Criminal Procedure Survey

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I. INTRODUCTION

This Survey provides an overview of each area of Kansas criminal procedure. Recent decisions are analyzed and discussed with regard to the United States Supreme Court and Kansas precedent where applicable. Additional commentary analyzing public policy implications of a decision or the soundness of its reasoning is included in each section.

II. POLICE INVESTIGATION

A. Introduction to the Fourth Amendment

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.

Searches without a warrant are per se unreasonable, subject to only a few established exceptions.2

The provisions of the Fourth Amendment are applicable to both the state and federal governments.3 Kansas has the option of construing the Kansas Constitution as providing more protection than the Federal Constitution, but it has not done so.4 The Fourth Amendment and section 15 of the Kansas Constitution’s Bill of Rights “are identical for all practical purposes.”5 The state bears the burden of showing that a challenged search or seizure was lawful.6

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1. Written by staff members B.J. Craig, Kelly Foos, Jeremy Graber, Lloyd Raber, Devin Ross, Tim Schapker, Bradley Serafine, Annie Wells, and Associate Editor Cheri Whiteside, and compiled by Note and Comment Editor David Siever.
4. Thompson, 166 P.3d at 1027.
5. Id. at 1028 (quoting State v. Johnson, 856 P.2d 134, 138 (Kan. 1993)).
B. Scope of the Fourth Amendment

1. Limits to the Fourth Amendment’s Scope

The Fourth Amendment only applies to actions taken by the government. Further, the Fourth Amendment only applies to a “search” or a “seizure.” If the government’s conduct cannot be characterized as either a search or a seizure, the Fourth Amendment is not applicable. In such instances, the police and government do not need to establish that their conduct followed a warrant, fell within one of the exceptions to the warrant requirement, or was otherwise reasonable.

2. Search and Seizure—Brief Introduction

For Fourth Amendment purposes, a search occurs when a person’s privacy interest has been infringed. A privacy interest consists of two elements: 1) a subjective expectation of privacy; that 2) society is willing to accept as reasonable. If a person does not or cannot take steps to keep his or her interests private, then any invasion of that interest is not a search, and no Fourth Amendment issue arises. Similarly, no Fourth Amendment issue arises if the expectation is not objectively reasonable.

A seizure of property within the Fourth Amendment occurs when a person’s possessory interest has been interfered with. A person is seized within the means of the Fourth Amendment when he or she is stopped by an officer and does not have the freedom to leave. A person can be seized within the meaning of the Fourth Amendment without being placed under arrest.
a. Open Fields, Trash, and Curtilage

The Kansas Supreme Court had the opportunity to address the meaning of a search in regards to curtilage, trash, and open fields in *State v. Fisher*. In that case, law enforcement received a report from a citizen concerned with a strong peculiar smell coming from trash being burned at the defendant’s house and an unusual amount of cars stopping there for short periods of time (indicator of drug activity). The defendant’s property was in a rural area, and contained a house, a small shed near the house, and a barn. Law enforcement went to defendant’s property and noticed a strong smell of ether and saw a clear trash bag near a burn barrel by the house. The officer went onto the defendant’s property and saw the remnants of several items used to manufacture methamphetamine in the trash bag. He took the trash bag back to the sheriff’s department for further investigation. Using this information, the officer obtained a search warrant. The subsequent search uncovered more drug paraphernalia on the property. The defendant moved to suppress the evidence because the trash was within his curtilage and was unconstitutionally seized. The district court denied the motion to suppress, finding that the area was not curtilage, and the officer had the right to take the trash.

Curtilage is the area around the home to which the Fourth Amendment protection against unreasonable search and seizure has been extended. Curtilage is the area that should be treated as the home itself to protect the privacy and intimacy of the home. The Kansas Supreme Court had not established the standard of review for trash within curtilage cases, and the court in *Fisher* adopted the recent trend that analyzes whether an area is curtilage as a mixed question of fact and law. The Kansas Supreme Court followed other courts that have relied

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17. *Id.* at 463.
18. *Id.*
19. *Id.*
20. *Id.* at 463–64.
21. *Id.*
22. *Id.* at 464.
23. *Id.*
24. *Id.* at 465. The defendant did not argue that the initial observation was unconstitutional. *Id.*
25. *Id.* at 466.
26. *Id.* at 468 (citing United States v. Dunn, 480 U.S. 294, 301 (1987)).
27. *Id.* at 467–68.
on *Ornelas v. United States* to reach this conclusion. The court reviewed the factual findings for substantial competent evidence and reviewed de novo the legal conclusion of whether a seizure occurred within the curtilage. The court adopted the four factor test from *United States v. Dunn* to determine if the area was curtilage: "[1] The proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." The court applied this test and found the trash to be within the curtilage based on the evidence that the trash was between the house and outbuildings, the area was enclosed with barbed wire fencing, the area was used as a driveway and for gardening, it was protected from observation by the house, and there was considerable distance between the road and the trash. The house’s location in a rural setting was also important to the court in reaching its conclusion that the trash was within the curtilage.

Although the court determined the garbage was within the curtilage, the court still had to examine whether the defendant had a reasonable expectation of privacy in the bag. If he had no reasonable expectation of privacy, then it would not matter that the trash was within the curtilage. There is no reasonable expectation of privacy in trash left in an area accessible by the public. However, the bag was not accessible to the public or left to be picked up by commercial trash collectors; it was behind the defendant’s house obstructed from view from three sides. The court held that Fisher had a subjective expectation of privacy by placing his trash there, and that his expectation was objectively reasonable. The court found that the expectation was objectively reasonable because it felt rural Kansans would not expect

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29. *Id.* See United States v. Breza, 308 F.3d 430, 435 (4th Cir. 2002) (following *Ornelas* reasoning that curtilage is a mixed question of fact and law); United States v. Diehl, 276 F.3d 32, 37 (1st Cir. 2002) (same).
33. *Id.* at 470–71.
34. *Id.*
35. *Id.* at 471.
36. *Id.*
38. *Fisher,* 154 P.3d at 472.
39. *Id.*
people to rummage through trash in their backyard.\textsuperscript{40} Since the defendant had a subjective expectation of privacy in the trash located in his curtilage that was objectively reasonable, the court found the warrantless seizure of the trash per se unreasonable.\textsuperscript{41}

The court went on to examine the State's claim that the seizure of the bag was within the plain view exception to the warrant requirement.\textsuperscript{42} The court quickly pointed out that lawful observation was not the same as lawful seizure.\textsuperscript{43} The plain view exception generally is used to justify warrantless seizure of property if the officer has a right to be in that location.\textsuperscript{44} The open view, or open fields, doctrine allows officers to observe illegal activity from outside of a constitutionally protected area without intruding on Fourth Amendment protections.\textsuperscript{45} Officers can use the information they observe and obtain a warrant to search and seize evidence of unlawful activities that they see.\textsuperscript{46} However, they cannot use their lawful open view observations to then seize evidence of illegal activity under the plain view exception.\textsuperscript{47} Here, the officer did not have a justifiable reason to be within Fisher's curtilage, so the seizure of the bag was unlawful.\textsuperscript{48}

The Kansas Supreme Court also stopped the State's attempt to piggyback on the open view, knock and talk, and plain view exceptions to validate the seizure of the bag.\textsuperscript{49} The officer had the right to partially intrude on Fisher's curtilage to knock on his door and make observations from that vantage point.\textsuperscript{50} However, he could not exceed the scope of that lawful intrusion.\textsuperscript{51} Here, the court found the officer exceeded the lawful scope of his entry by doing more than knocking on the door.\textsuperscript{52} Thus the seizure of the trash bag violated Fisher's Fourth Amendment rights.\textsuperscript{53} The court went on to find that there was enough other lawfully obtained evidence to establish probable cause to support the search
warrant.\textsuperscript{54}

This decision is a small victory for people in Kansas, especially those in rural areas. \textit{Fisher} shows that the Kansas Supreme Court is not willing to let law enforcement stack together several exceptions to the warrant requirement in order to justify their unlawful actions. The court in \textit{Fisher} established a limited restriction on the ability of the state to use open view, knock and talk, and the plain view exceptions to validate the seizure of a person's property.\textsuperscript{55} The court was unwilling to allow law enforcement to go onto someone's property to sift through their belongings on the mere suspicion of illegal activity. This case did not significantly change the law in Kansas, but it did clarify the issue of searching trash within a person's curtilage. It also demonstrated the court's unwillingness to give law enforcement free reign on a person's property just because the property is located in a rural area.

b. Traffic and Vehicular Stops

i. Reasonable Suspicion

A traffic stop is always a seizure within the Fourth Amendment.\textsuperscript{56} To stop a vehicle, an officer must "have a reasonable and articulable suspicion . . . that the person stopped has committed, is committing, or is about to commit a crime."\textsuperscript{57} The officer's subjective intent for stopping the vehicle is irrelevant as long as there are reasonable and articulable facts prior to the stop that illegal activity is afoot.\textsuperscript{58} This is an objective standard based on the totality of the circumstances that requires more than a mere hunch.\textsuperscript{59} If the officer does not have reasonable and articulable suspicion of illegal activity, the stop is an unlawful seizure within the Fourth Amendment.

ii. Investigatory Detention

Once an officer has lawfully stopped a vehicle, the detention cannot

\textsuperscript{54} Id. at 481.
\textsuperscript{55} Id. at 474.
\textsuperscript{56} State v. Thompson, 166 P.3d 1015, 1024 (Kan. 2007).
\textsuperscript{57} Id. (citing State v. DeMarco, 952 P.2d 1276, 1282 (Kan. 1998)).
\textsuperscript{58} Thompson, 166 P.3d at 1042.
\textsuperscript{59} Id. at 1024; In re J.M.E., 162 P.3d 835, 840 (Kan. Ct. App. 2007) (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).
exceed the scope necessary to carry out the purpose of the stop. An officer can request the driver’s license and registration, run a computer check and issue a citation. If no reasonable and articulable suspicion of illegal activity is discovered during this time, the motorist must be allowed to leave without delay. However, once the encounter ceases to be a detention, it can become consensual if the driver voluntarily answers an officer’s questions. Once the encounter becomes consensual, it is no longer a seizure within the Fourth Amendment, and the scope, duration, and purpose of the encounter become irrelevant.

In *State v. Thompson*, an officer pulled Thompson over for driving with a broken headlight. The officer asked for Thompson’s identification and insurance, returned to his police cruiser, and ran the identification through police dispatch. The officer expressed to his backup officer that he was going to ask Thompson for consent to search his vehicle because he had information that Thompson had previously been involved with illegal drugs. The officer returned Thompson’s driver’s license, gave him a warning, and told him to have a nice day. After briefly turning away, the officer returned and asked Thompson if he could ask a few questions. These questions eventually led Thompson to consent to a search of his vehicle where the officer discovered drugs and drug paraphernalia. The trial court denied Thompson’s motion to suppress the evidence because it found Thompson had consented to the search. The Court of Appeals reversed, finding that the encounter was not consensual.

The issue before the Kansas Supreme Court was whether the stop exceeded its permissible scope and duration, or whether the stop became consensual. Whether an encounter is consensual is based on the totality of the circumstances. An encounter is consensual if the officer’s

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60. *Thompson*, 166 P.3d at 1024.
61. *Id.*
62. *Id.*
63. *Id.* at 1025 (citing *State v. DeMarco*, 952 P.2d 1276, 1282 (Kan. 1998)).
64. *Id.* at 1023.
65. *Id.* at 1021.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1021–22.
70. *Id.* at 1022.
71. *Id.*
72. *Id.*
73. *Id.* at 1025.
74. *Id.*
conduct conveys to the person that they are free to leave or otherwise end the encounter.\textsuperscript{75} The court rejected a bright line test that the return of documentation turns a detention into a consensual encounter.\textsuperscript{76} Rather, this is just one factor to be weighed in determining if the encounter was consensual.\textsuperscript{77} Here, the court determined, based on the totality of the circumstances, that the initial lawful detention did not exceed its scope and became a consensual encounter once the officer returned to the driver’s window.\textsuperscript{78}

The scenario in Thompson is common in criminal procedure cases stemming from automobile stops. An officer stops a vehicle for a minor infraction with the intention of obtaining consent to search the vehicle for drugs or weapons. If the officer follows the rules properly, he can turn an investigatory detention into a consensual stop. Once the encounter becomes consensual, the officer can obtain consent to search the car and hopefully find evidence of illegal activity. The officer is no longer constrained by the Fourth Amendment if the encounter is consensual—as long as consent is given voluntarily.

The Kansas Supreme Court’s test of whether an encounter has become consensual is whether a reasonable person under all the circumstances would feel free to end the encounter with the officer.\textsuperscript{79} The United States and Kansas Supreme Courts have repeatedly refused to require an officer to say “you are free to go” before the encounter turns from a seizure to a consensual encounter.\textsuperscript{80} The court looks to factors such as number of officers present, officer’s tone of voice, officer’s actions (such as touching or leaning into the vehicle), whether the officer returned the driver’s documents, and whether the officer’s emergency lights are on.\textsuperscript{81} If the officer returns all documents and is polite to the driver, the stop typically becomes consensual, because a reasonable driver would feel free to decline further questions and go about his business.

This reasoning is flawed. Consider the following scenario. A driver is stopped early in the morning by an officer with his emergency lights

\textsuperscript{75} Id.
\textsuperscript{76} Id. at 1039.
\textsuperscript{77} Id. However, the court seemed to adopt the Tenth Circuit’s analysis that an encounter cannot be deemed consensual unless the person’s documentation is returned. Id. See United States v. Bradford, 423 F.3d 1149, 1158 (10th Cir. 2005).
\textsuperscript{78} Thompson, 166 P.3d at 1045.
\textsuperscript{79} Id.
\textsuperscript{81} Thompson, 166 P.3d at 1045.
going. After the officer writes the citation and returns the driver’s documents, the driver is assumed to know at that point that he is free to leave—even with the officer still standing at his car window, and without a clear signal or other act that the encounter is over.\textsuperscript{82} If an officer asks the driver to answer a few more questions, what reasonable driver would feel free to end the encounter? The officer’s emergency lights are flashing and the driver is stopped on the side of the road with the officer standing at the window. A reasonable person who has not studied criminal procedure would not feel free to drive away. The court seemed only to focus on the nature of the officer’s actions when examining the totality of the circumstances. In Thompson, the court found that it was not clear that the stop had ended, that the driver could refuse to answer questions, and that there was not a clear physical disengagement.\textsuperscript{83} Instead the court focused on the officer’s body language, actions, and tone of voice.\textsuperscript{84} The court dismissed the authoritative display of emergency lights as “ambiguous.”\textsuperscript{85} The court found that Thompson’s will was not overborne by the officer’s show of authority and thus deemed the encounter consensual.\textsuperscript{86} The court did not discuss why a person would feel free to leave; it merely stated that based on the totality of the circumstances a reasonable person would feel free to leave.\textsuperscript{87} The court made this conclusory statement, but only focused on the coerciveness of the officer’s actions. Thompson encourages great infringement on Fourth Amendment rights. The Kansas Supreme Court should require that an officer say “you are free to go” before an encounter becomes consensual. At the very least, the court should require more than an objective reasonable person standard based on the totality of the circumstances. The dissent in Thompson felt the same way.\textsuperscript{88}

c. Standing to Object to a Search or Seizure

A person must have a personal expectation of privacy in an area to object to a search of that area.\textsuperscript{89} The burden is on the defendant to show

\begin{itemize}
\item \textsuperscript{82} \textit{Id.} at 1044.
\item \textsuperscript{83} \textit{Id.} at 1045.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} at 1046–47 (Beier, J., dissenting).
\end{itemize}
an expectation of privacy.\textsuperscript{90} Generally, residents and overnight guests have a reasonable expectation of privacy in a room.\textsuperscript{91} Similarly, in a hotel or motel room, the person registered, those having a relationship to the person, and overnight guests have a privacy interest in the room.\textsuperscript{92} Anyone without a personal expectation of privacy in a room does not have standing to object to a search of that room.

A passenger in a car has standing to challenge the legality of a traffic stop.\textsuperscript{93} Passengers in a car are seized within the meaning of the Fourth Amendment during a traffic stop, and do not have the freedom to end the encounter.\textsuperscript{94} However, passengers do not have standing to challenge the search of the car.\textsuperscript{95} Only the owner and driver have the necessary reasonable expectation of privacy in the car.\textsuperscript{96} Thus, the passenger can object to the act of being seizures, but cannot object to the search.

\textbf{C. Arrest}

A person is under arrest when he or she is physically restrained or submits to an officer’s custody.\textsuperscript{97} The use of handcuffs does not necessarily mean that a person is under arrest.\textsuperscript{98} However, a person can be seized within the Fourth Amendment without being placed under arrest.\textsuperscript{99} An officer’s subjective belief of whether a person is under arrest is irrelevant.\textsuperscript{100} The test of whether an arrest has occurred is based on

\textsuperscript{90} Gonzales, 85 P.3d at 713.
\textsuperscript{91} Id. at 714.
\textsuperscript{92} Id.
\textsuperscript{94} Brendlin, 127 S. Ct. at 2407–08.
\textsuperscript{96} Delgado, 143 P.3d at 684.
\textsuperscript{97} State v. Hill, 130 P.3d 1, 7 (Kan. 2006).
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 8.
"what a reasonable person would believe under the totality of the circumstances surrounding the incident." 101

1. Kansas Statute

In Kansas, a police officer may arrest a person without a warrant if the officer has probable cause to believe the person is committing or has committed a crime. 102 If a person challenges the arrest, the burden is on the state to prove probable cause existed.

2. Probable Cause

Probable cause for arrest is the reasonable belief that a crime has been or is being committed, and that the defendant committed the crime. 103 Whether probable cause to arrest exists is based on the totality of the circumstances available to the officer at the time of arrest. 104 Information obtained after an arrest or attempted arrest cannot be factored into whether probable cause existed at the time of the arrest or attempted arrest. 105 If there was not probable cause at the time of the arrest, a warrantless arrest is per se unreasonable. 106

D. Search Warrants

Under Kansas law, when making a determination of probable cause for a search warrant, a magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of any person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." 107 Thus, a search warrant requires more than a simple description of illegal activity. The affidavit must establish a nexus between the suspected illegal or suspicious activity and the place to be searched, "sufficient to establish a

101. Id.
102. KAN. STAT. ANN. § 22-2401(c) (Supp. 2006).
103. Hill, 130 P.3d at 9.
105. Id.
fair probability that contraband or evidence of a crime will be found" in a particular place.108

In State v. Malm, a Target employee observed defendant and his wife attempting to purchase more than two packets of cold medicine containing psuedoephedrine, a methamphetamine ingredient.109 Target employees called the police, and officers later attempted to follow the couple to their residence.110 During the trip, the defendant got out of his vehicle and "looked around as if to check to see if he was being followed."111 He then turned onto a dirt road, where officers did not follow, and later returned to confront the officers.112 Officers arrested defendant on an active arrest warrant.113 Officers found components for a methamphetamine lab in a search of defendant's vehicle, and subsequently applied for and received a search warrant for defendant's residence.114

The Kansas Supreme Court held the State had not established a sufficient nexus between the affidavit's information and defendant's residence.115 The State relied solely on defendant's suspicious actions while officers were in pursuit to establish probable cause.116 Although this evidence suggested some nexus between the defendant's illegal activity and his residence, it was primarily speculative, and thus insufficient to create probable cause to search defendant's residence.117 The court rationalized, "[o]therwise, a nexus to the suspect's residence could be established in almost every case where the suspect is arrested while driving a vehicle, rendering this important requirement for probable cause almost meaningless."118

108. Id. at 1164 (citing State v. Ratzlaff, 877 P.2d 397, 405 (Kan. 1994)).
109. Id. at 1159.
110. Id.
111. Id.
112. Id. at 1159–60.
113. Id. at 1160.
114. Id.
115. Id. at 1165.
116. Id.
117. Id.
118. Id.
E. Exceptions to the Warrant Requirement

1. Generally

Kansas has authorized eight exceptions to the requirement that officers obtain a lawful warrant before conducting a search. A search or seizure is per se unreasonable unless it is conducted pursuant to a lawful warrant or one of the eight recognized exceptions. The recognized exceptions are "consent; search incident to a lawful arrest; stop and frisk; probable cause to search accompanied by exigent circumstances; the emergency doctrine; inventory searches; plain view; and administrative searches of closely regulated businesses." This section addresses a number of these exceptions as they are currently applied in Kansas.

2. Consent

"For a consent to search to be valid, two conditions must be met: (1) There must be clear and positive testimony that consent was unequivocal, specific, and freely given and (2) the consent must have been given without duress or coercion, express or implied."

a. Implied Consent

A finding of implied consent fails to prove by a preponderance of the evidence that a defendant "unequivocally, specifically, freely, and intelligently consented." In State v. Poulton, the court held evidence was inadmissible under the consent and plain view exceptions. Officers arrived at defendant’s house to serve an arrest warrant on a third party, Lamuz. After defendant, Poulton, answered the door, Officers

120. Id.
122. Id. at 1026.
124. Id. at 685–86.
125. Id. at 681–82.
Mora and Hedges asked if they could talk.\textsuperscript{126} Poulton responded affirmatively, opening the door and letting officers into the house.\textsuperscript{127}

The trial court held Poulton had given officers "implied consent" to enter the premises.\textsuperscript{128} The court equated the officers’ and Poulton’s entry into the house as a joint effort to retrieve Lamuz, because officers were never told not to enter.\textsuperscript{129} The Kansas Court of Appeals found no precedent to suggest consent could be impliedly given.\textsuperscript{130} "[T]he State does not discharge its burden to prove voluntary consent to justify the lawfulness of a search 'by showing no more than acquiescence to a claim of lawful authority.'"\textsuperscript{131}

The appellate court’s decision was correct to deny the state’s reliance on implied consent. Implied consent is not congruent with the requirement that consent be unequivocal and specific. Implied consent is "manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption or inference that the consent has been given. An inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or a lack of objection."\textsuperscript{132} Even the term’s definition demonstrates that implied consent is not unequivocal and specific. Further, absent consent or exigency, a warrantless entry into a home is impermissible, as "one’s reasonable expectation of privacy in the home is entitled to unique sensitivity."\textsuperscript{133} A defendant’s acquiescence with an officer’s authority is not compatible with this unique and elevated scrutiny.

b. Scope of Consent

Even if there is a valid warrantless search based on consent, the suspect determines its scope.\textsuperscript{134} In \textit{State v. Poulton}, after officers entered Poulton’s residence, they asked if Lamuz was in the house.\textsuperscript{135} Defendant stated Lamuz was in the back and moved to go get him.\textsuperscript{136} Officer Mora intervened and moved towards the kitchen area, when Lamuz appeared

\begin{itemize}
\item \textsuperscript{126} \textit{Id.} at 682.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.} at 685.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 685 (quoting Bumper v. North Carolina, 391 U.S. 543, 548–49 (1968)).
\item \textsuperscript{132} BLACK’S LAW DICTIONARY 305 (6th ed. 1990).
\item \textsuperscript{133} \textit{Poulton}, 152 P.3d at 684 (citing State v. Reno, 918 P.2d 1235, 1242 (Kan. 1996)).
\item \textsuperscript{134} \textit{Id.} at 685.
\item \textsuperscript{135} \textit{Id.} at 682.
\item \textsuperscript{136} \textit{Id.}
\end{itemize}
out of the back room. During the arrest Officer Graber was called in from the rear of the house for safety reasons and observed both guns and drug paraphernalia. A search warrant was obtained based on these observations, which lead to the seizure of baggies of methamphetamine, drug paraphernalia, and items commonly used in manufacturing methamphetamine.

The Kansas Court of Appeals held that "even if the officers had consent to enter Poulton's home, Poulton never gave the officers consent to search his home for Lamuz." The suspect controls the extent of the scope of consent given. The court found that Poulton had limited the scope of consent to search when he told the officers that Lamuz was in the back, that he would get Lamuz, and by walking in that direction. The court held "Mora clearly exceeded the scope of Poulton's consent when he physically restrained Poulton by grabbing his arm and telling him that he would get Lamuz and then proceeded through the house." Thus, the search exceeding that scope violated the Fourth Amendment, and any evidence obtained thereafter was inadmissible in court, even if covered by the exigent circumstances exception and a valid search warrant.

Though the ultimate decision is correct, the holding's reasoning is not. The court's scope analysis is in conflict with its consent analysis. The court should have analyzed the scope identically, defined through unequivocal and specific language. If Poulton could not impliedly consent when acquiescing to the officer's authority, Poulton could not impliedly limit the scope when resisting the officer's authority.

Although the court presumed that Poulton had given consent, there was no specific or unequivocal language with which to gauge the scope of his consent. However, considering officers only asked to speak with Poulton, the court's presumption that explicit consent had been given should have been limited to consent merely to enter the house. Officers had no authority to move about in the premises. Thus, Officer Mora's restraint of Poulton and move to search for Lamuz violated the original scope of the consent.

137. Id.
138. Id.
139. Id.
140. Id. at 685.
141. Id. (citing Florida v. Jimeno, 500 U.S. 248, 252 (1991)).
142. Id.
143. Id. at 685–86.
144. Id. at 686.
3. Probable Cause and Exigent Circumstances

The exigent circumstances exception requires a two-part analysis: (1) whether probable cause to search existed under the totality of the circumstances; and (2) whether exigent circumstances made obtaining a warrant impracticable. Each element is a fact sensitive analysis.

a. Probable Cause

Information creates probable cause if it would cause a "reasonably prudent person to believe that a crime has been or is being committed and that evidence of the crime may be found on a particular person, in a specific place, or within a specific means of conveyance." In State v. Fewell, officer Engholm pulled over Fewell for speeding. Noticing the odor of marijuana, the officer questioned Fewell, who admitted his passenger had been smoking. The officer searched the passenger, found marijuana, and subsequently searched Fewell finding a knife, a bent spoon, and a glass pipe. When backup arrived, officer Engholm again searched Fewell and found a bag of crack cocaine.

The Kansas Court of Appeals relied on two previous Kansas cases. In State v. MacDonald, the Kansas Supreme Court held that "marijuana odor, standing alone, provides probable cause to search a vehicle." State v. Thomas extended MacDonald, holding the smell of marijuana emanating from a person in custody "coupled with the detention facility's recognized security interest" provided probable cause to search that individual. Citing MacDonald and Thomas, the Kansas Court of Appeals held officer Engholm had probable cause to search Fewell based on: "(1) burnt marijuana odor from the vehicle; (2) Fewell's statement that the passenger smoked a blunt; and (3) marijuana found in the possession of the passenger."

The extension suggested in Fewell is tenuous considering the MacDonald holding is likely limited to the facts of that case. Fewell's
statement that the passenger had been smoking marijuana seems irrelevant in establishing probable cause to search Fewell. Further, Kansas courts have held marijuana found on the passenger does not create reasonable suspicion to detain the driver, or probable cause to arrest him.154 Finally, the probable cause in Thomas was created from a smell emanating from the defendant, not the general smell of marijuana.155 Thus, Fewell is a naked extension of MacDonald.156 Nonetheless, MacDonald is applicable because probable cause is created by the odor. If the odor creates probable cause to search a vehicle, it should also create probable cause to search its occupants.

b. Exigent Circumstances

"'Exigent circumstances exist where the police officer reasonably believes there is a threat of imminent loss, destruction, removal, or concealment of evidence or contraband.'"157 In Fewell, the search was performed only after Fewell had asked to leave to pick up the passenger's girlfriend.158 The court compared the circumstances in Fewell to those of State v. Houze, where exigent circumstances existed because the defendant was proceeding into his residence.159 As in Houze, there was a probable loss of evidence in Fewell if the defendant was allowed to leave while the police waited to obtain a warrant.160

4. The Emergency Aid Doctrine

The emergency aid doctrine is distinct from the exigent circumstances exception. Under the emergency aid doctrine, officers may enter premises without a warrant when there is reasonable belief that there is an immediate need to protect life or property.161 "'In cases in which this doctrine applies there is no probable cause which would

155. Thomas, 12 P.3d at 424.
156. See Fewell, 152 P.3d at 1254 (discussing the presence of probable cause and the presence of exigent circumstances independently).
157. Id. at 1254 (citing State v. Houze, 930 P.2d 620, 622 (Kan. Ct. App. 1997)).
158. Id.
159. Id.
160. Id.
justify issuance of a search warrant... and the police are not entering to arrest, search, or gather evidence.”

The Kansas Supreme Court, in State v. Drennan set out the rationale for the emergency aid doctrine exception created by the United States Supreme Court.

We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . “The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”

In State v. Mendez, Kansas approved a three part test for determining the applicability of the emergency aid doctrine: (1) there are reasonable grounds to believe that an emergency is at hand and immediate assistance is necessary to preserve life or property; (2) the primary motivation of the search is not to arrest or seize evidence; and (3) “there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.” However, the U.S. Supreme Court recently removed the second prong, which the Kansas Court of Appeals recognized in State v. Geraghty.

In Geraghty, the defendant’s daughter notified police she had found a methamphetamine lab in her father’s apartment (who was already in custody). Officer Gural arrived and asked the daughter to go inside the apartment with him. Gural observed numerous methamphetamine lab components and smelled ammonia. The court held that the emergency aid doctrine requirements were not met. The State presented no evidence that anyone was inside the apartment or that the lab was active. “The facts in this case do not support an objective

162. Id. (quoting State v. Jones, 947 P.2d 1030, 1037 (1997)).
165. Drennan, 101 P.3d at 1231 (quoting Mincey, 437 U.S. at 392).
166. 66 P.3d 811.
167. Geraghty, 163 P.3d at 358.
168. Id. (quoting Brigham City v. Stuart, 547 U.S. 398 (2006)).
169. Id. at 354.
170. Id.
171. Id.
172. Id. at 358.
173. Id.
belief that someone was in danger or that there was an imminent threat of harm to life or property.174

5. Search Incident to a Lawful Arrest

The Kansas Legislature has codified the search incident to lawful arrest exception in section 22-2501:

[w]hen a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person’s immediate presence for the purpose of (a) [p]rotecting the officer from attack; (b) [p]reventing the person from escaping; or (c) [d]iscovering the fruits, instrumentalities, or evidence of the crime.175

Previously, some Kansas courts followed the so called Tygart factors when analyzing the “reasonableness of the scope of a vehicle search incident to a valid arrest.”176 However, other decisions were contradictory. Recently, the Kansas Court of Appeals held in State v. Vandevelve that “[a]lthough [the] factors are helpful when considering the reasonableness of the scope of the search, our Supreme Court has made clear that a search incident to a lawful arrest may be conducted only for one of the three purposes under K.S.A. 22-2501.”177 No cases have since discussed the implications of this decision.

6. Inventory Search

Inventory searches are reasonable when serving three purposes: “(1) the protection of the owner’s property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property; and (3) the protection of the police from potential danger.”178 The key question in the inventory search exception analysis is reasonableness, however there is no “precise definition” for its application.179 Thus, courts balance governmental interests against the invasion of personal privacy rights.180

174. Id.
179. Id.
180. Id. (citing Pool v. McKune, 987 P.3d 1073, 1078 (Kan. 1999)).
In *State v. McCormick*, the defendant McCormick broke into Yasmin Haque's home to harass her. During the fracas, Haque noticed McCormick was carrying a backpack. Eventually, Haque was able to escape and contact police. McCormick was later arrested as he emerged from the backyard of his residence. During the arrest, an officer took a backpack he noticed near the defendant and placed it in the patrol car. At the law enforcement center, the backpack and its contents were inventoried as defendant’s personal property.

The court said the search and seizure was justified under the circumstances by the inventory search exception. "It was not unreasonable for the officers to believe the backpack constituted personal property of the defendant at the time of his arrest, which, if not collected, would be subject to loss or damage." However, the evidence did not indicate McCormick was wearing the backpack when arrested or that he put it down shortly beforehand. Instead officers simply decided to seize an item near where McCormick was arrested.

McCormick surely deserved more than the cursory analysis provided considering the backpack was lying on his property. The court should have provided a more thorough balancing of interests. The item’s presence on McCormick’s own property reduced the risk of loss and damage. People often leave items and containers laying around on their property and an arrest on that property should not give officers the automatic right to seize and search those items under the inventory exception. A court should consider the totality of the circumstances. Relevant circumstances could include whether officers observed the suspect carrying the item, the proximity of the item to the suspect at the time of arrest, and the character of the item (e.g., whether it belongs outdoors). Further, the *McCormick* court should have considered that the protection of personal property was not the officer’s primary motivation. Indeed, the item’s seizure and subsequent search was likely motivated by the officer’s knowledge of McCormick’s possession of a backpack while at Haque’s home.

181. *Id.* at 201.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 205.
188. *Id.*
7. Plain View and Plain Feel

The plain view or plain feel exception has three requirements: “1) [T]he initial intrusion which afforded authorities the plain view is lawful; 2) the discovery of the evidence is inadvertent; and 3) the incriminating character of the article is immediately apparent to searching authorities.” The third requirement “has been interpreted to mean that the officer must have probable cause to believe that the object is evidence of a crime.”

In *State v. Lee*, an officer discovered a container of methamphetamine during a weapons pat-down of the defendant. The Kansas Court of Appeals had reversed the district court’s suppression of evidence because the encounter was consensual. The Kansas Supreme Court reversed because the scope of the pat-down should have been limited to weapons. Though the Kansas Supreme Court found the first two requirements were satisfied, the court held the officer did not have probable cause to believe that the object was a weapon or evidence of a crime. Indeed, the officer admitted the “object in [defendant’s] pocket just felt like a bulge.”

F. Administrative Searches and Seizures

Kansas courts heard no cases in 2007 that radically changed the traditional approach to administrative searches and seizures. Kansas recognizes administrative searches as an exception to the general requirement that a search warrant is required for a search to be deemed reasonable under the Fourth Amendment. In 2007, the Kansas Court of Appeals affirmed that “[t]he recognized exceptions to the search warrant requirement under the Fourth Amendment . . . include . . . administrative searches of closely regulated businesses.”

The most recent exposition of Kansas law on the topic of administrative searches was the Tenth Circuit’s decision in *U.S. v.*

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190. *Id.* (citing *Wonders*, 952 P.2d at 1359).
191. *Id.* at 1290–91.
192. *Id.* at 1290.
193. *Id.*
194. *Id.*
195. *Id.*
In *Herrera*, the Tenth Circuit concluded that warrantless inspections of commercial premises are reasonable under the Fourth Amendment in "special needs" situations, where the government’s interest in regulating the business are thought to outweigh the business owner’s privacy interest. The court stated a three-factor test to determine whether a warrantless administrative search is reasonable. Courts must determine that the regulatory scheme is based on a substantial governmental interest, that warrantless inspections are necessary to further the regulatory scheme, and that the inspection program provides a constitutionally adequate substitute for a warrant. This remains the test that applies to administrative searches in Kansas.

Federal courts applying Kansas law affirm the applicability of the administrative search exception in Kansas. In *U.S. v. Mercado-Nava*, a Kansas district court decided a challenge to an administrative stop of a commercial vehicle, which ultimately uncovered illicit drugs. When a state trooper conducted a commercial inspection of defendant’s semi-truck after defendant stopped at a scale house, the trooper noticed signs that the truck had been altered to create a secret compartment that held cocaine. Defense counsel moved to suppress the drug evidence, in part because the Trooper’s search of defendant’s truck was warrantless and non-consensual. The district court denied the motion, stating:

> "Inspections of commercial vehicles do not require consent and are not premised on an officer’s reasonable suspicion that a specific individual is involved in a traffic offense or in criminal activity. Instead, ‘[a] regulatory search is justified if the state’s interest in ensuring that a class of regulated persons is obeying the law justifies the intrusiveness of a program of searches or seizures of those persons.’"

The court also stated that Kansas’ regulatory scheme has been held sufficient to justify administrative searches. Thus, the court in *U.S. v. Mercado-Nava* not only affirmed that there is an exception to the warrant

197. 444 F.3d 1238 (10th Cir. 2006).
198. See id. at 1244 ("[A]s in other situations of 'special needs,' where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.").
199. Id.
200. Id.
202. Id. at 1273.
203. Id. at 1274.
204. Id. at 1275 (quoting U.S. v. Seslar, 996 F.2d 1058, 1061 (10th Cir. 1993)).
205. Id.
requirement for administrative searches in Kansas, but also endorsed the specific administrative regime by which Kansas justifies conducting administrative searches.

The Tenth Circuit explained that the wisdom of a government’s administrative scheme is not at issue in administrative searches, as long as the scheme has been determined to serve a valid public purpose. In *Jones v. Wildgen*, several citizens whose homes were searched pursuant to administrative warrants brought a civil rights action alleging Fourth Amendment violations based in part on evidence that the regulatory scheme was inconsistently applied. The Tenth Circuit held that the searches were valid administrative searches, affirming the grant of summary judgment to defendant. The court noted that a judicial officer’s role in issuing an administrative warrant only includes verifying that the proposed search complies with administrative guidelines, and does not include looking behind the request to assess the reliability of the evidence presented or the probability the search will uncover a violation.

In addition, even an “imperfect” administration of a regulatory regime does not establish a genuine issue of material fact as to the scheme’s validity. The *Wildgen* decision seems to indicate a willingness to allow warrantless searches that are conducted pursuant to a regulatory regime thought to effect some valid public purpose. What provisions exist for review of administrative regimes’ continued relationship to a valid purpose over time does not come through in the 2007 cases.

**G. Exclusionary Rule**

Kansas’ exclusionary rule underwent a significant shift in *State v. Hoeck*. In *Hoeck*, the Kansas Supreme Court rejected its previous approach to applying the good-faith exception to the exclusionary rule. In *U.S. v. Leon*, the U.S. Supreme Court recognized a good-faith exception to the general rule that evidence gained through an

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206. 244 F. App’x 859 (10th Cir. 2007).
207. *Id.* at 864.
208. *Id.* at 863.
209. *Id.* at 863–64.
210. 163 P.3d 252 (Kan. 2007).
211. *Id.* at 265–66.
unreasonable search or seizure must be excluded from evidence.\textsuperscript{213} The Court held that the exclusionary rule did not "bar the use in the prosecution’s case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."\textsuperscript{214}

According to the Court in \textit{Leon}, the good-faith exception to the exclusionary rule is only available when the police officer’s belief that the warrant was properly issued was "objectively reasonable."\textsuperscript{215} The U.S. Supreme Court recognized four situations in which the officer’s reliance would not be reasonable:

(1) The magistrate issuing the warrant was deliberately misled by false information; (2) the magistrate wholly abandoned his or her detached or neutral role; (3) there was so little indicia of probable cause contained in the affidavit—in other words, the affidavit was so ‘bare bones’—that it was entirely unreasonable for the officer to believe the warrant was valid; or (4) the warrant so lacked specificity that officers could not determine the place to be searched or the items to be seized.\textsuperscript{216}

With respect to the sufficiency of affidavits, the \textit{Leon} Court in effect described a continuum of probable cause.\textsuperscript{217} At one extreme are affidavits that provide the magistrate with a "substantial basis" for determining probable cause, to which the good faith exception definitely applies. At the other extreme are “bare bones” affidavits that are so lacking in probable cause that an officer’s reliance on the resulting warrant is completely unjustified, such that the good faith exception does not apply. Between the two extremes fall affidavits that do not provide a "substantial basis" to determine probable cause, but do give enough indicia of probable cause that reliance on them is reasonable.\textsuperscript{218} Various federal courts have held that the good faith exception created in \textit{Leon} applies to both warrants issued with a substantial basis for probable cause and warrants issued with something less than probable cause but based on something more than a bare bones affidavit.\textsuperscript{219}

Kansas courts, however, have applied \textit{Leon}'s "substantial basis" test both to the determination of the warrant’s validity \textit{and} to the

\begin{itemize}
\item \textsuperscript{213} \textit{id.} at 924.
\item \textsuperscript{214} \textit{id.} at 900.
\item \textsuperscript{215} \textit{id.} at 922–23.
\item \textsuperscript{216} \textit{Hoeck}, 163 P.3d at 259 (citing \textit{Leon}, 468 U.S. at 923).
\item \textsuperscript{217} \textit{id.}
\item \textsuperscript{218} \textit{id.}
\item \textsuperscript{219} \textit{id.} at 260.
\end{itemize}
determination of whether the good faith exception applies.\textsuperscript{220} Kansas’
different interpretation seems to stem from taking a passage from \textit{Leon}
out of context. For example, in \textit{State v. Doile}, the Kansas Supreme
Court refused to admit evidence under the good faith exception, even in
the absence of any of the four situations set out by the \textit{Leon} court as
sufficient to waive the exception.\textsuperscript{221} It did so by reasoning that the good
faith exception only applies to reliance on warrants that “provide[d] the
magistrate with a substantial basis for determining the existence of
probable cause.”\textsuperscript{222} The court perpetuated the same misinterpretation of
the \textit{Leon} holding in \textit{State v. Longbine}.\textsuperscript{223}

In 2007, the Kansas Supreme Court in \textit{Hoeck} expressly rejected its
earlier interpretation of the good faith exception to the exclusionary rule.
In \textit{Hoeck}, the defendant convenience store manager was suspected of
having embezzled corporate funds and Kansas Lottery proceeds, in part
by using a personal computer to cover up losses in merchandise due to
theft and scanning erroneous information into reports filed with the
Kansas Lottery Commission.\textsuperscript{224} The police applied and received a search
warrant for Hoeck’s residence. When they executed the warrant, officers
seized from Hoeck’s home various computing and scanning accessories,
along with Kansas Lottery stock and receipts from the convenience store
that employed the defendant.\textsuperscript{225}

The trial court granted Hoeck’s motion to suppress the evidence
seized from her home.\textsuperscript{226} The court was persuaded by defense counsel’s
argument that because there was no nexus between the alleged criminal
activity and defendant’s residence, the search warrant should not have
been issued, and the State could not get the fruits of the illegal search
into evidence through the good faith exception because the warrant had
not been based on a “substantial basis” in probable cause.\textsuperscript{227} The Kansas
Court of Appeals affirmed, following the precedent in \textit{Longbine}: “\textit{Leon}’s
good faith exception will not be applied where the warrant was based on
an affidavit that failed to provide a substantial basis for determining the
existence of probable cause.”\textsuperscript{228} The State petitioned for the Kansas

\textsuperscript{220} Id. at 261.
\textsuperscript{222} \textit{Hoeck}, 163 P.3d at 261 (Kan. 2007) (citing \textit{Doile}, 769 P.2d at 502).
\textsuperscript{223} \textit{Id.} at 263 (citing \textit{State v. Longbine}, 896 P.2d 367 (Kan. 1995)).
\textsuperscript{224} \textit{Id.} at 254–55.
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.} at 255.
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.} at 256.
Supreme Court to review the decision and its prior holdings regarding the good faith exception to the exclusionary rule.\textsuperscript{229}

The Kansas Supreme Court overruled both the appellate court ruling and all other earlier decisions “applying the test of whether there is a substantial basis for the determination of probable cause to the determination of whether the good faith exception to the Fourth Amendment exclusionary rule applies.”\textsuperscript{230} The court held that the evidence seized from Hoeck’s home was improperly excluded because the good faith exception applies when, as in Hoeck, an affidavit falls short of providing a substantial basis for probable cause but provides enough indicia of probable cause that an officer could reasonably rely on it.\textsuperscript{231} The court felt comfortable overruling precedent on the basis that the earlier decisions appeared to stem merely from a misinterpretation of Leon, not from a specific desire to diverge from it.\textsuperscript{232} The view that the earlier interpretation of Leon was unintentional gains support from the facts that Kansas courts usually interpret the scope of section 15 of the Kansas Constitution’s Bill of Rights as identical to the scope of the Fourth Amendment, and the earlier decisions cited Leon with favor.\textsuperscript{233}

The Kansas Supreme Court’s wholesale rejection of its earlier interpretation of the good faith exception may have a significant effect on cases involving the execution of a warrant that is later held to be invalid. The court’s earlier interpretation essentially rendered the good faith exception “unattainable in Kansas.”\textsuperscript{234} By refusing to apply the exception to any situation in which there was anything less than a substantial basis for the warrant, the fact that the warrant was found to be invalid in the first instance also dictated that the good faith exception did not apply to it.\textsuperscript{235} The court’s previous interpretation guaranteed the unavailability of the good faith exception even in situations in which the police officers acted in good faith and without misconduct—the very situation the exception was designed to address.

Under Hoeck, it should be much easier for the state to admit evidence obtained through a defective warrant. As long as the warrant is more than a mere “bare bones” warrant, and provides some minimum indicia of probable cause, the court should admit evidence obtained

\begin{itemize}
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Id. at 265–66.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Id. at 265.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id. at 264.
\item \textsuperscript{235} Id.
\end{itemize}
through its execution, barring acts of bad faith on the part of the executing officers. Kansas' repudiation of its earlier holdings brings the state in line with federal courts' interpretations of Leon, which, according to the Kansas Supreme Court, is where Kansas desired to be all along.

In addition to this important development in Kansas, the Tenth Circuit also analyzed the application of the good faith exception to the exclusionary rule. In U.S. v. Cos,\textsuperscript{236} the defendant was convicted of being a felon in possession of a firearm. The firearm was discovered when a visitor to his house gave police officers who came to execute a warrant permission to search the defendant's house. The trial court granted defendant's motion to suppress the gun on the basis that the visitor lacked actual or apparent authority to consent to the search and that the good faith exception to the exclusionary rule did not apply.\textsuperscript{237} The Tenth Circuit affirmed the trial court's exclusion of the evidence. It emphasized that under Tenth Circuit jurisprudence, the good faith exception applies "ordinarily when an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer."\textsuperscript{238} In Cos, however, the officers' initial entry was based neither on a facially valid warrant nor on a mistake made by someone else.\textsuperscript{239} Because the mistake at issue was the executing officers' own mistake, the good faith exception did not apply.

The ruling in Cos is consistent with the rationale underlying the good faith exception to the exclusionary rule. The Leon court made clear that the exception is designed to address a situation in which police officers act properly, relying on a warrant with defects largely unknown to them. If the executing officers themselves make mistakes in executing the warrant, there is no justification for protecting the evidence they seize from exclusion.

\textit{H. Police Interrogation}

While the cases handed down in 2007 do not signify any serious changes in the law governing police interrogation in Kansas, they do offer refinements of several aspects of the law.

First, Kansas courts clarified the interaction between police interrogation and a suspect invoking his right to remain silent. The

\begin{itemize}
  \item \textsuperscript{236} 498 F.3d 1115 (10th Cir. 2007).
  \item \textsuperscript{237} Id. at 1119.
  \item \textsuperscript{238} Id. at 1132 (quoting State v. Herrera, 444 F.3d 1238, 1249 (10th Cir. 2006)).
  \item \textsuperscript{239} Id.
\end{itemize}
defendant in *State v. Birth* was convicted of armed robbery and burglary after having made inculpatory statements in the course of a police interrogation. During the interrogation, defendant Birth said, after offering a response to a line of questioning, "Let's leave it at that." In response to a different line of police questioning, Birth stated, "I'm not an imbecile, you don't need this interview." The police interrogator continued to question Birth after he made these statements, and made no attempt to clarify what Birth meant by these statements. On appeal, Birth argued the trial court erred in admitting the tape of his interrogation. Birth alleged that the statements made during the interrogation amounted to an invocation of his right to remain silent, which the interrogating officers failed to honor.

The Kansas Court of Appeals affirmed the trial court's denial of Birth's motion to suppress his interrogation statements. In rejecting Birth's argument, the court found that an interrogating officer need not cease interrogation after a suspect makes statements that do not clearly invoke his right to remain silent. An officer may, but is under no obligation to, ask questions to clarify whether or not the suspect is in fact invoking his right. In the instant case, the court considered Birth's statements "ambiguous at best." Because the statements permitted several plausible interpretations, only one of which was as an invocation of a right to remain silent, they were insufficient to serve as an "unequivocal invocation."

Second, Kansas courts clarified what constitutes custodial interrogation. Kansas courts historically have recognized the distinction between custodial interrogation, for which Miranda warnings are required, and investigatory interrogation, which can be conducted without Miranda warnings. The Kansas Supreme Court addressed the distinction in *State v. Jones*, in which the defendant, Jones, was convicted of first-degree murder, in part on the basis of his own inculpatory statements. Jones made incriminating statements in response to questioning at the district attorney's office before being read his

241. *Id.* at 359.
242. *Id.*
243. *Id.* at 360.
244. *Id.* at 359–60.
245. *Id.*
246. *Id.* at 360.
247. *Id.*
249. *Id.*
Miranda rights. He subsequently moved to suppress the statements as products of improper custodial interrogation without Mirandization. In Jones, the Kansas Supreme Court affirmed the admission of the contested statements, which it held were obtained through a non-custodial interrogation.

Jones was the Kansas Supreme Court’s first explicit adoption of the framework the U.S. Supreme Court set out in Thompson v. Keohane for determining when an interrogation must be considered custodial. The Thompson framework requires courts to make two discrete inquiries when deciding whether an interrogation was custodial. “[O]ur first inquiry is: what were the circumstances surrounding the interrogation . . . . The second inquiry is: under the totality of those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the investigation and leave?” The Kansas Supreme Court noted that although Jones was its first explicit recognition of a two-step inquiry for determining custodial interrogation, Kansas courts had in effect already been using such a framework.

The Kansas Supreme Court in Jones reaffirmed the factors it had previously stated as relevant to analysis of the circumstances of an interrogation, but emphasized that the importance of each factor differs from case to case. In State v. Deal, the court set out several factors to be considered in determining the circumstances of an interrogation:

1. when and where the interrogation occurred;
2. how long it lasted;
3. how many police officers were present;
4. what the officers and the defendant said and did;
5. the presence of actual physical restraint on the defendant or things equivalent to actual restraint . . .
6. whether the defendant is being questioned as a suspect or a witness;
7. how the defendant got to the place of questioning . . .
8. what happened after the interrogation—whether the defendant left freely, was detained, or was arrested.

In Jones, however, the court emphasized that while these factors may be helpful, “[t]his court has never slavishly adhered to these factors in

250. Id. at 28.
251. Id. at 29.
252. Id. at 34.
255. Id.
256. Id.
257. Id. (quoting State v. Deal, 23 P.3d 840, 852 (Kan. 2001), rev’d on other grounds by State v. Anthony, 145 P.3d 1 (Kan. 2006)).
analyzing the issue of whether a particular interrogation is custodial. In fact, these are not 'hard and fast factors.' Instead, not all the Deal factors will be relevant to each case, and determination of the circumstances of the interrogation will vary case-to-case.

The Kansas Supreme Court also confronted the custodial interrogation issue in *State v. Woolverton*, in which Woolverton agreed to speak with police officers who approached him at his home. The officers did not Mirandize Woolverton and told him that he would not be arrested and could return home after the questioning was complete, but also told him that they would return with a warrant if Woolverton did not submit to questioning. The Kansas Supreme Court affirmed the trial court's denial of Woolverton's motion to suppress his statements on the basis that officers failed to read him Miranda warnings.

In *Woolverton*, the Kansas Supreme Court applied a reasonable person standard to determine when a suspect is in custody and Miranda warnings must be offered. The court stated that officers must Mirandize a suspect only when there has been a restriction on his freedom of movement that a reasonable person would consider tantamount to arrest. Applied to the facts of the case, the court held that a reasonable person in Woolverton's situation would not have believed he was in custody. The court noted the facts that Woolverton was not prevented from leaving the stairway where he was talking with police, and was not arrested after he was questioned, as factors militating against the presence of a custodial environment.

*Jones* and *Woolverton* are in line with each other and federal interpretations. The application of a reasonable person standard to the definition of "custody" appears consistent with the federal courts' view that whether a custodial environment exists is decided by an objective standard, without reference to whether the particular suspect or questioning officer believed the suspect actually was free to leave.

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258. Id.
259. Id.
260. 159 P.3d 985 (Kan. 2007).
261. Id. at 988.
262. Id. at 995.
263. Id. at 994.
264. Id. at 995.
265. Id.
266. See, e.g., Berkemer v. McCarty, 468 U.S. 420, 421–22 (1984) (stating that "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time," and "the only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation").
Woolverton may be an example of the Kansas Supreme Court applying the U.S. Supreme Court's Thompson factors without explicitly designating the analysis as such. The court in Woolverton analyzed the circumstances surrounding the interrogation and then used a reasonable person standard to determine whether those circumstances indicated custody. This is the same analysis as the court employed in Jones, but merely without the Thompson moniker. In addition, the Kansas Supreme Court's consideration in Woolverton of some, but not all, of the Deal factors for analyzing the circumstances of an interrogation is consistent with the case-by-case approach the court stated in Jones.

I. Eyewitness Identification

The traditional analysis of whether an eyewitness identification should be excluded consists of various factors, including:

1. The witness’ opportunity to view the criminal at the time of the crime; 2. The witness’ degree of attention; 3. The accuracy of the witness’ prior description; 4. The level of certainty demonstrated by the witness at the confrontation; 5. The length of the time between the crime and the confrontation; 6. The witness’ capacity to observe the event, including his or her mental and physical acuity; 7. The spontaneity and consistency of the witness’ identification and the susceptibility to suggestion; and 8. The nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.267

State v. Corbett refined the factors to a two-step analysis of determining (1) “whether the procedure used for making the identification was impermissibly suggestive” and (2) “whether the impermissibly suggestive procedure led to a substantial likelihood of misidentification,” noting that “[t]he court must consider the totality of the circumstances.”268

The Kansas Court of Appeals recently applied the Corbett two-step analysis in State v. Shears.269 Shears involved charges of attempted murder, aggravated assault, and criminal possession of a firearm.270 On appeal, Shears claimed that the trial court erred in failing to suppress an eyewitness identification.271

268. Id.
270. Id. at *1.
271. Id. at *2.
The victim, McCall, had pulled into a parking stall in front of his apartment when he noticed an individual exit a large SUV. \(^{272}\) The SUV had been following him and exhibiting suspicious behavior. \(^{273}\) Because it was dark, McCall was only able to identify the individual as a black male with a dark jersey. \(^{274}\) After exiting the vehicle, the individual opened fire in the direction of McCall. \(^{275}\) While McCall was not able to clearly see the individual, two witnesses—who had pulled up behind the vehicle that was blocking the driveway—testified that they were able to see the defendant, Shears, step out of the vehicle and into the headlights. \(^{276}\) The witnesses identified the shooter to the police as "a black male wearing a red jersey and black pants." \(^{277}\) The shooter and two other occupants of the vehicle were apprehended fleeing into Wal-Mart. \(^{278}\) A short time later the two witnesses were able to "each independently identif[y] Shears as the shooter with absolute certainty and without hesitation or prompting on the part of the officers." \(^{279}\) Other evidence against Shears included fingerprints, additional witnesses of the fleeing individuals, and the Wal-Mart surveillance tapes of the individuals fleeing. \(^{280}\)

Shears attempted to suppress the eye-witness identification claiming it was unduly prejudicial. Each of the two identifications were performed separately and in similar methods with the witness sitting in the patrol car while the three suspects, who were arrested at Wal-Mart, were placed one at a time in the headlights of the patrol car about twenty feet from the vehicle. \(^{281}\) The witnesses were told that the three men were arrested at Wal-Mart and that one individual escaped. \(^{282}\) Therefore, the witnesses were basically told that one of the three individuals committed the shooting, and asked to identify which of the three individuals, who were paraded through the headlights, was the shooter. The trial court did not find this unnecessarily suggestive. \(^{283}\)

\(^{272}\) Id. at *1.

\(^{273}\) Id.

\(^{274}\) Id.

\(^{275}\) Id.

\(^{276}\) Id.

\(^{277}\) Id.

\(^{278}\) Id. at *2.

\(^{279}\) Id.

\(^{280}\) Id.

\(^{281}\) Id. at *3.

\(^{282}\) Id.

\(^{283}\) Id. at *4.
While recognizing the identification process was suggestive, the court of appeals cited a Kansas Supreme Court case where the court approved a one-on-one identification shortly after an offense.\textsuperscript{284} In \textit{State v. Alires}, the court upheld an identification performed by a victim of a store robbery when the victim identified the suspects from a police car while driving past the suspects in custody.\textsuperscript{285} In both cases, the identification was supported by additional evidence. Following its application of the \textit{Corbett} two-step process, the \textit{Shears} court concluded that the identification procedures were not unnecessarily suggestive, based in part on the ability of the jury to weigh the reliability of the eyewitness identifications.\textsuperscript{286} The court also concluded that there was no likelihood of misidentification because of the corroborating evidence.\textsuperscript{287}

\textbf{J. Right to Counsel}

1. \textit{Quarles} Public Safety Exception after Invocation of the Right to Counsel

\textit{State v. Cosby} presented the issue whether a police officer may solicit information, under the \textit{Quarles} public safety exception, from an individual in custody who has asserted his right to counsel.\textsuperscript{288} Traditionally, an assertion of an individual’s right to counsel “impose[s] a relatively rigid requirement that interrogation must cease.”\textsuperscript{289} However, it is undecided whether an assertion of the right to counsel is entirely impenetrable.

Cosby was charged with first degree premeditated murder and ultimately convicted.\textsuperscript{290} The main issue at trial was not whether Cosby committed the killing, but rather whether it was committed in defense of a friend.\textsuperscript{291} After the shooting, Cosby discarded the gun while walking from Lawrence, Kansas to Topeka, Kansas, where he ultimately was arrested.\textsuperscript{292} Cosby was taken to the police station, placed in an interrogation room and read his \textit{Miranda} warnings, after which he

\textsuperscript{284} \textit{Id.}
\textsuperscript{285} 792 P.2d 1019, 1023 (Kan. 1990).
\textsuperscript{286} \textit{Shears}, 2007 WL 2767945, at *7.
\textsuperscript{287} \textit{Id.}
\textsuperscript{288} 169 P.3d 1128 (Kan. 2007).
\textsuperscript{289} \textit{Id.} at 1137–38.
\textsuperscript{290} \textit{Id.} at 1132.
\textsuperscript{291} \textit{Id.}
\textsuperscript{292} \textit{Id.} at 1134.
clearly asserted his right to counsel. Although Cosby had been read his rights, Detective Brown asked Cosby if the gun was in a safe place, and Cosby responded it was. The trial court admitted the statement by Cosby under the Quarles public safety exception, believing that Detective Brown had a "legitimate concern for public safety."
The Kansas Court of Appeals did not consider whether the statement was made with "legitimate concern for public safety," but instead considered whether a statement made after an assertion of a right to counsel is admissible when solicited by an officer, even if the officer had a reasonable concern for public safety. The Kansas Supreme Court noted that it was undisputed that Cosby was in custody, that his assertion of his right to counsel was clear and unambiguous and that Cosby did not waive his right to counsel by responding to Brown’s question. Therefore, the statement would be protected, unless the Quarles exception applied. The court then recognized that there is no clear authority on the issue. In the end, the court declined to rule on the issue, or give any indication of its stance. Because Cosby never disputed the killing, his statement connecting him to the murder weapon was of no consequence. Therefore, even if admitting the statement violated Cosby’s right to counsel, the admission was harmless error.

2. Reference to Invocation of Right to Counsel

Another issue raised in Cosby was whether the state could use evidence of the defendant’s voluntary statements, made after invocation of right to counsel, to open the door to presenting evidence of defendant’s invocation of his rights. The court noted that “[g]enerally, it is constitutionally impermissible for the State to elicit evidence at trial of an accused’s post-Miranda silence.”

293. Id.
294. Id.
295. Id. at 1137.
296. Id. at 1138.
297. Id.
298. Id. at 1138–39.
299. Id. at 1139.
300. Id.
301. Id.
302. Id. (citing Doyle v. Ohio, 426 U.S. 610, 618 (1976)).
In *Cosby*, the trial court allowed the State to present evidence that the officers did not follow up on Cosby’s unsolicited statements. The State sought to discredit Cosby’s assertion of self-defense by pointing out that Cosby never said anything about self-defense around the time of his arrest. "In addition to ‘explaining’ why the officers did not follow up on defendant’s unsolicited statements, the prosecutor repeatedly asked about defendant’s post-Miranda silence." Because Cosby’s silence was excused by his invocation of the right to counsel, the prosecution’s questioning constituted misconduct.

K. The Effective Assistance of Counsel

1. Effective Assistance of Appellate Counsel and the Right to Appellate Counsel

In *Kargus v. State*, the Kansas Supreme Court addressed whether a defendant, convicted of a felony, has "a right to effective assistance of appellate counsel when filing a petition requesting [the Supreme Court]'s discretionary review." Kargus was convicted, in a jury trial, of aggravated rape and kidnapping. Kargus filed an appeal, and the conviction was affirmed. Approximately three years after his conviction, Kargus filed a claim in the district court, pursuant to section 60-1507 of the Kansas Statutes, asserting ineffective assistance of appellate counsel. In his petition, Kargus claimed that his counsel failed to appeal his conviction to the Kansas Supreme Court, though Kargus specifically requested the attorney do so. The district court denied Kargus’ petition, concluding Kargus did not have a constitutional right to counsel when “pursuing a discretionary review in the Kansas Supreme Court.” The Kansas Court of Appeals reversed and remanded, and the State appealed to the Kansas Supreme Court.

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303. Id.
304. Id. at 1139–40.
305. Id. at 1140.
306. Id.
308. Id.
309. Id.
310. Id.
311. Id.
312. Id.
313. Id. at 309–10.
Before deciding if Kargus had a right to effective assistance of
counsel, the Kansas Supreme Court had to decide if Kargus had a right to
any counsel in the first place. The court looked to Wainwright v. Torna. In Wainwright, the U.S. Supreme Court held there is no
constitutional right to effective assistance of counsel in a discretionary
appeal. However, Kansas courts have held that there is a statutory
right to counsel in some situations. The Kansas Supreme Court held in
Brown v. State that claims under section 60-1507 of the Kansas Statutes
have “a statutory right under certain circumstances to counsel,” although
the defendant has no constitutional right to counsel. The distinction
between Brown and Kargus is that Brown “dealt with a defendant’s
appeal of the denial of his section 60-1507 motion, whereas [Kargus]
deals with the discretionary review of a Court of Appeals’ decision in a
direct appeal from a conviction.” Because Brown “dealt with a
defendant’s appeal of the denial of his section 60-1507 motion,” and
Kargus dealt with a direct discretionary appeal, the State argued that
Brown did not apply. The Kansas Supreme Court found that “no
decision of this court specifically addresses the issue.”

In order to establish whether there was a statutory right to counsel,
the court had to analyze the statute enabling the appeal. While the court
found no specific statute providing a criminal defendant the right to
counsel on appeal to the supreme court, the court found that several
statutes, read together, do provide such a right. After concluding that
the right to counsel attaches to “every stage of the proceedings,” the
court held that the right to petition for review of an appeals court
decision “is not qualified or contingent.” Because a criminal
defendant has a statutory right to counsel on appeal from an appeals
court decision, the defendant also has the inherent right to effective
assistance of counsel within the right to counsel.

The court’s decision to extend a criminal defendant’s right to
effective appellate counsel to a discretionary appeal in the supreme court

314. Id. at 310.
315. Id. at 310 (citing Wainwright v. Torna, 455 U.S. 586 (1982)).
316. Id.
317. Id. at 311 (citing Brown v. State, 101 P.3d 1201 (Kan. 2004)).
318. Id. at 311.
319. Id.
320. Id.
321. Id. at 312.
322. Id. (quoting KAN. STAT. ANN. § 22-4503(a) (Supp. 2006)).
323. Id. (citing KAN. STAT. ANN. § 20-3018(b) (2006)).
324. Id. at 313.
is fair and reasonable. While the court could not point to any specific statute that provides the right to counsel, the court was able to cite various statutes which establish a similar right to counsel on appeals to the court of appeals. Under section 22-4505(b) of the Kansas Statutes, a court, upon conviction, must advise the defendant of the right to appeal and the right to have appointed counsel on appeal. Because a defendant has a right to effective assistance of counsel in the court of appeals, it is more than reasonable that a defendant would also have the same right on appeal from the decision by the court of appeals. If a defendant was not given the right to counsel on appeal to the supreme court, a defendant could be left alone to appeal an appellate court’s decision that wrongfully overturned a trial court’s findings.

While providing a higher level of assurance of justice, that higher level of justice is not free. By providing the right to counsel on discretionary appeal to the Kansas Supreme Court, the holding provides for an increase in the amount of discretionary appeals submitted to the supreme court. While the court retains ultimate authority to grant or deny certiorari, more lawyers will be needed to file petitions for indigent defendants. The State will ultimately bear the cost of providing counsel to these defendants who are appealing discretionary judicial decisions.

2. Standard of Review for Effective Assistance of Counsel on Discretionary Appeals

In Kargus, the court created new law by holding that a criminal defendant has a statutory right to effective assistance of counsel for a discretionary review of an appellate court decision. Therefore, the court had to also establish a standard to judge the effectiveness of the appellate counsel. The court was forced to decide what the standard was for ineffective assistance of counsel when an attorney fails to file an appeal.

The court found that the issue of whether Kargus requested his counsel file a petition was never addressed by the trial court and therefore the case had to be remanded. Because this was a question of fact, it was improper to decide on appeal, especially without the ability to examine the evidence. However, the court did establish a new standard by which the trial court should judge situations in which a defendant claims ineffective assistance of appellate counsel.

325. See supra Part II.K.1.
326. Kargus, 169 P.3d at 320.
There are three possible outcomes in determining whether Kargus requested his petition to be filed. After trying the facts, the trial court could conclude: (1) Kargus requested that an appeal not be filed and the petition was not filed, (2) Kargus requested that an appeal be filed, but his attorney did not file the petition, or (3) Kargus was not informed of his right to appeal and, therefore, did not have the opportunity to decide either way. Because the Court could not determine which of the situations applied to Kargus, it was required to create a standard that would apply to all three situations.

The traditional two-part effective assistance analysis was insufficient to cover the three situations. The traditional effective assistance analysis found in *Strickland v. Washington* was whether "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the defendant was prejudiced." The state argued that this traditional standard should be applied, and that the petitioner would have to show "that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." Kargus argued that "failure to file a petition for review is presumptively prejudicial."

The court agreed that if an individual was to request a petition to be filed and the counsel disregarded the request, counsel's assistance was ineffective. The court pointed to *Roe v. Flores-Ortega* as "[t]he leading case regarding the test for ineffective assistance of counsel when a direct appeal is not timely filed." In *Flores-Ortega*, the U.S. Supreme Court established that it is professionally unreasonable to disregard a client's specific request to file a notice of appeal. Such disregard "cannot be considered a strategic decision." The *Flores-Ortega* Court also suggested that an individual cannot explicitly instruct counsel not to file a petition and later claim ineffective assistance. In addition to being unreasonable, failure to file a requested notice of appeal...

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327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
is prejudicial.\textsuperscript{337} Failure to file a notice of appeal deprives the individual of the \textit{whole} judicial process; not just a critical stage.\textsuperscript{338}

While the court found a presumption of prejudice, it was not able to find prejudice per se.\textsuperscript{339} While it is easy to determine effective assistance when a petitioner has specifically requested whether or not a notice of appeal be filed, the court noted that it does "not find it appropriate to extend the . . . exception—where counsel fails to complete an appeal—to mean that a petition for review must be filed automatically in all cases in which an appeal has been taken."\textsuperscript{340} Therefore, the court established a standard that includes situations where defendants are not informed by their attorney of their right to counsel. The ultimate standard the court established was a three part test including all three situations.\textsuperscript{341} The court held:

(1) If a defendant has requested that a petition for review be filed and the petition was not filed, the appellate attorney provided ineffective assistance; (2) a defendant who explicitly tells his or her attorney not to file a petition for review cannot later complain that, by following instructions, counsel performed deficiently; (3) in other situations, such as where counsel has not consulted with a defendant or a defendant's directions are unclear, the defendant must show (a) counsel's representation fell below an objective standard of reasonableness, considering all the circumstances; and (b) the defendant would have directed the filing of the petition for review.\textsuperscript{342}

The court essentially adapted the \textit{Strickland} test to apply to the three situations. In the first situation, the court declared that it is ineffective assistance if an attorney does not file a petition where requested.\textsuperscript{343} Under the \textit{Strickland} test, the attorney's failure to act would fall below a reasonable standard in ignoring a non-discretionary decision, while the failure would be prejudicial by denying the defendant's ability to appeal, "[r]egardless of whether the right to counsel is statutory or constitutional."\textsuperscript{344} Under the second situation, an individual cannot complain when an attorney does exactly as requested, unless

\begin{itemize}
\item \textsuperscript{337} \textit{Flores-Ortega}, 528 U.S. at 483.
\item \textsuperscript{338} \textit{id.}
\item \textsuperscript{339} \textit{id.} at 484.
\item \textsuperscript{340} \textit{Kargus}, 169 P.3d at 319.
\item \textsuperscript{341} \textit{id.} at 320.
\item \textsuperscript{342} \textit{id.}
\item \textsuperscript{343} \textit{id.}
\item \textsuperscript{344} \textit{id.} at 316 (citing \textit{Strickland} v. Washington, 466 U.S. 668 (1984)).
\end{itemize}
misinformed about the situation. Therefore, an individual who clearly waives the right to appeal cannot later claim ineffective assistance. The third part of the test covers the case where an individual either was unclear about the desire to appeal, or was not informed about the opportunity to appeal. It is almost a direct application of the Strickland test. Part (a) supplies the same objective standard of reasonableness while part (b) requires prejudice by requiring the defendant show that he would have appealed but for his lawyer's below-standard conduct.

The court does not give an example of what would be below the objective standard of reasonable conduct, but merely supplies language to interpret based on the circumstances. Thus, the lower courts are able to apply the standard case by case. Though the standard is partially open to interpretation, it does provide a good basis that applies to all situations in which a defendant might claim ineffective assistance on an appeal to the Kansas Supreme Court. It is also a standard that can apply to any situation where there is a right to appeal. The first step would always ask whether the defendant clearly expressed desire to appeal or not appeal, and then, if neither, apply an objective standard. Where many courts have a tendency to avoid new issues or to limit their decision to very particular facts, the Kargus court considered all possible issues that could arise on remand and created a broad standard that would cover any situation that could arise from similar fact patterns. Furthermore, the court created a decision that has the possibility to be applied to all situations where an appeal is not filed.

In the end, the court suggested that attorneys should avoid risking litigation. In order to avoid situations in which the court must judge facts and apply the third test, the court suggests that attorneys "file a notice of appeal in a timely manner, unless a waiver of the right to appeal has been signed by the defendant."

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345. Id. at 320.
346. Id.
347. Id.
348. Id.
349. Id. (quoting KAN. ADMIN. REGS. § 105-3-9(a)(3)).
III. PRETRIAL ISSUES

A. The Complaint

The complaint is a “plain and concise written statement of the essential facts constituting the crime charged.” The complaint must “specify the particulars of the crime sufficiently to enable the defendant to prepare a defense.” This requires that the complaint properly set out all the essential elements of the charge—a complaint that omits such an element is fatally defective. A court may permit amendment of the complaint “at any time before the verdict [so long as] no additional or different crime is charged and if substantial rights of the defendant are not prejudiced.

In Swenson v. State, the defendant challenged his conviction for attempted first-degree murder, in part on the theory that the complaint was jurisdictionally defective. Specifically, the defendant argued that the complaint was defective because it failed to list “premeditation” as an element of attempted first-degree murder. In its evaluation of the case, the Kansas Supreme Court applied the “common-sense rule” previously established in State v. Hall for determining the sufficiency of the complaint. Under that rule, “even if an essential element of an offense is missing [from the complaint],” the document may be sufficient “if it would be fair to require the defendant to defend based on the charge as stated in the document.” The court has held that common sense is a “better guide than arbitrary and artificial rules when determining whether the charging document is sufficient.”

In its review of the trial, the court concluded that there was “no question that defense counsel was well aware of the premeditation element in the charge of attempted first-degree murder and was able to
provide an adequate defense."\(^{360}\) The court concluded that the defendant failed to show that he was prejudiced by the omission, and therefore the complaint was not deficient under the common-sense rule.\(^{361}\)

In *State v. Wilson*,\(^{362}\) the Kansas Supreme Court held that "an attempted crime has three essential elements: (1) the intent to commit the crime, (2) an overt act toward the perpetration of the crime, and (3) a failure to consummate the crime."\(^{363}\) The court determined that a complaint alleging attempted first-degree murder was not fatally defective because it included the three essential elements of an attempted crime.\(^{364}\) A complaint alleging the commission of an attempted crime need not lay out all of the individual elements of the crime that was attempted in order to be valid.\(^{365}\)

The common-sense rule has the potential to prejudice the accused in preparing a defense because it leaves to the discretion of the judge whether "it would be fair" to require the defendant to defend based on the charges as they are listed in the complaint. The rule itself provides a way for the courts to thwart the purpose of section 22-3201 of the Kansas Statutes. However, as applied in *Wilson*, the rule is reasonable and fair. It would be unreasonable to deem the complaint jurisdictionally defective for not listing the elements of the crime that was attempted although the elements of the attempt itself are clearly listed.

Additionally, the Kansas Supreme Court recently addressed the importance of the requirement that a complaint be in writing. In *State v. Davis*,\(^{366}\) the defendant was charged and convicted of first-degree murder, attempted first-degree murder, and conspiracy to commit first-degree murder.\(^{367}\) At the close of the State's evidence, defense counsel moved for a directed verdict on the grounds that the State had failed to prove that the defendant was with his coconspirators on the date that was specifically alleged in the complaint.\(^{368}\) In response to the motion, the State orally moved to amend the information "to properly show [the date], as the only date on which Davis allegedly conspired."\(^{369}\) The court

360. *Id.* at 817.
361. *Id.*
363. *Id.* at 816 (citing *Wilson*, 43 P.3d at 853).
364. *Id.*
365. *Id.*
366. 156 P.3d 665 (Kan. 2007).
367. *Id.* at 666.
368. *Id.*
369. *Id.*
granted the oral motion, but no writing or memorandum was ever filed.  

On appeal, Davis argued that the requirement under section 22-3201(b) of the Kansas Statutes that the complaint be "a plain and concise written statement of the essential facts constituting the crime charged," made the oral amendment insufficient. Davis contended that the State's failure to comply with the requirement deprived the trial court of jurisdiction. The court disagreed and held that "the State's failure to file an amended complaint after making an oral motion to do so does not deprive a trial court of subject matter jurisdiction over the defendant."

In Davis, the court was forced to prioritize between the general purpose of the complaint and the specific requirement that it be in writing. The court's decision demonstrates a willingness to apply the technicalities of the rule less strictly so long as the general purpose is complied with in full. This is a very practical and reasonable decision. The defendant in the case was seeking an extreme remedy for a minor and completely insignificant oversight on the part of the State.

B. Bail

The purpose of bail is "to insure the presence of the prisoner at a future hearing." How much bail is required for each case is left to the sound discretion of the magistrate. Under the Kansas Constitution's Bill of Rights, "[a]ll persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or presumption great."

An appearance bond forms a contract between the defendant and the surety on one hand and the state on the other. Through this contract it becomes the "responsibility of the surety to know the whereabouts of the defendant, to watch the court's calendar, and to see that the defendant appears as ordered." In State v. Sedam, the Kansas Court of Appeals held that a material modification to the agreement which changes the

370. Id.
371. Id. (citing KAN. STAT. ANN. § 22-3201(b) (2006)).
372. Id.
373. Id. at 667.
375. Id.
376. KAN. CONST. Bill of Rights, § 9.
surety’s obligation, such as new conditions imposed by the trial court on the defendant, constitute a discharge of the surety’s duty.\textsuperscript{379} In that case, the court held that reinstating a forfeited bond containing new conditions, without providing the surety any notice of the new conditions, deprived the surety of an opportunity to decide whether it was willing to take on the increased risk of forfeiture.\textsuperscript{380} Such a material change rendered the agreement between the parties null and void.

C. Preliminary Hearing

Under section 22-2902(2) of the Kansas Statutes, a preliminary hearing must be held within ten days of the defendant’s arrest or personal appearance.\textsuperscript{381} The Kansas Supreme Court has found this statutory time requirement “directory” as opposed to mandatory.\textsuperscript{382} Therefore, rather than dismiss charges when the ten day deadline is not met, courts are required to analyze the totality of the circumstances to determine whether a defendant’s right to a speedy trial has been violated.\textsuperscript{383}

In \textit{State v. Rush}, the defendant was charged and convicted of burglary and misdemeanor theft.\textsuperscript{384} The defendant appealed his conviction on the grounds that his constitutional guarantee to a speedy trial was violated because 274 days passed between his arrest and the preliminary hearing.\textsuperscript{385} The Kansas Court of Appeals applied the four-factor test established by the United States Supreme Court in \textit{Barker v. Wingo}\textsuperscript{386} to determine if the delay violated the constitutional right to a speedy trial.\textsuperscript{387} Given the court’s finding that the 274 day delay was presumptively prejudicial, the ultimate issue in the case was the court’s determination of the cause of the delay.\textsuperscript{388} The court reasoned that a “deliberate attempt by the State to thwart the defense would weigh heavily against the State,” while an error of negligence or an overcrowded docket would carry less weight against the State.\textsuperscript{389}

\textsuperscript{379} \textit{Id.}
\textsuperscript{380} \textit{Id.} at 827.
\textsuperscript{381} \textit{KAN. STAT. ANN.} § 22-2902(2) (2006).
\textsuperscript{383} \textit{Id.}
\textsuperscript{384} \textit{Id.}
\textsuperscript{385} \textit{Id.}
\textsuperscript{386} 407 U.S. 514 (1972).
\textsuperscript{387} \textit{Rush}, 2007 WL 1747871, at *2.
\textsuperscript{388} \textit{Id.}
\textsuperscript{389} \textit{Id.}
In its evaluation of the case's history, the Kansas Court of Appeals found that multiple factors contributed to the delay. A month of the delay arose from Rush's appointed counsel's request for a competency determination. Another six months of the delay was attributed to Rush's refusal on two separate occasions to cooperate with the competency evaluations. The Court of Appeals concluded that there was in fact only one month of delay between the trial court's determination of the competency of the defendant and the preliminary hearing. Based on these findings, the court concluded that the 274 day delay before holding a preliminary hearing did not violate Rush's constitutional rights.

The court in *State v. Rush* refused to allow the defendant to benefit from his own refusal to cooperate with the justice process. The court's loose application of the statutory ten-day requirement is appropriate in cases like *Rush*. While this loose interpretation could have the effect of excusing neglect or delay by the State at the cost of the rights of the accused, that argument by no means justifies releasing dangerous criminals back into society based on clerical errors or an overcrowded docket. However, the court's determination that section 22-2902(2) of the Kansas Statutes is "directory" as opposed to mandatory seems particularly dangerous when an innocent person's freedom is potentially being deprived.

Kansas law requires the discharge of a defendant after the preliminary hearing if the State is unable to present sufficient evidence to establish probable cause. In making this determination, the judge must determine if the evidence supports a finding that a crime was committed and that the person being charged with the crime committed it. The evidence presented at the preliminary hearing need not establish the defendant's guilt beyond a reasonable doubt; rather "there must be evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."

For example, in *State v. Shaw*, the defendant appealed his conviction for felony DUI as a third-time offender and argued that his case should

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390. *Id.* at *3–4.
391. *Id.* at *3.
392. *Id.* at *4.
393. *Id.*
394. *Id.* at *5.
396. *Id.*
397. *Id.* at 529 (quoting *State v. Huser*, 959 P.2d 908, 910 (Kan. 1998)).
have been dismissed because of the State’s failure at the preliminary hearing to prove that he had previously been convicted twice for DUI.\footnote{398} The defendant was charged as a third-time offender, making the two prior convictions a necessary element of the charge against him.\footnote{399} The defendant claimed that the State’s evidence at the preliminary hearing was insufficient because the only evidence of his prior convictions presented at the preliminary hearing was a certification of his driving record.\footnote{400} Specifically, the defendant argued that while the driving record contained evidence of the diversion agreement he had previously entered into, the program was not the same as a DUI conviction, and therefore the evidence presented was insufficient to prove the necessary element of the charge against him.\footnote{401}

The Kansas Supreme Court found that the State’s presentation of the defendant’s certified driving record at the preliminary hearing was sufficient evidence to establish probable cause that the defendant had been convicted of DUI twice.\footnote{402} The court held that it was up to the judge at the preliminary hearing to determine whether there was some evidence that “a felony has been committed and the person charged committed it,” and that the State “need not prove guilt beyond a reasonable doubt, only probable cause.”\footnote{403}

Requiring a lower burden of proof at the preliminary hearing is reasonable given the purpose of such hearings. Under section 22-2902(3) of the Kansas Statutes, a judge is required by statute to release the defendant if there is insufficient evidence to establish probable cause.\footnote{404} The accused’s guilt is not determined at this hearing; rather the judge merely makes a determination as to whether or not it is reasonable to have the defendant bound over for trial. There is no reason to require the State to have its entire case ready to present at this early stage. The court in Shaw required only a determination of whether a reasonably prudent person could conclude from the notations on the driving record that the defendant had been convicted of prior DUI’s. The evidence presented was more than sufficient for that purpose, and it was reasonable to hold the defendant for trial with the presumption that the

\begin{itemize}
    \item \footnote{398}{Id. at 528.}
    \item \footnote{399}{Id.}
    \item \footnote{400}{Id.}
    \item \footnote{401}{Id.}
    \item \footnote{402}{Id. at 529 (quoting State v. Huser, 959 P.2d 908, 910 (Kan. 1998)).}
    \item \footnote{403}{Id. at 529 (quoting State v. Huser, 959 P.2d 908, 910 (Kan. 1998)).}
    \item \footnote{404}{KAN. STAT. ANN. § 22-2902(3) (2006).}
\end{itemize}
State will have no problem confirming its theory with stronger evidence at trial.

D. The Formal Charge: Information and Indictment

The Bill of Rights of the Kansas Constitution requires that the State inform the accused as to the nature of the accusation. A defendant cannot be charged in the information with one offense and be convicted of a different offense except when the offense for which the defendant is convicted is a lesser included offense of the charged crime. To be sufficient, an information must state the precise offense for which the defendant is accused so that the defendant may prepare a defense. The information, complaint, or indictment serves as the jurisdictional instrument by which the accused is tried.

In *State v. Elrod*, the defendant was charged with two counts of indecent liberties with a child. The original charge stated that the defendant had "feloniously engage[d] in lewd fondling or touching of the person of a child." After the jury returned a verdict finding the defendant guilty of both counts, the state filed an amended information which again charged the defendant with two counts of indecent liberties with a child. This amended information charged the defendant with "feloniously soliciting a child . . . to engage in lewd fondling or touching of the offender." On appeal, the defendant argued that there was no evidence that he had ever made such a solicitation or that the victim had ever touched him in a sexual manner.

The Kansas Supreme Court was "puzzled by the State’s decision to amend the information after the conclusion of the trial." Finding no existing Kansas law on the issue, the court determined that the relevant inquiry was what effect, if any, the amendment had on the defendant's conviction. The court was satisfied that the jury "did not know that an amended information would be filed" and "based its decision on the

407. *Id.*
408. *Id.*
409. *Id.* at 1071.
410. *Id.* at 1071–72.
411. *Id.* at 1072.
412. *Id.*
413. *Id.*
414. *Id.*
The court found that the defendant knew the crimes for which he was charged and there was sufficient evidence to support a finding that the allegations in the first information were true. The court concluded that because the "information which was in place at the time of the trial contained all of the elements of the crime," the information was sufficient.

While the court's analysis and ultimate decision in Elrod are correct and fair, they fail to directly condemn the State's after-trial amendment. This failure may be seen by some as an indirect acceptance by the court of this type of amendment. The court mentions that it finds the after-trial amendment "puzzling," but never goes any further into the appropriateness of such an amendment. The court upholds the conviction, and in doing so, ratifies the after-trial amendment. It appears from the decision that the information, which clearly states facts that were never proven, remains part of the record of the trial.

As a general rule, an information charging burglary is defective if it fails to specify the ulterior felony that the accused was intending to commit during the unauthorized entry. This error can be corrected if the defendant is provided with adequate notice of the alleged ulterior felony before the case goes to trial. Attempts by the State to amend the information during the trial to change the ulterior felony listed in the original information raise due process issues.

State v. Wade went to trial on an information charging the defendant with aggravated burglary and listing the ulterior felony as premeditated first-degree murder. At the close of the evidence, the State moved to amend the information to add aggravated assault as an alternative ulterior felony. The State argued that the defendant should have known that there was potential for a change to the charging document because section 22-3201(e) of the Kansas Statutes expressly authorizes it. The court rejected this argument as circular, stating that the statute only authorizes such changes "where the defendant's substantial rights are not prejudiced." Therefore, the State cannot argue that the defendant was

415. Id.
416. Id.
417. Id.
419. Id.
420. Id. at 707.
421. Id.
422. Id. at 711.
423. Id.
not prejudiced based on the fact that "he should have known that an amendment was possible if he was not prejudiced." 424

The court was concerned with the fact that the defendant had "prepared and presented his defense with the understanding that he could obtain an acquittal on the aggravated burglary charge if he convinced the jury that he did not have a premeditated intent to kill [the victim] when he entered" the house. 425 The court reasoned that it was incorrect to "make one accused of aggravated burglary speculate on the State’s theory of guilt." 426 The court concluded that changing the ulterior felony after the close of the evidence prejudices the defendant in preparing and presenting a defense. 427 This was particularly true given the fact that the defendant "made the critical decision to testify at trial, based upon everyone’s understanding of what the State had assumed the responsibility of proving." 428 The State essentially lured the defendant to the stand and, by "adding aggravated assault as an alternative ulterior felony, transformed [the defendant’s] testimony into an after-the fact confession." 429

The decision in State v. Wade creates a harsh but necessary result. The State attempted to thwart the purpose of the information. The State moved to amend only after it realized it was unable to prove the element of premeditation. By that point, the defendant had already made the decision to testify on his own behalf, and in doing so, all but confessed to committing an aggravated assault. It would be unfair to allow the State to lure a defendant into testifying under the false hope of defending against one claim, and then to change the charge when a defense to the new charge is all but precluded.

E. Jurisdiction and Venue

In State v. Williams, the defendant challenged the district court’s jurisdiction to try him as an adult for crimes committed as a minor. 430 Williams was seventeen when he committed two crimes. 431 The State filed charges against Williams as an adult and a jury convicted him on

424. Id.
425. Id.
426. Id.
427. Id. at 715.
428. Id. at 711.
429. Id.
430. 153 P.3d 520, 521 (Kan. 2007).
431. Id.
two counts of first-degree murder and four counts of attempted first-degree murder.\textsuperscript{432} Prior to committing those crimes, Williams had been tried as a juvenile offender for several acts, one of which would have been a felony if he had been an adult.\textsuperscript{433}

Because of Williams' prior juvenile adjudication, the State filed charges against him as an adult.\textsuperscript{434} Williams participated in the trial proceedings without challenging the jurisdiction of the district court to prosecute him as an adult.\textsuperscript{435} On direct appeal, Williams again failed to challenge his adult prosecution.\textsuperscript{436} Williams then appealed to the Kansas Supreme Court.\textsuperscript{437}

The Kansas Supreme Court affirmed, holding that Williams was properly tried as an adult.\textsuperscript{438} The court noted that under the Kansas Code of Criminal Procedure, """'[t]he district court shall have exclusive jurisdiction to try all cases of felony and other criminal cases under the laws of the state of Kansas.'""\textsuperscript{439} However, the court noted that the Kansas Juvenile Offenders Code provided that """"proceedings concerning a... juvenile offender shall be governed by the provisions of this [Juvenile Offenders] code, when Williams committed his crimes."""\textsuperscript{440} The term """"juvenile offender"""" was defined in section 38-1602(b) of the Kansas Statutes, and that definition specifically excluded:

""""(3) a person 16 years of age or over who is charged with a felony or with more than one offense of which one or more is a felony after having been adjudicated in a separate prior juvenile proceeding as having committed an act which would constitute a felony if committed by an adult and the adjudications occurred prior to the date of the commission of the new act charged."""\textsuperscript{441}

Because Williams was over sixteen years of age and had a prior juvenile adjudication at the time he committed the crimes in this case, he was excluded from the statutory definition of a juvenile offender.\textsuperscript{442} The district court was precluded from proceeding against Williams under the

\textsuperscript{432} Id.
\textsuperscript{433} Id.
\textsuperscript{434} Id.
\textsuperscript{435} Id.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{438} Id. at 523.
\textsuperscript{439} Id. at 522 (quoting KAN. STAT. ANN. § 22-2601).
\textsuperscript{440} Id. (quoting KAN. STAT. ANN. § 38-1604(a)).
\textsuperscript{441} Id. (quoting KAN. STAT. ANN. § 38-1604(a)).
\textsuperscript{442} Id. at 523.
Juvenile Offenders Code, and had jurisdiction to prosecute and sentence Williams under the criminal code for adults.  

Section 38-1602(b) of the Kansas Statutes has been repealed and has not been replaced. As it stands now, the juvenile court would retain jurisdiction over a juvenile defendant identical to Williams. Thus, a minor defendant with a prior juvenile adjudication that would be considered a felony if committed by an adult would likely still be tried as a juvenile. The district court would not have jurisdiction over the minor.

Section 38-1602(b) of the Kansas Statutes should be replaced because, as a policy matter, juveniles with serious prior adjudications should be tried as adults. The provision in *State v. Williams* was reasonable and fair because the defendant was seventeen and had a prior adjudication that would have been a felony if committed by an adult. Minors over the age of sixteen with serious prior juvenile adjudications deserve to be tried as adults. The district court should retain jurisdiction over such minors.

In *State v. Johnson*, the defendant challenged the jurisdiction of the district court to convict him of aggravated indecent solicitation of a child. Johnson asserted that the crime of aggravated indecent solicitation of a child did not constitute a lesser included offense because all of its statutory elements were not identical to some of the elements of the crime charged. The Kansas Supreme Court concluded that because the convicted offense or a lesser included offense was not in the complaint, the district court lacked jurisdiction to convict Johnson.

The Kansas Supreme Court noted that if a defendant "is correct regarding the lack of identical elements, the district court had no jurisdiction over the lesser offense." The court continued:

“If a crime is not specifically stated in the information or is not a lesser included offense of the crime charged, the district court lacks jurisdiction to convict a defendant of the crime, regardless of the evidence presented.” A judgment for an offense where the court is without jurisdiction to decide the issue is void.

443. *Id.*
444. 156 P.3d 596, 598 (Kan. 2007).
445. *Id.*
446. *Id.* at 601.
447. *Id.* at 599.
448. *Id.* (quoting State v. Belcher, 4 P.3d 1137 (Kan. 2000)).
Whether jurisdiction exists is a question of law over which the state supreme court exercises unlimited review. Johnson was originally charged under section 21-3504(a)(3)(A) of the Kansas Statutes—aggravated indecent liberties with a child. Perhaps because this initial charge required physical contact with the child, the State replaced it with section 21-3504(a)(3)(B): "soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another." The Kansas Court of Appeals affirmed the conviction, concluding that aggravated indecent solicitation qualified as a lesser included offense. The Kansas Supreme Court reversed, finding that aggravated indecent solicitation of a child did not constitute a lesser included offense of the charged offense of aggravated indecent liberties with a child.

The result in this case is that the defendant’s conviction was overturned on a minor technicality. The reasoning applied by the Kansas Supreme Court is noteworthy. A criminal defendant may not be convicted of a crime unless the crime is charged or the crime is a lesser included offense of a charged crime. This allows a defendant to plan his defense and also affords due process. However, in cases such as State v. Johnson, the rule allows for reversal of convictions on potentially trivial technicalities. This case illustrates the difficulty of knowing when a court will find a lesser included offense. Both the State and the defendant must exercise caution when charging and defending against offenses.

In State v. Ortiz, the State asserted that the Kansas Court of Appeals lacked jurisdiction to review a defendant’s appeal because the appeal was not timely filed. The court noted that it would not have jurisdiction to entertain a defendant’s appeal unless a notice of appeal is filed within the time prescribed by the statute that provides for such an appeal.

The court of appeals deferred to a recent United States Supreme Court decision which held that statute-based time limits are jurisdictional, while rule-based time limits are not jurisdictional and can

449. Id.
450. Id.
451. Id.
452. Id. at 600.
453. Id. at 601.
455. Id.
be relaxed by a court using its discretion.\textsuperscript{456} In \textit{Bowles v. Russell}, the United States Supreme Court reasoned that because "Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."\textsuperscript{457}

The Kansas Court of Appeals applied the same reasoning, noting that the Kansas legislature created a statutory provision for the filing of criminal appeals.\textsuperscript{458} "For crimes committed on or after July 1, 1993, the defendant shall have 10 days after the judgment of the district court to appeal."\textsuperscript{459} The Kansas Supreme Court has held that the timely filing of an appeal is jurisdictional and if an appeal is not filed within the 10-day period fixed by statute, it must be dismissed.\textsuperscript{460}

Ortiz argued that his failure to file a notice of appeal was reasonable because there were unresolved issues in his case.\textsuperscript{461} The district court had ordered Ortiz to pay a $400 lab fee to the Kansas Bureau of Investigation for cocaine testing.\textsuperscript{462} Ortiz objected to the imposition of the fee, contending that the district court's order to pay the fee was contingent upon the State's providing proof that the lab test was conducted and that the State failed to provide such proof.\textsuperscript{463} There was no indication that the order was contingent upon anything.\textsuperscript{464} Ortiz continued to contest the fee until he filed his notice of appeal on June 14, 2006.\textsuperscript{465} The majority of his sentence had been pronounced four months earlier on March 17, 2006.\textsuperscript{466} The State asserted that because the notice of appeal was filed more than ten days after the sentence was pronounced, the Kansas Court of Appeals lacked jurisdiction to hear Ortiz's appeal.\textsuperscript{467}

The court noted that in criminal cases, sentences are effective upon pronouncement from the bench, not upon the filing of a journal entry.\textsuperscript{468} Ortiz argued that since the issue of the $400 lab fee was unresolved at the time the majority of his sentence was pronounced, a portion of the

\begin{thebibliography}{9}
\bibitem{456} Id. at *2 (citing Bowles v. Russell, 127 S. Ct. 2360 (2007)).
\bibitem{457} Id.
\bibitem{458} Id.
\bibitem{459} Id. (quoting KAN. STAT. ANN. § 22-3608(c) (1995)).
\bibitem{461} Ortiz, 2007 WL 2819991, at *2.
\bibitem{462} Id.
\bibitem{463} Id.
\bibitem{464} Id.
\bibitem{465} Id.
\bibitem{466} Id.
\bibitem{467} Id.
\bibitem{468} Id. at *3.
\end{thebibliography}
sentence was reserved or retained by the district court.\textsuperscript{469} The Kansas Court of Appeals held that because the issue of the KBI lab fee was kept open until June 7, 2006, when the district court resolved the open issue and firmly assessed the fee as part of Ortiz’s sentence, Ortiz filed his notice of appeal within ten days.\textsuperscript{470} Thus, the court had jurisdiction over the appeal.

\textit{F. Joinder and Severance}

In \textit{State v. Gaither}, Gaither was convicted of several crimes, all arising from his attempts to purchase illegal drugs.\textsuperscript{471} Specifically, Gaither was convicted and sentenced for attempted first-degree premeditated murder, first-degree felony murder, aggravated robbery, aggravated kidnapping, and felony obstruction of official duty.\textsuperscript{472} At trial, the district court joined the charges against Gaither into one complaint and one trial because the charges of attempted murder and felony murder were of the same or similar character.\textsuperscript{473} Gaither, on appeal to the Kansas Supreme Court, claimed that the district court improperly joined the charges against him. Gaither raised three principle arguments.\textsuperscript{474}

First, Gaither argued that the joinder violated section 22-3202(1) of the Kansas Statutes.\textsuperscript{475} The criminal joinder statute states that

\begin{quote}
[t]wo or more crimes may be charged against a defendant in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.\textsuperscript{476}
\end{quote}

The Kansas Supreme Court reasoned that one of three conditions precedent must be met before joinder can be proper.\textsuperscript{477} The three conditions precedent relate to the nature of the crimes charged: (1) whether the crimes are of the same or similar character; (2) whether the

\begin{itemize}
\item \textsuperscript{469} \textit{Id.}
\item \textsuperscript{470} \textit{Id.}
\item \textsuperscript{471} 156 P.3d 602, 605 (Kan. 2007).
\item \textsuperscript{472} \textit{Id.}
\item \textsuperscript{473} \textit{Id.} at 612.
\item \textsuperscript{474} \textit{Id.}
\item \textsuperscript{475} \textit{Id.}
\item \textsuperscript{476} KAN. STAT. ANN. § 22-3202(1) (2007).
\item \textsuperscript{477} \textit{Gaither}, 156 P.3d at 612.
\end{itemize}
crimes arise out of the same act or transaction; or (3) whether two or more acts or transactions are connected together or constitute parts of a common scheme or plan. Only one of the conditions precedent need be met before joinder of charges is permissible.

At trial, "[t]he State asserted that crack cocaine was the central theme underlying the commission of all the crimes." The Kansas Supreme Court concluded that the charges were of the same or similar character, and that joinder was permissible under section 22-3202(1) of the Kansas Statutes. Such a conclusion was supported by the facts that both victims in the case were drug dealers, both shootings involved Gaither's quest for drugs, both victims were shot in the chest with a nine millimeter handgun, and both shootings occurred at private dwellings within a five-day period. Further, "Gaither's charges involved the same mode of trial, the same kind of evidence, and the same kind of punishment."

Gaither next asserted that the joinder of charges denied him a fair trial by confusing the jury. The jury in the case had received an instruction to consider each charge "separately on the evidence and law applicable to it; uninfluenced by [their] decision as to any other charge." The Kansas Supreme Court presumed that the jury complied with the instruction and held that Gaither's "claim of jury confusion does not warrant the severance of the charges against him." Because nothing in the record suggested jury non-compliance with the judge's instruction, the reviewing court presumed compliance.

Finally, Gaither contended "that the improper joinder allowed the State to circumvent K.S.A. 60-455 and rely on propensity evidence." Section 60-455 of the Kansas Statutes governs character evidence, specifically the ability of the State to rely on character evidence to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." The court stated that "joinder is not dependent upon the other crimes being joined meeting the admissibility test set forth in K.S.A. 60-455". Applying the limitations of K.S.A.

478. Id.
479. Id.
480. Id. at 613.
481. Id.
482. Id.
483. Id.
484. Id. (quoting State v. Barksdale, 973 P.2d 165, 172 (Kan. 1999)).
485. Id.
486. Id. at 614.
60-455 to the joinder of charges would effectively nullify the application of K.S.A. 22-3202(1) when the crimes charged are of the same or similar character.488

The Kansas Supreme Court upheld Gaither's convictions.489 The ruling promotes judicial economy, and preserves the rights of the accused. Nothing in the record indicated a need to sever the charges against Gaither.

In general, joinder of similar crimes is the rule; severance is the exception.490 The criminal defendant bears the burden of showing special circumstances that illustrate the necessity for severance.491 "The 'same or similar character' language of K.S.A. 22-3202(1) does not limit joinder to only those crimes that are clones of each other," nor does any case law suggest that cases must be of equal strength or weakness to be joined.492

Joinder of two or more defendants is authorized by section 22-3202(3) of the Kansas Statutes, and is subject to requirements similar to those concerning the joinder of charges. Section 22-3202(3) provides for the charging of co-defendants in the same complaint.493 The need for judicial economy supports a liberal application of the joinder statutes to both joinder of charges and joinder of defendants.

G. The Arraignment

The arraignment is the "formal act of calling the defendant before a court having jurisdiction to impose sentence for the offense charged, informing the defendant of the offense with which the defendant is charged, and asking the defendant whether the defendant is guilty or not guilty."494

H. Guilty Pleas

A criminal defendant's plea of guilty or nolo contendere is governed by section 22-3210 of the Kansas Statutes. "The court must[] inform the

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488. Gaither, 156 P.3d at 614.
489. Id. at 616.
491. Id. at 23.
492. Id.
494. § 22-2202(3).
criminal defendant of the consequences of the plea, including the level of the crime and the maximum penalty.\textsuperscript{495} The court must also "address the defendant personally and determine that the plea is voluntarily and knowingly made."\textsuperscript{496} "A plea is void if induced by promises or threats that deprive it from its voluntary character."\textsuperscript{497} A defendant is presumed to know his criminal history when he enters into a plea agreement.\textsuperscript{498} Additionally, a criminal defendant is responsible for telling his trial counsel his criminal history.\textsuperscript{499}

Motions to withdraw pleas are governed by section 22-3210(d) of the Kansas Statutes, which states that "[a] plea of guilty or nolo contendere, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged."\textsuperscript{500} The statute additionally provides that a court may, after sentencing, permit the defendant to withdraw a plea to correct "manifest injustice."\textsuperscript{501}

In \textit{Guillory v. State}, Guillory pleaded nolo contendere to first-degree murder.\textsuperscript{502} In a pro se habeas petition seeking to withdraw his plea, Guillory alleged "(1) he was never informed he could appeal his sentence; (2) ineffective assistance of counsel; and (3) his attorney coerced him into entering a guilty plea."\textsuperscript{503} The district court and Kansas Court of Appeals dismissed Guillory's appeal because the notice of appeal was not filed within the thirty-day limitation of section 60-2103(a) of the Kansas Statutes.\textsuperscript{504} The Kansas Supreme Court discussed the three \textit{Ortiz} exceptions to the strict thirty-day notice of appeal limitation. Exceptions to the requirement of dismissal of direct appeals are appropriate in cases where "[1] a criminal defendant either was not informed of the rights to appeal or [2] was not furnished an attorney [for that purpose] or [3] was furnished an attorney for that purpose who failed to perfect and complete an appeal."\textsuperscript{505} The court did not reach the issue of whether Guillory was coerced by his attorney into entering his plea.\textsuperscript{506}
The court dismissed the appeal for lack of jurisdiction due to the untimely nature of the appeal. The criminal defendant wishing to contest his entrance of a guilty or nolo contendere plea must use extreme caution, as the Ortiz factors represent a narrow band of exceptions to the strict thirty-day requirement for contesting pleas on appeal. Courts appear to strictly enforce the thirty-day notice of appeal requirement.

I. Discovery

Kansas follows the standard articulated by the United States Supreme Court in *Brady v. Maryland* regarding prosecutorial disclosure of evidence and suppression. *Brady* holds that the prosecution may not suppress, either in good or bad faith, evidence favorable to the defendant and material to guilt or punishment without violating the defendant's due process rights. There are three scenarios in which *Brady* applies. Kansas's formulation of those scenarios is:

1. where there is a deliberate bad faith suppression for the purpose of obstructing the defense or intentional failure to disclose evidence which has high probative value and which could have not escaped the prosecutor's attention;
2. where there is a deliberate refusal to honor a request for evidence where the evidence is material to guilt or punishment, irrespective of the prosecutor's good or bad faith in refusing the request; and
3. where suppression was not deliberate and no request for evidence was made, but where hindsight discloses that it was so material that the defense could have put the evidence to significant use.

"This formulation requires the State to disclose evidence that could be exculpatory to a defendant even when no request for the disclosure has been made." The result from *Brady* is a sliding scale, with intentional withholding of evidence at one end and unintentional but material failure to disclose at the other. It may be difficult for the State to foresee whether certain evidence might be exculpatory. Because of this difficulty, full and frank disclosure of even debatably exculpatory evidence is the wisest option. Kansas courts have articulated several

507. *Id.*
511. *Id.* (citing *Kelly*, 531 P.2d at 63).
definitions of "exculpatory," which may provide guidance to a prosecutor.\textsuperscript{512} To avoid suppression under \textit{Brady}, the State should be forthright in disclosing potentially exculpatory evidence to the defense, even when such evidence has not been requested. The \textit{Brady} test is the fairest way to balance the State's interest in prosecuting criminals with a defendant's due process rights.

\textit{J. Pretrial Motions and Pretrial Conference}

After the filing of an indictment, pretrial conferences may be ordered by motion of any party or by the court to "consider such matters as will promote a fair and expeditious trial."\textsuperscript{513} The main objectives of the pretrial conference include "expedit\[ing\] processing and disposition of the litigation, minimiz\[ing\] expenses and conserv\[ing\] time."\textsuperscript{514} The court may give consideration to and take appropriate action regarding any matters that may aid in the disposition of the action,\textsuperscript{515} including but not limited to the simplification of issues,\textsuperscript{516} the determination of issues of law,\textsuperscript{517} and the necessity of amendments to the pleadings.\textsuperscript{518} In such a conference, admissions made by the defendant cannot be used against him or her unless they are written and signed by the defendant and the defendant's attorney.\textsuperscript{519}

Trial courts in Kansas have pretrial authority granted by statute to entertain motions in limine.\textsuperscript{520} "The purpose of a motion in limine is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel."\textsuperscript{521} The presence of two factors dictates whether a motion in limine should be granted: "(1) The . . . evidence in question will be admissible at a trial under the rules of evidence; and (2) the mere offer of evidence . . . will tend to prejudice the jury."\textsuperscript{522}

\textsuperscript{512} \textit{Kelly}, 531 P.2d at 65 (noting that "evidence is exculpatory if it tends to disprove a fact in issue which is material to guilt or punishment," and additionally, that evidence may be exculpatory if it bears upon the credibility of a key witness on important issue in case).

\textsuperscript{513} \textit{KAN. STAT. ANN.} \S 22-3217 (2006).

\textsuperscript{514} \S 60-216.

\textsuperscript{515} \S 60-216(c)(7).

\textsuperscript{516} \S 60-216(c)(1).

\textsuperscript{517} \S 60-216(c)(2).

\textsuperscript{518} \S 60-216(c)(3).

\textsuperscript{519} \S 22-3217.

\textsuperscript{520} State v. Quick, 597 P.2d 1108, 1112 (Kan. 1979).

\textsuperscript{521} \textit{Id.}

The Kansas Supreme Court and the Kansas Court of Appeals each decided a case within the past year dealing with purported violations of pretrial motions in limine. Courts use a two-part test to evaluate an alleged violation of a motion in limine. They first determine whether there has been a violation, and then determine whether the violation was substantially prejudicial to the defendant. The burden is on the defendant to show substantial prejudice.

In *State v. Johnson*, the defendant appealed from a conviction for the premeditated first-degree murder of Dorothy Griffin, who died after sustaining numerous stab wounds. Before trial, the district court granted the defendant’s motion in limine, which precluded statements about the defendant’s previous murder charges and his criminal record. During the trial, two of the State’s witnesses mentioned that they had each met the defendant after he had been released from jail a few weeks before the murder. The defendant moved for a mistrial arguing that the statements violated the motion in limine. The district court denied the motion and the defendant appealed.

The Kansas Supreme Court agreed with the district court and held that the witnesses’ statements did not technically violate the prohibition against statements regarding the defendant’s prior murder charges or criminal record, explaining that “mentioning defendant’s release from jail does not necessarily reveal the existence of a criminal record.” In making this determination the court distinguished *State v. Hartfield*, in which evidence that the defendant was on parole was indicative of prior criminal history. The statements in *Johnson* were held to be “innocuous references to jail release as a temporal frame of reference.”

This ruling potentially prejudices repeat criminal offenders. The rule in *Johnson* infers that for purposes of a motion in limine, statements touch on a person’s criminal record only if the jury can logically conclude that the person has a prior criminal record from the statement itself. It is possible for a person to be released from jail without having a criminal record—he could have been wrongfully arrested. However, if a

\[\text{\footnotesize \[523. State v. Warden, 891 P.2d 1074, 1095 (Kan. 1995).\]}
\[\text{\footnotesize \[524. Id.\]}
\[\text{\footnotesize \[525. State v. Johnson, 159 P.3d 161, 165 (Kan. 2007).\]}
\[\text{\footnotesize \[526. Id. at 170.\]}
\[\text{\footnotesize \[527. Id.\]}
\[\text{\footnotesize \[528. Id. at 165.\]}
\[\text{\footnotesize \[529. Id. at 170.\]}
\[\text{\footnotesize \[530. Id.\]}
\[\text{\footnotesize \[531. Id.\]}
\[\text{\footnotesize \[532. Id.\]}
\]
defendant does have a prior criminal conviction, this rule affords the State an end-run around the motion in limine. The State can purposefully elicit the fact that the defendant has been to jail from witnesses. A jury might then have a tendency to infer that because the case they are currently hearing is a criminal case, references to the defendant’s previous jail time involve a criminal conviction. The Johnson court seems to recognize this problem, but states that previous testimony regarding disorderly conduct by the defendant had the potential to give the jury reason to believe that the defendant could have been jailed for this conduct rather than a prior criminal conviction. Overall, courts should be wary of references to prior jail time and should temper the admissibility of such references through the substantial prejudice prong of the motion in limine analysis.

IV. TRIAL RIGHTS

A. The Right to a Speedy Trial

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Constitutional protection attaches at the beginning of a criminal prosecution by an indictment, an information, or an arrest. To evaluate potential Sixth Amendment violations, Kansas utilizes the test set out in Barker v. Wingo. This test requires an analysis of four elements: (1) length of delay, (2) reason for the delay, (3) defendant’s assertion of his or her right, and (4) prejudice to the defendant. As no single element is dispositive, courts consider these four factors in light of any other relevant circumstances. Kansas also recognizes a Fifth Amendment due process right to a reasonably timely prosecution of criminal charges. In reviewing allegations that this right has been violated, courts ask two questions: "(1) [h]as the delay prejudiced the accused’s ability to defend himself or herself, and (2) was the delay a tactical device to gain advantage over the defendant?"

533. Id. at 170–71.
534. U.S. Const. amend. VI, cl. 1.
539. Id. (citing State v. Royal, 535 P.2d 413 (Kan. 1975)).
Section 22-3402 of the Kansas Statutes provides the statutory basis for a defendant’s right to a speedy trial in Kansas. The provisions in this section require the defendant be discharged of criminal liability if he or she is not brought to trial within ninety days of arraignment if held in jail, or within 180 days if held to answer on an appearance bond. However, liability is not discharged if the delay happens as a result of the application or fault of the defendant.

Recently, in *State v. Adams*, the Kansas Supreme Court addressed the issue of whether a defendant had been denied his statutory right to a speedy trial. The State charged Charles Adams with, among other things, possession and conspiracy to sell cocaine and possession of marijuana. Adams’ first trial ended in a mistrial on January 27, 2004. The district court reinstated his bond and scheduled a new trial for March 5, 2004. Four days before the new trial, the State contacted the district court and expressed concern that Adams might not appear for trial because officers planned to serve him with an arrest warrant on other charges. The district court consulted with defense counsel who assured the court that Adams would appear. However, the district court cancelled the trial and set the matter for a status conference if Adams appeared. Adams appeared on May 25, 2004 for the status conference and a trial date was set for August 18, 2004 as the prosecutor indicated a conflict with a prior date.

Immediately before trial, defense counsel moved to dismiss based on a violation of the right to a speedy trial. The State argued that Adams acquiesced to the continuance, and the district court denied the motion. Adams was convicted and sentenced to ninety-nine months in prison. The Court of Appeals reversed one conviction but affirmed Adams’ other convictions and sentences. Defense counsel then petitioned for review.

542. Id.
544. Id.
545. Id.
546. Id.
547. Id.
548. Id.
549. Id.
550. Id.
551. Id.
552. Id.
553. Id.
554. Id.
The Kansas Supreme Court noted that Adams' appellate counsel failed to raise the statutory speedy trial issue on appeal, but the case presented "the exceptional circumstances necessary for raising the... issue *sua sponte*." The speedy trial statute provides that a defendant who is not in custody solely for the crime charged must be brought to trial within 180 days after arraignment. Adams' speedy trial period ended on July 26, 2004 and his trial was held twenty-three days later on August 18, 2004. A defendant is not required to take affirmative action to ensure his statutory right to a speedy trial, but a defendant waives his or her right by requesting or acquiescing in the granting of a continuance. Because neither defense counsel nor the State ever filed a motion to continue, the court held that defense counsel's agreement to the August 18, 2004 trial setting was neither an acquiescence to a continuance nor the equivalent of a waiver of Adams' statutory right to a speedy trial. The court, therefore reversed all of Adams' convictions, vacated his sentences, and dismissed the charges against him.

This result reinforces the language in prior case law stating that the burden is on the State to try the defendant before the statutory speedy trial deadline expires. Adams had no duty to inform the State that the statutory period had run out or to convince them to choose an earlier date for trial. The facts of *Adams* are unusual because through no choice of the defendant, the eventual trial date was postponed yet no continuance was filed. Had the court held that Adams' agreement to the new trial date was a waiver of his right to a speedy trial, prosecutors in the future might have been able to contravene the statute by obtaining a "waiver" that the defendants would have no choice but to give.

The clear-cut 180 day time period in the speedy trial statute does not allow the State much room for error. A small miscalculation or a failure to recognize an atypical case such as *Adams* when scheduling a trial can result in violent criminals being cleared of all charges. Overall, however, the benefits of the statute outweigh its potential problems. The statute does give prosecutors an incentive to perform their duties in a timely manner and provides clear guidelines that are easy to follow. Without the mandatory time period, prosecutors would have to use their best estimate as to how long they could wait to try defendants so as not to

555. *Id.* at 515.
556. *Id.* (citing State v. Abel, 932 P.2d 952 (Kan. 1997)).
557. *Id.* at 516.
558. *Id.* (citing State v. White, 67 P.3d 138 (Kan. 2003)).
559. *Id.*
560. *Id.*
violate their constitutional right to a speedy trial. Litigation on this issue would unnecessarily consume judicial resources.

B. The Right to a Trial by Jury

The Sixth Amendment right to jury trial is incorporated via the Fourteenth Amendment and enforceable against the states.\textsuperscript{561} A criminal defendant has both a constitutional and a statutory right to a jury trial.\textsuperscript{562} Legislatures have the power to make jury trials unavailable in the case of "petty crimes or offenses."\textsuperscript{563} Kansas's statutes provide that the defendant may choose to submit the trial of any felony to the court, but all other felony trials must be by jury.\textsuperscript{564} Juries in felony cases must consist of twelve members unless the court and both parties agree to a number less than twelve.\textsuperscript{565} In a jury trial, the court decides questions of law and the jury decides questions of fact.\textsuperscript{566} Unless the defendant requests a jury trial, misdemeanor and traffic infractions are tried to the court.\textsuperscript{567} Trials for municipal offenses such as traffic infractions are also tried to the court.\textsuperscript{568}

1. Impartial Jury

In Duren v. Missouri, the United States Supreme Court invalidated a Missouri statute that allowed for the automatic exemption of women from jury service, a law which had produced juries that generally were at least eighty-five percent male.\textsuperscript{569} The Court held that the statute resulted in an unconstitutional underrepresentation of women on jury venires and violated the defendant's constitutional right to a jury comprised of a fair cross-section of the community.\textsuperscript{570} The Duren test for determining whether a fair cross-section of the community is represented in a jury requires:

\begin{itemize}
\item See U.S. CONST. amend. VI; KAN. CONST. Bill of Rights, §§ 5, 10; KAN. STAT. ANN. § 22-3403 (2006).
\item See, e.g., Blanton v. City of N. Las Vegas, 489 U.S. 538, 543 (1989) (holding that there was no Sixth Amendment right to trial by jury in the case of a first offense for DUI).
\item KAN. STAT. ANN. § 22-3403(1) (2006).
\item § 22-3403(2).
\item § 22-3403(3).
\item § 22-3404.
\item § 22-3404(3), (5).
\item Id. at 370.
\end{itemize}
that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.571

State v. Lewis is an example of a recent application of the Duren test by the Kansas Court of Appeals.572 The defendant argued that the failure to enforce jury service in Sedgwick County resulted in a disparity in the representation of African Americans on juries.573 At trial, the defendant filed a motion to dismiss on the basis of systematic discrimination against African Americans.574 At the hearing, the defendant compared two tracts of land: tract one was 80% African American and tract two was 90% Caucasian.575 Over the course of four weeks, twelve summoned jurors from tract one and twenty-four summoned jurors from tract two reported for duty, even though roughly the same percentage were summoned from each tract.576 The court applied Duren and held that the group from tract one could not be considered a distinctive group because membership in tract one did not necessarily establish a juror’s race or economic status.577 Notwithstanding the failure of the first element, the court also stated that jurors from tract one would not be underrepresented because tract one representation in the jury pool (twelve out of thirty-six) was only 10% less than the tract one representation in the pool of randomly selected jurors (fifty-one out of 118).578 Finally, comparing a case which upheld the use of voter registration records to create jury pools, the court stated that “the State has imposed no obstacles that present a discernable class of individuals from reporting for jury duty . . . . The fact that a certain segment of the community honored the summons slightly better than another segment of the community does not establish a program of systematic discrimination . . . .”579

571. Id. at 364.
573. Id. at 810.
574. Id.
575. Id. at 811.
576. Id.
577. Id.
578. Id. at 811–12.
579. Id. at 812.
2. Peremptory Challenges

In *Batson v. Kentucky*, the United States Supreme Court held that the State’s striking of a venireperson of the same race as the defendant was impermissible under the Equal Protection Clause. The Supreme Court set forth a three-step process to analyze whether the State used peremptory challenges to eliminate potential jurors on the basis of race. Kansas courts have also embraced this analytical framework:

First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. In this second step, the prosecutor is only required to put forth a facially valid reason for exercising a peremptory strike. Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.

Because of the ease with which the State can comport with the second step, “the ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike.” Additionally, a defendant has standing to raise a *Batson* challenge based on striking members of a minority group even when the defendant is not a member of that group.

*State v. Davis* involved an appellate review of a lower court’s application of the *Batson* framework. The defendant was charged with aggravated assault and the case proceeded to trial. After voir dire, the defendant objected to the State’s use of peremptory challenges to eliminate the only two African Americans from a jury panel that included twenty-eight members. The trial court overruled the objection on the grounds that the State’s reasons for striking the two jurors were race neutral, and the defendant was convicted. The Kansas Court of Appeals determined that the defendant made a prima facie

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581. Id. at 95–98.
582. State v. Pham, 136 P.3d 919, 928 (Kan. 2006).
584. Id. at 1213.
585. Id.
586. Id. at 1211.
587. Id.
588. Id.
showing of discrimination because the prosecutor eliminated the only African Americans in the jury pool within the first three picks.\textsuperscript{589} The reasons given by the prosecutor—that one juror had a problem with the State’s burden of proof and that the other might prove a difficult juror—were found to be race neutral.\textsuperscript{590} However, the trial court never determined whether the defendant had proven purposeful discrimination because the prosecutor cut off defense counsel’s response to his explanations.\textsuperscript{591} Because the trial court did not perform a full third step analysis, this portion of the case was remanded for a proper \textit{Batson} hearing.\textsuperscript{592}

There should be a per se rule which prohibits prosecutors from eliminating all of the members of a clearly identifiable group of the population from the potential juror pool. At the very least, the burden in such cases should shift to the prosecutor to show the strikes were not discriminatory, especially in cases where the potential jurors are the same race as the defendant. One can imagine a case like \textit{Davis} where a prosecutor does not act in a purposefully discriminatory manner. However, the practical result of the strikes will be discriminatory. A per se rule or a burden shift would protect against such blatant, facially discriminatory practices.

\textbf{C. Other Sixth Amendment Trial Rights}

The Confrontation Clause of the Sixth Amendment states that a criminal defendant shall enjoy the right “to be confronted with the witnesses against him.”\textsuperscript{593} The Kansas Constitution provides a criminal defendant the right “to meet the witness face to face.”\textsuperscript{594} In \textit{State v. Davis}, the defendant appealed his conviction for first-degree murder on the grounds that the trial court admitted hearsay evidence in violation of his confrontation rights.\textsuperscript{595} While the case was pending, the United States Supreme Court decided \textit{Davis v. Washington} which held that non-testimonial hearsay does not violate the Confrontation Clause.\textsuperscript{596} This decision expands the test set forth in \textit{Crawford v. Washington}, which

\begin{itemize}
\item \textsuperscript{589} \textit{Id.} at 1214.
\item \textsuperscript{590} \textit{Id.}
\item \textsuperscript{591} \textit{Id.}
\item \textsuperscript{592} \textit{Id.} at 1217, 1219.
\item \textsuperscript{593} \textit{U.S. CONST.} amend. VI.
\item \textsuperscript{594} \textit{KAN. CONST. Bill of Rights, \S} 10.
\item \textsuperscript{595} 158 P.3d 317 (Kan. 2006).
\item \textsuperscript{596} \textit{Davis v. Washington}, 547 U.S. 813 (2006).
\end{itemize}
states that if a statement is found to be testimonial, it must be excluded unless a court finds that the declarant is unavailable as a witness and that the defendant had a prior opportunity to cross-examine the declarant.597

In State v. Davis, the Kansas Supreme Court stated: “After Davis [v. Washington], the test to determine whether the admission of a hearsay statement violates a defendant’s rights under the Confrontation Clause turns [solely] on whether the statement is testimonial.”598 Davis v. Washington held that if a statement is not testimonial, then it does not implicate the Confrontation Clause.599 Thus, the Kansas Supreme Court modified its opinion in State v. Davis to conform to Davis v. Washington, in effect overruling all previous Kansas cases to the extent they involved a confrontation analysis different from Davis v. Washington.600 Because the defendant “conced[ed] that the hearsay statement [in question] was not testimonial,” the court’s analysis went no further.601 Accordingly, “the trial court’s admission of that statement [did] not implicate [the defendant’s] rights under the Confrontation Clause of the United States or Kansas Constitutions.”602

D. The Right to Remain Silent

The Fifth Amendment provides that “no person... shall be compelled in any criminal case to be a witness against himself.”603 The privilege applies only to statements that are testimonial and communicative.604 The privilege can be invoked during all phases of criminal litigation, including grand jury proceedings.605 The privilege also guarantees the right to remain silent and the right to an attorney during police interrogations.606

The privilege against self-incrimination is also provided by the Kansas Constitution Bill of Rights,607 which states that “[n]o person shall

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598. State v. Davis, 158 P.3d at 322.
599. 547 U.S. at 813.
600. See State v. Davis, 158 P.3d at 322 (“This confrontation analysis substantially alters the analyses of statements under the Confrontation Clause in this court’s previous decisions.”).
601. Id. at 322–23.
602. Id. at 323.
603. U.S. CONST. amend. V, cl. 3.
607. KAN. CONST. Bill of Rights, § 10.
be a witness against himself.\textsuperscript{608} Various Kansas statutes also include the privilege against self-incrimination.\textsuperscript{609} Section 60-423 of the Kansas Statutes provides that "[e]very person has in any criminal action in which he or she is an accused a privilege not to be called as a witness and not to testify."\textsuperscript{610} Once a defendant or any other witness chooses not to testify, neither the judge nor the prosecutor may comment about the invocation of the privilege and the jury may not draw any inference from defendant’s decision not to testify.\textsuperscript{611}

1. Use of Post-Arrest Silence to Impeach

A prosecutor may not use a defendant’s post-arrest silence to impeach the defendant’s testimony if the defendant has invoked his privilege against self-incrimination.\textsuperscript{612} For example, a prosecutor may not ask a defendant who is testifying on his own behalf why he had not “volunteered his version of events” at any point before his testimony at the trial.\textsuperscript{613} However, if a defendant decides to testify on his own behalf, his prior inconsistent statements may be used to impeach him, even if the statements were made after the Miranda warnings were given.\textsuperscript{614}

If the prosecutor in a criminal case attempts to impeach a defendant’s testimony by referring to the defendant’s post-arrest silence, it may be considered prosecutorial misconduct.\textsuperscript{615} However, such misconduct in the trial court will not necessarily require reversal on appeal.\textsuperscript{616}

2. Public Safety Exception to Miranda Warnings

After Miranda v. Arizona,\textsuperscript{617} the United States Supreme Court determined that there was a public safety exception to the required Miranda warnings.\textsuperscript{618} In New York v. Quarles, the United States
Supreme Court held that it was permissible for a police officer to ask about the whereabouts of a weapon—without issuing the Miranda warnings—to protect the safety of the officer and the public generally. The Quarles exception has since been adopted and applied in Kansas. Until recently, the rule had been applied in Kansas only in pre-Miranda cases.

However, in State v. Cosby, the Kansas Supreme Court expanded the public safety exception to include both pre- and post-Miranda statements. In Cosby, the defendant invoked his right to remain silent and his right to an attorney after receiving Miranda warnings. Subsequently, an officer asked the defendant where the gun he had allegedly used in the shooting was currently located, in an apparent attempt to protect the public from any danger potentially posed by the weapon. The court discussed the authority from various jurisdictions on this issue and “decline[d] to weigh in on [the] conflict” as to whether or not to extend the public safety exception to include testimonial statements, obtained post-Miranda, in the interest of public safety. Instead, the court decided the case on a “narrower ground.” Namely, that the defendant’s knowledge of the location of the gun was not relevant to either of the central disputed issues in the case.

The decision in Cosby likely will affect Kansas courts’ future decisions in cases dealing with Miranda warnings. Traditionally, police officers could not ask any questions which required a testimonial or communicative answer after the accused had invoked his right to remain silent or his right to an attorney. Whether or not the public safety exception extends to statements made after the Miranda warnings were given and the accused had invoked his rights is a question that has caused a split in authority. The Kansas Supreme Court has not provided any clear indication as to what the preferred outcome should be if this question is presented in a later case.

619. Id. at 657.
622. 169 P.3d 1128 (Kan. 2007).
623. Id. at 1134.
624. Id.
625. Id. at 1139.
626. Id.
627. Id.
628. E.g., id. at 1137–38 (citing Edwards v. Arizona, 451 U.S. 477 (1981)).
E. Proof Beyond a Reasonable Doubt

In criminal cases, the government has the burden of proving its case beyond a reasonable doubt. In State v. Davis, the Kansas Court of Appeals quoted the United States Supreme Court:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure [because] . . . [t]he accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would become stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

The Kansas Supreme Court stated in State v. Elrod, "[t]he State is required by the Due Process Clause of the Fourteenth Amendment to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which an accused is charged." The court further determined that "[e]videntiary presumptions cannot be included in the jury instructions if they have the effect of relieving the State of its burden of proof beyond a reasonable doubt of every essential element of a crime." Similarly, prosecutors cannot "dilute" the State's burden to prove its case beyond a reasonable doubt by misstating the burden in closing arguments to the jury. In State v. Sappington, the Kansas Supreme Court held that a prosecutor had impermissibly "dilute[d] the State's burden because a jury could convict due to its reasonable belief that a defendant committed a crime while still having reasonable doubt as to guilt." However, the prosecutor's statements were not grounds for reversal because the misstatement of the burden of proof did not "deprive[] Sappington of a fair trial."

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632. Id.
634. Id. at 1115.
635. Id.
F. Evidence of Other Crimes or Civil Wrongs

1. Traditional Rule and Section 60-455 of the Kansas Statutes

The traditional rule controlling evidence of other crimes or civil wrongs was "'that evidence is inadmissible to prove that the accused has been convicted of another crime independent of, and unrelated to, the one on trial; it is not competent to prove one crime by proving another.'" However, "several distinct exceptions to the general rule developed at common law." Section 60-455 of the Kansas Statutes, enacted in 1963, states that

evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but . . . such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The statute largely codified the traditional common law rule. The standard for reviewing the admission of section 60-455 evidence on the appellate level is de novo.

2. State v. Gunby

Since the enactment of section 60-455 of the Kansas Statutes, there have been problems with the application of the statute. In State v. Gunby, the Kansas Supreme Court sought to address and eliminate those problems. The court in Gunby highlighted two key problems with the application of the statute, both of which originated in earlier Kansas Supreme Court cases. First, in State v. Wright, the court changed

637. Id. at 656 (citing Myrick, 317 P.2d at 487).
638. § 60-455.
639. Gunby, 144 P.3d at 656.
641. Gunby, 144 P.3d at 657.
642. Id. at 655.
643. Id. at 657.
the statute’s "list of material facts from exemplary to exclusive." The *Gunby* court determined, however, that the list in the statute is supposed to serve as a "starting point[] for analysis." The second problem with the application of the statute, according to the court in *Gunby*, first appeared in *State v. Roth*. In *Roth*, the court held that the failure of the trial judge to give a limiting instruction concerning the use of section 60-455 evidence required reversal, whether or not the defendant requested the instruction. In *State v. Rambo*, the Kansas Supreme Court held that a judge’s failure to give a limiting instruction results in automatic reversal.

Because these two problems made application of the rule somewhat harsh, Kansas courts began admitting section 60-455 evidence without using section 60-455 in an effort to "skirt its attendant safeguards." In order to eliminate that tendency, the court in *Gunby* specifically held that "the list of material facts in K.S.A. 60-455 is exemplary rather than exclusive" and that "the admission of K.S.A. 60-455 evidence without... [a] limiting instruction is not inevitably so prejudicial as to require automatic reversal.

3. Post-*Gunby* Decisions

a. The *Dayhuff* Decision

In *State v. Dayhuff*, the Kansas Court of Appeals again dealt with evidence presented under section 60-455. In *Dayhuff*, however, the evidence was admitted to prove a plan or modus operandi. The court in *Dayhuff* apparently did not follow the holding stated by the Kansas Supreme Court in *Gunby* as it related to the eight material facts listed in section 60-455. Instead, the court followed the test set forth in *State v. Overton*, which requires a three step process in the admission of

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646. *Id*.
648. *Id* at 61.
651. *Id* at 659–60.
653. *Id* at 337.
654. *Id*.
655. 112 P.3d 244 (Kan. 2005).
The three steps required in Overton are: "'[f]irst, the evidence must be relevant to prove one of the facts specified in the statute. Second, the fact must be a disputed, material fact. Third, the probative value of the evidence must outweigh its potential prejudice.'" The first requirement of the test in Overton seems to directly contradict the holding in Gunby, where the court held "unequivocally that the list of material facts in K.S.A. 60-455 is exemplary rather than exclusive." The holding in Dayhuff is likely to cause problems with the future application and interpretation of section 60-455. The Kansas Supreme Court's apparent intention in the Gunby decision was to simplify the admission of section 60-455 evidence and eliminate most of the common law exceptions that had undermined the statute. The effect of the Dayhuff decision, however, is to undermine that intention by reinstating the strict limitation of admission of evidence to prove only the material facts specifically enumerated in section 60-455. This, in turn, reopens the door for Kansas courts to create exceptions to section 60-455, and independently admit section 60-455 evidence in an effort to allow the introduction of evidence that may not otherwise fit into the specific categories provided in the statute. These attempts to avoid the effect of the statute are exactly what the Kansas Supreme Court was trying to eliminate in Gunby.

b. Evidence of Gang Membership

In State v. Gholston, a pre-Gunby case, the Kansas Supreme Court rejected the defendant's argument that evidence of gang membership is section 60-455 evidence that requires a limiting instruction if admitted. In fact, evidence of gang membership is not section 60-455 evidence at all because "'membership alone in [a] gang is not a crime or civil wrong.'" Because evidence of gang membership is not within the purview of section 60-455, the court in Gholston held that a limiting instruction is not required for the admission of this type of evidence. In June 2007, the Kansas Supreme Court upheld Gholston in State v.

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656. Dayhuff, 158 P.3d at 337.
657. Id. (quoting State v. Overton, 112 P.3d 244 (Kan. 2005)) (emphasis added).
661. Gholston, 35 P.3d at 880.
The defendant in *Conway* argued that a trial judge had an affirmative duty to give a limiting instruction regarding section 60-455 evidence. The court rejected that argument based on the prior decision in *Gholston* that evidence of gang membership does not fall within section 60-455 and, therefore, does not require a limiting instruction. The defendant in *Conway* went on to argue that the court's decision in *Gunby* changed this rule by requiring a limiting instruction by the court, "even in the absence of a request by the defense," for all section 60-455 evidence. The *Conway* court, however, held that this argument was a misinterpretation of *Gunby*. First, contrary to the defendant's argument, the decision in *Gunby* did not affect the rule that evidence of gang membership is not section 60-455 evidence. Secondly, the court reiterated the portion of the decision in *Gunby* that the "failure to provide a limiting instruction in the case of evidence admitted under K.S.A. 60-455 will . . . be reviewed for clear error if a defendant fails to request such an instruction." Therefore, even if the evidence in *Conway* had been section 60-455 evidence, the failure of the judge to provide a limiting instruction would have been reviewed for clear error and reversal would not have been automatic.

The holding in *Conway* makes clear the Kansas Supreme Court's position on evidence of gang membership. Even though the *Gunby* holding specifically allows for a greater number of theories upon which this evidence may be admitted, gang membership is still excluded. This case will eliminate any further confusion that may have existed regarding the application, or lack thereof, of the *Gunby* decision to evidence of gang membership and the necessity of providing limiting instructions in cases where gang membership is at issue.

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662. *Conway*, 159 P.3d at 926.
663. *Id.*
664. *Id.* at 926–27.
665. *Id.*
666. *Id.*
667. *Id.*
668. *Id.* at 927.
669. *Id.*
G. Other Kansas Trial Issues

1. Erroneous Elements Instructions

In *State v. Wade*, the Kansas Supreme Court addressed the issue of erroneous elements instructions and their effect on a defendant’s conviction.670 The defendant was charged by information with aggravated burglary and felony murder—or first degree premeditated murder in the alternative—both of which require a predicate felony.671 The predicate felony for the charge of felony murder was aggravated burglary.672 Initially, the predicate felony for the charge of aggravated burglary was first degree premeditated murder.673 However, “the State moved to amend the complaint/information to add aggravated assault as an alternative predicate felony for both the felony murder and aggravated burglary charges.”674 The court did not amend the documents but “permitted the elements instruction on aggravated burglary to read that the defendant made an unauthorized entry into the house ‘with intent to commit a felony therein, first degree premeditated murder or aggravated assault.’”675 The court found that the addition of an alternate predicate felony in the elements instruction “adversely affected the defendant’s ability to prepare for and present his defense and prejudiced the defendant’s critical decision to waive his Fifth Amendment rights and testify.”676 Accordingly, the defendant’s conviction for aggravated burglary was reversed and the case was remanded for a new trial.677

The court went on to find that the felony murder conviction also had to be reversed because the elements instruction for that charge incorporated by reference the elements instruction of the erroneous aggravated burglary charge.678 Again, the court stated that the instruction deprived the defendant of his ability to prepare his defense, based on the analysis regarding the aggravated burglary instruction.679

670. 161 P.3d 704 (Kan. 2007).
671. Id. at 707.
672. Id.
673. Id.
674. Id.
675. Id.
676. Id. at 712.
677. Id.
678. Id. at 714–15.
679. Id. at 715.
2. Defendant’s Self-Representation at a Competency Hearing

In *State v. McCall*, the Kansas Court of Appeals addressed whether a criminal defendant’s due process rights are protected if he is allowed to represent himself at a competency hearing. The defendant in *McCall* was charged with two counts of identity theft. Both attorneys hired to represent him withdrew before he decided to assert his “constitutional right to self-representation.” The defendant was warned about the risks associated with pro se representation but insisted on it nonetheless. Because the defendant was “taking psychotropic medication due to a brain injury” and he “sought to call the governors and attorneys general of both Kansas and Missouri as witnesses,” the government filed a motion for a competency hearing. Based on a mental health evaluation, the defendant was ruled competent and was subsequently found guilty on both counts of identity theft.

On appeal, the defendant argued that “the trial court denied his Sixth Amendment right to counsel by failing to appoint counsel for him for the competency hearing.” The question in this case was one of first impression in Kansas and the court of appeals surveyed cases in various other jurisdictions. Ultimately, the court determined that it would not “enter a bright-line rule regarding pro se representation at... competency proceeding[s]... [but the defendant’s] Sixth Amendment rights were protected.”

The decision in this case could prove to be problematic in future application because the court of appeals did not provide any method for determining whether a defendant’s rights are violated or protected in such a situation. The decisions cited by the court from other jurisdictions were split on the matter. The court’s decision hinged on the fact that the defendant waived his right to counsel and that he was ruled competent in the mental health evaluation. Although the outcome was appropriate, the court’s holding provides no basis for future courts that

681. *Id.* at 380.
682. *Id.*
683. *Id.*
684. *Id.* at 381.
685. *Id.*
686. *Id.*
687. *Id.* at 381–82.
688. *Id.* at 382.
689. *Id.*
690. *Id.*
may be faced with similar questions. While the court of appeals in *McCall* did not want to create a bright-line rule, it would have been advantageous for the court to at least announce some guidelines or factors which could aid in future determinations.

**H. Double Jeopardy**

1. Generally

   The Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy."*691* This clause, often referred to as the Double Jeopardy Clause, bestows three primary rights on defendants. First, a defendant may not be retried for the same offense after a conviction. Second, a defendant may not be retried for the same offense after an acquittal. Finally, a defendant cannot receive multiple punishments for the same offense.*692* The stage of the prosecution limits the defendant's use of these rights. These rights are only available to a defendant after a jury is sworn or empanelled, or in the case of a bench trial, after the prosecution's first witness is sworn.*693*

   The Double Jeopardy Clause is not available to defendants in reprosecution cases following either a mistrial, or an appellate court's decision that evidence supporting the initial conviction is insufficient.*694* However, the Double Jeopardy Clause may be available after a mistrial in limited circumstances when a mistrial was not caused by a "manifest necessity."*695* For example, a defendant is protected by the Double Jeopardy Clause if a mistrial is called due to bad faith conduct by a prosecutor.*696*

2. Multiplicity

   As discussed above, one of the rights available to the defendant under the Double Jeopardy Clause protects defendants from receiving multiple punishments for the "same offense." This right is often referred to as "multiplicity." The United States Supreme Court, in *Blockburger v.*

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691. U.S. CONST. amend. V.
696. Id.
United States, created a test for determining what offenses constitute the "same offense." The Blockburger test defines the "same offense" as offenses arising from statutory provisions that require the same proof: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."697 Under this test a defendant may be charged under two statutory provisions without violating the Double Jeopardy Clause if the statutory provisions differ by proof of an additional fact. Kansas adopted this "strict elements" statutory test for multiplicity in State v. Patten. In Patten, the Kansas Supreme Court held that the "test for whether the offenses merge and are, therefore, multiplicitous is whether each offense charged requires proof of a fact not required in proving the other."698

Following the Kansas Supreme Court’s decision in Patten, the court in State v. Schoonover applied this “strict elements test,” holding that the single act of violence/merger doctrine would no longer be applied in Kansas.699 The court found that an application of the violence/merger doctrine could result in multiplicitous effects.700 The Blockburger test and “strict elements” test—as seen in Patten and Schoonover—limits a court’s inquiry regarding what constitutes the “same offense” to the abstract elements of the offenses charged rather than a common-law test which takes into account what facts were proved at trial.

Under one of the most recent applications of the strict elements test in Kansas courts, the Kansas Supreme Court held in State v. McKissack that criminal deprivation of property is not a lesser included offense of theft.701 Prior to the court’s decision in McKissack, Kansas courts had inconsistently characterized criminal deprivation. Some courts characterized criminal deprivation as a lesser offense of theft, while other courts characterized it as a separate offense.

3. State v. McKissack

Nicholas McKissack was convicted of burglary and criminal deprivation of property.702 The defense objected to the trial court’s

700. Id. at 78.
701. 156 P.3d 1249, 1256 (Kan. 2007).
702. Id. at 1252.
characterization of criminal deprivation of property as a lesser included offense of misdemeanor theft. The parties argued whether criminal deprivation of property and misdemeanor theft require different levels of intent for conviction. McKissack asserted that "criminal deprivation of property only involves an intent to temporarily deprive someone of their property, while theft involves an intent to permanently deprive." The trial court and the Kansas Court of Appeals held that "the intent to temporarily deprive is a 'lesser intent' of the intent to permanently deprive," and overruled the defense's objection. The trial court and court of appeals' holdings reflect the Kansas Supreme Court's current characterization of criminal deprivation as held in State v. Keeler.

In State v. Keeler, the Kansas Supreme Court held that criminal deprivation is a lesser offense of misdemeanor theft. The opinion in Keeler overruled the court of appeals' previous determination in State v. Burnett that unlawful deprivation of property was a separate offense of theft. Although Keeler, as a Kansas Supreme Court case, seemingly concluded that criminal deprivation was a lesser included offense of theft with some level of finality, the court of appeals in McKissack expressed difficulty in applying Keeler's holding. The McKissack court found that although the Keeler opinion was conclusive at the time, the changes in "statutory and case law . . . that have occurred since the 1985 Keeler decision" indicate inconsistencies with the Keeler holding.

a. Statutory and Case Law Changes Made After Keeler

The initial reasoning for Keeler's holding no longer stands. After Keeler, the statutory definition of a "lesser included crime" changed in relevant part from "a crime necessarily proved if the crime charged were proved" to "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." Additionally, the "common-law test in existence at the time of the Keeler decision, [which took] into account the facts" proved during the course of the trial, has been replaced by the Patten/Schoonover strict elements test. Under

703. Id.
704. Id.
705. Id.
706. Id. at 1253.
708. McKissack, 156 P.3d at 1253.
709. Id.
710. Id. at 1254.
711. Id.
both changes, a shift occurred from viewing and defining lesser and separate offenses through what proof is presented during the course of a trial to viewing offenses in terms of their objective elements and statutory definitions.

Prior to this shift in Kansas law, Keeler held that criminal deprivation was a lesser offense of misdemeanor theft.\textsuperscript{712} Both criminal deprivation and theft primarily require the same factual inquiry during the course of the trial regarding the element of intent, differing only by degrees.\textsuperscript{713} The element of intent was viewed "as a fluid concept progressively changing by degrees based on facts proved at trial."\textsuperscript{714} Therefore, criminal deprivation is a lesser crime.

However, under the strict elements test used in both Patten and Schoonover, the court must look at the elements of each crime abstractly.\textsuperscript{715} An abstract view of the elements of theft and criminal deprivation eliminates the court's ability to view the element of intent as a fluid concept because the court may only look at the element of intent as it is written under Kansas law, not as it is presented at trial.\textsuperscript{716} A conviction under Kansas law of theft requires an intent to permanently deprive the victim of the stolen item, while criminal deprivation requires only an intent to temporarily deprive.\textsuperscript{717} In the abstract, the element of intent is different, and therefore criminal deprivation cannot be considered a "lesser" crime of theft because it requires a different element than theft for conviction. Following Patten, the Kansas Supreme Court in McKissack held that criminal deprivation is a separate offense, overruling the trial court and court of appeals.\textsuperscript{718}

b. In Avoiding Multiplicity, Is the Defendant Punished More?

Similar to the holding in Schoonover, the holding in McKissack limits the amount of offenses that are now considered multiplicitous. In Schoonover, the practical result of the court's dismissal of the merger doctrine to avoid multiplicitous effects is that defendants may now be charged with more crimes than they would have under the application of the merger doctrine. In McKissack, the Kansas Supreme Court further

\textsuperscript{712} Keeler, 710 P.2d at 1287. \\
\textsuperscript{713} McKissack, 156 P.3d at 1254. \\
\textsuperscript{714} Id. at 1255. \\
\textsuperscript{715} Id. \\
\textsuperscript{716} Id. \\
\textsuperscript{717} Id. \\
\textsuperscript{718} Id. at 1256.
expanded the offenses with which a defendant may be charged. A defendant may now be charged with criminal deprivation and theft without violating the Double Jeopardy Clause. Although Blockburger and Patten have given Kansas courts a means to avoid multiplicity, the ends so far have resulted in an expanded range of offenses defendants may be charged with.

I. Appeals

Appeals may be made by the defendant or the prosecution. A defendant may appeal any judgment made by the district court, but is limited to appeals challenging only the legality of the proceedings for convictions after nolo contendere or guilty pleas. The prosecution’s appeals are limited to the following four rulings: (1) an order of dismissal; (2) an order arresting judgment; (3) a question reserved by the prosecution; and (4) an order granting certain new trials. The prosecution may also appeal an order to quash a warrant or suppress evidence before trial and within ten days of the order.

J. Resentencing After Conviction

The United States Supreme Court in North Carolina v. Pearce held that a defendant may not be resentenced to a harsher punishment merely because the defendant appealed the conviction. Any court that increases a defendant’s sentence without giving an affirmative reason for doing so is presumed to have acted vindictively. The Kansas Supreme Court adopted the Pearce holding in State v. Rinck. The sentencing judge in Rinck failed to give an affirmative reason for increasing the defendant’s sentence post appeal. In adopting Pearce, the Rinck court held that the increased second sentence was vindictive and thus unconstitutional as a matter of law. A presumption of vindictiveness exists even if a different judge provides the second sentencing. In

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719. KAN. STAT. ANN. § 22-3602(a) (Supp. 2006).
720. § 22-3602(b)(1)-(4).
723. Id. at 726.
725. Id. at 69.
726. Id. at 73.
cases where no presumption of vindictiveness is present, a defendant may still win by a showing of actual vindictiveness.\textsuperscript{727}

Recently the Kansas Court of Appeals addressed whether a change in the manner in which a sentence is served—concurrently versus consecutively—gives rise to a presumption of vindictiveness under \textit{Rinck}. In \textit{State v. Merrills} the defendant was sentenced to 494 months of imprisonment for aggravated robbery and sixty-one months of imprisonment for attempted second-degree murder.\textsuperscript{728} The sentences were ordered to "run concurrently for a controlling prison term of 494 months."\textsuperscript{729} Merrills objected to the "upward durational departure" of his sentence for aggravated robbery, arguing that the facts supporting an upward departure had not been proved beyond a reasonable doubt.\textsuperscript{730} Upon appeal, the court vacated the defendant’s sentence and remanded the case for resentencing on the count of aggravated robbery.\textsuperscript{731} Merrills’ second sentence resulted in 247 months imprisonment for aggravated robbery and sixty-one months for attempted second-degree murder to run consecutively for a total of 308 months.\textsuperscript{732}

The Kansas Court of Appeals held in \textit{Merrills} that no presumption of vindictiveness can exist when the length of the sentence does not increase.\textsuperscript{733} Despite the fact that the court changed the manner in which the sentences applied, the length of time did not increase. This case reaffirmed the central holding in \textit{State v. Cooper}.\textsuperscript{734} In \textit{Cooper}, the defendant was charged with the minimum sentence for indecent liberties with a child—three to ten years.\textsuperscript{735} The sentence was vacated and the defendant was resentenced under a conviction of aggravated incest.\textsuperscript{736} During the second sentencing the court gave the defendant the maximum sentence—three to ten years.\textsuperscript{737} The Kansas Supreme Court held in Cooper that no presumption of vindictiveness exists because the defendant’s penalty was not increased.\textsuperscript{738} Kansas courts have
consistently applied the concept that the end results are what matters. A defendant’s objections to the means by which the court sentences will not violate Rinck if the sentence is not increased by result of those means.

K. Postconviction Remedies

Kansas provides a prisoner has several postconviction remedies, including the right to move for the sentence-imposing court to vacate, set aside, or correct the sentence. The prisoner’s postconviction remedies are limited by the court’s discretion and time. Courts are not required to entertain more than one motion from the petitioner, and the petitioner’s motions must be exercised within one year of the final order from the prisoner’s direct appeal. Common grounds to petition the court include that “the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.” The sentencing court’s decision may be appealed.

A prisoner also has federal habeas corpus relief under 28 U.S.C. § 2254. This relief is only available if the prisoner’s state remedies have been exhausted and the prisoner alleges a violation of federal law.

740. § 60-1507(c).
741. § 60-1507(b).
742. § 60-1507(d).