated if women or members of a religion or some other constitutionally protected class are intentionally excluded.

The limitation on the acceptable grounds for exercising peremptory challenges is fair only if it is to be equally applied to both the prosecution and the defense. "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' "[112] If peremptory challenges continue to be abused, the Court may be forced to eliminate the peremptory challenge in order to protect defendants and society from discrimination. Further, if the peremptory challenge is taken from the prosecution, fairness would mandate that it be taken from the defense. The defendant would ultimately be harmed more than the

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[105] *Id.*

[106] *Id.* at 1723. The Court requires the defendant to show that he is a member of a cognizable *racial* group, not just a cognizable group. *Id.*

[107] *Swain*, 380 U.S. at 205 (citing Hernandez v. Texas, 347 U.S. 475 (1954)).

[108] 347 U.S. 475 (1954).

[109] *Id.* at 478.

[110] *See* People v. Trevino, 39 Cal. 3d 667, 676, 704 P.2d 719, 721, 217 Cal. Rptr. 652, 654 (1985).

[111] *See* People v. Motton, 39 Cal. 3d 596, 605, 704 P.2d 176, 181, 217 Cal. Rptr. 416, 421 (1985).

[112] *Batson*, 106 S. Ct. at 1729 (Marshall, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

prosecution. Ironically, the peremptory challenge, designed to ensure a fair cross-section, may need to be entirely abolished to ensure fairness.

The majority opinion did not mention whether the decision should be applied retroactively or prospectively. Of the four concurring opinions, only those of Justices White and O'Connor specifically stated that it should not apply retroactively.[113] Chief Justice Burger, joined by Justice Rehnquist, agreed with this analysis in their joint dissenting opinion.[114] Lower courts quickly became split on the issue of *Batson's* retroactivity.[115] The Supreme Court, in *Allen v. Hardy*,[116] later decided that *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced.[117] In that decision, the Court explained that *"Batson* not only overruled the evidentiary standard of *Swain*, it also announced a new standard that significantly changes the burden of proof imposed on both the defense and the prosecution."[118] The Supreme Court then granted certiorari in *Griffith v. Kentucky*[119] and *Brown v. United States*[120] to consider whether *Batson* should be applied retroactively in cases pending on direct appeal.

After discussing the three criteria enumerated in *Solem v. Stumes*,[121] the Court, in *Griffith*, held that *Batson* should be applied retroactively to cases pending on direct review when *Batson* was decided.[122] The retroactive application was not surprising given two recent Supreme Court decisions.

In *Vasquez v. Hillery*,[123] decided three months before *Batson*, the Court held that discrimination in grand jury selection required reversal of a murder conviction entered twenty-three years earlier. Justice Marshall's majority opinion noted that:

> The overriding imperative to eliminate this systematic flaw [discrimination] in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.[124]

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[113] *Id.* at 1726, 1731.
[114] *Id.* at 1741 (Burger, C.J., dissenting).
[115] *Compare* United States v. David, 803 F.2d 1567 (11th Cir. 1986) (retroactive application) *with* United States v. Wilson, 806 F.2d 171 (8th Cir. 1986) (prospective application). *See also* People v. Johnson, 148 Ill. App. 3d 163, 489 N.E.2d 816 (1986) (retroactive application to cases pending on direct review); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986) (refusing to apply *Batson* retroactively).
[116] 106 S. Ct. 2878 (1986).
[117] *Id.* at 2880. The Court explained that " '[b]y final we mean where the judgment was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' Batson v. Kentucky." *Id.* (quoting Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)).
[118] *Id.* at 2881.
[119] 106 S. Ct. 2274 (1986).
[120] 106 S. Ct. 2275 (1986).
[121] 465 U.S. 638 (1984).
[122] 107 S. Ct. 708, 716 (1987).
[123] 106 S. Ct. 617 (1986).
[124] *Id.* at 624.

The *Vasquez* Court reasoned that the rule requiring mandatory reversal was not "unworkable, or otherwise legitimately vulnerable to serious reconsideration."[125] Certainly, discrimination in the composition of the petit jury, which actually decides the guilt of a defendant, is even more intolerable than grand jury discrimination.

Furthermore, in *Shea v. Louisiana*,[126] a 1985 case, the Court found that the application:

> [O]f a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule.[127]

The Court's decisions in *Griffith v. Kentucky* and *Brown v. United States* promote this theory.

V. CONCLUSION

The *Batson* decision modifies the necessary elements to prove an equal protection violation through the use of peremptory challenges. It also limits the prosecutor's right to make peremptory challenges.

Past abuses of the peremptory challenge have led the Court to this decision. Prosecutors will now be required to justify their exercise of the challenge when the defendant makes the requisite prima facie showing of discrimination. As a result, peremptory challenges in these cases are now similar to challenges "for cause."

Regardless of these rules, those who wish to discriminate will often be able to find the adequate words justifying their actions. Courts now face a period of establishing guidelines to avoid the grey areas that now exist in determining whether violations have occurred. This may require more than simply listening to the prosecutor's stated reasons. Judges will probably need to use "intuition" to determine whether a challenge in a given case was racially motivated. Peremptory challenges were designed to allow attorneys to exercise intuitive judgment—now these judgments rest with the court.

Lower courts will have to clarify the standards regarding the prosecutor's acceptable reasons for striking black jurors once the defendant establishes a prima facie case. Guidelines and rules will need to be clear to avoid potential abuses that may result from the testing of the boundaries. Otherwise, the Court will have to entirely eliminate the peremptory challenge.

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[125] *Id.* at 625.
[126] 105 S. Ct. 1065 (1985).
[127] *Id.* at 1069. *See also* Desist v. United States, 394 U.S. 244 (1969).