

Kansas Law Review Criminal Procedure Survey*

I. INTRODUCTION	1191
II. SEARCHES	1191
A. <i>Fourth Amendment Issues</i>	1191
1. Scope of the Fourth Amendment	1192
2. Search Warrant Requirements	1192
3. Exceptions	1195
a. Consent	1195
b. Probable Cause plus Exigent Circumstances	1199
c. Automobiles and Other Vehicles	1199
d. Stop and Frisk	1200
e. Plain View and Plain Feel	1201
f. Protective Sweeps of Premises	1202
g. Search Incident to a Lawful Arrest	1203
h. Inventory Searches	1205
i. Administrative Searches	1205
4. The Exclusionary Rule	1206
a. General Exclusion of Evidence from Unlawful Searches	1206
b. Good-Faith Exception to the Exclusionary Rule	1207
c. Inevitable Discovery Exception to the Exclusionary Rule	1207
d. Knock-and-Announce Violation Exception to the Exclusionary Rule	1208
5. Standing to Object to a Search	1208
a. Generally	1208
b. Common Third Party Searches	1210
i. Residents and Overnight Guests	1210
ii. Vehicle Passengers	1210
c. Curtilage, Trash, and Open Fields	1211
6. Technology and Searches	1213
a. Wiretapping	1213

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b. Electronic Surveillance.....	1214
c. Chemical Drug Tests	1215
III. SEIZURES	1216
A. <i>Fourth Amendment Issues</i>	1216
1. Seizure of Property	1216
2. Seizure of Persons.....	1217
a. Seizure of Persons During Traffic Stops	1218
b. Detention of Third Parties During a Search	1219
c. Seizure Made for Public Safety Reasons.....	1220
d. Seizure Made of Persons During Police Interrogation.....	1220
i. <i>State v. McGinnis</i>	1221
ii. <i>State v. Morales</i>	1222
iii. <i>State v. Thomas</i>	1222
3. Standing to Object to a Seizure.....	1223
B. <i>Fifth and Sixth Amendment Issues</i>	1223
1. The Seizure Protections of the Fifth and Sixth Amendments.....	1223
2. Miranda Warnings—Additional Protections to the Fifth and Sixth Amendments	1224
a. “In Custody”	1224
b. Police Officers’ Duties During Interrogation	1227
i. Repeated <i>Miranda</i> Warnings.....	1227
ii. Sufficiency of Language of <i>Miranda</i> Warnings..	1228
iii. <i>Quarles</i> Public Safety Exception.....	1229
c. Invocation of the Right to Remain Silent	1229
d. Invocation of the Right to Counsel.....	1232
e. Voluntariness of Statements Made During Police Interrogation.....	1233
IV. PRETRIAL ISSUES.....	1234
A. <i>The Formal Charge</i>	1234
1. The Charging Documents—The Complaint, Information and Indictment, and Bill of Particulars	1235
2. Changes to the Charging Documents—Amendments, Challenges, and Variances	1237
B. <i>Initial Appearance</i>	1238
C. <i>Bail</i>	1239
1. Purpose of Bail.....	1239
2. Determining the Amount and Type of Bond	1240
3. Forfeiture of an Appearance Bond.....	1241
D. <i>Preliminary Hearing and Examination</i>	1241
1. Purpose of the Preliminary Hearing.....	1241

2011]	CRIMINAL PROCEDURE SURVEY	1189
	2. The Right to a Preliminary Hearing	1242
	3. Procedure of the Preliminary Hearing	1243
	4. Sixth Amendment Rights	1244
	<i>E. Competency to Stand Trial</i>	1245
	1. Requirements for a Finding of Incompetency	1245
	2. Competency Hearing	1245
	3. Procedure After a Finding of Incompetency	1246
	<i>F. Jurisdiction and Venue</i>	1248
	1. Establishing Jurisdiction and Venue.....	1248
	2. Change of Venue	1249
	3. Timeliness of Challenges to Jurisdiction	1250
	<i>G. Statute of Limitations</i>	1250
	1. Commencing Prosecution.....	1250
	2. Tolling the Statute of Limitations	1251
	3. The Statute of Limitations as an Affirmative Defense	1251
	<i>H. Joinder and Severance</i>	1252
	1. Joinder of Charges	1252
	2. Joinder and Severance of Codefendants	1253
	<i>I. Plea Agreements</i>	1255
	1. Generally.....	1255
	2. Binding Nature of Plea Agreements	1256
	<i>J. Arraignment</i>	1258
	<i>K. Discovery</i>	1258
	<i>L. Pretrial Motions and Pretrial Conference</i>	1259
	<i>M. Motion to Suppress</i>	1260
V.	TRIAL RIGHTS	1261
	<i>A. Fifth Amendment Issues</i>	1261
	1. Right to Remain Silent—Self-Incrimination	1261
	2. Immunity.....	1262
	3. Double Jeopardy and Multiplicity	1263
	4. Due Process	1267
	<i>B. Sixth Amendment Issues</i>	1268
	1. Speedy Trial	1268
	2. Trial by Jury	1270
	a. Generally	1270
	b. Impartial Jury	1271
	c. Waiver of the Right to a Jury Trial.....	1271
	d. Jury Selection and Peremptory Challenges.....	1273
	e. Jury Misconduct	1275
	3. Confront Witnesses—Cross-Examination	1275
	4. Right to Testify and Present a Defense.....	1277
	5. Right to Counsel	1277

a.	Invocation of the Right to Counsel.....	1277
b.	Personal Choice.....	1278
c.	Waiver of Right to Counsel.....	1279
d.	Effective Assistance of Counsel.....	1280
C.	<i>Evidentiary Issues</i>	1282
1.	Prior Actions by the Defendant.....	1282
2.	Defendant's Silence.....	1284
3.	Evidence Implicating Third Parties.....	1284
4.	Cross-Examination.....	1285
5.	Proof Beyond a Reasonable Doubt.....	1286
D.	<i>Actions by Different Players During a Trial</i>	1286
1.	Prosecutors.....	1286
a.	Selective Prosecution.....	1287
b.	Prosecutorial Misconduct.....	1287
2.	Trial Judges.....	1288
a.	Admissibility of Evidence.....	1288
b.	Authority.....	1288
i.	Jury Instructions.....	1288
ii.	Duties.....	1289
E.	<i>Potential Trial Actions</i>	1290
1.	Motion for Acquittal.....	1290
2.	Mistrial.....	1290
VI.	SENTENCING.....	1291
A.	<i>Federal Sentencing</i>	1291
1.	Criminal History.....	1291
2.	Guideline Departures.....	1291
B.	<i>Kansas Sentencing</i>	1292
1.	Sentence Determination.....	1292
a.	Crime Severity Levels.....	1292
b.	Hard 40/50 Sentences.....	1293
c.	Criminal History.....	1293
2.	Ability to Modify a Sentence.....	1294
3.	Constitutional Challenges.....	1296
4.	Retroactivity of Statutes.....	1296
VII.	POST-TRIAL ISSUES.....	1297
A.	<i>Appeals</i>	1297
B.	<i>New Trial</i>	1298
C.	<i>Sufficiency of the Evidence</i>	1299
D.	<i>Habeas Corpus Relief</i>	1299

I. INTRODUCTION

This Survey presents the current state of Kansas criminal procedure law. It addresses recent changes in case law from the United States Supreme Court, Tenth Circuit Court of Appeals, and Kansas courts. It discusses recent changes in several important Kansas criminal procedure statutes. The Survey also provides analysis of some these changes and some of the open questions that face the courts and practitioners. The Survey should provide courts, practitioners, and researchers a helpful global perspective on the state of criminal procedure law in Kansas.

II. SEARCHES

A. *Fourth Amendment Issues*

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures.¹ The applicable language of the Fourth Amendment concerning searches reads,

[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.²

Section 15 of the Kansas Constitution's Bill of Rights contains similar language³ and "provides protection identical to that provided under the Fourth Amendment of the United States Constitution."⁴

The key question in a Fourth Amendment case is whether the search was reasonable.⁵ Reasonableness is determined by looking objectively at the totality of the circumstances.⁶ In determining the reasonableness of a search, the court balances the State's interests against the individual's right to be secure from unwarranted governmental intrusion.⁷ No single

1. See U.S. CONST. amend. IV.

2. *Id.*

3. KAN. CONST. Bill of Rights § 15.

4. *State v. Morris*, 72 P.3d 570, 576 (Kan. 2003).

5. *State v. Smith*, 184 P.3d 890, 895 (Kan. 2008).

6. *Id.* at 895.

7. *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968).

factor can determine if something is reasonable, but rather the court must consider the individual facts and circumstances of each case.⁸

1. Scope of the Fourth Amendment

The protections of the Fourth Amendment are limited to protection from governmental action.⁹ But even if evidence is found by government workers, the Fourth Amendment still may not apply if the government workers are acting as private citizens.¹⁰ To determine whether a search by the government workers is government action, courts must consider two inquiries: “(1) whether the government knew of or acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.”¹¹ The Fourth Amendment does not apply to a search by a private party unless the individual is acting as an agent of the government or with participation or knowledge of a government official.¹² For example, if the government “coerces, dominates, or directs the actions” of the private person, then the search falls within the scope of the Fourth Amendment.¹³

2. Search Warrant Requirements

The Fourth Amendment itself mentions several requirements of a search warrant.¹⁴ Specifically, the Fourth Amendment requires warrants to be based upon probable cause, supported by oath or affirmation, and particularly to describe the place to be searched.¹⁵ Probable cause exists “if the facts and circumstances within the arresting officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed.”¹⁶ The oath or affirmation portion of the Fourth Amendment requires that the search warrant be

8. *See* State v. Barriger, 239 P.3d 1290, 1294 (Kan. Ct. App. 2010).

9. State v. Windes, 776 P.2d 477, 480 (Kan. Ct. App. 1989).

10. State v. Brittingham, 218 P.3d 441, 444–45 (Kan. Ct. App. 2009).

11. *Id.* at 444 (quoting Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989)) (internal quotation marks omitted).

12. Windes, 776 P.2d at 480.

13. Brittingham, 218 P.3d at 444.

14. *See* U.S. CONST. amend. IV.

15. *See id.*

16. State v. Abu-Isba, 685 P.2d 856, 860 (Kan. 1984).

supported by the statements of a person under oath.¹⁷ Finally, there must be a nexus between the suspected criminal activity and the place to be searched.¹⁸

When these requirements are supported by an affidavit, the warrant is generally presumed valid.¹⁹ A warrant can be held invalid when,

- (1) the magistrate was deliberately misled by false information when issuing the warrant;
- (2) the magistrate wholly abandoned the detached and neutral role required;
- (3) there was so little indicia of probable cause in the affidavit that it would be entirely unreasonable for an 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.²⁰

Further, the party against whom the search warrant is directed generally may not challenge the matters alleged in the supporting affidavit.²¹

In *Franks v. Delaware*, the United States Supreme Court carved out an exception to this general rule presuming validity.²² The *Franks* Court held that

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.²³

The defendant has a duty to point to the specific portion of the affidavit that is false in its motion to suppress, and the challenge must be accompanied by supporting reasons and evidence.²⁴ If the trial court can set aside the challenged portions of the affidavit and there is still sufficient evidence for probable cause, there is no need to have the evidentiary hearing.²⁵ However, if the affidavit's remaining content is

17. *State v. Martin*, No. 98,435, 2008 WL 4471699, at *1 (Kan. Ct. App. Oct. 3, 2008).

18. *See United States v. Potts*, 586 F.3d 823, 831 (10th Cir. 2009).

19. *State v. Jacques*, 587 P.2d 861, 866 (Kan. 1978).

20. *State v. Daniel*, 242 P.3d 1186, 1191 (Kan. 2010) (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)).

21. *Jacques*, 587 P.2d at 866.

22. *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

23. *Id.*

24. *Id.* at 171.

25. *Id.* at 171–72.

insufficient to establish probable cause, the defendant is entitled to the evidentiary hearing.²⁶ At the hearing, if

the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.²⁷

The Kansas Supreme Court adopted the *Franks* exception to the general rule presuming validity in *State v. Jacques*.²⁸

A defendant in a recent Kansas case, *State v. Adams*, attempted to exercise this *Franks* exception.²⁹ In an affidavit to secure a search warrant for a residence, an officer stated: "Based on my training and experience, I am familiar with how controlled substances are manufactured, obtained, diluted, packaged, distributed, sold and used."³⁰ The affidavit's probable cause section stated that methamphetamine had been purchased at the residence and verified that there was a "George Pitcherello" at the residence who was responsible for the manufacture of the methamphetamine.³¹ The officer, however, later admitted that he was not familiar with the different cooking methods of methamphetamine and had used a "search warrant template" that was on his computer to draft the affidavit.³² Police executed the signed search warrant on the residence and found methamphetamine and several items that could be used to manufacture methamphetamine, leading to Adams's arrest.³³

Adams filed a motion to suppress the search warrant, arguing that the affidavit written by the officer was supported by false statements.³⁴ Adams argued that although the affidavit stated the officer had knowledge of how methamphetamine was manufactured, the officer actually had "no personal knowledge of the process of cooking methamphetamine."³⁵ Because the officer did not have "personal

26. *Id.* at 172.

27. *Id.* at 156.

28. 587 P.2d 861, 866 (Kan. 1978).

29. 232 P.3d 347, 353 (Kan. Ct. App. 2010).

30. *Id.* at 350.

31. *Id.*

32. *Id.* at 353.

33. *Id.* at 350.

34. *Id.* at 351.

35. *Id.*

knowledge,” Adams claimed the affidavit did not have enough support for a magistrate to determine probable cause existed.³⁶ The trial court denied the motion stating that even absent the alleged false statements, the affidavit was still sufficient to support probable cause.³⁷ The trial court made an additional finding that the officer’s statements on the affidavit were not material misrepresentations or made in reckless disregard for the truth.³⁸ The trial court denied the motion to suppress.³⁹

On appeal, the appellate court affirmed, noting that the use of a search warrant template was not enough to constitute a material misrepresentation because the deputy testified he had some training in the manufacture of methamphetamine and the template only stated that the officer was familiar with the process.⁴⁰ While the template may have included some overstatements of knowledge, Adams failed to show that these statements were a deliberate attempt to mislead or were in reckless disregard of the truth.⁴¹

3. Exceptions

Generally, a search conducted without a warrant is *per se* unreasonable.⁴² In some situations, however, a search can be reasonable despite the lack of a search warrant.⁴³

a. Consent

Consent to a search makes it constitutionally reasonable even without a warrant.⁴⁴ The government bears the burden of proving this exception, and it “must: (1) proffer clear and positive testimony that consent was unequivocal and specific and freely and intelligently given; and (2) prove that this consent was given without implied or express duress or coercion.”⁴⁵ This level of proof embodies the two

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 354.

41. *Id.*

42. *State v. Graham*, 46 P.3d 1177, 1180 (Kan. 2002).

43. *See State v. Lee*, 156 P.3d 1284, 1288 (Kan. 2007).

44. *Callahan v. Millar Cnty.*, 494 F.3d 891, 896–97 (10th Cir. 2007), *rev’d on other grounds*, *Pearson v. Callahan*, 555 U.S. 223 (2009).

45. *United States v. McKinney*, 470 F. Supp. 2d 1226, 1233 (D. Kan. 2007) (quoting *United States v. Pena*, 143 F.3d 1363, 1366 (10th Cir. 1998)).

requirements for constitutional consent, which are authority and voluntariness. A person can consent to a search of their own home, belongings, and other like items.⁴⁶ It is possible, however, for a third party to have authority to give consent to a search. Third parties can give consent if they have actual or apparent authority with respect to the place or item being searched. Third parties have actual authority “if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes.”⁴⁷ Third parties can have apparent authority when “the facts available to the officers at the time they commenced the search would lead a reasonable officer to believe the third party had authority to consent to the search.”⁴⁸

Even if a person has the authority to consent, the consent must be voluntarily given.⁴⁹ Voluntariness is determined by an evaluation of the totality of circumstances in each case.⁵⁰ Factors such as the presence of more than one officer, the display of a weapon, physical contact by the officer, use of a commanding tone of voice, activation of sirens or flashers, a command to halt or to approach, and an attempt to control the ability to flee assist the court in determining under the circumstances if the consent was voluntary.⁵¹ Additionally, whether the defendant knew that they had the right to refuse to consent to the search is a factor in the court’s determination, but the state “is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.”⁵² Nonverbal gestures, such as a nod of the head, can also indicate voluntariness.⁵³ But this does not mean that consent can simply be implied from circumstances, there must an affirmative indication of approval.⁵⁴

Consent is not unlimited. A person’s consent to a search can be revoked at any time.⁵⁵ Also, the scope of a warrantless consensual

46. *State v. Vandiver*, 891 P.2d 350, 357 (Kan. 1995).

47. *United States v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007) (quoting *United States v. Rith*, 164 F.3d 1328, 1329 (10th Cir. 1999)); *see also* *United States v. Matlock*, 415 U.S. 164, 171 (1974).

48. *Andrus*, 483 F.3d at 716.

49. *State v. Thompson*, 166 P.3d 1015, 1026 (Kan. 2007).

50. *State v. Thomas*, 246 P.3d 678, 684 (Kan. 2011) (citing *State v. McGinnis*, 233 P.3d 246, 252 (Kan. 2010)).

51. *Id.*

52. *Thompson*, 166 P.3d at 1029 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 281, 248–49 (1973)).

53. *See State v. Seeley*, No. 99,456, 2009 WL 500960, at *4 (Kan. Ct. App. Feb. 27, 2009).

54. *See State v. Poulton*, 152 P.3d 678, 685 (Kan. Ct. App. 2007), *aff’d in part, rev’d in part*, 179 P.3d 1145 (Kan. 2008).

55. *See United States v. Chavira*, No. 05-40010-01-JAR, 2005 WL 1213670, at *6 (D. Kan. May 18, 2005).

search can be limited by the person giving consent.⁵⁶ Generally, the scope of consent is determined by “objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect.”⁵⁷ Yet when a defendant does not limit his consent, the continuation of the search by the officer is an indication that the search was within the scope of the consent.⁵⁸

Traffic stops are a situation where a search may be reasonable without a warrant based on consent.⁵⁹ And part and parcel to these stops is the issue of consent.⁶⁰ In fact, if the citizen consents to the encounter, the Fourth Amendment is not implicated at all.⁶¹

One recent Kansas case, *State v. White*, dealt with consent and whether a traffic stop could include a search not related to the purpose of the stop.⁶² Under current Kansas law, an officer may not “expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search.”⁶³ In *White*, a police officer pulled a car over after a traffic violation.⁶⁴ After taking the driver’s license and insurance information back to the police car, the officer ran a warrant check.⁶⁵ The officer did not discover any warrants but learned that the driver had a record of prior narcotics offenses.⁶⁶ The officer returned to the driver’s car and asked for the driver’s consent to search the vehicle.⁶⁷ The officer stated later that he wanted to make sure there were no illegal substances in the vehicle.⁶⁸ The driver eventually agreed to the search.⁶⁹ At the instruction of the officer, the driver walked to the rear of the vehicle, where a second officer conducted a pat-down search.⁷⁰ The pat-down search uncovered a bag of marijuana and drug

56. *Poulton*, 152 P.3d at 685.

57. *United States v. Elliott*, 107 F.3d 810, 815 (10th Cir. 1997) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)) (internal quotation marks omitted).

58. *United States v. McRae*, 81 F.3d 1528, 1538 (10th Cir. 1996).

59. *See State v. Lee*, 156 P.3d 1284, 1288 (Kan. 2007).

60. *Id.*

61. *Id.*

62. *State v. White*, 241 P.3d 591 (Kan. Ct. App. 2010).

63. *State v. Smith*, 184 P.3d 890, 902 (Kan. 2008).

64. *White*, 241 P.3d at 594.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

paraphernalia on the driver's person.⁷¹ The officers then arrested the driver for possession of marijuana and other charges.⁷²

Before trial, the driver filed a motion to suppress the evidence found by the officers because "he was illegally detained beyond the scope of the traffic stop and as a result his consent to the vehicle search was involuntary."⁷³ The driver argued that the officer had to justify the extended detention caused by the vehicle search with reasonable suspicion of illegal activity beyond the traffic violation.⁷⁴ Only after finding reasonable suspicion could the officer request the driver to consent to the search of the vehicle.⁷⁵ The State argued that when the officer requested the driver's consent to search the vehicle, the purpose of the traffic stop was complete and the encounter beyond the traffic stop was entirely voluntary.⁷⁶

The court disagreed with the State and said there was no resolution to the initial traffic stop.⁷⁷ The court reasoned that the officer did not give a verbal warning or a written citation and never returned the driver's identification and other documents.⁷⁸ Further, no evidence showed any disengagement between the officer and the driver, nor a statement that White was free to go.⁷⁹ The court stated that the officer should have resolved the initial purpose of the traffic stop before asking for the driver's consent to search the car.⁸⁰ Because the officer did not conclude the traffic stop in some way, the court concluded that the defendant was still detained as part of the traffic stop when the officer asked for consent to search the vehicle.⁸¹ Because the vehicle search was not related to the purpose of that stop, the court concluded that the driver's consent could not be considered voluntary.⁸²

71. *Id.*

72. *Id.* at 594–95.

73. *Id.* at 595.

74. *Id.* at 596.

75. *Id.*

76. *Id.*

77. *Id.* at 597.

78. *Id.*

79. *Id.*

80. *Id.* at 597–98.

81. *Id.*

82. *Id.*

b. Probable Cause plus Exigent Circumstances

One of the other exceptions to the search warrant requirement is the combination of probable cause plus exigent circumstances.⁸³ Kansas has three requirements for this emergency doctrine.⁸⁴ First, “police must have reasonable grounds to believe that an emergency is at hand and that their assistance is needed immediately for the protection of life or property.”⁸⁵ Second, “the search must not be primarily motivated by the intent to arrest and seize evidence.”⁸⁶ Third, “there must be a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.”⁸⁷ Courts determine the reasonableness of the officer’s belief of the existence of an emergency or immediate need for assistance using an objective standard.⁸⁸

c. Automobiles and Other Vehicles

Another recognized exception to the warrant requirement for a search protected by the Fourth Amendment is the automobile exception.⁸⁹ The Kansas Supreme Court has held that officers can search automobiles without a warrant under circumstances that would not provide justification to search a private residence or office.⁹⁰ The automobile exception to the warrant requirement is based on the mobility of the automobile, the automobile itself is said to provide the exigency to circumvent the warrant requirement.⁹¹ Another justification is that individuals have a lessened expectation of privacy concerning their automobile as compared to their home.⁹²

The requisite level of suspicion for the automobile exception is probable cause.⁹³ “Probable cause under the automobile exception . . . exists if, given the totality of the circumstances, there is a fair probability

83. *State v. Fitzgerald*, 192 P.3d 171, 173 (Kan. 2008).

84. *State v. Geraghty*, 163 P.3d 350, 358 (Kan. Ct. App. 2007).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *United States v. Scott*, No. 09-10099-06-JTM, 2010 WL 2985980, at *5 (D. Kan. July 27, 2010); *State v. Sanchez-Loredo*, 220 P.3d 374, 377 (Kan. Ct. App. 2009).

90. *Id.*

91. *Id.*

92. *Id.*

93. *United States v. Poghosyan*, No. 10-10060-01, 02, 03, 04-EFM, 2010 WL 4568988, at *17 (D. Kan. Oct. 28, 2010); *United States v. Montes-Ramos*, 347 F. App’x 383, 391 (10th Cir. 2009).

that the vehicle contains contraband or evidence.”⁹⁴ A search under the automobile exception includes all containers within the automobile if the officer has probable cause to believe contraband is within a container.⁹⁵ Furthermore, if the requisite level of suspicion is present for a routine traffic stop, officers can develop probable cause during the traffic stop to permit a search of the automobile under this exception to the warrant requirement.⁹⁶

Unique to vehicle searches is the use of dogs to identify drugs. The Tenth Circuit does not view a narcotics dog sniff of the exterior of a vehicle as a search for Fourth Amendment purposes.⁹⁷ Therefore, for vehicle searches, the “Tenth Circuit has consistently held that probable cause can be established based on alerts by [qualified] canines.”⁹⁸ The canine’s indication of narcotics need not be coupled with other evidence for a finding of probable cause.⁹⁹ In addition, the scope of a search based on a canine sniff may include the “entire car, including the trunk.”¹⁰⁰ The foundational requirement for a finding of probable cause based on a canine sniff is that the canine be “trained and certified to detect narcotics.”¹⁰¹

d. Stop and Frisk

Kansas law also permits officers to perform what courts refer to as a “*Terry* stop,” or an “officer-safety pat down,” without a warrant.¹⁰² Section 22-2402(2) of the Kansas Statutes states: “When a law enforcement officer has stopped a person for questioning . . . and reasonably suspects that such officer’s personal safety requires it, such officer may frisk such person for firearms or other dangerous

94. *United States v. Diaz*, 356 F. App’x 117, 123 (10th Cir. 2009).

95. *Poghosyan*, 2010 WL 4568988, at *17; *Montes-Ramos*, 374 F. App’x at 391.

96. *See United States v. Redd*, No. 09-10099-JTM, 2010 WL 3892231, at *18 (D. Kan. Sep. 29, 2010) (“[U]pon the confirmation that the vehicle indeed contained secret compartments, [the officer] had probable cause to seize the vehicle.”).

97. *United States v. Roberts*, 572 F. Supp. 2d 1240, 1249 (D. Kan. 2008).

98. *Poghosyan*, 2010 WL 4568988, at *17.

99. *United States v. Gardenhire*, No. 09-40089-02-JAR, 2010 U.S. Dist. LEXIS 77843, at *23 (D. Kan. July 30, 2010).

100. *Id.*

101. *United States v. Simpson*, 609 F.3d 1140, 1152 (10th Cir. 2010) (“A trained and reliable alert from a narcotics dog can provide support for an officer to conduct a search.”); *Poghosyan*, 2010 WL 4568988, at *17 (“When a canine sniff is challenged, the Court must make a determination as to whether the canine in question was qualified.”).

102. KAN. STAT. ANN. § 22-2402(2) (2009); *State v. White*, 241 P.3d 591, 599 (Kan. Ct. App. 2010).

weapons.”¹⁰³ For such a search to be upheld, the ““officer must have prior knowledge of facts, observe conduct of the detained person, or receive responses from the detained person that, in light of the officer’s experience, would give rise to a reasonable suspicion that such a search is necessary.””¹⁰⁴ While consent is not required for a *Terry* stop-and-frisk, the officer is confined to a “pat down [of] a person’s outer clothing without placing the officer’s hands inside any pockets or under the outer surface of any garment, unless or until a weapon is found.”¹⁰⁵ The question in assessing an officer’s determination that an encounter warranted a *Terry* stop-and-frisk is whether “a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or that of others was in danger.”¹⁰⁶

e. Plain View and Plain Feel

Another exception to the warrant requirement is the plain view exception, allowing an officer lawfully to seize facially incriminating evidence observed in plain view.¹⁰⁷ Under the plain view exception to the warrant requirement in Kansas, an officer can seize evidence of a crime if ““(1) the 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.””¹⁰⁸ In assessing an officer’s determination of the incriminating nature of an object, Kansas courts will consider the officer’s training and experience.¹⁰⁹ Alternatively, the Tenth Circuit allows an officer to seize evidence in plain view without a warrant if

103. § 22-2402(2).

104. *State v. Shaffer*, No. 101,668, 2010 WL 2545657, at *3 (Kan. Ct. App. June 11, 2010) (quoting *State v. Johnson*, 217 P.3d 42, 47 (2009)); *see also White*, 241 P.3d at 599 (“A law enforcement officer must be able to point to specific, articulable facts to support reasonable suspicion for both the stop and the frisk.”).

105. *White*, 241 P.3d at 599; *see also Shaffer*, 2010 WL 2545657, at *4 (“The protective search is ‘limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.’” (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968))).

106. *White*, 241 P.3d at 599.

107. *State v. Roberts*, No. 101,118, 2010 WL 2348688, at *4 (Kan. Ct. App. June 4, 2010).

108. *Id.* (quoting *State v. Ulrey*, 208 P.3d 317, 323 (Kan. Ct. App. 2009)) (internal quotations omitted); *see also State v. Colvard*, No. 101,906, 2010 WL 2502889, at *3 (Kan. Ct. App. June 18, 2010) (“The plain view doctrine only applies when the incriminating character of the evidence is immediately apparent to searching authorities.” (citing *State v. Galloway*, 652 P.2d 673 (Kan. 1982))).

109. *Colvard*, 2010 WL 2502889, at *3 (“[I]t was proper for the district court to rely on [the officer’s] training and experience in recognizing the little clear tube to be drug paraphernalia.”).

“(1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the object’s incriminating character was immediately apparent . . . ; and (3) the officer had a lawful right of access to the object itself.”¹¹⁰ Courts have interpreted whether the incriminating character of an object is immediately apparent “to mean that the officer must have probable cause to believe that the object is evidence of a crime.”¹¹¹

Closely related to the plain-view doctrine is the plain-feel doctrine; Kansas courts have adopted both doctrines.¹¹² The plain-feel exception arises when an officer is performing a lawful pat down of a suspect and through his knowledge and experience feels what he reasonably believes to be contraband on the suspect’s person.¹¹³ Requirements for application of the plain-feel doctrine in Kansas are the same as plain-view.¹¹⁴ If during a lawful pat down an officer feels an object that, through the officer’s experience and training, “the officer had probable cause to believe . . . contained evidence of a crime,” the officer may extend the search to removing the object from the suspect’s person.¹¹⁵

f. Protective Sweeps of Premises

“A protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.”¹¹⁶ With the presumption against warrantless entry to the home in mind, the Tenth Circuit held that a “‘protective sweep’ of a residence to ensure officer safety may take place only incident to an arrest.”¹¹⁷ The exigent-circumstances doctrine, however, may justify a protective sweep of a residence in a nonarrest situation “if reasonable grounds existed to search to protect the safety of someone besides the officer[.]”¹¹⁸ Alternatively, a protective sweep of a vehicle may be

110. *United States v. Montes*, No. 09-2269, 2010 WL 4263308, at *4 (10th Cir. Oct. 29, 2010) (quoting *United States v. Sparks*, 291 F.3d 683, 690 (10th Cir. 2002)).

111. *State v. Outland*, No. 100,274, 2010 WL 744778, at *8 (Kan. Ct. App. Feb. 26, 2010) (quoting *State v. Lee*, 156 P.3d 1284, 1290 (Kan. 2007)) (internal quotation marks omitted).

112. *Id.* at *4.

113. *Id.* at *5.

114. *Id.* at *8–9.

115. *Id.* at *9–10.

116. *United States v. Freeman*, 479 F.3d 743, 750 (10th Cir. 2007) (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990)) (internal quotation marks omitted).

117. *Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065, 1072 (10th Cir. 2010) (citing *Buie*, 494 U.S. at 334; *United States v. Walker*, 474 F.3d 1249, 1254 (10th Cir. 2007)).

118. *Id.*

justified by a “reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and . . . may gain immediate control of weapons.”¹¹⁹

g. Search Incident to a Lawful Arrest

In 2009, the United States Supreme Court altered the law concerning an automobile search incident to a lawful arrest of a recent occupant.¹²⁰ In *Gant*, the Supreme Court held that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”¹²¹ It did not take Kansas long to recognize the decision and declare the current version of Kansas’s search incident to a lawful arrest statute unconstitutional by both the Fourth Amendment of the United States Constitution and section 15 of the Bill of Rights in the Kansas Constitution.¹²²

Following the Supreme Court’s ruling in *Gant*, the Kansas Legislature, in the 2011 Regular Session, amended its statute to comply with the new guidelines set down in *Gant*.¹²³ Before the amendment, section 22-2501(c) of the Kansas Statutes provided that “when 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 . . . discovering the fruits, instrumentalities, or evidence of a crime.”¹²⁴ On January 13, 2011, the Kansas Legislature introduced an amendment to section (c), such that it would now read, “for the purpose of . . . discovering the fruits, instrumentalities or evidence of *the* crime.”¹²⁵ The Kansas Supreme Court noted that the statute’s current “breadth cannot be reconciled with the narrowness of the search and seizure concept it was meant to codify.”¹²⁶ Furthermore, on January 13,

119. *United States v. Chambers*, 383 F. App’x 719, 721 (10th Cir. 2010) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)).

120. *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009).

121. *Id.* at 1723.

122. *State v. Henning*, 209 P.3d 711, 719–20 (Kan. 2009).

123. S.B. 6, 84th Leg., Reg. Sess. (Kan. 2011).

124. KAN. STAT. ANN. § 22-2501(c) (2009) (emphasis added).

125. Kan. S.B. 6.

126. *Henning*, 209 P.3d at 720.

2011, the Kansas Legislature went as far as to recommend section 22-2501 be repealed in its entirety.¹²⁷

The Kansas Court of Appeals has also recognized the *Gant* decision's impact on the scope of a search incident to a lawful arrest in the vehicle context.¹²⁸ The Court of Appeals held that in only one instance can an officer search a car "merely because an occupant has been arrested . . . [and] secured outside the car."¹²⁹ That instance being "when it's reasonable to expect that evidence relevant to the crime of arrest may be found in the car."¹³⁰

The Tenth Circuit has similarly applied the *Gant* decision to searches of a vehicle incident to a lawful arrest.¹³¹ The court held that when officers secured the driver of a truck and transported the truck to the police station, a subsequent search of the truck could not be "justified as a [vehicle] search incident to a valid arrest."¹³² The court reasoned that the exception did not apply because it "applies only to areas within an arrestee's 'immediate control,' and so the exception 'does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.'"¹³³ Put another way, a vehicle search incident to a valid arrest is lawful under two circumstances: "(1) 'when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search,' and (2) 'when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"¹³⁴ The first requirement provides an important restriction, the arrestee must be "unsecured and within reaching distance . . . *at the time of the search.*"¹³⁵ Furthermore, the search may extend to containers within the vehicle if the "offense of arrest will supply a basis for searching . . . containers therein."¹³⁶

In the home context, where a presumption against any warrantless search exists, "an officer may perform a warrantless search of a home incident to arrest, so long as the search is limited to the area within the

127. Kan. S.B. 6.

128. See *State v. Karson*, 235 P.3d 1260, 1264 (Kan. Ct. App. 2010).

129. *Id.*

130. *Id.*

131. *United States v. Polly*, 630 F.3d 991, 999 (10th Cir. 2011).

132. *Id.*

133. *Id.* at 998 (quoting *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009)).

134. *United States v. Hodges*, No. 09-40077-04-RDR, 2010 WL 2553780, at *7 (D. Kan. June 23, 2010) (quoting *Gant*, 129 S. Ct. at 1719).

135. *Id.* (quoting *Gant*, 129 S. Ct. at 1719) (emphasis added).

136. *Id.*

arrestee's 'immediate control,' which means 'the area from within which he might gain possession of a weapon or destructible evidence.'"¹³⁷

h. Inventory Searches

Officers may also conduct inventory searches without a warrant or probable cause.¹³⁸ "A lawful inventory search is intended to promote three administrative purposes: 'the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of police from potential danger.'"¹³⁹ Inventory searches are not unlimited in scope and justification; they must be "conducted according to standardized procedures" and "the . . . practice governing inventory searches should be designed to produce an inventory, in other words, . . . justified by the administrative purpose of [inventory] searches."¹⁴⁰ When "an inventory search has been undertaken with an investigatory goal," as opposed to an administrative goal, courts are more likely to be skeptical of the reasonableness of the search.¹⁴¹

i. Administrative Searches

Kansas courts have recognized administrative searches of "closely regulated businesses" as an exception to the Fourth Amendment's warrant requirement.¹⁴² The United States Supreme Court reasoned that operators of commercial premises in a "closely regulated industry [have] a reduced expectation of privacy."¹⁴³ The reduced expectation of privacy coupled with the government's particular interest in regulating that business opens the door for a court to find a warrantless inspection of commercial premises reasonable.¹⁴⁴ The Tenth Circuit has similarly recognized such an exception in upholding the search of a tractor-trailer

137. *Id.* at *6 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

138. *United States v. Beltran-Palafox*, 731 F. Supp. 2d 1126, 1162 (D. Kan. 2010).

139. *Id.* (quoting *United States v. Martinez*, 512 F.3d 1268, 1274 (10th Cir. 2008)).

140. *Id.* (quoting *United States v. Tueller*, 349 F.3d 1239, 1243 (10th Cir. 2003)).

141. *State v. Wear*, No. 100,442, 2009 WL 2902577, at *2 (Kan. Ct. App. Sept. 4, 2009).

142. *State v. Outland*, No. 100,274, 2010 WL 744778, at *4 (Kan. Ct. App. Feb. 26, 2010) (quoting *State v. Baughman*, 32 P.3d 199, 201 (Kan. Ct. App. 2001)); *State v. Richardson*, No. 101,821, 2010 WL 1610407, at *1 (Kan. Ct. App. April 15, 2010).

143. *New York v. Burger*, 482 U.S. 691, 702 (1987).

144. *Id.*; *see also* *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (holding that warrantless inspections of underground and surface mines are reasonable in light of the nation's interest in improving the health and safety conditions).

under the State's highway trucking inspection system.¹⁴⁵ These administrative searches may include booking searches, regulatory investigations, and other situations. The United States Supreme Court has recognized that the probable cause is not required when a government actor is conducting an administrative search because it is not within the criminal investigation purview.¹⁴⁶ It is instead an effort to protect health and safety.¹⁴⁷ The Court said the "need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."¹⁴⁸

4. The Exclusionary Rule

a. General Exclusion of Evidence from Unlawful Searches

When evidence is obtained in violation of the Fourth Amendment of the United States Constitution or section 15 of the Bill of Rights in the Kansas Constitution, a "judicially created remedy exists to prevent . . . use of [the] . . . evidence in a criminal proceeding against the victim of the illegal search."¹⁴⁹ The main goal of the exclusionary rule is to deter wrongful police conduct.¹⁵⁰ However, "[n]either the Fourth Amendment nor [section] 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective protections,"¹⁵¹ and exclusion of the "evidence . . . will not always have the desired deterrent effect."¹⁵² The court must determine "whether the rule's deterrent effect will be achieved, and . . . [weigh] the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process."¹⁵³ As a result, the courts have crafted exceptions to the exclusionary rule.

145. *United States v. Diaz*, 356 F. App'x 117, 122 (10th Cir. 2009).

146. *See Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656, 667–68 (1989).

147. *See id.*

148. *Id.* at 668.

149. *State v. Daniel*, 242 P.3d 1186, 1190 (Kan. 2010).

150. *United States v. Birch*, 401 F. App'x 351, 353 (10th Cir. 2010) (citing *United States v. Leon*, 468 U.S. 897, 913 (1984)).

151. *Daniel*, 242 P.3d at 1190.

152. *Birch*, 401 F. App'x at 353.

153. *Daniel*, 242 P.3d at 1190.

b. Good-Faith Exception to the Exclusionary Rule

Kansas recognizes a good-faith exception to the exclusionary rule.¹⁵⁴ The exception has been applied when it is determined an officer reasonably “relied on a warrant subsequently determined to be unsupported by probable cause.”¹⁵⁵ Kansas courts may also apply the good-faith exception when the court determines the officer acted in reliance on a statute later held unconstitutional.¹⁵⁶ The United States Supreme Court has applied the good-faith exception when an officer acted in reliance on negligently maintained police records¹⁵⁷ or on inaccurate court records,¹⁵⁸ however, Kansas courts have yet to address either exception.¹⁵⁹ In determining whether further extensions of the good-faith exception are appropriate, the analysis should focus on “whether the remedial purpose of the exclusionary rule would be fulfilled if the illegally obtained evidence was suppressed.”¹⁶⁰

c. Inevitable Discovery Exception to the Exclusionary Rule

“The inevitable discovery doctrine provides an exception to the exclusionary rule and permits evidence to be admitted if an independent, lawful police investigation inevitably would have discovered it.”¹⁶¹ Application of the inevitable discovery exception requires the State to establish “by a preponderance of the evidence that the evidence at issue would have been discovered without the Fourth Amendment violation.”¹⁶² “Put another way, under the inevitable discovery doctrine, the prosecution may use evidence it obtained improperly but would have obtained legally in any event.”¹⁶³ When arguing inevitable discovery,

154. *Id.* at 1188.

155. *Id.*

156. *Id.* at 1192–93.

157. *Herring v. United States*, 555 U.S. 135 (2009).

158. *Arizona v. Evans*, 514 U.S. 1, 14–16 (1995).

159. *Daniel*, 242 P.3d at 1191.

160. *Id.*

161. *United States v. Sanchez*, 608 F.3d 685, 691 (10th Cir. 2010) (quoting *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005)).

162. *United States v. Beltran-Palafox*, 731 F. Supp. 2d 1126, 1161 (D. Kan. 2010) (quoting *United States v. Martinez*, 512 F.3d 1268, 1273 (10th Cir. 2008)).

163. *State v. Rose*, No. 99,940, 2010 WL 481255, at *5 (Kan. Ct. App. Feb. 5, 2010) (citing *State v. Ackward*, 128 P.3d 382 (2006)).

which by its nature deals with possibilities, the “government may rely on a hypothetical . . . search.”¹⁶⁴

d. Knock-and-Announce Violation Exception to the Exclusionary Rule

Common law has long required officers to knock and announce their presence before entering the home under a search warrant.¹⁶⁵ Courts, however, recognize situations where they can waive the knock-and-announce requirement: “when ‘circumstances presen[t] a threat of physical violence,’ or if there is ‘reason to believe that evidence would likely be destroyed if advance notice were given,’ or if knocking and announcing would be ‘futile.’”¹⁶⁶ For an exception to apply, the officer need only “‘have a reasonable suspicion . . . under the particular circumstances’ that one of [the] grounds for failing to knock and announce exists.”¹⁶⁷ However, even if evidence is obtained in violation of the knock-and-announce rule and does not fit one of the exceptions, the court is not required to apply the exclusionary rule to the unlawfully seized evidence if it determines the deterrence benefits do not outweigh the societal costs.¹⁶⁸ In *Hudson v. Michigan*, the Supreme Court held that the “social costs of applying the exclusionary rule to knock-and-announce violations are considerable [while] the incentive to [commit] such violations is minimal;”¹⁶⁹ therefore, the minimal deterrence benefits do not justify exclusion of such evidence.

5. Standing to Object to a Search

a. Generally

A threshold question in any case is whether the allegedly aggrieved party has standing to bring the cause of action. In the criminal context, this question often arises when defendant seek to suppress evidence

164. *Beltran-Palafox*, 731 F. Supp. 2d at 1161.

165. *Hudson v. Michigan*, 547 U.S. 586, 589 (2006).

166. *Id.* at 589–90 (citations omitted).

167. *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)).

168. *Id.* at 599.

169. *Id.* (“In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.”).

obtained in a search or seizure of someone other than themselves, at some place other than their residence, or in a vehicle not owned by them. The defendant seeking suppression based on a Fourth Amendment violation “must first show that he has standing to challenge the search or seizure in question.”¹⁷⁰ The defendant seeking suppression must show by a preponderance of the evidence that he was “‘personally aggrieved by the alleged search and seizure because it invaded [his] subjective expectation of privacy.’”¹⁷¹ The court must ask two questions in determining whether the expectation of privacy is reasonable: “‘(1) whether the individual, by his conduct has exhibited an actual (subjective) expectation of privacy, and (2) whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.’”¹⁷²

The subjective expectation is particularly important when the party seeking suppression was not the subject of the search or seizure in which the evidence sought to be suppressed was obtained. While the issue of standing concerning Fourth Amendment violations was debated years ago, the law is now clear that “‘Fourth Amendment rights are personal, and, therefore, a defendant cannot claim a violation of his Fourth Amendment rights based only on the introduction of evidence procured through an illegal search and seizure of a third person’s property or premises.’”¹⁷³ “‘It is immaterial if evidence sought to be introduced against a defendant was obtained in violation of someone else’s Fourth Amendment rights.’”¹⁷⁴ The ultimate point being that “‘a defendant can [only] challenge the constitutionality of *his own* seizure.’”¹⁷⁵

170. United States v. Poghosyan, No. 10-10060-01, 02, 03, 04-EFM, 2010 WL 4568988, at *8 (D. Kan. Oct. 28, 2010).

171. *Id.* (quoting United States v. Cantley, 130 F.3d 1371, 1377 (10th Cir. 1997)).

172. United States v. Clark, No. 09-40051-01-JAR, 2009 WL 3807087, at *3 (D. Kan. Nov. 12, 2009) (quoting United States v. Cooper, 283 F. Supp. 2d 1215, 1245 (D. Kan. 2003)).

173. United States v. Rios, No. 10-6175, 2010 WL 4948966, at *1 (10th Cir. Dec. 7, 2010) (quoting United States v. Worthon, 520 F.3d 1173, 1178 (10th Cir. 2008)).

174. *Clark*, 2009 WL 3807087, at *3 (quoting United States v. Carr, 939 F.2d 1442, 1444 (10th Cir. 1991)).

175. United States v. Hernandez-Lizardi, No. 10-10136-01-02-EFM, 2011 WL 166724, at *2 (D. Kan. Jan. 19, 2011) (emphasis added).

b. Common Third Party Searches

i. Residents and Overnight Guests

Any resident of a home has standing to challenge any entry into his home.¹⁷⁶ The more difficult question arises when a guest in that residence alleges a violation of his Fourth Amendment rights. While “an invited guest may possess a reasonable expectation of privacy in the premises of his host,”¹⁷⁷ to have standing to challenge the introduction of evidence obtained during a search of that residence, the guest must show that he was “either an overnight guest or a social guest at the time of the illegal search.”¹⁷⁸ “[O]vernight guests have a reasonable expectation of privacy in the home of their host’ and, in some contexts, social guests who do not stay the night may also have a reasonable expectation of privacy in their host’s home.”¹⁷⁹ In determining whether the expectation of privacy was reasonable, courts will often consider “whether the individual had lawful ownership or control of the premises searched,” or alternatively, the “status of . . . an overnight guest.”¹⁸⁰

ii. Vehicle Passengers

As previously discussed, to have standing to seek suppression of evidence obtained during a search or seizure falling within the scope of the Fourth Amendment, the defendant seeking suppression must have had a subjective expectation of privacy in the item searched or seized, and that expectation must be one society is prepared to accept as objectively reasonable.¹⁸¹ Therefore, a common problem is presented when a defendant seeks to suppress evidence obtained in a search of a vehicle of which he is not the owner of record. The Tenth Circuit has held that for a defendant to show the requisite subjective expectation of privacy in the vehicle, “the defendant bears the burden at the suppression hearing to show a legitimate interest in or lawful control over the car.”¹⁸²

176. *United States v. Toledo*, 378 F. App’x 799, 804 (10th Cir. 2010).

177. *Rios*, 2010 WL 4948966, at *2.

178. *United States v. Poghosyan*, No. 10-10060-01, 02, 03, 04-EFM, 2010 WL 4568988, at *9 (D. Kan. Oct. 28, 2010).

179. *Clark*, 2009 WL 3807087, at *3 (quoting *United States v. Thomas*, 372 F.3d 1173, 1176 (10th Cir. 2004)).

180. *Id.* (quoting *United States v. Gordon*, 168 F.3d 1222, 1226 (10th Cir. 1999)).

181. *See supra* part II.A.5.a.

182. *United States v. Allen*, 235 F.3d 482, 489 (10th Cir. 2000).

If the party seeking suppression is not the registered owner of the vehicle, he must establish “that he gained possession from the owner or someone with authority to grant possession.”¹⁸³ In a suppression hearing of this nature, the court will consider: “(1) whether the defendant asserted ownership over the items seized from the vehicle; (2) whether the defendant testified to his expectation of privacy at the suppression hearing; and (3) whether the defendant presented any testimony at the suppression hearing that he had a legitimate possessory interest in the vehicle.”¹⁸⁴

If a court holds that a vehicle passenger does not have standing to challenge the search of a vehicle, the passenger may still have standing to challenge a search of the vehicle so much as it extends to personal items within that vehicle.¹⁸⁵ The Tenth Circuit has held that when a search extends to closed bags found in the trunk, which contained clothing and toiletries, the owner of the bags may have standing to seek suppression of evidence obtained in the search of the bags.¹⁸⁶ By contrast, an unauthorized driver of a van was held not to have standing to challenge the search of unlocked bags in the open compartment of the van.¹⁸⁷

c. Curtilage, Trash, and Open Fields

The home receives the highest level of privacy. And courts extend the same level of Fourth Amendment protection afforded to the home to its curtilage.¹⁸⁸ Curtilage is defined as the “area to which extends the intimate activity associated with the sanctity of a . . . home and the privacies of life.”¹⁸⁹ The court applies a factor test in determining whether a specific area is within the curtilage of the home: “(1) the proximity of the area to the home; (2) inclusion of the area within an enclosure surrounding the home; (3) the nature of the uses of the area; and (4) steps taken by the resident to protect the area from observation by persons passing by.”¹⁹⁰

183. *United States v. Arango*, 912 F.2d 441, 445 (10th Cir. 1990).

184. *Allen*, 235 F.3d at 489.

185. *United States v. Worthon*, 520 F.3d 1173, 1182 (10th Cir. 2008) (citing *United States v. Edwards*, 242 F.3d 928, 936 (10th Cir. 2001)).

186. *Id.* (citing *Edwards*, 242 F.3d at 928).

187. *Id.* at 1182–83.

188. *Lundstrom v. Romero*, 616 F.3d 1108, 1129 (10th Cir. 2010).

189. *Id.* at 1128 (quoting *Reeves v. Churchich*, 484 F.3d 1244, 1254 (10th Cir. 2007)).

190. *United States v. Long*, 176 F.3d 1304, 1308 (10th Cir. 1999).

A unique question arises when officers pull an individual's trash from outside the home for investigative purposes without a search warrant. In determining whether such a trash pull is a Fourth Amendment violation, the court asks two questions: "(1) Was the discarded trash located within the curtilage of the residence? And (2) if so, did the person who discarded the trash manifest a subjective expectation of privacy in the trash and was that expectation of privacy objectively reasonable."¹⁹¹ The Tenth Circuit stated that trash bags placed at the end of the driveway for regular pickup and not placed there by officers were not something in which society recognizes a reasonable expectation of privacy.¹⁹² However, if the court determines the "trash collector acted as an agent of law enforcement in seizing the trash, then law enforcement effectively" seized the trash,¹⁹³ which if located within the curtilage of the home would be an unreasonable warrantless search.¹⁹⁴

Fourth Amendment protections afforded the home and its curtilage are not extended to open fields.¹⁹⁵ Open fields "do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance."¹⁹⁶ Open fields are viewed as "accessible to the public and the police in ways a home, an office, or commercial structure" is not.¹⁹⁷ Furthermore, neither the presence of no trespassing signs nor fences "effectively bar[s] the public from viewing open fields."¹⁹⁸ Ultimately, neither "the text of the Fourth Amendment . . . [nor the] historical and contemporary understanding of its purposes, . . . [provides] an individual [a] legitimate expectation that open fields will remain free from warrantless intrusion by government officers."¹⁹⁹

191. *State v. Wheeler*, No. 102,638, 2010 WL 1253751, at *4 (Kan. Ct. App. March 26, 2010).

192. *United States v. Cianciarulo*, No. 10-40041-01-SAC, 2010 WL 2653423, at *3 (D. Kan. June 29, 2010)

193. *Wheeler*, 2010 WL 1253751, at *6.

194. *See Cianciarulo*, 2010 WL 2653423, at *3 ("[T]he court finds the trash to be outside the curtilage . . . and outside the protection of the Fourth Amendment.").

195. *State v. Swinney*, 127 P.3d 261, 265 (Kan. 2006).

196. *Id.* at 266 (quoting *Oliver v. United States*, 466 U.S. 170, 179 (1984)).

197. *Id.*

198. *Id.*

199. *Oliver*, 466 U.S. at 181.

6. Technology and Searches

a. Wiretapping

The Federal Wiretap Act, prohibits the intentional interception of “any wire, oral, or electronic communication,”²⁰⁰ and the intentional disclosure or use of the contents of any such illegally intercepted communication if the persons who disclose or use it did so “knowing, or having reason to know,” the communication was intercepted in violation of the Federal Wiretap Act.²⁰¹

The legislative history of the Act, however, shows that the Act was not intended to apply to “[t]he disclosure of the contents of an intercepted communication that had already become public information or common knowledge.”²⁰² A more commonly used exception to the Federal Wiretap Act’s prohibitions is the “one-party consent” rule.²⁰³ The “one-party consent” rule provides that an intercepted communication is not unlawful if one of the parties to the conversation consents to the recording, unless the interception is otherwise unlawful outside of the Federal Wiretap Act.²⁰⁴ In addition, the statute permits law enforcement officers to disclose intercepted communications if necessary to execution of their official duties.²⁰⁵ A good-faith exception provides defense to civil liability in instances involving reliance on a court order, statute, or other legislation.²⁰⁶

An application for a wiretap must include

a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including: (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) . . . a particular description of the nature and location of the facilities from which . . . the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the

200. 18 U.S.C. § 2511(1)(a) (2006).

201. *Id.* § 2511(1)(c)–(d).

202. *Phillips v. Bell*, 365 F. App’x 133, 140 (10th Cir. 2010) (quoting S. REP. NO. 90-1097, at 4 (1968)) (internal quotation marks omitted).

203. 18 U.S.C. § 2511(2)(d).

204. *Id.*

205. *Id.* § 2517(1)–(2).

206. *Id.* § 2520(d).

person, if known, committing the offense and whose communications are to be intercepted.²⁰⁷

In addition, the applicant must “show that traditional investigative techniques have been tried unsuccessfully . . . or are too dangerous to attempt.”²⁰⁸ The applicant is not required to show that all possible investigative techniques have been exhausted, instead, the government should act “in a common sense fashion.”²⁰⁹ In the Tenth Circuit, a defendant seeking invalidation of a wiretap must overcome a presumption that a district court’s wiretap authorization is proper.²¹⁰

b. Electronic Surveillance

In 2001, the United States Supreme Court held the use of a thermal imaging device to detect heat emitting from a suspected drug dealer’s home was an unreasonable search under the Fourth Amendment.²¹¹ While the thermal imaging device gave agents only a crude image as to the heat levels emanating from the home, the court held that any warrantless search into the home, no matter how little is discovered, is presumptively unreasonable.²¹²

In 2010, the Supreme Court was faced with the question of whether a government employer performed an unreasonable search under the Fourth Amendment by reading text message transcripts sent over employees’ work pagers.²¹³ The court held that because the search was “motivated by a legitimate work-related purpose, and because it was not excessive in scope,” the search was reasonable for Fourth Amendment purposes.²¹⁴ In dicta, the Court noted that “rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.”²¹⁵ As previously discussed, current Fourth Amendment analysis involves a determination of whether one’s subjective expectation of privacy is an expectation society is prepared to accept as

207. *Id.* § 2518(1)(b).

208. *United States v. Ramirez-Encarnacion*, 291 F.3d 1219, 1222 (10th Cir. 2002).

209. *Id.*

210. *United States v. VanMeter*, 278 F.3d 1156, 1163 (10th Cir. 2002).

211. *Kyllo v. United States*, 533 U.S. 27, 39 (2001).

212. *Id.* at 38.

213. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2624 (2010).

214. *Id.* at 2632.

215. *Id.* at 2629.

objectively reasonable.²¹⁶ Therefore, as what society accepts as reasonable in the realm of communication technology changes, what is reasonable for Fourth Amendment search purposes will continue to evolve.

c. Chemical Drug Tests

Section 8-1001(b) of the Kansas Statutes states that an officer shall request a blood, breath, or other test if the officer “has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs” and one of various other factors is present—for example, if the driver has previously been arrested for driving while under the influence.²¹⁷ “The determination of reasonable grounds is similar to a determination of probable cause to make an arrest.”²¹⁸ Consent is not an issue because by operating or attempting to operate a vehicle in Kansas, an individual is deemed to have consented to such a test.²¹⁹

Any warrantless drawing of blood from a criminal suspect must meet an exception to the warrant requirement to be held reasonable.²²⁰ In dealing with a DUI suspect, such an exception exists if the blood draw satisfies three requirements: “(1) there are exigent circumstances in which the delay necessary to obtain a warrant would threaten the destruction of evidence; (2) the officer has probable cause to believe the suspect has been driving under the influence of alcohol; and (3) reasonable procedures are used to extract the blood.”²²¹ The first requirement will almost certainly be met in DUI cases.²²² Although consent could effectively satisfy the exigent circumstance and probable cause requirements, the State will still be required to demonstrate “the blood draw was performed in a reasonable manner.”²²³ In determining whether a blood draw was performed in a reasonable manner, a court will consider “the qualifications of the person drawing the blood, the

216. *See supra* Part II.A.5.a.

217. KAN. STAT. ANN. § 8-1001(b) (2010).

218. *Poteet v. Kan. Dep’t of Revenue*, 233 P.3d 286, 289 (Kan. Ct. App. 2010) (citing *Bruch v. Kan. Dep’t of Revenue*, 148 P.3d 538, 546 (Kan. 2006)).

219. § 8-1001(a).

220. *State v. Davis*, 207 P.3d 281, 284–86 (Kan. Ct. App. 2009).

221. *Id.* (citing *State v. Murry*, 21 P.3d 528, 531–32 (Kan. 2001)).

222. *Id.*

223. *Id.*

environment in which the blood was drawn, and the manner in which the blood was drawn.”²²⁴

III. SEIZURES

A. *Fourth Amendment Issues*

The Fourth Amendment of the United States Constitution states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized.”²²⁵ Just as the Fourth Amendment protects against unreasonable searches, it also protects against unreasonable seizures by government actors.²²⁶ The Kansas Supreme Court has “held that the wording and scope of the two sections are identical for all practical purposes. If conduct is prohibited by one it is prohibited by the other.”²²⁷ Therefore, all the previously enumerated reasoning and standards of protection for unreasonable searches can be applied to seizures.²²⁸ Like a search claim, a defendant may raise a Fourth Amendment seizure claim based on the warrant requirement, standards for the seizure of property and the seizure of a person, and may face standing problems.

1. Seizure of Property

A seizure of property occurs when a governmental actor interferes with someone’s possessory interest in that property in a meaningful way.²²⁹ The defendant must assert his possessory interest in the property and manifest a subjective expectation of privacy in the property.²³⁰ If the seizure of the person or property is “minimally intrusive of the individual’s Fourth Amendment interests,” it can often be justified on

224. *Id.* at 286.

225. U.S. CONST. amend. IV.

226. *State v. Johnson*, 856 P.2d 134, 138 (Kan. 1993).

227. *Id.*

228. *See supra* Part II.

229. *United States v. Karo*, 468 U.S. 705, 712 (1984).

230. *See United States v. Morales*, No. 09-20034-02-KHV, 2009 WL 4571846, at *2 (D. Kan. Dec. 3, 2009) (rejecting an unreasonable search and seizure claim because the defendant failed to manifest a subjective expectation of privacy in the invaded property).

less than probable cause.²³¹ If the seizure is not minimally intrusive, the court must consider whether it is a constitutional violation.²³²

An illustrative example of possessory interest can be seen in the seizure of mail. The United States Supreme Court has held that the Fourth Amendment protects from the unreasonable seizure of sealed envelopes and packages but not catalogs, magazines, pamphlets, or newspapers because those are “purposely left in a condition to be examined.”²³³ A person who is neither the sender nor the addressee of a piece of mail has no possessory interest in it.²³⁴

A government agent must have reasonable suspicion to seize a piece of mail that he believes contains contraband, which requires an “intensely fact specific” constitutional analysis.²³⁵ Kansas courts offer several factors in determining whether reasonable suspicion was present, including the package’s size, shape, markings, secureness, or any unusual odors or other unusual qualities.²³⁶ The government actor may seize mail if any combination of these factors objectively creates reasonable suspicion.²³⁷

2. Seizure of Persons

The United States Supreme Court has stated, “[a] person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, ‘by means of physical force or show of authority,’ terminates or restrains his freedom of movement.”²³⁸ The Kansas Constitution provides identical protection to the protection offered by the Fourth Amendment.²³⁹ This double layer of protection, through both the state and federal constitutions, is meant to ensure that no person is unreasonably seized.²⁴⁰

231. *United States v. Place*, 462 U.S. 696, 703 (1983).

232. *Id.*

233. *Walter v. United States*, 447 U.S. 649, 655 n.5 (1980) (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)).

234. *United States v. Wood*, 6 F. Supp. 2d 1213, 1223 (D. Kan. 1998).

235. *State v. Duhon*, 109 P.3d 1282, 1287 (Kan. Ct. App. 2005) (citing *United States v. Cantrall*, 762 F. Supp. 875, 879 (D. Kan. 1991)).

236. *Id.*

237. *Id.*

238. *Brendlin v. California*, 551 U.S. 249, 254 (2007) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

239. *State v. Morris*, 72 P.3d 570, 576 (Kan. 2003).

240. *See id.*

The Kansas Supreme Court explained that “[t]here are four types of police–citizen encounters.”²⁴¹ The first is “a voluntary encounter, which is not considered a seizure.”²⁴² The second is “an investigatory detention or *Terry* stop, in which an officer may detain any person in a public place if the officer reasonably suspects that the person is committing, has committed, or is about to commit a crime.”²⁴³ The third is “a public safety stop, in which an officer may approach a person to check on his or her welfare when the officer can articulate specific facts indicating a concern for the public’s safety.”²⁴⁴ The last is simply an arrest.²⁴⁵ The lines between these four types of encounters, and whether a seizure was reasonable, have been fertile ground for claims of constitutional violations.

To determine the type of encounter, courts use the “totality of the circumstances” test.²⁴⁶ They often use enumerated factors, but none are definitive, and the courts will weigh each individual element.²⁴⁷ It is, therefore, important to know the distinguishing factors that courts have used and the gravity that they have been attached.

a. Seizure of Persons During Traffic Stops

“A traffic violation provides an objectively valid reason to effectuate a traffic stop, even if the stop is pretextual.”²⁴⁸ But a traffic stop can become unreasonable: Kansas courts have held that “[a]n investigatory traffic stop is reasonable, and thus constitutional, if (1) the stop is justified at its inception and (2) the scope and duration of the stop are reasonably related to the initial justification for the stop.”²⁴⁹ Therefore, the officer must have a valid reason to have made the stop and then only conduct an investigation within the scope of that reason. “Police may stop and detain [drivers] briefly on the roadways based on reasonable suspicion, meaning an objective and specific basis for believing that the person being detained is involved in criminal activity.”²⁵⁰ While a stop

241. *State v. Morales*, 242 P.3d 223, 228 (Kan. Ct. App. 2010).

242. *Id.* (citing *State v. Lee*, 156 P.3d 1284, 1288 (Kan. 2007)).

243. *Id.* (citing KAN. STAT. ANN. § 22-2402 (2010); *Terry v. Ohio*, 92 U.S. 1 (1968)).

244. *Id.* (citing *State v. Vistuba*, 840 P.2d 511 (Kan. 1992)).

245. *Id.* (citing § 22-2401).

246. *Id.* (citing *State v. McGinnis*, 233 P.3d 246 (Kan. 2010)).

247. *Id.*

248. *State v. Anderson*, 136 P.3d 406, 410–11 (Kan. 2006).

249. *State v. Diaz-Ruiz*, 211 P.3d 836, 840 (Kan. Ct. App. 2009).

250. *State v. Barriger*, 239 P.3d 1290, 1291 (Kan. Ct. App. 2010) (citing *State v. Pollman*, 190 P.3d 234 (Kan. 2008)).

may be a purely voluntary encounter if the officer did not intend for that particular driver to stop,²⁵¹ it is a seizure “when there is a show of authority by the officer that would communicate to a reasonable person that he or she is not free to leave and that person submits to the show of authority.”²⁵² Once stopped, the officer acts reasonably if he does not unduly prolong the duration of the detention and does not convert an investigatory detention into an arrest.²⁵³

Kansas courts have spelled out very specific parameters for officers conducting traffic violation stops to ensure that the officer does not unduly prolong the detention or convert it into an arrest:

A law enforcement officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid license and proof that he or she is entitled to operate the car, the driver must be allowed to proceed on his or her way, without being subject to further delay by the officer for additional questioning.²⁵⁴

An officer can only keep the person longer “if (1) the encounter between the officer and the driver ceases to be a detention, but becomes consensual, and the driver voluntarily consents to additional questioning, or (2) during the traffic stop the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity.”²⁵⁵ If under the totality of the circumstances, a reasonable person would not feel free to leave or refuse the officer’s requests, the encounter is not consensual and voluntary.²⁵⁶

b. Detention of Third Parties During a Search

An officer must observe and follow the safeguards that are provided for a driver when questioning the passenger of a stopped vehicle because the United States Supreme Court has held that “during a traffic stop an

251. *State v. Reiss*, 244 P.3d 693, 695 (Kan. Ct. App. 2010) (citing *United States v. Al Nasser*, 555 F.3d 722, 725–32 (9th Cir. 2009)).

252. *Id.* (citing *Brendlin v. California*, 551 U.S. 249, 254–55 (2007); *State v. Morris*, 72 P.3d 570 (Kan. 2003)).

253. *Barriger*, 239 P.3d at 1293.

254. *State v. Mitchell*, 960 P.2d 200, 205 (Kan. 1998).

255. *State v. White*, 241 P.3d 591, 596 (Kan. Ct. App. 2010) (citing *State v. Thompson*, 166 P.3d 1015 (Kan. 2007)).

256. *Id.*

officer seizes everyone in the vehicle, not just the driver.”²⁵⁷ But if the passenger of a vehicle also raises suspicions in the officer’s mind, any questions asked of the passengers are valid and reasonable just as they would be for the driver.²⁵⁸

c. Seizure Made for Public Safety Reasons

Kansas courts have repeatedly held that “[p]ublic safety stops fall under the police’s community caretaking function, which expands beyond the police’s role in investigating crime,” but the safety stop is not to be used for investigative purposes.²⁵⁹ Public safety stops are unique in their capacity to allow an officer to stop a person without a warrant, probable cause, or reasonable suspicion.²⁶⁰ If there is any motive other than public safety, however, the stop becomes an investigatory detention and the officer must conform to all search and seizure requirements.²⁶¹ The public safety exception is even more limited for entry into homes. Under the emergency doctrine, warrantless entry into a home for public safety reasons requires “an immediate need for assistance for the protection of life or property” or anything seized will be subject to the exclusionary rule.²⁶²

d. Seizure Made of Persons During Police Interrogation

A seizure does not occur every time an officer approaches someone and ask questions.²⁶³ If an encounter between an officer and defendant is consensual or voluntary any evidence gathered is not afforded protection by the Fourth Amendment.²⁶⁴ The Kansas Supreme Court, like the United States Supreme Court, has held that the totality of circumstances test should be used to determine whether an encounter was voluntary.²⁶⁵ There have been several cases this year that address the voluntariness of

257. *Brendlin*, 551 U.S. at 255.

258. *State v. Morlock*, 218 P.3d 801, 810–11 (Kan. 2009).

259. *State v. McCaddon*, 185 P.3d 309, 312 (Kan. Ct. App. 2008) (citing *State v. Vistuba*, 840 P.2d 511, 514 (Kan. 1992)).

260. *See supra* Part III.A.2.c.

261. *See McCaddon*, 185 P.3d at 312 (“Public safety stops are not to be used for investigative purposes.”).

262. *State v. Peterman*, 216 P.3d 710, 713 (Kan. Ct. App. 2009).

263. *State v. McGinnis*, 233 P.3d 246, 252 (Kan. 2010).

264. *Id.* at 251.

265. *Id.*

an encounter, and the Kansas Supreme Court clarified factors that contribute to the totality of circumstances.

i. *State v. McGinnis*

In *State v. McGinnis*, the Kansas Supreme Court made a ruling that further clarified the importance of the placement of an officer's vehicle in the creation of an involuntary encounter.²⁶⁶ Atchison County Deputy Sheriff Bryan Clark was on patrol and came upon a vehicle that pulled over, drove a little farther, and then pulled over again.²⁶⁷ The driver, Stephen McGinnis, then got out.²⁶⁸ The officer pulled up behind him on the gravel road and got out of his car to talk to McGinnis.²⁶⁹ Clark noticed several signs of alcohol use and questioned McGinnis, then arrested him.²⁷⁰ McGinnis argued that the encounter was an involuntary seizure of his person because the officer's car was blocking his exit.²⁷¹ The Court followed the United States Supreme Court's totality of the circumstances test and examined several factors to determine that a seizure had not occurred:²⁷² (1) there was physical space for the defendant to leave in his car, (2) the officer's vehicle placement was not an intentional attempt to block the defendant, even though the court said the officer's intent is "irrelevant," (3) the officer did not tell him to wait or stay, and (4) the officer did not use his lights or sirens.²⁷³

Additionally, in *McGinnis*, the court also cited

[t]he presence of only one officer, Deputy Clark; the lack of the display of any of Clark's weapons; the lack of physical touching by Clark until effectuating the arrest for DUI; the lack of Clark's commanding tone, indeed, his maintenance of a cordial and conversational tone until initiating the DUI investigation; the lack of a Clark command for McGinnis to halt or to approach Clark; and the lack of activation of Clark's vehicle emergency lights or sirens.²⁷⁴

266. *Id.*

267. *Id.* at 250.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 251.

272. *Id.*

273. *Id.* at 256.

274. *Id.*

Thus, *McGinnis* demonstrates that the voluntariness of an encounter with police officers truly takes into account all of the surrounding circumstances.

ii. *State v. Morales*

While the court in *McGinnis* listed many factors, in *State v. Morales*, the court emphasized that the determination of whether interaction with a police officer is voluntary “is fact-driven, [and] no list of factors can be exhaustive or exclusive.”²⁷⁵ The outcome does not depend on any one factor and requires careful scrutiny.²⁷⁶ But the court in *Morales* did limit the scope of the court’s scrutiny, emphasizing that the totality of the circumstances must be viewed objectively, with no consideration of what the defendant may have subjectively perceived or what the officer subjectively intended.²⁷⁷

iii. *State v. Thomas*

In *State v. Thomas*, the Kansas Supreme Court again performed a fact-driven analysis to determine whether an encounter was voluntary or constituted a seizure, adding even more factors.²⁷⁸ It considered the officer’s repeated questioning of the defendant, his failure to tell her she was free to leave, and his request for backup.²⁷⁹ The Court found special importance in the call for backup because the defendant heard this call and it “would strongly suggest to a reasonable person that the called officer was being asked to ‘back up’ the calling officer in ways besides just helping to ask more questions.”²⁸⁰ The Court determined that this, and other previously enumerated factors—such as “the presence of more than one officer, the display of a weapon, physical contact by the officer, use of a commanding tone of voice, activation of sirens or flashers, a command to halt or to approach, and an attempt to control the ability to flee”—would lead a reasonable person to think the encounter was involuntary, and therefore a seizure.²⁸¹

275. 242 P.3d 223, 228–29 (Kan. Ct. App. 2010).

276. *Id.*

277. *Id.* at 229.

278. *State v. Thomas*, 246 P.3d 678, 683 (Kan. 2011).

279. *Id.* at 685.

280. *Id.*

281. *Id.*

3. Standing to Object to a Seizure

Even if a defendant has a claim under any of the preceding issues, he must still have standing to object to the evidence to be able to make a valid claim.²⁸² In determining whether a defendant has standing, courts consider the same two factors for standing to bring a claim for an unreasonable search: “First, did the defendant establish a subjective expectation of privacy in the property to be searched? Second, would society recognize his subjective expectation as objectively reasonable?”²⁸³ If the defendant can show both these objective and subjective expectations of privacy, then he has standing to bring a claim of a constitutional violation.²⁸⁴

B. *Fifth and Sixth Amendment Issues*

1. The Seizure Protections of the Fifth and Sixth Amendments

The Fifth Amendment ensures that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”²⁸⁵ This aims to protect the “noble heritage” stemming back to “ancient times” of disallowing confessions obtained through unjust means by law enforcement officers; therefore it is interpreted broadly.²⁸⁶ Fifth Amendment rights, however, cannot be raised in anticipation of interrogation, and Kansas courts place great importance on the imminence of the interrogation.²⁸⁷

The Sixth Amendment promises that criminal defendants “shall . . . have the Assistance of Counsel for [their] defence.”²⁸⁸ This Sixth Amendment protection is triggered only by “adversarial judicial proceedings” and protects statements “deliberately elicited.”²⁸⁹ Adversarial judicial proceedings can include a grand jury proceeding, arraignment, complaint, or other trial-like proceedings, but does not

282. See *State v. Grissom*, 840 P.2d 1142, 1177 (Kan. 1992).

283. *United States v. Wood*, 6 F. Supp. 2d 1213, 1222 (D. Kan. 1998).

284. *Id.*

285. U.S. CONST. amend. V.

286. *Miranda v. Arizona*, 384 U.S. 436, 458–60 (1966).

287. *State v. Appleby*, 221 P.3d 525, 547–48 (Kan. 2009).

288. U.S. CONST. amend. VI.

289. *Massiah v. United States*, 377 U.S. 201, 204–05 (1964).

include arrest or investigation.²⁹⁰ If the first requirement of “adversarial judicial proceedings” is met, then any statement “deliberately elicited” is not admissible into evidence.²⁹¹ “The timing as well as the content and context of a reference to counsel may help determine whether there has been an unambiguous assertion of the right to have the assistance of an attorney.”²⁹²

2. Miranda Warnings—Additional Protections to the Fifth and Sixth Amendments

With its landmark decision in *Miranda v. Arizona*, the United States Supreme Court established prophylactic rules to protect suspects in custodial interrogation.²⁹³ *Miranda* warnings consist of informing a defendant that he has the right to remain silent, that anything he says may be used against him in court, and that he has the right to an attorney, which may be appointed if the defendant is unable to afford one.²⁹⁴ In Kansas, *Miranda* warnings are required “in police encounters ‘where there has been such a restriction on a person’s freedom as to render him in custody.’”²⁹⁵

a. “In Custody”

To determine whether a suspect is in a “custodial interrogation,” the Kansas Supreme Court has set out a two-pronged test.²⁹⁶ The first prong of the test is an analysis of the circumstances of the interrogation.²⁹⁷ The analysis focuses on the following eight factors: the time and place of the interrogation, the duration of the interrogation, the number of police officers present, the conduct of the officers and person of interest, whether the suspect was physically restrained in any way, including by drawn firearms, whether the person was escorted to the interrogation site by police or arrived voluntarily, and the result of the interrogation, including whether the person was further detained, arrested, or allowed

290. *Id.* at 205.

291. *Id.* at 204.

292. *Id.* at 548.

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

294. *Id.* at 444.

295. *State v. Schultz*, 212 P.3d 150, 155 (Kan. 2009) (quoting *State v. Morton*, 186 P.3d 785 (Kan. 2008)) (internal quotation marks omitted).

296. *Morton*, 186 P.3d at 791.

297. *Id.*

to leave.²⁹⁸ The second prong of the test analyzes whether the totality of the above circumstances would have led “a reasonable person to believe he or she was not at liberty to terminate the interrogation.”²⁹⁹ Because each set of facts is different, decisions on whether custodial interrogation existed are made on a case-by-case basis.

The Kansas Supreme Court recently considered whether a defendant was “in custody” when he was questioned in a police officer’s patrol car during a routine traffic stop.³⁰⁰ In *Smith v. Kansas Department of Revenue*, the defendant was driving his pickup truck, pulling a trailer.³⁰¹ The tail lights on the trailer were not functioning properly, and Smith was pulled over.³⁰² Upon making contact with Smith, the officer noticed an odor of alcohol surrounding Smith.³⁰³ After obtaining Smith’s driver’s license, the officer asked Smith to sit in the patrol car while the officer filled out a warning for the tail light violation.³⁰⁴ After returning to his patrol car, the officer asked Smith if he had consumed any alcohol that evening.³⁰⁵ Smith responded that he had had three or four drinks and had stopped drinking about thirty minutes before the traffic stop.³⁰⁶ Following this conversation, both Smith and the officer walked to Smith’s truck, which the officer searched, finding an open beer bottle with a small amount of liquid in it on the floor of the back seat.³⁰⁷ Following the search, Smith and the officer returned to the patrol car, where the officer conducted two prefield sobriety tests.³⁰⁸ Next, the officer asked Smith to perform two field sobriety tests, one of which Smith passed.³⁰⁹ Finally, upon the officer’s request, Smith took a preliminary breath test and failed.³¹⁰ At that point, the officer arrested Smith and transported him to the Norton County Sheriff’s office.³¹¹ Smith was again given an evidentiary breath test, the result of which was

298. *Id.*

299. *Schultz*, 212 P.3d at 155.

300. *Smith v. Kan. Dep’t of Revenue*, 242 P.3d 1179, 1180 (Kan. 2010).

301. *Id.* at 1181.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 1182.

309. *Id.*

310. *Id.* The actual result of the preliminary breath test (PBT) result was not recorded. *Id.*

311. *Id.*

over the legal limit at 0.099.³¹² After this breath test, the officer read Smith the *Miranda* warnings.³¹³ Smith promptly told the officer he did not want to answer any questions and at that point, police contact with Smith ended.³¹⁴ In his notice of appeal, Smith claimed that his admissions to the officer—that he had been drinking—should not have been included in the officer’s determination that reasonable grounds existed because Smith was not advised of his *Miranda* rights before making the statements.³¹⁵

The Kansas Supreme Court held that Smith was not “in custody” for the purposes of *Miranda* and therefore, the admission that Smith had been drinking was not barred from the officer’s determination.³¹⁶ In reaching its conclusion, the court cited the United States Supreme Court decision in *Berkemer v. McCarty*.³¹⁷ In *Berkemer*, the officer noticed the defendant was having a hard time standing after he pulled the car over for swerving in and out of its lane.³¹⁸ The officer in *Berkemer* asked the defendant if he had consumed any intoxicants, to which the defendant responded affirmatively.³¹⁹ Following the incriminating response, the officer arrested the defendant.³²⁰ The Kansas Supreme Court found Smith’s circumstances nearly identical to those present in *Berkemer*.³²¹ The only significant difference the court noted was that, whereas Smith was seated in the patrol car when he incriminated himself, the defendant in *Berkemer* was not.³²² The court noted that, while there are some situations in which a defendant is in custody and the patrol car serves as a “temporary jail,” that was not the case for Smith.³²³ Smith’s questioning occurred during the period in which the officer was issuing a ticket for a tail light infraction, and only a limited number of questions were asked.³²⁴ Because the inquiry did not prolong the duration of the traffic stop, the court held the officer’s questioning of Smith was not a

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 1185.

317. *Id.* at 1184–85.

318. *Berkemer v. McCarty*, 468 U.S. 420, 423 (1984).

319. *Id.*

320. *Id.*

321. *Smith*, 242 P.3d at 1185.

322. *Id.*

323. *Id.*

324. *Id.*

custodial interrogation and, therefore, *Miranda* warnings were not required.³²⁵

The court's decision in *Smith* was appropriate under the circumstances. It is quite common for a police officer to ask whether a driver suspected of being under the influence has been drinking. The fact that Smith happened to be in the officer's patrol car at the time of the question should have no effect on the validity of the question. The facts show this was no more than a routine traffic stop until after the incriminating statement was made. Had Smith been handcuffed and restrained while being questioned, the result would likely have been different, and rightly so. However, since he was not handcuffed or restrained in any way, he cannot be considered to have been "in custody" for purposes of *Miranda*. The decision in *Smith* preserves police officers' ability to procure additional information during a routine traffic stop by interacting with a suspect while the officer communicates with other law enforcement entities to make sure the driver does not have any outstanding warrants and is not otherwise a danger to the community.

b. Police Officers' Duties During Interrogation

i. Repeated *Miranda* Warnings

Occasionally, it may be necessary for an officer to give a suspect *Miranda* warnings again, for instance, if a significant period of time has passed between being read the warnings and the actual interrogation commencing.³²⁶ A totality of the circumstances test is used to determine whether officers must give *Miranda* warnings again to a suspect who has already waived his rights.³²⁷ The court may consider factors such as "the defendant's mental condition; the manner and duration of the interrogation; the ability of the defendant to communicate with the outside world; the defendant's age, intellect, and background; the fairness of the officers in conducting the interrogation; and the defendant's proficiency with the English language."³²⁸ In the most recent Kansas case to deal with the question, the Kansas Court of Appeals held that "[e]ven if a full 45 minutes had passed between

325. *Id.*

326. *See* State v. Ransom, 207 P.3d 208, 217 (Kan. 2009).

327. *Id.*

328. State v. Cofield, 203 P.3d 1261, 1264 (Kan. 2009).

[suspect's] initial *Miranda*-waiver and his subsequent statements, [his] *Miranda* rights did not expire."³²⁹

ii. Sufficiency of Language of *Miranda* Warnings

In *Florida v. Powell*, the United States Supreme Court recently visited the issue of the effect of variations on the *Miranda* warnings before questioning a suspect.³³⁰ In *Powell*, before beginning a custodial interrogation, officers read Powell a standard consent and release form, which states:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.³³¹

Powell argued, and the Florida Supreme Court agreed, that the language of the form made the entire set of warnings misleading because it did not satisfy the requirement of informing Powell of his right to have counsel present during the interrogation.³³²

In reversing the Florida Supreme Court, a seven-to-two majority of the United States Supreme Court held that the warnings, as they were conveyed to Powell, were unambiguous and therefore sufficient to inform a suspect of his *Miranda* rights.³³³ Relying on previous holdings declining to dictate "the words in which the essential information [of *Miranda*] must be conveyed,"³³⁴ the Court found that none of the required *Miranda* warnings were omitted.³³⁵ Since all the required warnings were reasonably conveyed, the Court held that Powell's incriminating statement should not have been suppressed at trial.³³⁶

The Court's holding in *Powell* was consistent with previous United States Supreme Court precedent, which has never required that exact

329. *State v. Taylor*, No. 101,451, 2010 WL 2245599, at *4 (Kan. Ct. App. May 28, 2010) (citing *State v. Nguyen*, 133 P.3d 1259, 1275 (Kan. 2006)).

330. 130 S. Ct. 1195, 1195–96 (2010).

331. *Id.* at 1200.

332. *Id.* at 1200–01.

333. *Id.* at 1204.

334. *Id.* at 1198 (citing *California v. Prysock*, 453 U.S. 355, 359 (1981)).

335. *Id.* at 1204.

336. *Id.* at 1205–06.

language be used to convey a suspect's *Miranda* rights. The only ambiguity that existed in the form read to Powell was that it could have appeared that the suspect could talk with a lawyer before each and every question, a reading that makes very little sense. The Court rightly found the form unambiguous and upheld the idea that it is the substance of the *Miranda* rights, and not the form, that is paramount when those rights are conveyed to a suspect.

iii. *Quarles* Public Safety Exception

Under the *New York v. Quarles* exception to the *Miranda* rule, police officers may refrain from reading the *Miranda* rights if the officer has "an objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon."³³⁷ The Tenth Circuit has adopted a two-pronged test to determine whether the *Quarles* exception applies.³³⁸ The officer must reasonably believe both that the defendant either has or recently has had a weapon and that "someone other than police might gain access to that weapon and inflict harm with it."³³⁹

c. Invocation of the Right to Remain Silent

Under the United States Supreme Court's holding in *Miranda*, a custodial interrogation must stop immediately if the suspect invokes either his right to remain silent or his right to counsel.³⁴⁰ In *Berghuis v. Thompkins*, the Supreme Court recently held that merely remaining silent is not sufficient to invoke one's right to remain silent.³⁴¹ In *Berghuis*, the defendant, after being arrested and taken into custody for interrogation, was presented with a written version of the *Miranda* warnings.³⁴² The interrogating detective asked Thompkins to read a portion of the written warnings aloud, which included the following text: "[y]ou have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."³⁴³ The detective testified that he did this to make sure that

337. *New York v. Quarles*, 467 U.S. 649, 659 n.8 (1984).

338. *United States v. DeJear*, 552 F.3d 1196, 1201 (10th Cir. 2009).

339. *Id.* at 1201–02 (citing *United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007)).

340. *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

341. 130 S. Ct. 2250, 2260 (2010).

342. *Id.* at 2256.

343. *Id.*

Thompkins could read and understand English.³⁴⁴ Thompkins, however, declined to sign a form indicating he understood his rights.³⁴⁵

During the ensuing three-hour interrogation, Thompkins neither said he wanted to remain silent nor requested an attorney.³⁴⁶ Although Thompkins remained largely silent during the interrogation, he occasionally responded to questions with short verbal statements or by nodding or shaking his head.³⁴⁷ About two hours and forty-five minutes into the interview, the detective asked Thompkins, “Do you pray to God to forgive you for shooting that boy down?”³⁴⁸ Thompkins responded, “Yes,” and turned away.³⁴⁹ However, Thompkins declined to record a written confession, and the interview ended shortly after this statement.³⁵⁰ Thompkins moved to suppress the statements made during the interrogation, arguing that he had invoked his right to remain silent and that the questioning should have ended before the statements were made.³⁵¹

Justice Kennedy, writing for a five-to-four majority, held that Thompkins did not invoke his right to remain silent.³⁵² The Court drew an analogy between the invocation of the right to remain silent and the invocation of the right to counsel, which must be done “unambiguously.”³⁵³ The Court found no reason to adopt a different standard for invoking the two separate rights.³⁵⁴ Next, the Court discussed whether Thompkins waived his right to remain silent.³⁵⁵ Here, the court held that because he had answered the detective’s questions—instead of saying nothing or unambiguously invoking his right to remain silent—he “engaged in a course of conduct indicating waiver.”³⁵⁶ The Court further held that detectives were not required to obtain a waiver for the inculpatory statements to be admitted into evidence.³⁵⁷

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 2256–57.

348. *Id.* at 2257.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 2260.

353. *Id.* at 2259–60 (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)).

354. *Id.* at 2260.

355. *Id.* at 2260–63.

356. *Id.* at 2263.

357. *Id.* at 2264.

The majority opinion in *Berghuis* was sharply criticized in Justice Sotomayor's dissent. The dissent found the majority's new rule—that a defendant must break his silence to unequivocally invoke his right to remain silent—counterintuitive.³⁵⁸ Rather, Justice Sotomayor concluded that Thompkins's silence and lack of cooperation in the interrogation could not “reasonably be understood other than as an invocation of the right to remain silent.”³⁵⁹ Justice Sotomayor also rejected the majority's use of the *Davis* rule requiring unambiguous invocation of the right, preferring a fact-specific standard to determine if a suspect has invoked his right to remain silent.³⁶⁰ In the end, of course, the majority opinion sets forth a bright-line rule that a defendant must unambiguously invoke his right to remain silent, a thing most likely accomplished, in fact, by breaking silence.

Although the decision in *Berghuis* was contentious, the majority's holding certainly establishes more of a bright-line rule than the dissent would have preferred. The bright-line rule should help law enforcement discern the exact moment they must stop the questioning in the heat of an interrogation. On the other hand, the rule meted out by the Court in *Berghuis* could deter law enforcement from asking clarifying questions to equivocal statements by suspects regarding their willingness to continue to speak to authorities. For instance, because a detective knows that an unambiguous invocation of the right to remain silent is required to end the interrogation, he may not follow up on a suspect's statement such as “I'm not sure I want to keep talking to you about this.” The detective may hear that statement and, rather than clarify if the suspect would like to invoke his right, may decide to change the subject quickly, knowing—or suspecting, at the very least—that such a statement is not “unambiguous.”

However, despite the possibility that an unscrupulous detective may take advantage of the rule in *Berghuis*, the overall effect of the rule should be a clearer understanding, both by law enforcement and suspects, of the point at which an interrogation must cease. The Court in *Berghuis*, despite the seeming incongruity of requiring a suspect to break his silence to invoke his right to remain silent, established a consistent set of rules for invoking both the right to remain silent and the right to counsel during custodial interrogation. If the ambiguity of the invocation of rights in custodial interrogation can be minimized, as it likely will be

358. *Id.* at 2266 (Sotomayor, J., dissenting).

359. *Id.* at 2276.

360. *Id.*

based on the holding in *Berghuis*, then both authorities and suspects will be better off for it.

d. Invocation of the Right to Counsel

Once a suspect is read his *Miranda* warnings, an invocation of his right to counsel must end the custodial interrogation.³⁶¹ After the right to counsel is invoked, the interrogation may continue once an attorney is present.³⁶² The United States Supreme Court imposed another prophylactic rule in *Edwards v. Arizona* when it held that a defendant cannot waive the right to counsel during the interrogation unless the defendant initiates communication with the authorities present.³⁶³

In *State v. Bowlin*, the Kansas Court of Appeals recently awarded a new trial to a defendant whose right to counsel was violated when his interrogation continued long after counsel was requested.³⁶⁴ In this case, Bowlin was suspected of starting a fire, which killed a young girl, by tossing M-80 firecrackers into the basement of the house.³⁶⁵ While the opinion focused on whether Bowlin received ineffective assistance of counsel, the discussion of whether Bowlin's right to counsel was violated figured heavily in the analysis.³⁶⁶ About two hours into a three hour and eleven minute interrogation, Bowlin stated, "I think I'm going to have to get a lawyer."³⁶⁷ A moment later, the officer conducting the interrogation asked Bowlin a clarifying question to determine if Bowlin wished to have an attorney present, asking "Do you need a lawyer?"³⁶⁸ Bowlin replied, "Yeah," to which the officer responded, "[You're] right you need a lawyer."³⁶⁹

The court held that, even though an officer is not required to ask clarifying questions to ambiguous statements made after *Miranda* warnings were given, doing so is "good police practice."³⁷⁰ Because the officer *did* ask a clarifying question—"Do you need a lawyer?"—he could not ignore or deflect Bowlin's affirmative response, and the

361. *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

362. *Id.* at 474.

363. 451 U.S. 477, 484–85 (1981).

364. 229 P.3d 402 (Kan. Ct. App. 2010).

365. *Id.* at 406.

366. *Id.* at 409–12.

367. *Id.* at 406, 409.

368. *Id.* at 410.

369. *Id.*

370. *Id.* at 412 (citing *Davis v. United States*, 512 U.S. 452 (1994)).

interrogation should have ceased at that point.³⁷¹ Thus, statements made after this request were inadmissible.³⁷²

The Kansas Court of Appeals' decision in *Bowlin* makes a great deal of sense. Under current case law, an unambiguous request for an attorney must end the interrogation immediately, and it cannot resume until an attorney is present.³⁷³ Even though *Bowlin's* initial statement was likely ambiguous, his answer to the detective's clarifying question was anything but. One downside to the decision in *Bowlin* is that it may discourage law enforcement from asking clarifying questions, because the response to those questions may result in the termination of the interrogation. However, a bright-line rule such as the one applied in *Bowlin* puts both detective and suspect on notice that an unambiguous request for an attorney must end a custodial interrogation.

e. Voluntariness of Statements Made During Police Interrogation

Generally, to determine whether a statement made during police interrogation is voluntary, Kansas courts weigh several factors, including the suspect's mental condition, the style and length of the interrogation, the amount of contact the suspect has with the outside world, the defendant's age, background, and intelligence, and the defendant's English language proficiency.³⁷⁴ The burden is on the State to prove by a preponderance of the evidence that a defendant's statements were the product of the defendant's free and independent will.³⁷⁵

In *State v. Edwards*, the defendant claimed that, although he was correctly advised of and waived his *Miranda* rights before making any statements to the police, those statements should nonetheless be inadmissible because he suffered from bipolar disorder.³⁷⁶ In addition, *Edwards* claimed that he was not taking his medication, that he was extremely anxious, scared, and hungry, and that he was of low intelligence and only eighteen years of age when the statements were made.³⁷⁷ Citing these factors, *Edwards* claimed his statements were

371. *Id.*

372. *Id.*

373. *State v. Appleby*, 221 P.3d 525, 544 (Kan. 2009) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991)).

374. *State v. Edwards*, 243 P.3d 683, 693 (Kan. 2010) (citing *State v. McMullen*, 221 P.3d 92, 95 (Kan. 2009)).

375. *Id.*

376. *Id.*

377. *Id.*

involuntary.³⁷⁸ The Kansas Supreme Court rejected Edwards's argument, holding that despite the cited factors, the defendant was familiar with the legal system—having been through the courts on previous occasions, thus offsetting his young age—and had failed to show that not being on his medication had any adverse effect on the voluntariness of his statements to police.³⁷⁹

The court's decision in *Edwards* was fair. Edwards, having provided no medical evidence that he was disadvantaged by his failing to take his medication, essentially asked the court to act as a mental health expert, a role the court wisely declined to undertake.³⁸⁰ Based on the totality of the circumstances test the court applied to the facts of the case, Edwards's statement was voluntary, knowingly made, and freely given, and thus his statements were rightly admitted into evidence.

IV. PRETRIAL ISSUES

A. *The Formal Charge*

Under the protections of the Fifth Amendment to the United States Constitution, a person may not be “held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law.”³⁸¹ Further protections are offered in the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence.”³⁸² The Bill of Rights in the Kansas Constitution requires that an accused be provided the opportunity to “demand the nature and cause of the accusation against him.”³⁸³

378. *Id.*

379. *Id.* at 693–94.

380. *See id.* at 694.

381. U.S. CONST. amend. V.

382. U.S. CONST. amend. VI.

383. KAN. CONST. Bill of Rights § 10.

1. The Charging Documents—The Complaint, Information and Indictment, and Bill of Particulars

Prosecutions in Kansas may be commenced by the presentation of a complaint or by information or indictment of a grand jury.³⁸⁴ A complaint is a written document consisting of a “plain and concise” statement of the essential facts constituting the crime being charged.³⁸⁵ “[S]ome person with knowledge of the facts” must sign the complaint.³⁸⁶ Errors and omissions in the complaint are considered harmless unless the error or omission prejudiced the defendant.³⁸⁷ If a complaint fails to include an essential element of the crime charged, it is considered “fatally defective.”³⁸⁸

A person may also be formally charged through indictment by grand jury or information.³⁸⁹ While an information may be amended before trial—so long as the defendant is not prejudiced—the state may not alter the crime charged.³⁹⁰ An indictment or information is sufficient if the defendant can determine that of which he is accused and prepare a defense.³⁹¹ If charged by a grand jury, the presiding officer of the grand jury must sign the indictment.³⁹² “[T]he county attorney, the attorney general or any legally appointed assistant or deputy of either” must sign an information.³⁹³

In *State v. Brown*, the defendant argued the district court did not have jurisdiction to sentence him because the charging document failed to allege in any count that Brown was eighteen years of age or older at the time of the crime, an essential element of the charged offense.³⁹⁴ Brown did not allege the complaint was defective; rather, he argued the State had failed to allege a valid crime under section 21-4643 of the Kansas Statutes.³⁹⁵ In the initial information charging Brown with aggravated indecent liberties with a child, the charging document

384. KAN. STAT. ANN. § 22-3201(a) (2008).

385. *Id.* § 22-3201(b).

386. *Id.*

387. *Id.*

388. *State v. Brown*, 244 P.3d 267, 277 (Kan. 2011) (quoting *State v. Gonzales*, 212 P.3d 215, 226 (Kan. 2009)).

389. § 22-3201(a).

390. *Id.* § 22-3201(e).

391. *Brown*, 244 P.3d at 277 (citing *State v. Gracey*, 200 P.3d 1275, 1278 (Kan. 2009)).

392. § 22-3201(b).

393. *Id.*

394. *Brown*, 244 P.3d at 277.

395. *Id.*

included Brown's age, which was over eighteen.³⁹⁶ The court laid out the test for challenging a charging document for the first time on appeal, as Brown had done here.³⁹⁷ The defendant must show one of the following occurred due to the defective charging document: (1) defendant's preparation of a defense was prejudiced; (2) defendant's ability to plead to the conviction in any subsequent prosecution was impaired; or (3) defendant's substantial rights to a fair trial were limited.³⁹⁸

In *Brown*, the court upheld the district court's jurisdiction as valid.³⁹⁹ Although the first and second amended information charging documents omitted Brown's age, the initial information charging Brown with the crime *did* include his age.⁴⁰⁰ This fact, coupled with the fact that Brown never argued that the lack of age on the amended information impaired his ability to mount a defense, led the court to uphold his conviction and sentence.⁴⁰¹

Because Brown's ability to defend himself was not prejudiced in any way by the omission of his age, there was no reason to find the conviction and sentence deprived him of his "substantial rights to a fair trial."⁴⁰² So long as a defendant is able to tell what the state is charging him with, there is simply no need to bog down the courts with unnecessary litigation. As the Kansas Supreme Court has previously held, it is far better to look at charging documents with an eye on practical, rather than technical, considerations.⁴⁰³ As it did in *Brown*, common sense should prevail whenever possible.

The prosecuting attorney may be required to draft a bill of particulars for the defendant if the charging document charges a crime but lacks sufficient detail about the particulars of the crime for the defendant to adequately mount a defense.⁴⁰⁴ The defendant must provide a written motion to secure a bill of particulars, and the evidence the prosecution presents at trial must be limited to the particulars in this document.⁴⁰⁵ If

396. *Id.*

397. *Id.*

398. *Id.* (quoting *State v. Gracey*, 200 P.3d 1275, 1281 (Kan. 2009)).

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* (quoting *Gracey*, 200 P.3d at 1281).

403. See *State v. Hall*, 793 P.2d 737, 757 (Kan. 1990), *overruled on other grounds by Ferguson v. State*, 78 P.3d 40 (Kan. 2003).

404. KAN. STAT. ANN. § 22-3201(f) (2007).

405. *Id.*

the defendant makes no motion, he waives his right to a bill of particulars.⁴⁰⁶

2. Changes to the Charging Documents—Amendments, Challenges, and Variances

Kansas courts may allow a complaint or information “to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced.”⁴⁰⁷ The Kansas Supreme Court has gone a step further, holding that amending a complaint by charging a different crime is allowable as long as the “rights of the defendant are not prejudiced.”⁴⁰⁸

The Kansas Court of Appeals recently decided whether the defendant’s substantial rights were prejudiced by allowing the State to amend its complaint at the close of the State’s case in chief.⁴⁰⁹ In *State v. Glover*, the defendant was charged with aggravated robbery after allegedly entering the victim’s apartment and stealing \$300 in cash and approximately \$2500 worth of marijuana.⁴¹⁰ In the process of the robbery, Glover struck one of the victims, Ryan Paulson, in the head with his pistol, injuring Paulson.⁴¹¹ After the robbery, Paulson went to the hospital for treatment, where he told police Glover had stolen approximately \$300 in cash, but did not mention the marijuana that Glover had also taken.⁴¹² About three weeks before trial, Paulson contacted authorities and informed them that Glover had also stolen about \$2500 worth of marijuana in the robbery.⁴¹³ The charging document only included the currency Glover was accused of taking and did not include the marijuana.⁴¹⁴

At trial, Paulson admitted that he had originally failed to inform the police officers of the stolen marijuana, testifying that he originally lied to the police because he was on probation and thought he might be

406. *Phillips v. United States*, 406 F.2d 599, 602 (10th Cir. 1969).

407. § 22-3201(e).

408. *State v. Bischoff*, 131 P.3d 531, 538 (Kan. 2006) (citing *State v. Woods*, 825 P.2d 514 (Kan. 1992)).

409. *State v. Glover*, No. 101,418, 2010 WL 1078442, at *1 (Kan. Ct. App. March 19, 2010).

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

prosecuted for selling marijuana if he admitted that part of the robbery.⁴¹⁵ At the end of its case, the State orally moved to amend the complaint to include marijuana in the property that was stolen.⁴¹⁶ The district court allowed the amendment over Glover's objection that doing so would prejudice his defense, holding that the amendment merely conformed to the evidence presented at trial and did not prejudice the defense.⁴¹⁷

Since the amendment did not change the crime charged, the only question the court had to answer was whether the change prejudiced Glover's defense.⁴¹⁸ The court answered this question in the negative, finding that Glover's defense did not rely on the *type* of property he took from Paulson but rather focused on creating reasonable doubt as to whether Paulson was telling the truth in his testimony.⁴¹⁹ Further, the court found that Glover was aware the marijuana would be entered into evidence, as the State had provided reports a month before the trial began citing Paulson's changed story, which included the marijuana theft.⁴²⁰ In addition, Glover did not object to the introduction of the marijuana evidence when it was presented in the State's case.⁴²¹ For these reasons, the court found the district court did not abuse its discretion in allowing the State to amend its complaint to include the marijuana.⁴²²

The court's decision in *State v. Glover* was correct, because Glover knew the evidence of marijuana would be introduced at trial. Had he been caught unaware that the marijuana would be a part of the State's case against him, the result probably would have been different. As it was, however, the court's decision here promotes judicial efficiency by allowing insignificant and nonprejudicial amendments that conform to the evidence presented at trial.

B. Initial Appearance

Section 22-2901 of the Kansas Statutes provides that following arrest, the accused "shall be taken without unnecessary delay before a magistrate of the court from which the warrant was issued."⁴²³ If the

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at *3.

420. *Id.* at *4.

421. *Id.*

422. *Id.*

423. KAN. STAT. ANN. § 22-2901(1) (Supp. 2010).

arrest was made on probable cause without a warrant, the accused “shall be taken without unnecessary delay before the nearest available magistrate and a complaint shall be filed forthwith.”⁴²⁴ Thus, the manner in which the accused should appear before a magistrate requires reasonable promptness and no unnecessary delay.⁴²⁵ The purpose of requiring no unnecessary delay in bringing the accused before a magistrate “is to safeguard individual rights without hampering effective and intelligent law enforcement.”⁴²⁶ An unwarranted delay in taking the accused before a magistrate is not a denial of due process, though, unless it has in some way prejudiced the right of the accused to a fair trial.⁴²⁷ “Whether a delay is unreasonable or prejudicial must depend on the facts and circumstances of each case.”⁴²⁸ The accused bears the burden to show prejudice by the delay.⁴²⁹

C. Bail

Kansas Constitution’s Bill of Rights provides “[a]ll persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great.”⁴³⁰ It also provides that “[e]xcessive bail shall not be required, nor excessive fines imposed.”⁴³¹ There are two basic ways to challenge a bond as excessive.⁴³² First, a defendant can file a motion to reduce or otherwise modify the bond.⁴³³ Second, a defendant can file a writ of habeas corpus.⁴³⁴

1. Purpose of Bail

Bail is available to prevent a person from needless detention pending trial, sentencing, or appeal, when “detention serves neither the ends of

424. *Id.*

425. *Cooper v. State*, 411 P.2d 652, 655 (Kan. 1966) (citing *State v. Beebe*, 13 Kan. 589, 595 (1874)).

426. *State v. Crouch*, 641 P.2d 394, 396–97 (Kan. 1982) (citing *Mallory v. United States*, 354 U.S. 449, 453 (1957)).

427. *State v. Goodseal*, 553 P.2d 279, 290 (Kan. 1976) (citing *State v. Giddings*, 531 P.2d 445, 449 (Kan. 1975)), *overruled on other grounds by State v. Underwood*, 615 P.2d 153 (Kan. 1980).

428. *Id.* at 290.

429. *State v. Taylor*, 538 P.2d 1375, 1378 (Kan. 1975).

430. KAN. CONST. Bill of Rights § 9.

431. *Id.*

432. *Smith v. State*, 955 P.2d 1293, 1299 (Kan. 1998).

433. *Id.*

434. *Id.*

justice nor the public interest.”⁴³⁵ The purpose of bail is to assure the accused’s presence at a future hearing.⁴³⁶ Section 22-2802 of the Kansas Statutes provides for the release of the accused pending a preliminary hearing or trial upon the execution of an appearance bond in an amount sufficient to assure the accused’s appearance before the court when ordered and to assure public safety.⁴³⁷ Numerous factors are weighed in determining which conditions of release will reasonably assure appearance and public safety.⁴³⁸ Section 22-2804 provides for the release of a person under the conditions in section 22-2802 if the person has been convicted and is awaiting sentencing or has filed an appeal, as long as a judge finds the “conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.”⁴³⁹

2. Determining the Amount and Type of Bond

Generally, there is no hard and fast rule for fixing the amount of bail.⁴⁴⁰ The amount is in the discretion of the presiding magistrate, as each case is governed by its specific facts and circumstances.⁴⁴¹ The court has the discretion to require a cash bond, a surety bond, or to release the accused on the person’s own recognizance.⁴⁴² A cash bond is deposited in the full amount of the bond in lieu of a surety bond.⁴⁴³ A person is entitled to a refund after final disposition if the person complies with all requirements to appear in court.⁴⁴⁴ A person released on their own recognizance guarantees payment of the amount of the bond if that person fails to comply with appearance requirements.⁴⁴⁵

If the court determines a surety is necessary to assure appearance, a surety bond is executed “with sufficient solvent sureties who are

435. KAN. STAT. ANN. § 22-2801 (2007).

436. *State v. Robertson*, 455 P.2d 570, 572 (Kan. 1969).

437. § 22-2802(1) (Supp. 2010).

438. *See id.* § 22-2802(8) (providing a list of factors the magistrate shall take into account when determining which conditions of release to impose).

439. *Id.* § 22-2804(1) (2007).

440. *State v. Foy*, 582 P.2d 281, 286 (Kan. 1978) (citing *Robertson*, 455 P.2d at 572).

441. *Id.* at 286 (citing *State v. Way*, 461 P.2d 820, 825 (Kan. 1969); *Craig v. State*, 422 P.2d 955, 958 (Kan. 1967)); *see also State v. Gardner*, 244 P.3d 1292 (Kan. Ct. App. 2011) (illustrating the fifteen-dollar-per-week limit on costs associated with the supervision of the conditions of release).

442. § 22-2802(3), (4), (6).

443. *Id.* § 22-2802(4).

444. *Id.*

445. *Id.* § 22-2802(6).

residents of the state of Kansas.”⁴⁴⁶ A surety bond creates a contract between the accused and the surety on one hand and the surety and the state on the other.⁴⁴⁷ The surety is responsible for knowing the whereabouts of the accused and for ensuring the accused appears as ordered.⁴⁴⁸

3. Forfeiture of an Appearance Bond

Should the accused fail to appear as required by the court and an appearance bond, the court shall declare a forfeiture of bail under section 22-2807.⁴⁴⁹ Forfeiture only occurs upon failure to appear.⁴⁵⁰ The bond may be revoked for any other violation of a condition of release.⁴⁵¹ If the court does not set aside the forfeiture, it shall enter a judgment of default and execute on that judgment.⁴⁵² The surety, as an obligor of the bond, submits to the power of the court and its default judgment.⁴⁵³ However, a material modification that alters the surety’s obligation discharges the surety.⁴⁵⁴ A material modification can be “a change that a careful and prudent person would regard as substantially increasing the risk of loss.”⁴⁵⁵

D. Preliminary Hearing and Examination

1. Purpose of the Preliminary Hearing

“The purpose of a preliminary [hearing] is to determine whether it appears that a felony has been committed and that there is probable cause to believe the [accused] committed the offense.”⁴⁵⁶ The hearing does not

446. *Id.* § 22-2802(3).

447. *State v. Indem. Ins. Co. of N. Am.*, 672 P.2d 251, 253 (Kan. Ct. App. 1984).

448. *Id.*

449. § 22-2807(1) (Supp. 2010). In an unpublished case, the Kansas Court of Appeals interpreted the term *appear*. *State v. Anguiano*, No. 100,717, 2009 WL 3082586, at *3 (Kan. Ct. App. 2009). Stating the statute draws a distinction between failure to appear and acts violating other conditions of the bond, the court concluded *appear* is “a term of art meaning appearance in court.” *Id.*

450. § 22-2807(2).

451. *Id.*

452. *Id.* § 22-2807(4).

453. *Id.*

454. *State v. Sedam*, 122 P.3d 829, 831 (Kan. Ct. App. 2005) (citing *First Nat’l Bank of Anthony v. Dunning*, 855 P.2d 493, 495 (Kan. Ct. App. 1993)).

455. *Dunning*, 855 P.2d at 496.

456. *State v. Garza*, 916 P.2d 9, 11 (Kan. 1996).

determine the accused's guilt, but rather is an inquiry into whether the accused should be bound over for trial.⁴⁵⁷ A judge does not consider the possibility of a conviction or the prosecution's wisdom in filing charges.⁴⁵⁸

2. The Right to a Preliminary Hearing

Section 22-2902 of the Kansas Statutes gives every person charged with a felony the right to a preliminary hearing unless the charge is issued by a grand jury indictment.⁴⁵⁹ An accused also has the right to waive the preliminary hearing.⁴⁶⁰ If the right is waived, the accused shall be bound over to the district judge to try the case.⁴⁶¹ The right to a preliminary hearing is a statutory right and not a constitutional right.⁴⁶² However, the Kansas Supreme Court held that a juvenile has no statutory or constitutional right to a preliminary hearing.⁴⁶³ A district court should make a finding of probable cause in the case of a juvenile, but it "need not conduct a full-blown [section] 22-2902 preliminary examination."⁴⁶⁴

The finding of probable cause for a juvenile is supported by constitutional considerations.⁴⁶⁵ The court has declined to say what type of proceeding is sufficient to protect these concerns.⁴⁶⁶ If a juvenile is denied the right to introduce evidence and cross-examine the state's witnesses at a proceeding to determine probable cause, it could be detrimental to the juvenile. No matter the proceedings, though, a court should find probable cause that the juvenile committed the offense. This requirement protects a juvenile's constitutional due process rights.

457. *State v. Hood*, 873 P.2d 1355, 1357 (Kan. 1994) (citing *State v. Jones*, 660 P.2d 965, 969 (Kan. 1983)).

458. *State v. Ismaili*, 7 P.3d 236, 239 (Kan. 2000) (quoting *State v. Powell*, 971 P.2d 340, 341 (1998)).

459. KAN. STAT. ANN. § 22-2902(1) (Supp. 2010).

460. *See id.* § 22-2902(4); *see also State v. Gamble*, 236 P.3d 541 (Kan. 2010) (showing an example of the denial of a defendant's late request for a preliminary hearing when the defendant had earlier waived his right to the preliminary hearing).

461. § 22-2902(4).

462. *In re D.E.R.*, 225 P.3d 1187, 1192 (Kan. 2010).

463. *See id.* at 1193 (stating that "[w]ithout the need to accommodate constitutional concerns, this court is without the authority to declare that a juvenile is entitled to a [section] 22-2902 preliminary examination, when neither that statute nor the Juvenile Code provides for such a procedure").

464. *Id.*

465. *Id.*

466. *Id.*

3. Procedure of the Preliminary Hearing

The preliminary hearing shall be held within fourteen days after an arrest or personal appearance of the accused, with a continuance granted only for good cause.⁴⁶⁷ “At the preliminary examination, the [accused] must be present, represented by an attorney unless that right is waived, and the witness examined in the [accused’s] presence.”⁴⁶⁸ The accused does not enter a plea.⁴⁶⁹ During the proceeding, the accused has the right to cross-examine witnesses, except those who are children under the age of thirteen and also has the right to introduce evidence.⁴⁷⁰

“If from the evidence it appears a felony has been committed and there is probable cause to believe” the accused committed the act, the accused shall be bound over.⁴⁷¹ At the preliminary hearing, the only evidence considered is evidence that would be admissible at trial.⁴⁷² Section 22-2902a of the Kansas Statutes permits the admission of a forensic report into evidence,⁴⁷³ while section 22-2902c governs the admissibility of an alleged controlled substance.⁴⁷⁴ Showing probable cause requires the evidence to be “sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant’s guilt.”⁴⁷⁵ From the evidence, a court must draw inferences favorable to the prosecution.⁴⁷⁶ Should a district court judge conduct the preliminary hearing and find probable cause to believe the accused committed the act, the judge has the discretion to conduct arraignment at the conclusion of the hearing.⁴⁷⁷ But if the evidence does not support a finding of probable cause, the magistrate must discharge the accused.⁴⁷⁸

467. KAN. STAT. ANN. § 22-2902(2) (Supp. 2010).

468. *State v. Jones*, 660 P.2d 965, 968 (Kan. 1983).

469. § 22-2902(3).

470. *Id.*

471. *Id.*; *State v. Hernandez*, 193 P.3d 915, 917 (Kan. Ct. App. 2008) (citing *State v. Berg*, 13 P.3d 914, 915 (Kan. 2000)).

472. *State v. Sherry*, 667 P.2d 367, 375 (Kan. 1983) (citing *State v. Zimmerman*, 660 P.2d 960, 965 (Kan. 1983)).

473. § 22-2902a.

474. *Id.* § 22-2902c.

475. *Id.*

476. *Hernandez*, 193 P.3d at 917 (citing *State v. Huser*, 959 P.2d 908, 910 (Kan. 1998)).

477. § 22-2902(7) (2008 & Supp. 2010).

478. § 22-2902(3); *State v. Engle*, 699 P.2d 47, 49 (Kan. 1985).

4. Sixth Amendment Rights

The right to self-representation is implicit in the Sixth Amendment, which grants the right to counsel.⁴⁷⁹ The right to counsel applies to all critical stages of criminal prosecution.⁴⁸⁰ In *State v. Jones*, the Kansas Supreme Court analyzed whether the right to self-representation extends to preliminary hearings.⁴⁸¹ While earlier cases held that the right to self-representation did not automatically attach at preliminary hearings, the *Jones* court found otherwise. The court stated that the case illustrated that the preliminary hearing is a critical phase of the criminal prosecution and denying Jones' request to represent himself constituted a violation of the Sixth Amendment.⁴⁸² Because the right to counsel was violated, the court found the structural error analysis applicable and remanded for a new trial, commencing with a preliminary hearing.⁴⁸³

Jones's consistency with rulings from the United States Supreme Court is readily apparent.⁴⁸⁴ If probable cause is not shown, proceedings do not continue to trial. A person's freedom from prosecution is obviously critical. Also, if the denial of a request for self-representation were subject to a harmless-error analysis, the accused would have to show actual prejudice resulting from the denial.⁴⁸⁵ An appellate court would have to inquire as to what would have happened if the accused had been granted the right to self-representation. In this situation, the prejudicial effects are not necessarily measurable. Such a speculative inquiry into a constitutional right does not seem proper. Thus, extending the right to self-representation to the preliminary hearing and applying the structural-error analysis upon the denial of a request is appropriate.

479. *State v. Jones*, 228 P.3d 394, 398 (Kan. 2010).

480. *Id.* at 399 (citing *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004)).

481. *Id.*

482. *Id.* at 400 (citing *Byrd v. State*, 413 P.2d 61 (Kan. 1966); *State v. Lewis*, 405 P.2d 796 (Kan. 1965), *overruled on other grounds by State v. Bly*, 523 P.2d 397 (Kan. 1974); *Tarr v. State*, 402 P.2d 309 (Kan. 1965); *Bergin v. State*, 400 P.2d 978 (Kan. 1965)).

483. *Id.* at 401–02.

484. *See id.* at 399, 401 (stating that the United States Supreme Court has concluded that the right to self-representation extends to all phases of criminal proceedings and that a defendant is entitled to a new trial if the right to self-representation is violated, regardless of whether the defendant can demonstrate prejudice).

485. *Id.* at 401 (citing *State v. Butler*, 897 P.2d 1007, 1021 (Kan. 1995)).

E. Competency to Stand Trial

1. Requirements for a Finding of Incompetency

Section 22-3301 of the Kansas Statutes states that a person is incompetent to stand trial when a mental illness or defect makes that person unable to understand “the nature and purpose of the proceedings against him” or unable to “make or assist in making” a defense.⁴⁸⁶ A finding of incompetency only requires the presence of one of the alternative definitions.⁴⁸⁷ “A criminal defendant is presumed competent to stand trial” and has the burden to prove otherwise.⁴⁸⁸ Upon appeal, the standard of review is abuse of discretion.⁴⁸⁹

2. Competency Hearing

The issue of competency can be raised by “the defendant, the defendant’s counsel, the prosecutor, or *sua sponte* by the judge.”⁴⁹⁰ If the judge has reason to believe the defendant is incompetent to stand trial, the proceedings are suspended and a competency hearing is held.⁴⁹¹ A “failure to hold a competency hearing, when ‘evidence raises a bona fide doubt as to defendant’s competency, is a denial of due process.’”⁴⁹² The statute does not require a full-blown adversarial hearing, as long as the defendant can present evidence of incompetency.⁴⁹³ The Kansas Supreme Court has not addressed the issue of a defendant’s right to self-representation at a competency hearing, and the appellate court neglected to enter a bright-line rule.⁴⁹⁴

486. KAN. STAT. ANN. § 22-3301(1) (2007).

487. *State v. Johnson*, 218 P.3d 46, 58 (Kan. 2009).

488. *State v. Hill*, 228 P.3d 1027, 1046 (Kan. 2010) (citing *State v. Cellier*, 948 P.2d 616, 626 (Kan. 1997)).

489. *Id.* at 1045.

490. *Johnson*, 218 P.3d at 53; *see also* § 22-3302(1).

491. § 22-3302(1); *Johnson*, 218 P.3d at 53–54.

492. *State v. Foster*, 233 P.3d 265, 273 (Kan. 2010) (quoting *State v. Davis*, 130 P.3d 69, 76 (Kan. 2006)).

493. *State v. Staggs*, 9 P.3d 601, 602 (Kan. Ct. App. 2000) (citing *State v. Costa*, 613 P.2d 1359, 1368 (Kan. 1980)). As to evidence of incompetency, a defendant is not per se incompetent as a result of the use of medication to synthetically restore competency. *State v. Harkness*, 847 P.2d 1191, 1198 (Kan. 1993).

494. *State v. McCall*, 163 P.3d 378, 381–82 (Kan. Ct. App. 2007). The appellate court in *McCall* found that the defendant’s Sixth Amendment rights were protected based on the trial court’s findings relating to the defendant’s waiver of counsel and the mental health evaluation report. *Id.* at 382.

The right to self-representation is an issue Kansas courts will have to address more in depth in the future. It seems counterintuitive, though, to grant a defendant who may not be competent the right to self-representation at a hearing to determine whether that defendant is competent. A solution may be to modify the right to self-representation by granting a defendant the right to self-representation at competency hearings, protecting the defendant's Sixth Amendment rights, but providing for counsel to be present for guidance and assistance.

To assist in making the determination of competency, the trial court may order a psychiatric examination of the defendant and impanel a six-person jury.⁴⁹⁵ No statement made during the examination can be "admitted in evidence against the defendant in any criminal proceeding."⁴⁹⁶ If the defendant is found to be competent, the suspended proceedings will resume.⁴⁹⁷ But if the defendant is found incompetent to stand trial, the defendant shall be committed under section 22-3303.⁴⁹⁸

3. Procedure After a Finding of Incompetency

After a finding of incompetency, the defendant shall be committed for evaluation and treatment at an institution for a period not to exceed ninety days.⁴⁹⁹ During this period, the chief medical officer of the institution at which the defendant is committed shall certify whether the defendant has a "substantial probability of attaining competency . . . in the foreseeable future."⁵⁰⁰ If the probability exists, the defendant shall remain at the institution until competency to stand trial is attained or for six months from the date of the original commitment, whichever occurs first.⁵⁰¹ If the defendant has no probability of attaining competency, involuntary commitment proceedings shall commence.⁵⁰² For the defendant where a substantial probability of attaining competency to stand trial is found but the defendant has not attained competency within

495. § 22-3302(3).

496. *Id.*

497. *Id.* § 22-3302(4).

498. *Id.* § 22-3302(5).

499. *Id.* § 22-3303(1).

500. *Id.*

501. *Id.*

502. *Id.* Once involuntary commitment proceedings have commenced, the procedure under section 22-3305 governs. *State v. Johnson*, 218 P.3d 46, 57 (Kan. 2009).

the six-month period, involuntary commitment proceedings shall commence as well.⁵⁰³

In *State v. Johnson*, the Kansas Supreme Court addressed the disconnect between section 22-3303 and the statutes governing involuntary commitment.⁵⁰⁴ Section 22-3303 of the Kansas Statutes mandates the commencement of involuntary commitment proceedings if a defendant is “adjudged incompetent to stand trial with no substantial probability of attaining competency in the foreseeable future,” while sections 59-2945 to 59-2986 provide for the involuntary commitment of the mentally ill.⁵⁰⁵ This creates a paradox because a defendant subject to involuntary commitment who is diagnosed with an organic mental disorder, such as a traumatic brain injury, is statutorily excluded from the definition of a mentally ill person.⁵⁰⁶ Thus, SRS cannot legally comply with an order to commence involuntary commitment proceedings if the incompetency is due solely to an organic brain disorder.⁵⁰⁷

When addressing this issue, the legislature noted the competing interests of public safety and providing services and support for persons with disabilities.⁵⁰⁸ It tried to strike a balance by permitting the involuntary commitment of defendants who are incompetent to stand trial because of an excepted diagnosis if the defendants are charged with certain crimes.⁵⁰⁹ However, requiring the involuntary commitment of a person deemed incompetent because of an organic brain injury serves no deterrence or retributive purpose. A person with an organic brain injury who is incapacitated to the point of “incompetency” may not function again at a high enough level to commit crimes, let alone be deterred from further criminal activity. Also, such a person may not comprehend the punishment being served or the purpose of the punishment, negating any retributive purpose for involuntary commitment. Consequently, the legislature is in a precarious position to find an effective solution for

503. § 22-3303(2).

504. See *Johnson*, 218 P.3d at 56 (citing the statutes governing involuntary commitment as sections 59-2945 through 59-2986, which can be referred to as the “care and treatment act of mentally ill persons”).

505. See *id.* at 54–56 (stating subsections 22-3303(1)–(2) call for involuntary commitment proceedings under article 29 of chapter 59 of the Kansas Statutes and defining mentally ill under section 59-2946).

506. *Id.* at 55.

507. *Id.* at 56.

508. *Id.*

509. *Id.* (citing section 22-3303(1) of the Kansas Statutes and listing the crimes that a person with an excepted diagnosis can be involuntarily committed for as aggravated indecent liberties with a child, aggravated indecent solicitation of a child, aggravated sexual battery, aggravated incest, and aggravated arson).

defendants not charged with those specified crimes, while balancing the need for public safety against the need to provide services and support for the disabled.

F. Jurisdiction and Venue

1. Establishing Jurisdiction and Venue

The Sixth Amendment grants the right to a trial in the state and district “wherein the crime shall have been committed, which district shall have been previously ascertained by law.”⁵¹⁰ In Kansas, this right is provided by the state constitution and by statute.⁵¹¹ The Kansas Bill of Rights provides that the accused is entitled to “a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”⁵¹² Section 22-2602 of the Kansas Statutes states, “[e]xcept as otherwise provided by law, the prosecution shall be in the county where the crime was committed.”⁵¹³

“Venue of an offense is jurisdictional, and it must be proved to establish the jurisdiction of the court.”⁵¹⁴ It is a question of fact for the jury.⁵¹⁵ Specific question and answer is not necessary to establish the jurisdictional facts of venue.⁵¹⁶ “[O]ther competent evidence” may establish venue.⁵¹⁷ It can be established by evidence of facts and circumstances “from which the place . . . of [the offense] . . . may fairly and reasonably be inferred.”⁵¹⁸ If two or more acts are required to commit the crime and the acts occur in different counties, any county in which an act occurs has venue.⁵¹⁹

510. U.S. CONST. amend. VI.

511. See KAN. CONST. Bill of Rights § 10; KAN. STAT. ANN. § 22-2602 (2007).

512. KAN. CONST. Bill of Rights § 10.

513. § 22-2602.

514. *State v. Calderon-Aparicio*, 242 P.3d 1197, 1204 (Kan. Ct. App. 2010) (quoting *State v. Griffin*, 504 P.2d 150, 152 (Kan. 1972)).

515. *Id.* (citing *State v. Jones*, 466 P.2d 283, 289 (Kan. 1970)).

516. *Id.* (citing *Griffin*, 504 P.2d at 152).

517. *Id.*

518. *Id.* at 1203–04 (quoting *State v. Pencek*, 585 P.2d 1052, 1056 (Kan. 1978)).

519. KAN. STAT. ANN. § 22-2603 (2007).

2. Change of Venue

“The Constitution’s place-of-trial prescriptions” do not inhibit a change of venue if “extra ordinary local prejudice will prevent a fair trial.”⁵²⁰ In Kansas, a defendant can move for a change of venue and the court must grant it if the court finds the prejudice against the defendant so substantial that the defendant cannot obtain a fair and impartial trial.⁵²¹ “The burden is on the defendant to show prejudice exists . . . as a demonstrable reality.”⁵²² It must be reasonably certain that a fair trial cannot be obtained.⁵²³

Factors courts consider in determining whether a defendant’s right to a fair trial is jeopardized include: publicity within the community, publicity within other areas to which the venue may be changed, length of time from the start of the publicity to the date of the trial, juror familiarity with the publicity and its effects, connection of government officials with the release of the publicity, severity of the offense charged, size of the area from which the venire is drawn, and the defendant’s challenges during jury selection.⁵²⁴

In *Skilling v. United States*, the United States Supreme Court analyzed some of these factors in deciding that the district court did not err in failing to change venue because of a presumption of prejudice.⁵²⁵ In *Skilling*, the defendant, a former employee of Enron, was charged with crimes after Enron’s fall.⁵²⁶ The trial took place in Houston where Enron was headquartered.⁵²⁷ The Court examined the size and characteristics of Houston, the area news stories, the time between Enron’s failure and Skilling’s trial, and the jury’s acquittal on nine counts.⁵²⁸ These factors did not weigh toward a presumption of prejudice.⁵²⁹ Further, the Court stated that “pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair

520. *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

521. § 22-2616(1).

522. *State v. Higgenbotham*, 23 P.3d 874, 881 (Kan. 2001).

523. *Id.*

524. *Id.* (citing *State v. Jackson*, 936 P.2d 761, 770 (Kan. 1997)).

525. *Skilling*, 130 S. Ct. at 2912, 2915–17.

526. *Id.* at 2907.

527. *Id.*

528. *Id.* at 2915–16.

529. *See id.* at 2916 (stating that Skilling’s trial had little in common with trials in which a presumption of prejudice is found).

trial.”⁵³⁰ “A presumption of prejudice . . . attends only the extreme case.”⁵³¹ Finally, the Court examined the codefendant’s guilty plea.⁵³² Such a plea requires an inquiry into actual prejudice.⁵³³ However, it does not ordinarily trigger an automatic presumption of prejudice and did not here.⁵³⁴

This case illustrates that a defendant has a fairly high burden to show prejudice exists as a demonstrable reality. Although there was a significant time gap between Enron’s failure and Skilling’s trial, Enron’s collapse was national news and still resonates today. The fact that a case is highly publicized does not mean a change of venue will occur. Other factors taken into consideration may alleviate concern about the defendant’s ability to receive a fair trial. Here, the Court adequately balanced the factors for determining whether a change of venue was required. A decision to change venue is within the discretion of the trial court, but the factors provide an objective list that minimizes judicial discretion. This promotes fairness in the proceedings, and although each case is judged on its own circumstances, consistency in decisions.

3. Timeliness of Challenges to Jurisdiction

A party or a court can raise the issue of subject matter jurisdiction at any time.⁵³⁵ A defendant’s failure to raise the issue of venue at trial is irrelevant because jurisdiction is not a waivable defense, and venue is a matter of jurisdiction.⁵³⁶ Accordingly, the issue of venue can be raised at any time as well.

G. Statute of Limitations

1. Commencing Prosecution

In Kansas, the prosecution of most crimes must commence within five years of being committed.⁵³⁷ Criminal offenses, except for

530. *Id.* (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976)).

531. *Id.* at 2915.

532. *Id.* at 2917.

533. *Id.*

534. *Id.*

535. *State v. Howard*, 238 P.3d 752, 755 (Kan. Ct. App. 2010).

536. *State v. McElroy*, 130 P.3d 100, 106 (Kan. 2006).

537. *See* KAN. STAT. ANN. § 21-3106(4) (2007) (stating that prosecution for a crime defined in section 21-3105, not governed by subsections (1), (2), or (3) of section 21-3106, must commence

continuing offenses, are committed when every element of the offense has occurred.⁵³⁸ Continuing offenses occur when the prohibited conduct or conspiracy has terminated.⁵³⁹ To constitute a continuing offense, the conduct must be clearly defined by statute as such.⁵⁴⁰

Prosecution generally commences when a complaint or information is filed or an indictment returned and a warrant is delivered to the authorities for execution.⁵⁴¹ As long as the warrant is executed within the statute of limitations, prosecution is not time barred, even if there is an unreasonable delay in the execution.⁵⁴² But an unreasonable delay in execution is included in the period within which prosecution must commence.⁵⁴³ Absent a reasonable delay, if the warrant is not executed until the statute of limitations has run, prosecution is barred.⁵⁴⁴

2. Tolling the Statute of Limitations

There are certain exceptions that permit the tolling of the period within which prosecution must commence.⁵⁴⁵ Examples of when the statute of limitations can be tolled include: the accused's absence from the state, the accused's concealment within the state, the concealment of the crime, the defendant's pending prosecution for the same conduct, and the inability to investigate certain criminal conduct because of a court order.⁵⁴⁶

3. The Statute of Limitations as an Affirmative Defense

At trial, the statute of limitations is an affirmative defense and must be raised, or it is waived.⁵⁴⁷ Statutes of limitation are favored by the law and are to be construed in favor of the defendant.⁵⁴⁸ The Kansas Court of

within five years of such crime). Section 21-3105 defines *crime* in Kansas and gives the different statutory classifications as felony, traffic infraction, cigarette or tobacco offense, and all others as misdemeanors. § 21-3105.

538. *Id.* § 21-3106(6); *State v. Smith*, 993 P.2d 1213, 1220 (Kan. 1999).

539. § 21-3106(6); *State v. Palmer*, 810 P.2d 734, 740 (Kan. 1991).

540. *Palmer*, 810 P.2d at 740-41.

541. § 21-3106(7); *State v. McDowell*, 111 P.3d 193, 196 (Kan. Ct. App. 2005).

542. *McDowell*, 111 P.3d at 196.

543. *State v. Washington*, 752 P.2d 1084, 1086 (Kan. Ct. App. 1988).

544. *See, e.g., id.* at 1085-86.

545. *See* § 21-3106(5).

546. *Id.* § 21-3106(5)(a)-(e).

547. *State v. Sitlington*, 241 P.3d 1003, 1008 (Kan. 2010) (citing *In re Johnson*, 230 P. 67, 68 (Kan. 1924)).

548. *State v. Mills*, 707 P.2d 1079, 1081 (Kan. 1985).

Appeals recently faced the issue of whether a statute of limitations defense applies to juveniles as well as adults.⁵⁴⁹ The respondents contended that the statute of limitations was not tolled because of the unreasonable delay in executing the warrant.⁵⁵⁰ Thus, when process was served, the statute of limitations had run.⁵⁵¹ The Kansas Juvenile Justice Code contains no provisions similar to section 21-3106(7) of the Kansas Statutes, which supports the respondents' arguments.⁵⁵² Common law supports the concept of unreasonable delay, though, by enforcing the right of an accused to be arrested within the statute of limitations.⁵⁵³ The court held the common law rule applied in juvenile proceedings.⁵⁵⁴ Thus, a person is not open to prosecution for stale offenses committed in adolescence long after reaching adulthood.

Although the concept of unreasonable delay is not codified as a right for juveniles, a strong argument exists for extending the rights in section 21-3106(7) to juveniles. The common law concept of unreasonable delay has not been abolished, it is embodied in section 21-3106(7), and it has the weight of case law supporting it.⁵⁵⁵ It is not purely a statutory right. Thus, the court justifiably extended the substance of section 21-3106(7) to juveniles as a basic right, even though not explicitly provided for by the juvenile code.

H. Joinder and Severance

1. Joinder of Charges

A court can join multiple charges against a defendant, whether felony or misdemeanor, in a single complaint if one of three conditions precedent is met:⁵⁵⁶ if the crimes charged (1) "are of the same or similar character," (2) "are based on the same act or transaction," or (3) "are based on two or more acts or transactions connected together as part of a

549. See *In re P.R.G.*, 244 P.3d 279, 281 (Kan. Ct. App. 2010) (examining the issue of whether the district court erred when it determined prosecution commenced within the two-year statute of limitations).

550. *Id.*

551. *Id.*

552. *Id.* at 281–82.

553. *Id.* at 282, 286.

554. *Id.*

555. See *id.* at 282–83, 286 (citing numerous cases that support the common-law concept of unreasonable delay in executing a warrant).

556. *State v. Gaither*, 156 P.3d 602, 612 (Kan. 2007).

common” plan.⁵⁵⁷ For offenses to be of the same or similar character, they require the same mode of trial, the same kind of evidence, and the same kind of punishment.⁵⁵⁸ Offenses are “connected together” in three situations: (1) the defendant “provides evidence of one crime while committing another,” (2) “some of the charges are precipitated by other charges,” and (3) “all of the charges stem from a common event or goal.”⁵⁵⁹

After a court decides which condition precedent applies, it has the discretion to join the charges.⁵⁶⁰ A trial court also has the discretion to consolidate two or more cases against a defendant if the crimes could have been joined in a single complaint, information, or indictment.⁵⁶¹ To meet the “connected together” test of section 22-3202(1) of the Kansas Statutes for purposes of consolidation, it is sufficient that criminal conduct resulting in a second charge was precipitated by a prior charge.⁵⁶² The proper time for defense counsel to request consolidation of charges is after the complaints have been filed and during preparation for trial.⁵⁶³ The defendant has the burden to show prejudice as a result of joinder or consolidation.⁵⁶⁴ An appellate court will review the decision to join or consolidate charges using an abuse of discretion standard.⁵⁶⁵

2. Joinder and Severance of Codefendants

Two or more defendants may be charged in the same complaint, information, or indictment if they are alleged to have participated in the act or acts constituting the crime or crimes.⁵⁶⁶ The Kansas Supreme Court has interpreted section 22-3202(3) of the Kansas Statutes as meaning two or more defendants can be tried together when: (1) “each defendant is charged with accountability for each offense,” (2) “each

557. KAN. STAT. ANN. § 22-3202(1) (2007).

558. See, e.g., *State v. Barksdale*, 973 P.2d 165, 171–72 (Kan. 1999) (quoting *State v. Hodges*, 26 P. 676, 677 (Kan. 1891)).

559. *State v. Coburn*, 176 P.3d 203, 213 (Kan. Ct. App. 2008) (citing *State v. Donaldson*, 112 P.3d 99, 105–06 (Kan. 2005)).

560. *Gaither*, 156 P.3d at 612.

561. § 22-3203; *State v. Timley*, 875 P.2d 242, 254 (Kan. 1994).

562. *State v. Paredes*, 118 P.3d 708, 713 (Kan. Ct. App. 2005) (citing *State v. Pondexter*, 671 P.2d 539, 546 (Kan. 1983)).

563. See *id.* at 711.

564. *State v. Dreiling*, 54 P.3d 475, 496 (Kan. 2002) (citing *State v. Crawford*, 872 P.2d 293, 298 (Kan. 1994)).

565. *Gaither*, 156 P.3d at 612 (citing *State v. Bunyard*, 122 P.3d 14, 23 (Kan. 2006); *Timley*, 875 P.2d at 254).

566. § 22-3202(3).

defendant is charged with conspiracy and some are also charged with one or more offenses alleged to be in furtherance of the conspiracy,” or (3) when a conspiracy is absent, it is alleged the offenses were part of a common plan “or were so closely connected in time, place, and occasion that proof of one charge would require proof of the others.”⁵⁶⁷ The defendants can be charged together or separately on one or more counts.⁵⁶⁸ Joint trials of defendants are preferred because they promote efficiency and the interests of justice by avoiding inconsistent verdicts.⁵⁶⁹ The trial judge has inherent authority to join or consolidate defendants for trial.⁵⁷⁰

Upon request by one of the defendants or the prosecuting attorney, the court may order a separate trial.⁵⁷¹ A defendant must request separate trials, otherwise it “is deemed a waiver of the right to request severance.”⁵⁷² Severance requires showing that actual prejudice will result from a joint trial.⁵⁷³ Kansas courts consider numerous factors in deciding whether sufficient prejudice exists for severance.⁵⁷⁴ One factor is whether defendants have antagonistic defenses.⁵⁷⁵ However, the presentation of evidence by one defendant that is inconsistent with evidence presented by another does not make the defenses antagonistic.⁵⁷⁶ If severance is denied because sufficient prejudice was not shown, the defendant has the burden to show the denial was an abuse of discretion.⁵⁷⁷

567. *State v. Davis*, 83 P.3d 182, 186 (Kan. 2004) (quoting *State v. Roberts*, 574 P.2d 164, 170 (Kan. 1977), *disapproved of on other grounds by State v. Sharp*, 210 P.3d 590 (Kan. 2009)).

568. § 22-3202(3).

569. *United States v. Stein*, 694 F. Supp. 2d 1231, 1238 (D. Kan. 2010) (citing *United States v. Hall*, 473 F.3d 1295, 1301 (10th Cir. 2007)).

570. *State v. Boyd*, 127 P.3d 998, 1007 (Kan. 2006) (citing *State v. Aikins*, 932 P.2d 408, 421 (Kan. 1997)).

571. § 22-3204.

572. *State v. Bryant*, 78 P.3d 462, 469 (Kan. 2003) (citing *State v. Pham*, 675 P.2d 848, 852 (Kan. 1984)), *abrogated on other grounds by State v. Gleason*, 88 P.3d 218 (Kan. 2004).

573. *See, e.g., State v. Winston*, 135 P.3d 1072, 1084 (Kan. 2006).

574. *See State v. Reid*, 186 P.3d 713, 730 (Kan. 2008); *see also United States v. Wardell*, 591 F.3d 1279 (10th Cir. 2009) (providing an example of the factors and reasoning the Tenth Circuit considered in denying the codefendants’ motions for severance); *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009) (same).

575. *Reid*, 186 P.3d at 730.

576. *See id.* at 731 (quoting *State v. White*, 67 P.3d 138, 147 (Kan. 2003)).

577. *Winston*, 135 P.3d at 1084 (quoting *White*, 67 P.3d at 147).

I. Plea Agreements

1. Generally

Two Kansas Statutes specifically govern pleas and plea agreements. Section 22-3209 describes the types of pleas a criminal defendant may enter into and the effect of entering into such pleas.⁵⁷⁸ When a criminal defendant enters into a guilty plea, the defendant admits “the truth of the charge and every material fact alleged therein.”⁵⁷⁹ A criminal defendant may enter a plea of *nolo contendere*—“no contest”—that is a “formal declaration that the defendant does not contest the charge.”⁵⁸⁰ When entering into a *nolo contendere* plea, the criminal defendant “does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.”⁵⁸¹ Additionally, in Kansas a defendant may enter into an *Alford* plea, which is a “plea of guilty to the charge without admitting to the commission of the offense.”⁵⁸² While similar in many respects, an *Alford* plea and a *nolo contendere* plea are different from one another.⁵⁸³

The second Kansas statute governing pleas is section 22-3210, which describes the process by which a criminal defendant may enter into a guilty or *nolo contendere* plea.⁵⁸⁴ Section 22-3210 ensures that defendants are afforded their due process rights.⁵⁸⁵ A defendant may enter into a guilty or *nolo contendere* plea before or during trial, so long as the plea is entered in open court and in felony cases, the court has both informed the defendant of the consequences of the plea and determined the plea was made voluntarily with an understanding of the consequences of the plea.⁵⁸⁶ When a defendant enters into a guilty or *nolo contendere* plea, certain federal constitutional rights are waived, such as the right against self-incrimination, the right to trial by jury, and the right to confront one’s accusers.⁵⁸⁷

578. KAN. STAT. ANN. § 22-3209 (2007).

579. *Id.* § 22-3209(1).

580. *Id.* § 22-3209(2).

581. *State v. Case*, 213 P.3d 429, 461 (Kan. 2009).

582. *Id.*

583. *Id.*

584. § 22-3210 (2007 & Supp. 2010).

585. *State v. Muriithi*, 46 P.3d 1145, 1153 (Kan. 2002).

586. § 22-3210.

587. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

In informing a criminal defendant of plea consequences, Kansas courts distinguish “between direct penal consequences and collateral consequences.”⁵⁸⁸ A trial court must only inform a criminal defendant of those consequences that are “definite, immediate, and almost automatic as a result of his guilty plea.”⁵⁸⁹ For example, deportation has been held to be a collateral consequence of a plea to a criminal charge, and thus a trial court has no duty to advise a defendant of this possible consequence.⁵⁹⁰ However, recently the United States Supreme Court held that *defense counsel’s* failure to inform a noncitizen criminal defendant of the immigration consequences of entering into a plea may, in some instances, constitute ineffective assistance of counsel.⁵⁹¹

2. Binding Nature of Plea Agreements

When a prosecutor and criminal defendant enter into a plea agreement, there is an expectation that both parties “will honor the terms of the agreement.”⁵⁹² However, section 22-3210(d) provides instances, presentencing and postsentencing, when a guilty or nolo contendere plea may be withdrawn.⁵⁹³ Before sentencing, a plea of guilty or nolo contendere may be withdrawn for “good cause,” and this determination is left to the discretion of the court.⁵⁹⁴ After sentencing, a plea of guilty or nolo contendere may only be withdrawn “to correct manifest injustice.”⁵⁹⁵ The manifest injustice standard requires a defendant to show that not allowing a plea withdrawal would be “obviously unfair or shocking to the conscience.”⁵⁹⁶ The Kansas Court of Appeals has found that a defendant is not entitled to a postsentence withdrawal of guilty pleas based on a claim that counsel failed to inform defendant that his convictions could be used to enhance any subsequent sentence.⁵⁹⁷ If in a postsentence motion to withdraw, however, the defendant alleges ineffective assistance of counsel based on facts not contained in the

588. *Muriithi*, 46 P.3d at 1153.

589. *Id.*

590. *Id.* at 1155.

591. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

592. *State v. Woodward*, 202 P.3d 15, 18 (Kan. 2009).

593. KAN. STAT. ANN. § 22-3210(d)(1) (2007 & Supp. 2010).

594. *Id.*

595. *Id.* § 22-3210(d)(2).

596. *State v. Atteberry*, 239 P.3d 857, 863 (Kan. Ct. App. 2010) (citing *State v. Barahona*, 132 P.3d 959 (Kan. Ct. App. 2006)).

597. *Barahona*, 132 P.3d 959, 963–64 (Kan. Ct. App. 2006).

record but those facts, if true, would entitle the defendant to relief, the motion may not be denied until an evidentiary hearing is held.⁵⁹⁸

In *State v. Aguilar*, the Kansas Supreme Court analyzed the good cause standard for withdrawing a plea before sentencing.⁵⁹⁹ In *Aguilar*, the defendant and a close family friend were charged with possession of narcotics that were discovered during a traffic stop.⁶⁰⁰ The defendant and the close family friend retained the same attorney to represent them and received a “deal” for doing so.⁶⁰¹ Defense counsel represented both defendants at their joint plea hearing three days later.⁶⁰² The defendants both entered into guilty pleas.⁶⁰³ Days after the plea hearing, one defendant notified the defense counsel that she wished to withdraw her plea.⁶⁰⁴ The defendant claimed she felt pressure to enter into a plea because of the close relationship she shared with the codefendant.⁶⁰⁵ The motion also claimed that the defense counsel had a conflict of interest in representing both defendants and, additionally, he told the defendant that by entering into a plea, she would save “substantial legal fees she could not afford.”⁶⁰⁶ At the end of the plea withdrawal hearing, the district court judge denied the defendant’s motion to withdraw her plea.⁶⁰⁷

In overruling the district court, the Kansas Supreme Court noted that before sentencing, “courts have discretion to permit withdrawal of pleas if a defendant shows ‘good cause.’”⁶⁰⁸ The *Edgar* factors, which are sometimes considered in determining whether to allow a withdrawal of plea, are “(1) whether the defendant was represented by competent counsel, (2) whether the defendant was misled, coerced, mistreated or unfairly taken advantage of, and (3) whether the plea was fairly and understandingly made.”⁶⁰⁹ The court noted that the good cause standard for presentence motions is a lesser standard than the manifest injustice standard a defendant must show postsentence.⁶¹⁰ The court emphasized

598. *Wilkinson v. State*, 195 P.3d 278, 282 (Kan. Ct. App. 2008).

599. 231 P.3d 563 (Kan. 2010).

600. *Id.* at 564.

601. *Id.* at 564.

602. *Id.* at 565.

603. *Id.*

604. *Id.*

605. *Id.*

606. *Id.*

607. *Id.* at 566.

608. *Id.* at 567.

609. *Id.* These factors are named after *State v. Edgar*, 127 P.3d 986 (Kan. 2006), where they were first applied.

610. *Id.*

that while counsel's competence may be one factor in deciding a presentence plea withdrawal motion, it should not be "applied to demand that a defendant demonstrate ineffective assistance arising to the level of a violation of the Sixth Amendment."⁶¹¹ A court may take into account other factors when deciding if good cause exists, and all the *Edgar* factors do not have to be present for a court to find that good cause exists.⁶¹²

J. Arraignment

Arraignment is the formal act of calling the defendant before a court having appropriate jurisdiction, informing the defendant of the charges against him, and asking the defendant whether he is guilty or not guilty.⁶¹³ Section 22-3205 of the Kansas Statutes describes the procedure under which an arraignment must take place. Arraignment must be in open court and the defendant must be informed of the substance of the charge against him and then the defendant must enter a plea.⁶¹⁴ In felony cases, the defendant must be personally present for arraignment but may appear via two-way electronic audio video communication at the discretion of the court.⁶¹⁵ The defendant, however, should be informed of his right to be physically present in the courtroom for arraignment, and defendant's exercise of this right shall not prejudice him in any way.⁶¹⁶

K. Discovery

Section 22-3212 of the Kansas Statutes sets forth the procedure for discovery in criminal proceedings.⁶¹⁷ At the defendant's request, the prosecutor must permit the defendant to inspect relevant evidence, such as written or recorded statements or confessions made by the defendant, results or reports of examinations, testimony of the defendant before a grand jury or at an inquisition, and memoranda of any oral confession made by the defendant and a list of witnesses to that confession.⁶¹⁸ The

611. *Id.* at 568.

612. *Id.*

613. KAN. STAT. ANN. § 22-2202(3) (2007).

614. *Id.* § 22-3205(a).

615. *Id.*

616. *Id.* § 22-3205.

617. *Id.* § 22-3212 (2007 & Supp. 2010).

618. *Id.*

defendant has the burden of proving that the evidence sought is material evidence and that the request is reasonable.⁶¹⁹

The time allowed for discovery in criminal cases has changed. Section 22-3212 of the Kansas Statutes was amended requiring discovery be completed within twenty-one days after arraignment or at a later reasonable time that is determined by the court.⁶²⁰ Previously, discovery needed to be completed within twenty days.⁶²¹

While a prosecutor has no duty to disclose inculpatory evidence, the prosecutor has an affirmative duty to disclose exculpatory evidence to the defendant.⁶²² Kansas follows *Brady v. Maryland*,⁶²³ which holds that a prosecutor may not withhold exculpatory evidence, either in good or bad faith, without violating a defendant's due process rights.⁶²⁴ In Kansas, *Brady* applies in three scenarios:⁶²⁵ (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 not have escaped the prosecutor's attention,"⁶²⁶ (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,"⁶²⁷ 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."⁶²⁸

L. Pretrial Motions and Pretrial Conference

The court, upon motion or at its own discretion, may order a pretrial conference "to consider such matters as will promote a fair and expeditious trial."⁶²⁹ This authority also includes the ability to consider motions in limine. A district court's authority to consider motions in

619. *State v. Kessler*, 73 P.3d 761, 769 (Kan. 2003).

620. *Id.* § 22-3212(f).

621. *Id.*

622. *State v. Krider*, 202 P.3d 722, 730 (Kan. Ct. App. 2009).

623. 373 U.S. 83 (1963).

624. *State v. Adams*, 124 P.3d 19, 26 (Kan. 2005).

625. *Id.*

626. *Id.*

627. *Id.*

628. *Id.*

629. KAN. STAT. ANN. § 22-3217 (2007).

limine is derived from its statutory pretrial authority under sections 22-3217 and 60-216 of the Kansas Statutes.⁶³⁰ “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.”⁶³¹ A district court may grant a motion in limine when two factors are present:

- (1) The material or evidence in question will be inadmissible at trial;
- and (2) The pretrial ruling is justified as opposed to a ruling during trial because the mere offer or mention of the evidence during trial may cause unfair prejudice, confuse the issues, or mislead the jury; the consideration of the issue during the trial might unduly interrupt and delay the trial and inconvenience the jury; or a ruling in advance of trial may limit issues and save the parties time, effort, and cost in trial preparation.⁶³²

In determining whether to grant a motion in limine, the district court should consider whether the court will be better able to assess the value and potential prejudice of the evidence at the time of trial.⁶³³ The second part of the motion in limine test rests in the discretion of the district court and an appellate court will apply an abuse of discretion standard.⁶³⁴ The Kansas Supreme Court, however, has clarified a previously confused appellate analysis of the first factor and held that in reviewing the first factor, the appellate court should apply the multistep evidentiary standard, where an abuse of discretion standard applies to some parts of the analysis and other parts require de novo review.⁶³⁵ Motions in limine should be specific and pinpoint the protected evidence; they should not be general in scope.⁶³⁶

M. Motion to Suppress

Before a trial begins, the defendant may move to suppress evidence that was obtained as a result of an unlawful search or seizure.⁶³⁷ The

630. *State v. Bloom*, 44 P.3d 305, 314 (Kan. 2002) (citing *State v. Quick*, 597 P.2d 1108 (Kan. 1979), *disapproved on other grounds*, *State v. Jackson*, 772 P.2d 747 (Kan. 1989)); *see also* § 22-3217; § 60-216 (2007 & Supp. 2010).

631. *State v. Shadden*, 235 P.3d 436, 446 (Kan. 2010) (quoting *Quick*, 597 P.2d 1108).

632. *Id.* at 446–47.

633. *Id.* at 447.

634. *Id.* (citing *Luce v. United States*, 469 U.S. 38, 40 (1984)).

635. *Id.*

636. *State v. Bloom*, 44 P.3d 305, 314 (quoting *Quick*, 597 P.2d 1108).

637. KAN. STAT. ANN. § 22-3216(1) (2007).

motion to suppress must be in writing and must set forth facts detailing why such search and seizure was unlawful.⁶³⁸ Once the defendant has made such a motion, the prosecution has the burden of proving that such search and seizure was lawful by a preponderance of the evidence.⁶³⁹ A trial court may rehear a previous motion to suppress that has been denied, and the decision to rehear lies within the discretion of the trial court.⁶⁴⁰ If a motion to suppress is appealed, the appellate court will not reweigh the evidence, rather they will review the factual findings of the district court by a “substantial competent evidence standard and the ultimate legal conclusion drawn from those factual findings by a de novo standard.”⁶⁴¹

V. TRIAL RIGHTS

A. *Fifth Amendment Issues*

1. Right to Remain Silent—Self-Incrimination

The Fifth Amendment to the United States Constitution states, in pertinent part, “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.”⁶⁴² The right to remain silent can also be found in the Kansas Constitution’s Bill of Rights, which states in part, “[n]o person shall be a witness against himself.”⁶⁴³ This right is also codified in section 60-423(a) of the Kansas Statutes, which gives criminal defendants the right not to testify.⁶⁴⁴ While a criminal defendant does not have to testify, he does not have the right to refuse an order to be present in court for identification purposes or any other requested acts in the presence of the judge or trier of fact.⁶⁴⁵

638. *Id.* § 22-3216(2).

639. *Id.*; *State v. Lemons*, 155 P.3d 732, 736 (Kan. Ct. App. 2007) (citing *State v. Porting*, 130 P.3d 1173 (Kan. 2006)).

640. *State v. Holmes*, 102 P.3d 406, 420 (Kan. 2004).

641. *State v. Moralez*, 242 P.3d 223, 227 (Kan. Ct. App. 2010) (citing *State v. Ransom*, 212 P.3d 203 (Kan. 2009)).

642. U.S. CONST. amend. V.

643. KAN. CONST. Bill of Rights § 10.

644. KAN. STAT. ANN. § 60-423(a).

645. *Id.* § 60-423(c).

2. Immunity

Under section 22-3415 of the Kansas Statutes, a prosecutor may grant either transactional immunity or use and derivative immunity to any witness.⁶⁴⁶ The Kansas Supreme Court explained the theory behind granting immunity, stating:

In order for governments to exercise their power to compel testimony a grant of immunity from prosecution based upon the compelled testimony is necessary and it is generally understood that a grant of immunity is sufficient to require the incriminating testimony of the immunity granted is coextensive with the scope of the constitutional privilege against self-incrimination.⁶⁴⁷

A witness who is granted transactional immunity cannot be prosecuted for any crime for which immunity has been granted or for any other crime that may arise from the same incident.⁶⁴⁸ On the other hand, a witness who is granted use and derivative immunity can be prosecuted for any crime, but testimony that was given under a grant of such immunity cannot be used against the witness.⁶⁴⁹ A witness who is granted either type of immunity waives the right against self-incrimination, unless the testimony forms the basis for a violation of federal law for which immunity has not been granted.⁶⁵⁰

In *State v. Ralston*, the Kansas Court of Appeals held that “law enforcement officers, absent the prior knowledge and approval of county and district attorneys, are without authority to enter into immunity agreements.”⁶⁵¹ In *Ralston*, the defendant made incriminating statements to police officers after the police officer told the defendant, “he would do anything to help.”⁶⁵² The court found that this vague statement did not create an enforceable contract.⁶⁵³ The court went on to note that even if this statement had created an immunity agreement between the defendant and the officers, that agreement would have been unenforceable because it was entered into without the authority of the state.⁶⁵⁴

646. *Id.* § 22-3415(b)–(d).

647. *In re Birdsong*, 532 P.2d 1301, 1304–1305 (Kan. 1975).

648. § 22-3415(b)(1).

649. *Id.* § 22-3415(b)(2).

650. *Id.* § 22-3415(c).

651. 225 P.3d 741, 750 (Kan. Ct. App. 2010).

652. *Id.* at 746.

653. *Id.*

654. *Id.* at 749.

3. Double Jeopardy and Multiplicity

The Fifth Amendment to the United States Constitution provides, in part, “[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb.”⁶⁵⁵ The Fifth Amendment has been incorporated and is therefore applicable to the states through the Fourteenth Amendment.⁶⁵⁶ Section 10 of the Kansas Constitution’s Bill of Rights and section 21-3108 of the Kansas Statutes also protects a defendant from double jeopardy.⁶⁵⁷ However, the Kansas Supreme Court has held that the Fifth Amendment “guarantees no greater double jeopardy protection . . . than does [section] 10 of the Kansas Constitution Bill of Rights; in other words, the provisions are coextensive.”⁶⁵⁸

In *State v. Fillman*, the Kansas Court of Appeals addressed the issue of whether the government’s use of state charges against a defendant to enhance the total offense level at sentencing in federal court bars the state from prosecuting the defendant for those charges under section 21-3108(3)(a).⁶⁵⁹ In *Fillman*, the defendant was charged in state court of committing two counts of aggravated assault and one count of aggravated battery.⁶⁶⁰ Before his trial in state court, the defendant was charged and convicted in federal court of “two counts of possessing an unregistered destructive device and three counts of being a felon in possession of a firearm and ammunition.”⁶⁶¹ In calculating the offense level, the court took into account that the defendant “unlawfully possessed the firearm in conjunction with an aggravated assault and aggravated battery”—the charges pending in state court.⁶⁶² After being sentenced to a 292-month imprisonment, the defendant filed a motion to dismiss the pending state charges against him for aggravated assault and aggravated battery under section 21-3108(3)(a).⁶⁶³ The defendant “maintained he already had been prosecuted for these particular crimes when the federal court relied on them to enhance his total offense level at sentencing.”⁶⁶⁴ The district court denied the defendant’s motion, and he

655. U.S. CONST. amend. V.

656. *State v. Johnson*, 932 P.2d 380, 382 (Kan. 1997).

657. KAN. CONST. Bill of Rights § 10; KAN. STAT. ANN. § 21-3108 (2007).

658. *State v. Fillman*, 223 P.3d 827, 831 (Kan. Ct. App. 2010).

659. *Id.* at 830.

660. *Id.*

661. *Id.*

662. *Id.*

663. *Id.*

664. *Id.*

was ultimately convicted of two counts of aggravated assault and one count of aggravated battery.⁶⁶⁵

In affirming the district court's denial of the motion to dismiss, the Kansas Court of Appeals held that because the defendant's "292-month federal sentence did not exceed the maximum statutory sentence of 50 years' imprisonment," the state charges of aggravated assault and aggravated battery were not "necessary elements of the federal convictions."⁶⁶⁶ The defendant maintained that when the state charges against him were used by the federal court to increase his offense level, those crimes became elements of his firearm convictions in federal court.⁶⁶⁷ However, the court noted that the United States Supreme Court held that "the facts constituting the elements of a crime are those that increase the maximum punishment to which the defendant is exposed under governing law."⁶⁶⁸ Because the defendant's sentence did not exceed the maximum statutory sentence, the maximum punishment to which the defendant was exposed did not increase.⁶⁶⁹ Therefore, the aggravated assault and aggravated battery charges did not constitute necessary elements of the federal conviction for unlawfully possessing a firearm.⁶⁷⁰

In *State v. Schoonover*, the Kansas Supreme Court explained the complicated subject of multiplicity.⁶⁷¹ The Double Jeopardy Clause of the Fifth Amendment protects against: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense."⁶⁷² All three categories involve unitary conduct, which arises from "'the same act or transaction' or a 'single course of conduct.'"⁶⁷³ Factors that may be considered when determining whether conduct is unitary are:

- (1) whether the acts occur at or near the same time;
- (2) whether the acts occur at the same location;
- (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event;

665. *Id.*

666. *Id.* at 833.

667. *Id.* at 832.

668. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

669. *Id.* at 833.

670. *Id.*

671. 133 P.3d 48, 59–83 (Kan. 2006).

672. *Id.* at 60.

673. *Id.* (citations omitted).

and (4) whether there is a fresh impulse motivating some of the conduct.⁶⁷⁴

In *Schoonover*, the court addressed the third category, multiple punishments for the same offense.⁶⁷⁵ The focus of this analysis was on what constitutes a “same offense.”⁶⁷⁶ At this stage, cases are divided into two categories.⁶⁷⁷

In multiple-description cases, “the defendant is charged with violations of multiple statutes that may or may not be deemed the same offense for double jeopardy purposes.”⁶⁷⁸ The test applied in these cases is known as the *Blockburger* or the elements test, which provides: “[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 the other does not.”⁶⁷⁹ If each offense contains an element not found in the other, they are not the same offense and no protection against double jeopardy is afforded.⁶⁸⁰ The inquiry here is focused on the elements of the statutes in question and not the evidence actually offered at trial.⁶⁸¹

The second category deals with cases in which “the defendant is charged with multiple violations of the same statute.”⁶⁸² These cases are often referred to as unit-of-prosecution cases.⁶⁸³ In unit-of-prosecution cases, “the statutory definition of the crime determines the minimum scope of the conduct proscribed by the statute.”⁶⁸⁴ In determining the proper unit of prosecution, the key is the nature of the conduct and not necessarily whether there is a single action or single victim.⁶⁸⁵ The court must look to the statute to determine whether the legislature intended multiple punishments for multiple violations or just a single punishment.⁶⁸⁶ Courts apply the rule of lenity when deciding unit-of-

674. *Id.* at 79.

675. *Id.*

676. *Id.* at 60.

677. *Id.*

678. *Id.*

679. *Id.* at 62.

680. *Id.* (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

681. *Id.*

682. *Id.* at 60.

683. *Id.* at 64.

684. *Id.*

685. *Id.* at 65.

686. *Id.*

prosecution cases, meaning that if a statute is ambiguous as to unit of conduct, only one conviction will be allowed.⁶⁸⁷ The problem with this test occurs when a statute is ambiguous as to unit of conduct, leaving the court to interpret what is the appropriate unit of prosecution. If a court is required to apply the rule of lenity, this is advantageous to criminal defendants being prosecuted under ambiguous statutes.

In *State v. Hood*, the defendant admitted to stealing both a bank bag and purse from a restaurant.⁶⁸⁸ The defendant was convicted of two counts of felony theft in violation of section 21-3701(a)(1) and (b)(3).⁶⁸⁹ The defendant argued that the two counts of felony theft were multiplicitous.⁶⁹⁰ The State maintained that the defendant's two theft convictions did not arise from the same conduct because he took two different pieces of property belonging to two different owners.⁶⁹¹ The Court of Appeals applied the factors set forth in *Schoonover* for determining whether the conduct was unitary and found that when the defendant took the purse and the bank bag, it constituted unitary conduct.⁶⁹² The court found that the purse and bank bag were taken at the same time and same location.⁶⁹³ Additionally, there was no intervening event between the taking of the purse and the taking of the bank bag.⁶⁹⁴ The convictions were based on multiple violations of the same statute, and, therefore, the court applied the unit-of-prosecution test.⁶⁹⁵

The court found that under section 21-3701(a)(1) "the unit of prosecution . . . is the unlawful taking of a single owner's property."⁶⁹⁶ In other words, "if a defendant takes property from multiple owners, even in a single transaction, [section] 21-3701(a)(1) allows for multiple prosecutions."⁶⁹⁷ The court recognized that section "21-3701(a)(1) requires the defendant have the intent to deprive the owner permanently of the possession, use or benefit of the owner's property."⁶⁹⁸ The intent element affects the allowable prosecution under section 21-3701(a)(1)

687. *Id.*

688. 234 P.3d 853, 856 (Kan. Ct. App. 2010).

689. *Id.* at 855.

690. *Id.* at 856.

691. *Id.* at 857.

692. *Id.*

693. *Id.*

694. *Id.*

695. *Id.* at 858.

696. *Id.* at 859.

697. *Id.*

698. *Id.* at 859–60.

because if a defendant takes multiple items from a single location and believes the items belonged to a single owner, then the defendant did not *intend* to take property from multiple owners, and, therefore, only one theft prosecution would be allowed.⁶⁹⁹ However, the court determined that the defendant had “reasonable notice that the property he took belonged to two different owners” and, therefore, the charges against him were not multiplicitous.⁷⁰⁰

4. Due Process

The Due Process Clause of the Fifth Amendment to the United States Constitution protects criminal defendants against unreasonable delay in the filing of formal charges.⁷⁰¹ A delay in the filing of formal charges may increase the chances that memories will fade, witnesses will become unavailable, and that evidence will be lost.⁷⁰² The Kansas Supreme Court set forth a two-part test for determining if a defendant’s due process rights have been violated: “(1) Has the delay prejudiced the accused in his ability to defend himself, and (2) was the delay a tactical device to gain advantage over him?”⁷⁰³ In analyzing the second part of the test, an intentional or avoidable delay is not enough for a dismissal; rather, the court must also look at the purpose of the delay.⁷⁰⁴ The delay may have been necessary to effective enforcement of the law, and in these cases, the delay may not warrant a dismissal.⁷⁰⁵ In Kansas, a prosecution is commenced “when a complaint or information is filed, or an indictment is returned, and a warrant thereon is delivered to the sheriff or other officer for execution.”⁷⁰⁶ If there is an unreasonable delay in the execution of the warrant, the prosecution is said to have commenced when the warrant is served on the defendant.⁷⁰⁷ As long as the warrant is served within the applicable statute of limitations, prosecution is not barred despite an unreasonable delay in the execution of the warrant.⁷⁰⁸

699. *Id.* at 860.

700. *Id.*

701. U.S. CONST. amend. V.

702. *State v. Royal*, 535 P.2d 413, 417 (Kan. 1975) (citing *United States v. Marion*, 404 U.S. 307, 325, 326 (1971)).

703. *Id.*

704. *Id.*

705. *Id.* at 418.

706. *State v. McDowell*, 111 P.3d 193, 196 (Kan. Ct. App. 2005).

707. *Id.*

708. *Id.*

B. Sixth Amendment Issues

1. Speedy Trial

Persons charged with crimes in Kansas are guaranteed the right to a speedy trial by both the United States Constitution and the Kansas Statutes. The Sixth Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”⁷⁰⁹ In 1972, the Supreme Court adopted a four part balancing test in *Barker v. Wingo* to determine if a defendant’s speedy trial rights have been violated.⁷¹⁰ The four factors are “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”⁷¹¹ The Kansas Supreme Court uses the test laid out in *Barker* when evaluating speedy trial cases.⁷¹² All four factors must be weighed and considered, and a finding that one factor has been met is not “sufficient for finding a violation.”⁷¹³

Defendants in Kansas are also guaranteed the right to a speedy trial by statute.⁷¹⁴ Section 22-3402 of the Kansas Statutes states “if any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person’s arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged.”⁷¹⁵ If the suspect is “charged with a crime and held to answer on an appearance bond,” the time is extended to 180 days.⁷¹⁶ Any delays attributable to the defendant and some continuances ordered by the court⁷¹⁷ pause the speedy trial clock.⁷¹⁸

The Kansas Court of Appeals recently resolved a speedy trial issue in *State v. Blizzard*.⁷¹⁹ The court in *Blizzard* dealt with the issue of “how to count the number of days a criminal case is pending when it has been dismissed by the district court, revived by the Court of Appeals, and then

709. U.S. CONST. amend. VI.

710. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

711. *Id.*

712. *State v. Rivera*, 83 P.3d 169, 173 (Kan. 2004).

713. *Id.*

714. KAN. STAT. ANN. § 22-3402 (2007).

715. *Id.* § 22-3402(1).

716. *Id.* § 22-3402(2).

717. *Id.* § 22-3402(5)(a)–(d) (listing reasons the court may grant a continuance, including an incompetent defendant, unavailable evidence, and too many cases pending on the court’s docket).

718. *Id.* § 22-3402(1)–(2).

719. 225 P.3d 773 (Kan. Ct. App. 2010).

remanded to the district court for trial.”⁷²⁰ The State arraigned Darren Blizzard on May 28, 2004, based on various charges related to the possession and sale of cocaine.⁷²¹ The defendant argued that the State had previously charged and arraigned him for the same crimes but was forced to drop the charges due to a missing witness.⁷²² He argued that the speedy trial clock started at the original arraignment, and therefore “the statutory time limit had elapsed and the court should discharge him.”⁷²³ The district court dismissed all charges and released Blizzard from custody.⁷²⁴

The State successfully appealed the district court ruling to the Kansas Court of Appeals, and reinstated charges against Blizzard on December 21, 2005.⁷²⁵ A status conference was held on March 17, 2006, during which a trial date was set for May 24, 2006.⁷²⁶ The court also ordered the defendant to post an appearance bond.⁷²⁷ Before the second trial, Blizzard again argued that the charges should be dropped due to a speedy trial violation.⁷²⁸ According to the defendant, the speedy trial clock should run from the date he was arraigned until the district court’s dismissal or from the time the State filed its appeal.⁷²⁹ Either of these methods of calculation would result in a violation of section 22-3402.⁷³⁰ The district court denied the motion, “holding that any delay causing the trial date to be scheduled more than 180 days after Blizzard’s arraignment ‘was caused by the actions of the defendant’s previous counsel, and is binding upon the defendant.’”⁷³¹ The jury convicted Blizzard of sale of cocaine.⁷³² The case was again appealed to the Kansas Court of Appeals, this time by the defendant.⁷³³

The Court of Appeals affirmed the district court’s ruling, stating that the district court had reached the correct result but on incorrect

720. *Id.* at 775.

721. *Id.*

722. *Id.*

723. *Id.*

724. *Id.*

725. *Id.*

726. *Id.* at 775–76.

727. *Id.* at 776.

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id.*

732. *Id.*

733. *Id.*

reasoning.⁷³⁴ The lower court stated that any delay was attributable to the defendant; however, “[t]his conclusion was based on the district court’s erroneous conclusion that May 24, 2006, was outside the speedy trial period.”⁷³⁵ The court held that the speedy trial clock stopped when the district court dismissed the charges against the defendant in May 2004.⁷³⁶ The statutory speedy trial time resumed after the charges were remanded and Blizzard was ordered to again post bond.⁷³⁷ The court distinguished this case from *State v. White*, where the Kansas Supreme Court held that “the statutory speedy trial period . . . run[s] after an *interlocutory appeal* [is] taken by the State.”⁷³⁸ The State’s appeal in *Blizzard* was not interlocutory; rather, the charges had been dismissed altogether by the district court.⁷³⁹

While not changing existing law, *State v. Blizzard* illustrates the potential complexity speedy trial issues may present. In this instance, the district court erred twice. When the court of appeals originally reinstated all charges against Blizzard, it stated that the district court erred in finding a speedy trial violation because the state had made “an adequate showing of necessity to the court” that the missing witness was essential to the case and that the state was not attempting to manipulate the clock.⁷⁴⁰ On remand, the district court reached the right conclusion, yet by the wrong reasoning. Therefore, attorneys on either side of a speedy trial issue must pay meticulous attention to the record and the applicable statutes when making their claims.

2. Trial by Jury

a. Generally

The right to a trial by jury is guaranteed to all U.S. citizens by the Sixth Amendment to the United States Constitution.⁷⁴¹ The right to a trial by jury in Kansas is guaranteed in both the Kansas Constitution’s Bill of Rights and by statute. The Kansas Constitution states that “[t]he

734. *Id.* at 776–77.

735. *Id.* at 777.

736. *Id.* at 776.

737. *Id.*

738. *Id.* at 777.

739. *Id.*

740. *State v. Blizzard*, No. 93,045, 2005 WL 2001739, at *3 (Kan. Ct. App. Aug. 19, 2005).

741. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

right of trial by jury shall be inviolate.”⁷⁴² Section 22-3403 of the Kansas Statutes states that “[t]he defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. All other trials of felony cases shall be by jury.”⁷⁴³ The statute also specifies that unless the parties agree to a lower number, twelve jurors will preside over all felony trials.⁷⁴⁴

b. Impartial Jury

The Sixth Amendment provides that all criminal defendants “shall enjoy the right to a speedy and public trial, by an impartial jury.”⁷⁴⁵ The Supreme Court has interpreted this to mean a jury must consist of a “fair cross section” of the community.⁷⁴⁶ To prove a violation of this requirement, a defendant must show:

(1) 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.⁷⁴⁷

c. Waiver of the Right to a Jury Trial

A criminal defendant may waive the right to a jury trial.⁷⁴⁸ In Kansas, two things must occur for this right to be effectively waived.⁷⁴⁹ First, the trial court must advise the defendant of the right to a jury trial.⁷⁵⁰ Second, the defendant “must personally waive the right in writing or in open court for the record.”⁷⁵¹

Last year, the Kansas Court of Appeals elaborated on what standard of proof a defendant must show on appeal to prove a violation of the

742. KAN. CONST. Bill of Rights § 5.

743. KAN. STAT. ANN. § 22-3403 (2007).

744. *Id.* § 22-3403(2).

745. U.S. CONST. amend. VI.

746. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

747. *Id.*

748. *State v. Irving*, 533 P.2d 1225, 1227 (Kan. 1975).

749. *Id.* at 1228.

750. *Id.*

751. *Id.*

right to a jury trial.⁷⁵² In *State v. Duncan*, the defendant appealed his DUI conviction following a bench trial.⁷⁵³ On appeal, Duncan claimed that there was “no evidence in the record that the district court advised him of his right to a jury trial or that he personally waived his right to a jury trial in writing or in open court.”⁷⁵⁴ The State claimed that Duncan needed to “designate a record which affirmatively shows prejudicial error,” not simply claim there is an absence in the record.⁷⁵⁵

The court explained the distinction between a defendant who fails to include evidence from trial to prove an error occurred and one who is trying to prove the absence of evidence.⁷⁵⁶ The burden of proof is lower when trying to prove a negative fact, “unlike the definitive burden necessary to prove an *existing* fact.”⁷⁵⁷ “Stated another way, the party asserting an absence of evidence to support a claim still bears the burden to prove that claim, but the standard of proof required to satisfy this burden necessarily is less onerous.”⁷⁵⁸

The court explained that under this less strict standard, Duncan did not have to produce irrefutable proof that he was not advised of his right to a jury trial or that he did not waive such a right, rather he needed to show that there was a high probability that this occurred.⁷⁵⁹ The only transcripts contained in the record produced by the defendant were those from the bench trial.⁷⁶⁰ In addition, Duncan provided a listing of disposition hearings that occurred before the trial.⁷⁶¹ Nothing in any of these records “suggest[ed], let alone establish[ed], that Duncan was advised of, or waived his right to, a jury trial.”⁷⁶² Because the defendant met this lower burden of proof on appeal, the court reversed his DUI conviction and remanded the case back to the district court.⁷⁶³

The Court of Appeal’s holding in *Duncan* is highly beneficial for defendants trying to prove on appeal that they did not waive their jury trial rights. Because it would be nearly impossible for a defendant to

752. *State v. Duncan*, 242 P.3d 1271, 1277–80 (Kan. Ct. App. 2010).

753. *Id.* at 1278.

754. *Id.*

755. *Id.*

756. *Id.* (“This factual distinction is significant because it requires Duncan to prove an absence of evidence; in other words, to prove a negative fact.”).

757. *Id.* at 1278–79.

758. *Id.* at 1279.

759. *Id.*

760. *Id.*

761. *Id.*

762. *Id.*

763. *Id.*

prove, in the absence of evidence, that his jury trial rights were violated, the court necessarily lowered the burden of proof to prove a negative fact. Thus, a defendant need not prove definitively that he was not made aware of his right to a jury trial, only that there exists a high probability that the court did not inform him of this right.

d. Jury Selection and Peremptory Challenges

The method for selecting a jury in a criminal trial in Kansas is defined by statute.⁷⁶⁴ Both the prosecution and the defense examine prospective jurors and the court conducts any additional examination of potential jurors it deems necessary.⁷⁶⁵ During this examination “[e]ach party may challenge any prospective juror for cause.”⁷⁶⁶ During the initial examination, if a juror is found to have some bias in favor of or against either party to the action, such as being related to either the defendant or the injured party, that juror will be struck for cause.⁷⁶⁷ A list of grounds on which jurors may be struck for cause is found in section 22-3410.⁷⁶⁸ Both the prosecution and the defendant are also allowed a certain number of peremptory challenges.⁷⁶⁹ Peremptory challenges allow each side to strike jurors without providing reasons to show why the juror is unsuitable.⁷⁷⁰ The same number of peremptory challenges are issued to the defendant and the prosecution.⁷⁷¹ A party may oppose a peremptory challenge, however, with a *Batson* challenge if the party believes the preemptory challenge was based on race.⁷⁷²

A *Batson* challenge stems from the Supreme Court’s 1986 decision in *Batson v. Kentucky*, holding that peremptory strikes may not be used to strike jurors based on their race.⁷⁷³ When raising a *Batson* objection, the defendant must show that he or she is a member of a discriminated against group and make a prima facie case that a particular juror was struck on the basis of his or her race.⁷⁷⁴ The State must rebut this charge

764. KAN. STAT. ANN. §§ 22-3408 to -3413 (2007).

765. *Id.* § 22-3408(3).

766. *Id.* § 22-3410(1).

767. *Id.* § 22-3410(2)(a).

768. *Id.* § 22-3410(2)(a)–(i).

769. *Id.* § 22-3412 (2007 & Supp. 2010).

770. *Id.*

771. *Id.* § 22-3412(a)(2)(E).

772. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

773. *Id.*

774. *Id.* at 94.

with a neutral explanation for why the juror was struck.⁷⁷⁵ The trial court must then rule on the objection and “determine if the defendant has established purposeful discrimination.”⁷⁷⁶

Last year, the United States Supreme Court issued a decision on peremptory strikes in *Thaler v. Haynes*.⁷⁷⁷ In *Thaler*, the Court held that a judge does not have to personally witness a juror’s demeanor to rule on a *Batson* challenge.⁷⁷⁸ The defendant in *Thaler* was being tried for the murder of a police officer.⁷⁷⁹ Two different judges presided over the jury selection: the first judge sat during individual questioning of the jurors and the second judge sat when peremptory challenges were proposed.⁷⁸⁰ During the second portion of the jury selection, the defense raised a *Batson* objection when the prosecution attempted to strike an African-American juror.⁷⁸¹

The judge found that the defense made a prima facie case of discrimination, and the State “then offered a race-neutral explanation that was based on [the juror’s] demeanor during individual questioning.”⁷⁸² The prosecutor claimed that the juror appeared to have not been taking the proceedings seriously and that her body language conveyed her “true feeling.”⁷⁸³ The judge, who did not witness the individual questioning in the first part of jury selection, accepted the prosecution’s argument and denied the challenge.⁷⁸⁴ The defendant was subsequently tried, found guilty, and sentenced to death.⁷⁸⁵

On appeal, the defendant argued that “a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge.”⁷⁸⁶ The state court of appeals rejected this argument, and the case eventually reached the Fifth Circuit Court of Appeals.⁷⁸⁷ The Fifth Circuit held that “[n]o court, including ours, can now engage in a proper adjudication of the defendant’s demeanor-based *Batson* challenge as to prospective juror Owens because we will be relying

775. *Id.* at 97.

776. *Id.* at 98.

777. 130 S. Ct. 1171 (2010).

778. *Id.* at 1174.

779. *Id.* at 1172.

780. *Id.*

781. *Id.*

782. *Id.*

783. *Id.*

784. *Id.*

785. *Id.*

786. *Id.*

787. *Id.* at 1172–73.

solely on a paper record and would thereby contravene *Batson* and its clearly-established factual inquiry requirement.”⁷⁸⁸ The Supreme Court clarified their ruling in *Batson*, stating that while the judge is required to make an assessment of the entire circumstances surrounding the hearing, it “did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror’s demeanor.”⁷⁸⁹ Thus, a judge need not personally witness a juror’s demeanor to rule on a *Batson* challenge.⁷⁹⁰ Although the circumstances in *Thaler* are rare—different judges presiding over the same voir dire—the decision will have implications when a judge simply does not recall the specific demeanor of a certain juror.

e. Juror Misconduct

Kansas courts use a two part test to determine whether juror misconduct should result in a new trial.⁷⁹¹ A defendant must “show that (1) an act of the jury constituted misconduct and (2) the misconduct substantially prejudiced the defendant’s right to a fair trial.”⁷⁹²

3. Confront Witnesses—Cross-Examination

The right to confront and cross-examine witnesses is guaranteed by both the United States Constitution and Kansas Constitution. The Confrontation Clause portion of the Sixth Amendment reads: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁷⁹³ The Kansas Constitution states that “[i]n all prosecutions, the accused shall be allowed . . . to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf.”⁷⁹⁴

A seminal case in Confrontation Clause jurisprudence is *Crawford v. Washington*.⁷⁹⁵ The United States Supreme Court in *Crawford* significantly altered what types of out-of-court testimony are acceptable

788. *Id.* at 1173 (internal quotation marks omitted).

789. *Id.* at 1174.

790. *Id.* at 1175.

791. *State v. Mathis*, 130 P.3d 14, 20 (Kan. 2006).

792. *Id.*

793. U.S. CONST. amend. VI.

794. KAN. CONST. Bill of Rights § 10.

795. 541 U.S. 36 (2004).

for use at trial. The Court stated that it would not allow “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁷⁹⁶ When statements are nontestimonial in nature, normal hearsay rules apply, and no Confrontation Clause issue arises.⁷⁹⁷ The Court did not specifically define what constituted testimonial statements but said that at a minimum “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations” are testimonial.⁷⁹⁸

This year the Tenth Circuit expanded its *Crawford* jurisprudence in *United States v. Yeley-Davis*.⁷⁹⁹ In *Yeley-Davis*, a jury convicted the defendant of conspiracy with intent to distribute narcotics using evidence including telephone records implicating the defendant.⁸⁰⁰ The trial court admitted the telephone records under the business record exception to the hearsay rule.⁸⁰¹ On appeal, the defendant argued that “the district court erred in admitting [the telephone records], thereby depriving her of her Sixth Amendment right to confrontation.”⁸⁰²

In assessing the defendant’s argument, the Tenth Circuit first stated that a testimonial statement is “a statement that a reasonable person in the position of the declarant would objectively foresee might be used in the investigation or prosecution of a crime.”⁸⁰³ The defendant argued that since the records of her phone activity were produced specifically for the trial, they were testimonial.⁸⁰⁴ The court dismissed this argument, stating that the records themselves were made in the ordinary course of business and were therefore acceptable under the business record exception to hearsay.⁸⁰⁵ Next, the defendant argued that the affidavit establishing that the phone records were kept in the ordinary course of business was made specifically for trial and was therefore testimonial.⁸⁰⁶ The court admitted that “[a]rguably, these documents fit our broad definition of testimonial statements, as the [phone] records custodian objectively could have foreseen that the certification and affidavit might

796. *Id.* at 53–54.

797. *Id.* at 68.

798. *Id.*

799. 632 F.3d 673 (10th Cir. 2011).

800. *Id.* at 677.

801. *Id.*

802. *Id.*

803. *Id.* at 679 (quoting *United States v. Pablo*, 625 F.3d 1285, 1291 (10th Cir. 2010)).

804. *Id.*

805. *Id.*

806. *Id.* at 680.

be used in the investigation or prosecution of a crime.”⁸⁰⁷ The court had previously declined “to decide whether foundational documents such as these are testimonial.”⁸⁰⁸ The court then held they are not testimonial, “because the purpose of the certifications [are] merely to authenticate the cell phone records—and not to establish or prove some fact at trial.”⁸⁰⁹ Although not groundbreaking, this decision will help streamline the admittance of phone records into evidence. It also illustrates how certain evidence may, on first glance, appear to be testimonial, but upon further analysis is found to be nontestimonial.

4. Right to Testify and Present a Defense

The Sixth Amendment gives criminal defendants the right “to have compulsory process for obtaining witnesses in [their] favor.”⁸¹⁰ In *Rock v. Arkansas*, the Supreme Court stated that “[l]ogically included in the accused’s right to call witnesses whose testimony is ‘material and favorable to his defense,’ is a right to testify himself, should he decide it is in his favor to do so.”⁸¹¹ The Court in *Rock* also found justification for the right to testify on one’s own behalf in the Due Process Clause of the Fourteenth Amendment and in the Fifth Amendment’s “guarantee against compelled testimony.”⁸¹²

5. Right to Counsel

a. Invocation of the Right to Counsel

In Kansas, if a criminal defendant appears in court without an attorney, it is the “duty of the court to inform the defendant that such defendant is entitled to counsel and that counsel will be appointed to represent the defendant if the defendant is not financially able to employ an attorney.”⁸¹³ A defendant is then given the opportunity to retain

807. *Id.*

808. *Id.*

809. *Id.*

810. U.S. CONST. amend. VI.

811. 483 U.S. 44, 52 (1987) (citing *United States v. Valenzuela-Bernal* 458 U.S. 858, 867 (1982)).

812. *Id.* at 51–53.

813. KAN. STAT. ANN. § 22-4503(b) (2007 & Supp. 2010).

private counsel or is appointed a public defender.⁸¹⁴ Therefore, invocation of counsel at trial is the duty of the court, not the defendant.

b. Personal Choice

Felony criminal defendants in Kansas are guaranteed the right to assistance of counsel at “every stage of the proceedings.”⁸¹⁵ These defendants also have the right to the counsel of their choice. Section 22-4503(b) of the Kansas Statutes states:

The Court shall give the defendant an opportunity to employ counsel of the defendant’s own choosing if the defendant states the defendant is able to do so. If the defendant asks to consult with counsel of the defendant’s own choosing, the defendant shall be given a reasonable opportunity to do so.⁸¹⁶

If a defendant is determined to be indigent, a court appointed attorney is provided to him.⁸¹⁷

Criminal defendants also have the right to appoint new counsel. The Kansas Supreme Court recently explained that to appoint “new trial counsel, a defendant must show ‘justifiable dissatisfaction’ with his or her appointed counsel. ‘Justifiable dissatisfaction’ may be demonstrated by showing a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between the defendant and his or her appointed attorney.”⁸¹⁸ In *State v. Smith*, a criminal defendant requested the appointment of new counsel after his trial counsel refused to put on certain evidence because he was convinced of his client’s guilt.⁸¹⁹ Trial counsel believed a surveillance video unquestionably proved his client was guilty.⁸²⁰ The trial court denied his motion, stating that any other attorney would face the same dilemma.⁸²¹ The Kansas Court of Appeals reversed, holding that the trial court’s view that all attorneys would be faced with the same dilemma was too broad.⁸²² The Kansas Supreme

814. *Id.* § 22-4503(b)–(c).

815. *Id.* § 22-4503(a).

816. *Id.* § 22-4503(b).

817. *Id.* § 22-4503(c).

818. *State v. Smith*, 247 P.3d 676, 379 (Kan. 2011).

819. *Id.* at 677.

820. *Id.* at 678.

821. *Id.*

822. *Id.*

Court affirmed the Kansas Court of Appeals but on different grounds.⁸²³ The Kansas Supreme Court held that trial counsel usurped the jury's fact-finding duty by determining his client's identity in the video.⁸²⁴ The court went on to explain that a defendant cannot make his counsel present false evidence, but in this case, the defendant's dissatisfaction with his trial counsel was justified because of counsel's improper role as finder of fact.⁸²⁵ This case illustrates that defense counsel's "refusal to present truthful evidence" is grounds for the requisite justifiable dissatisfaction a defendant must show to obtain new counsel.⁸²⁶

Kansas law also mandates that persons shall be represented by counsel during probation hearings.⁸²⁷ Section 22-3716(b) of the Kansas Statutes states, in part, that a defendant in a probation hearing "shall have the right to be represented by counsel and shall be informed by the judge that, if the defendant is financially unable to obtain counsel, an attorney will be appointed to represent the defendant."⁸²⁸ In *State v. Miller*, the defendant elected to represent himself at his probation hearing.⁸²⁹ The court, however, did not inform him of his right to counsel.⁸³⁰ The Kansas Court of Appeals held that to proceed pro se, a defendant must waive his right to counsel "knowingly and intelligently."⁸³¹ The court held that because the defendant was "not informed of the dangers and disadvantages of self-representation," he could not have given a knowing and intelligent waiver.⁸³² The court then found that the trial court violated section 22-3716(b) of the Kansas Statutes and remanded the case back for a new hearing.⁸³³

c. Waiver of Right to Counsel

The United States Supreme Court has held that defendants in criminal cases have a constitutional right of self-representation and may defend themselves if they voluntarily and intelligently decide to proceed

823. *Id.* at 680–81.

824. *Id.* at 680.

825. *Id.*

826. *Id.*

827. KAN. STAT. ANN. § 22-3716(b) (2007 & Supp. 2010).

828. *Id.*

829. 237 P.3d 1254, 1256 (Kan. Ct. App. 2010).

830. *Id.*

831. *Id.* at 1257.

832. *Id.*

833. *Id.*

without counsel.”⁸³⁴ The Supreme Court reasoned that this right is fundamental because defendants “suffer[] the consequences if the defense fails.”⁸³⁵ Courts must make defendants aware of all the potential pitfalls and dangers of self-representation.⁸³⁶ “For this reason, in order to represent himself, the accused must ‘knowingly and intelligently’ forgo those relinquished benefits.”⁸³⁷

d. Effective Assistance of Counsel

The Sixth Amendment guarantees not only that criminal defendants receive assistance of counsel but also that counsel be effective.⁸³⁸ The United States Supreme Court in *Strickland v. Washington* laid out a two-part test to determine whether counsel is ineffective: (1) trial counsel’s representation must be below an objective standard of reasonableness,⁸³⁹ and (2) “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁸⁴⁰ Because of the wide range of acceptable professional conduct, this burden is often difficult to meet.

The Kansas Court of Appeals’ recent decision in *State v. Bowlin* illustrates how a defendant meets this burden.⁸⁴¹ The defendant in *Bowlin* argued on appeal that his trial counsel’s decision not to attempt to suppress an interrogation tape that clearly showed police violating his Fifth Amendment rights constituted reversible error.⁸⁴² The State claimed that the defense counsel’s action was trial strategy even though admission of the tape would show the police’s inappropriate conduct and would be damaging to their credibility.⁸⁴³ The court admitted that trial strategy is typically not reviewable: “Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on

834. *Faretta v. California*, 422 U.S. 806, 807 (1975). The Kansas Supreme Court recently extended this right to preliminary hearings. See Part IV.D.4.

835. *Id.* at 820.

836. *Id.* at 835.

837. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)).

838. *Strickland v. Washington*, 466 U.S. 668, 693–94 (1984).

839. *Id.* at 688.

840. *Id.* at 694.

841. 229 P.3d 402 (Kan. Ct. App. 2010).

842. *Id.* at 405–06.

843. *Id.* at 416.

investigation.”⁸⁴⁴ However, the court found that because of “serious credibility flaws in the State’s evidence, defense counsel should have moved to suppress the interrogation tape and should not have stipulated to its admission into evidence at trial.”⁸⁴⁵ Thus, the court found that the attorney’s conduct fell below the objective standard for reasonableness.⁸⁴⁶ And because of the “trial court’s heavy reliance on Bowlin’s interrogation confession,” the court found that the second prong of the *Strickland* analysis—that a reasonable probability existed that the trial would have been different were it not for the error—was also met.⁸⁴⁷ Accordingly, the Kansas Court of Appeals reversed and remanded for a new trial.⁸⁴⁸

An accused’s right to effective assistance of counsel also extends to appellate counsel: section 22-4503 of the Kansas Statutes states that “[a] defendant charged by the state of Kansas . . . with any felony is entitled to have the assistance of counsel at every stage of the proceedings.”⁸⁴⁹ The Kansas Supreme Court has held that “where there [is] a statutory right to counsel, there [is] a right that counsel be effective and competent.”⁸⁵⁰ The standard for effective assistance of counsel when filing a petition for discretionary review following a defendant’s direct appeal from conviction is slightly different. An attorney who does not file a petition for review after a negative outcome in a direct appeal after the defendant requests this be done has performed ineffectively.⁸⁵¹ If a defendant explicitly tells his attorney not to file further motions after direct appeal, there is no ineffective assistance of counsel claim.⁸⁵²

In other situations, such as where counsel has not consulted with a defendant or 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.⁸⁵³

844. *Id.* (quoting *State v. Gleason*, 88 P.3d 218, 233 (Kan. 2004)).

845. *Id.* at 417–18.

846. *Id.* at 418.

847. *Id.*

848. *Id.* at 419.

849. KAN. STAT. ANN. § 22-4503(a) (2007).

850. *Kargus v. State*, 169 P.3d 307, 311 (Kan. 2007).

851. *Id.* at 320.

852. *Id.*

853. *Id.*

There is no requirement that a defendant prove the outcome of the trial would have been different but for his attorney's errors.⁸⁵⁴

C. Evidentiary Issues

1. Prior Actions by the Defendant

Under section 60-455 of the Kansas Statutes, "evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's 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."⁸⁵⁵ The section, however, allows such evidence when it is "relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁸⁵⁶

In 2006, the Kansas Supreme Court decided *State v. Gunby*, in which it held that the eight exceptions listed in section 60-455(b) were merely examples of what material facts evidence of prior crimes could be offered to prove and not an exclusive list.⁸⁵⁷ Before *Gunby*, courts saw the list as exclusive.⁸⁵⁸ *Gunby* also recognized that when a judge failed to give a limiting instruction to the jury regarding prior crimes, the appellate court almost always reversed the decision.⁸⁵⁹ This created a problem because prosecutors would then look for ways to admit evidence of prior crimes, outside of the exclusive statutory list, for the jury to hear.⁸⁶⁰ Thus, *Gunby* further held that the failure to give a limiting instruction did not automatically constitute reversible error.⁸⁶¹

In 2007, the Kansas Court of Appeals interpreted the list of exceptions in section 60-455(b) to once again be exclusive in *State v. Dayhuff*—seemingly at odds with the *Gunby* decision.⁸⁶² The court stated that under section 60-455, "three requirements must be met. First, the evidence must be relevant to prove *one of the facts specified in the*

854. *Id.*

855. KAN. STAT. ANN. § 60-455(a) (Supp. 2010).

856. *Id.* § 60-455(b).

857. 144 P.3d 647, 659 (Kan. 2006).

858. *Id.* at 657–59.

859. *Id.* at 657–58 (citing *State v. Rambo*, 495 P.2d 101, 103 (Kan. 1972)).

860. *Id.* at 658.

861. *Id.* at 660.

862. 158 P.3d 330, 337 (Kan. Ct. App. 2007) (citing *State v. Overton*, 112 P.3d 244, 249 (Kan. 2005)).

statute. Second, the fact must be a disputed, material fact. Third, the probative value of the evidence must outweigh its potential prejudice.”⁸⁶³

A 2009 amendment to section 60-455 made evidence of other crimes or civil wrongs also admissible in all criminal actions, other than sex offenses, “to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case” as long as “it is reasonable to conclude the same individual committed both acts.”⁸⁶⁴ For sexually based offenses, the exception was broadened to allow “evidence of the defendant’s commission of another act or offense of sexual misconduct” as long as it is “relevant and probative.”⁸⁶⁵ Similarly, the Kansas Supreme Court has consistently held that evidence of gang membership is not a criminal or civil wrong barred by section 60-455⁸⁶⁶ and is thus “admissible if relevant.”⁸⁶⁷

In 2010, the Kansas Court of Appeals heard *State v. Hart*, in which the prosecution claimed evidence of prior alleged bad acts was admissible against a defendant charged with indecent liberties with a child because of the 2009 addition of subsection 60-455(d).⁸⁶⁸ The court rejected the argument that the prior sexual evidence was relevant to prove the defendant had motive and intent to molest the victims, stating:

The problem with the State’s argument is that the legislature did not remove subsection (b), which relates to the admissibility of prior crimes evidence “to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident,” from [section] 60-455 or exempt that subsection in sex crime prosecutions. Moreover, there is no language in [subsection] 60-455(d) excepting it from the application of subsection (b) of 60-455. Therefore, it would seem that in order to admit evidence to prove one of the material facts under [subsection] 60-455(b), the analysis set forth in [*Gunby*], and consistently followed by this court and our Supreme Court would still need to be applied.⁸⁶⁹

Thus, despite the expanded scope of admissibility, the Kansas Court of Appeals determined that evidence admitted under subsection 60-455(d)

863. *Id.* (quoting *Overton*, 112 P.3d at 249).

864. KAN. STAT. ANN. § 60-455(c) (Supp. 2010).

865. *Id.* § 60-455(d).

866. *State v. Goodson*, 135 P.3d 1116, 1125 (Kan. 2006).

867. *State v. Conway*, 159 P.3d 917, 925 (Kan. 2007) (citing *State v. Ross*, 127 P.3d 249 (Kan. 2006)).

868. 242 P.3d 1230, 1249 (Kan. Ct. App. 2010).

869. *Id.* at 1253.

is still subject to the same relevance and prejudice analysis as evidence admitted under subsection 60-455(b).

2. Defendant's Silence

The Fifth Amendment to the United States Constitution provides that “[no] person shall . . . be compelled in any criminal case to be a witness against himself.”⁸⁷⁰ In *Miranda* warnings, suspects are instructed that their “silence will carry no penalty.”⁸⁷¹ And prosecutors may not make direct or indirect comments referring to the defendant's silence.

An indirect comment violates the privilege against self-incrimination if it was “manifestly intended or was of such a character that the jury would necessarily take it to be a comment on the failure of the accused to testify.” In particular, a comment that the defense has not contradicted the State's evidence is impermissible if “it is highly unlikely that anyone other than the defendant could rebut the evidence.”⁸⁷²

A prosecutor's question to a witness about the defendant's post-arrest silence is improper and constitutes a violation of the right against self-incrimination.⁸⁷³ Even with a limiting instruction from the judge, an improper statement is not harmless error if the prosecution intended the statement to prejudice the jury.⁸⁷⁴

3. Evidence Implicating Third Parties

In Kansas, under the so-called third-party evidence rule, “evidence that a third party had a motive to commit the crime is not relevant and admissible unless there is other evidence connecting the third party to the crime.”⁸⁷⁵ The judge must then “evaluate the totality of facts and

870. U.S. CONST. amend. V.

871. *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) (quoting *Doyle v. Ohio*, 426 U.S. 610, 618 (1976)).

872. *State v. Madkins*, 219 P.3d 831, 835 (Kan. Ct. App. 2009) (citations omitted).

873. *State v. Pruitt*, 211 P.3d 166, 171 (Kan. Ct. App. 2009) (finding that a prosecutor's question to a police officer, inducing the officer to reply that the defendant did not want to answer any questions, violated the defendant's right against self-incrimination).

874. *Id.* at 172–73.

875. *State v. Louis*, No. 100,530, 2010 WL 1882141, at *4 (Kan. Ct. App. May 6, 2010).

circumstances to determine whether the defense's proffered evidence connects the third party to the crime charged."⁸⁷⁶

4. Cross-Examination

Under both the Sixth Amendment to the United States Constitution and the Kansas Constitution's Bill of Rights, all criminal defendants must have the opportunity to confront the witnesses against them.⁸⁷⁷ The trial court may exercise reasonable control over the scope of a cross-examination,⁸⁷⁸ but it may not limit the defendant's ability to question issues which are critical to the case.⁸⁷⁹ The ability of a defendant to cross examine witnesses implicates the Confrontation Clause.⁸⁸⁰ But two recent cases have carved out limited exceptions to its application. In *State v. Becker*, the Kansas Supreme Court acknowledged that statements are not testimonial hearsay, and thus do not violate the Confrontation Clause, if they are made in the course of criminal activity and not made in the reasonable expectation of eventual use in a criminal proceeding.⁸⁸¹ Testimonial statements of witnesses absent from trial may satisfy the Confrontation Clause if the defendant has previously cross-examined the witness, and the witness is unavailable.⁸⁸² In 2010, the Kansas Court of Appeals, in *State v. Elkins*, held that running the defendant's DNA profile against the national database known as the Combined DNA Indexing System (CODIS) was not a testimonial act that implicated the defendant's right of confrontation under the Sixth Amendment.⁸⁸³

The Confrontation Clause may also include the right to have a witness undergo a psychological examination. In 2010, the Kansas Supreme Court in *State v. Berriozabal* affirmed the holding of *State v. Gregg* that a defendant must show "compelling reasons" to justify a psychological examination of a complaining witness.⁸⁸⁴ Under a totality

876. *Id.*

877. U.S. CONST. amend. VI; KAN. CONST. Bill of Rights § 10.

878. *Manley v. Rings*, 564 P.2d 482, 485 (Kan. 1977).

879. *State v. Atkinson*, 80 P.3d 1143, 1149–50 (Kan. 2003) (finding in a sexual assault case that the trial court's denial of defendant's ability to cross-examine his accuser about consensual sexual contact the night before the crime violated his constitutional rights).

880. *See supra* Part V.B.3.

881. 235 P.3d 424, 431 (Kan. 2010).

882. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

883. 242 P.3d 1223, 1326–28 (Kan. Ct. App. 2010).

884. *State v. Berriozabal*, 243 P.3d 352, 362 (Kan. 2010) (citing *State v. Gregg*, 602 P.2d 85, 91 (Kan. 1979)).

of the circumstances test, the court laid out six nonexclusive factors judges must consider when making this determination:

(1) whether there was corroborating evidence of the complaining witness' version of the facts, (2) whether the complaining witness demonstrates mental instability, (3) whether the complaining witness demonstrates a lack of veracity, (4) whether similar charges by the complaining witness against others are proven to be false, (5) whether the defendant's motion for a psychological evaluation of the complaining witness appears to be a fishing expedition, and (6) whether the complaining witness provides an unusual response when questioned about his or her understanding of what it means to tell the truth.⁸⁸⁵

The trial court makes the same determination for a noncomplaining witness as well.⁸⁸⁶

5. Proof Beyond a Reasonable Doubt

The prosecution must prove every element of the crime beyond a reasonable doubt. When considering the sufficiency of the evidence against a criminal defendant, an appellate court "reviews all the evidence in the light most favorable to the prosecution to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt."⁸⁸⁷ In Kansas and the Tenth Circuit, even the most serious convictions can be based solely on circumstantial evidence, as long as the evidence still proves guilt beyond the reasonable doubt standard.⁸⁸⁸

D. Actions by Different Players During a Trial

1. Prosecutors

Subject to constitutional constraints—such as equal protection—prosecutors have broad discretion to take any case to trial where probable cause exists and where the prosecutor believes the evidence proves guilt

885. *Id.* at 363.

886. *State v. Cook*, 135 P.3d 1147, 1161–63 (Kan. 2006).

887. *State v. Duncan*, 242 P.3d 1271, 1276 (Kan. Ct. App. 2010); *see also* *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011).

888. *Real v. United States*, 326 F.2d 441, 441 (10th Cir. 1963); *State v. McCaslin*, 245 P.3d 1030, 1041 (Kan. 2011).

beyond a reasonable doubt.⁸⁸⁹ The prosecutor's discretion, however, is not limitless.⁸⁹⁰

a. Selective Prosecution

Prosecutors may choose who to prosecute, but they may not choose to enforce any law based on considerations such as race—this constitutes discriminatory prosecution.⁸⁹¹ To assert a discriminatory prosecution claim, a defendant must demonstrate that similarly situated individuals of another race were not prosecuted and that the prosecution intentionally and purposefully singled out the defendant based on arbitrary criteria.⁸⁹²

b. Prosecutorial Misconduct

“A prosecutor has the duty to refrain from making improper, leading, inflammatory, or irrelevant statements to the jury.”⁸⁹³ Claims of prosecutorial misconduct require a court to determine whether the prosecutor's statements were outside the wide latitude given to prosecutors in discussing evidence and whether the statements were “so gross and flagrant” that they prejudiced the jury and thus denied the defendant his or her right to a fair trial.⁸⁹⁴ In 2010, the Kansas Court of Appeals found that a prosecutor did not commit misconduct in the closing statement of a second-degree murder case by referring to the Virginia Tech massacre, Columbine, and the Kennedy Assassination.⁸⁹⁵ The court also noted that the prosecution improperly misstated its burden of proof to the jury during its closing statement,⁸⁹⁶ but it did not find the statements to cause a due process violation because they did not prejudice the defendant.⁸⁹⁷ The Kansas Supreme Court found in *State v. Huerta-Alvarez* that the prosecutor's improper comments in a closing argument about a witness's credibility did not constitute reversible error

889. *United States v. Bradshaw*, 580 F.3d 1129, 1135 (10th Cir. 2009).

890. *Comprehensive Health of Planned Parenthood of Kan. and Mid-Mo., Inc. v. Kline*, 197 P.3d 370, 395 (Kan. 2008).

891. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1263–64 (10th Cir. 2006).

892. *Id.* at 1264; *State v. Gant*, 201 P.3d 673, 679–80 (Kan. 2009).

893. *State v. Scott*, 183 P.3d 801, 821 (Kan. 2008).

894. *Id.*

895. *State v. McMillan*, 242 P.3d 203, 209–10 (Kan. Ct. App. 2010) (finding that “it is not misconduct for the prosecutor to use examples from common experience or history for explanation or contextual purposes”).

896. *Id.* at 211.

897. *Id.* at 212.

because “it is unlikely, in the context of the trial as a whole, that the outcome of the trial was directly attributable to those remarks.”⁸⁹⁸

2. Trial Judges

Trial judges have a duty to render decisions that are fair under the circumstances and guided by the rule of law.⁸⁹⁹ The appellate courts will only reverse when a trial judge’s “decision is legally erroneous, or when the facts are so lopsided against the option the district court has chosen.”⁹⁰⁰

a. Admissibility of Evidence

A trial judge’s error in the admission of evidence is not automatically reversible error.⁹⁰¹ The appellate court will first determine whether the evidence is relevant by determining if it has materiality and probative value.⁹⁰² Courts review whether evidence is probative under an abuse of discretion standard, while materiality is reviewed *de novo*.⁹⁰³ Probative evidence is also reviewed under the abuse of discretion standard to verify that its probative value is not outweighed by its prejudicial effect.⁹⁰⁴

b. Authority

i. Jury Instructions

The Kansas Supreme Court has held that a trial judge’s failure to properly instruct the jury on the elements of the crime charged could cause reversible error.⁹⁰⁵ An appellate court will reverse a verdict when

898. 243 P.3d 326, 337 (Kan. 2010); *see also* *State v. Magallanez*, 235 P.3d 460, 468 (Kan. 2010) (finding that “[t]he prosecutor’s statement that the measure of reasonable doubt is ‘an individual standard . . . a standard that when you believe he’s guilty you’ve passed beyond’” is improper in a closing statement, but not grounds for reversal).

899. *United States v. Hutchinson*, 573 F.3d 1011, 1024 (10th Cir. 2009).

900. *Id.* (citing *United States v. McComb*, 519 F.3d 1049, 1054 (10th Cir. 2007)).

901. *State v. Hart*, 242 P.3d 1230, 1247 (Kan. Ct. App. 2010) (citing *State v. Gunby*, 144 P.3d 647, 660 (Kan. 2006)).

902. *Id.* at 1246 (citing *State v. Houston*, 213 P.3d 728, 735–36 (Kan. 2009)).

903. *Id.* (citing *State v. Reid*, 186 P.3d 713, 722 (Kan. 2008)); *State v. Wells*, 221 P.3d 561, 567–68 (Kan. 2009)).

904. *Hart*, 242 P.3d at 1246–47.

905. *State v. Hunt*, 894 P.2d 178, 185 (Kan. 1995) (citing *State v. Castoreno*, 874 P.2d 1173, 1180 (Kan. 1994)).

it “reaches a firm conviction that, if the trial error had not occurred, there is a real possibility that the jury would have returned a different verdict.”⁹⁰⁶

Other jury instructions can also cause reversible error. Sometimes, courts will give an instruction to juries to pressure them to reach a verdict—such as warning them of the consequences of a hung jury or urging them to reach a verdict.⁹⁰⁷ The Kansas Supreme Court in *State v. Brown* explained that “if the trial court gives the ‘deadlocked jury’ instruction before the jury retires for deliberations, the instruction is not an error.”⁹⁰⁸ However, if there is a “real possibility that the jury would have returned a different verdict without the instruction,” then the reviewing court will overturn.⁹⁰⁹ If, however, a different instruction would not have changed the outcome of the verdict, the error does not make the verdict reversible.⁹¹⁰

ii. Duties

A judge has a duty to recuse himself in a case if his impartiality might reasonably be questioned.⁹¹¹ The Tenth Circuit has repeatedly held that adverse rulings do not necessarily give grounds for recusal.⁹¹² Instead, a defendant must show actual bias or the appearance of bias against him for reversal based on impartiality.⁹¹³

906. *Castoreno*, 874 P.2d at 1176 (quoting *State v. Novotny*, 851 P.2d 365, 367 (Kan. 1993)).

907. *State v. Brown*, 244 P.3d 267, 275–76 (Kan. 2011).

908. *Id.* at 276 (citation omitted) (citing *State v. Anthony*, 145 P.3d 1, 11–12 (Kan. 2006); *State v. Makthepharak*, 78 P.3d 412, 417 (Kan. 2003)).

909. *Brown*, 244 P.3d at 276 (citing *State v. Salts*, 200 P.3d 464, 466 (Kan. 2009)).

910. *See id.*; *see also State v. Magallanez*, 235 P.3d 460, 474 (Kan. 2010) (refusing to decide if the “language, standing alone, constitutes reversible error,” stating instead that “it will be a factor in our cumulative error discussion”); *State v. Hernandez*, 239 P.3d 103, 109 (Kan. Ct. App. 2010) (finding that there was “virtually no chance the jury was persuaded by one line in a one-and-a-half page instruction to render a different verdict.”).

911. *United States v. Erickson*, 561 F.3d 1150, 1166 (10th Cir. 2009) (quoting 28 U.S.C. § 455 (2006)).

912. *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010) (citing *United States v. Nickl*, 427 F.3d 1286, 1298 (10th Cir. 2005)).

913. *Id.* at 762 (quoting *Nickl*, 427 F.3d at 1298).

E. Potential Trial Actions

1. Motion for Acquittal

Under Kansas law, a defendant may make a motion for judgment of acquittal, at which time the trial judge will view all evidence in the light most favorable to the prosecution and determine whether a reasonable jury could find the defendant guilty beyond a reasonable doubt.⁹¹⁴ The court may also do so on its own accord.⁹¹⁵ If the court grants a judgment of acquittal, the state may not appeal.⁹¹⁶ Kansas courts have recognized the possibility of confusion between dismissal and acquittal at this stage and therefore have defined an acquittal as “‘a resolution, correct or not, of some or all of the factual elements of the offense charged.’”⁹¹⁷ When a motion to dismiss claims insufficient evidence, “the proper motion should be for a judgment of acquittal.”⁹¹⁸

2. Mistrial

Under section 22-3423 of the Kansas Statutes, the trial judge can declare a mistrial at any point in the trial.⁹¹⁹ The statutory reasons for declaring a mistrial are:

- (a) It is physically impossible to proceed with the trial in conformity with law; or
- (b) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law and the defendant requests or consents to the declaration of a mistrial; or
- (c) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution; or

914. KAN. STAT. ANN. § 22-3419 (2007); *United States v. Riley*, 292 F. App'x 717, 724 (10th Cir. 2008) (quoting *United States v. Harris*, 369 F.3d 1157, 1163 (10th Cir. 2004)).

915. § 22-3419.

916. *City of Wichita v. Bannon*, 209 P.3d 207, 211 (Kan. Ct. App. 2009) (quoting *State v. Ruden*, 774 P.2d 972, 975 (Kan. 1989)).

917. *State v. Whorton*, 589 P.2d 610, 612 (Kan. 1979) (quoting *United States v. Scott*, 437 U.S. 82, 97 (1978)).

918. *Id.* (citing *United States v. Ambers*, 416 F.2d 942 (5th Cir. 1969)).

919. § 22-3423(1).

2011]

CRIMINAL PROCEDURE SURVEY

1291

- (d) The jury is unable to agree upon a verdict; or
- (e) False statements of a juror on *voir dire* prevent a fair trial; or
- (f) The trial has been interrupted pending a determination of the defendant's competency to stand trial.⁹²⁰

VI. SENTENCING

A. *Federal Sentencing*

1. Criminal History

Federal sentencing takes into account both the seriousness of the offense committed and the criminal history of the defendant. The rationale behind considering criminal history is:

A defendant's record of past criminal conduct is directly relevant. . . . A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.⁹²¹

2. Guideline Departures

Similar to Kansas judges, federal judges have discretion to depart from the federal guidelines under certain circumstances.⁹²²

The [federal] sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."⁹²³

920. *Id.* § 22-3423.

921. U.S. SENTENCING GUIDELINES MANUAL § 4A1 introductory cmt. (2010).

922. *Id.* § 1A1.4(b).

923. *Id.* (quoting 18 U.S.C. § 3553(b) (2006)).

B. Kansas Sentencing

1. Sentence Determination

In Kansas, sentencing for felonies is determined by the severity of the crime and the defendant's criminal history.⁹²⁴

a. Crime Severity Levels

For sentencing in many crimes, Kansas uses a sentencing grid based on the history of criminal acts and the severity of the crime.⁹²⁵ The first element of the grid is the severity level of the crime, ranging from severity level I (highest sentences) to X (lowest sentences).⁹²⁶ Drug offenses have a separate sentencing scale and range from severity levels I to IV.⁹²⁷ The most serious crimes, such as capital murder, aggravated child trafficking, and terrorism, are off-grid felonies.⁹²⁸ When sentencing, the court,

having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, shall fix the lowest minimum term which, in the opinion of such court, is consistent with the public safety, the needs of the defendant, and the seriousness of the defendant's crime.⁹²⁹

In addition to renumbering the criminal code, the Kansas Legislature enacted several changes in severity levels in 2010 that will take effect July 1, 2011. For example, cultivation, distribution, or possession of certain drugs with intent to distribute for adults eighteen and older will be a drug severity level II felony if the drugs were distributed to minors or within 1000 feet of a school.⁹³⁰

924. § 21-4704(d) (2007 & Supp. 2010); Act effective July 1, 2011, ch. 136, 2010 Kan. Sess. Laws 1409, 1618.

925. See § 21-4704 (2007).

926. *Id.* § 21-4704(a) (2007 & Supp. 2010); 2010 Kan. Sess. Laws at 1609–10.

927. § 21-4705(a); 2010 Kan. Sess. Laws at 1615–17.

928. § 21-4706 (2007).

929. *Id.* § 21-4606(a); 2010 Kan. Sess. Laws at 1602.

930. 2010 Kan. Sess. Laws at 618.

b. Hard 40/50 Sentences

Under section 21-4643(a)(1) of the Kansas Statutes, several offenses in Kansas carry a minimum twenty-five years imprisonment—such as aggravated human trafficking of a victim under fourteen, aggravated indecent liberties with a child, aggravated criminal sodomy, promoting prostitution of a child under fourteen, and sexual exploitation of a child under fourteen.⁹³¹ If a defendant is convicted of a crime under section 21-4643(b)(1) of the Kansas Statutes and then subsequently convicted of another crime under the same section or a similar crime in another jurisdiction, the defendant must be sentenced to a mandatory minimum of forty years.⁹³² A sentence under section 21-4643 of the Kansas Statutes is not eligible for parole until the mandatory term is served, and a judge may not make a downward departure.⁹³³

Beginning July 1, 2011 the penalty for attempt, conspiracy, or criminal solicitation of a child under fourteen will become an off-grid offense, as will attempt, conspiracy, or criminal solicitation of terrorism and illegal use of weapons of mass destruction.⁹³⁴ The definition of “habitual sex offender” will also change to include any person convicted of two or more prior violent sex offenses, even if they occur on the same day.⁹³⁵

c. Criminal History

Criminal history is defined as “an offender’s criminal record of adult felony, class A misdemeanor, class B person misdemeanor or select misdemeanor convictions and comparable juvenile adjudications at the time such offender is sentenced.”⁹³⁶ The court then figures a “criminal history score,” which guides sentencing.⁹³⁷ Classification of prior convictions ranges from categories A to I.⁹³⁸ Category A is the most severe and occurs when the defendant has three or more previous felony

931. § 21-4643(a)(1)(A)–(G) (2007 & Supp. 2010); 2010 Kan. Sess. Laws at 1593–94.

932. § 21-4643(b)(1). However, if the defendant is classified as a habitual sex offender under section 21-4642 of the Kansas Statutes, then section 4643(b)(1) does not apply and the defendant is sentenced to life without parole. *Id.* §§ 21-4642(a), 21-4643(b)(2)(A); 2010 Kan. Sess. Laws at 1592, 1594.

933. § 21-4643(b)(2)(C).

934. H.B. 2435, 83d Leg., Reg. Sess., at 1–4 (Kan. 2010).

935. 2010 Kan. Sess. Laws at 1592–93.

936. *Id.* at 1608.

937. *Id.*

938. § 21-4704(a).

convictions as either an adult or juvenile.⁹³⁹ Category I is for those with no criminal history or one nonperson misdemeanor conviction.⁹⁴⁰ The table for drug offenses uses the same categories to classify prior convictions, but the actual sentences within the table are different from nondrug offenses.⁹⁴¹ The criminal history of a defendant must be established by a preponderance of the evidence by the prosecution.⁹⁴²

A court may not consider some types of prior criminal history when sentencing. Under Kansas law, diversion agreements are not admissible as part of the defendant's criminal history because the diversion agreement is not a plea bargain, is designed to avoid adjudication of criminal guilt, and successful completion of the diversion program results in a dismissal of charges against the defendant.⁹⁴³

Courts determine the defendant's criminal history through presentence investigation reports. Immediately after a defendant is convicted of a felony, the court is obligated to order a presentence investigation report.⁹⁴⁴ The report includes a summary of the crimes committed, classification of the crimes, victim report, listing of defendant's prior convictions, and classification of those prior crimes on the grid.⁹⁴⁵ The court then uses the presentence investigation report when making its sentence determination.⁹⁴⁶

2. Ability to Modify a Sentence

Kansas law gives the trial judge broad discretion to impose a sentence of “any term within the presumptive grid block, as determined by the conviction and the defendant's criminal history.”⁹⁴⁷ However, a presumptive sentence may be appealed if the trial judge misstates applicable law or the sentencing process violates the defendant's due process rights.⁹⁴⁸

939. *Id.*

940. *Id.*

941. *Id.*; § 21-4795(a).

942. 2010 Kan. Sess. Laws at 1627.

943. *State v. Chamberlain*, 120 P.3d 319, 323 (Kan. 2005).

944. 2010 Kan. Sess. Laws at 1625–26.

945. *Id.*

946. *Id.* at 1602 (listing the information contained in the presentence investigation report as factors courts consider in fixing the minimum term of imprisonment).

947. *State v. McCaslin*, 245 P.3d 1030, 1052 (Kan. 2011) (citing *State v. Johnson*, 190 P.3d 207 (Kan. 2008)).

948. *State v. Dillon*, 244 P.3d 680, 686 (Kan. Ct. App. 2010).

A trial judge may also impose a sentence that is within the sentencing guidelines, but outside the presumptive sentence for the crime committed—known as a departure sentence.⁹⁴⁹ The court must find “substantial and compelling reasons” to depart from the presumptive sentence.⁹⁵⁰ Section 21-4721(d) of the Kansas Statutes gives appellate courts the power to review departure sentences, but the review is limited to whether the sentencing court’s factual findings and reasons warrant such a departure.⁹⁵¹ Appellate courts may also not review any sentence that is within the presumptive sentence for the crime⁹⁵² or any sentence that is the result of a plea agreement between the state and defendant approved by the trial court.⁹⁵³

A trial court lacks jurisdiction to change or modify a defendant’s sentence once sentencing has been concluded, even if it specifically reserves the right to do so.⁹⁵⁴ The only exception is if there are “arithmetical or clerical errors” under section 21-4721 of the Kansas Statutes.⁹⁵⁵ But at any point, a court may also correct an illegal sentence.⁹⁵⁶ An illegal sentence is defined as “a sentence imposed by a court without jurisdiction, a sentence which does not conform to the statutory provision, either in character or the term of the punishment authorized, or a sentence which is ambiguous with regard to the time and manner in which it is to be served.”⁹⁵⁷

The Kansas Supreme Court recently found that clerical and arithmetic errors can also lead to an illegal sentence, even if the defendant stipulates to those errors. In *State v. LaBelle*, the defendant mistakenly stipulated to his criminal history and PSI score at sentencing, which resulted in his classification as a “persistent sex offender” and a longer prison sentence.⁹⁵⁸ The Court of Appeals ruled that LaBelle’s motion to change his sentence based on the error constituted modification and was thus barred by law; however, the Kansas Supreme Court reversed the decision and found that his motion to correct the

949. *State v. Ballard*, 218 P.3d 432, 436 (Kan. 2009).

950. *Id.*

951. KAN. STAT. ANN. § 21-4721(d) (2007).

952. *Id.* § 21-4721(c)(1).

953. *Id.* § 21-4721(c)(2).

954. *State v. Trostle*, 201 P.3d 724, 728 (Kan. Ct. App. 2009) (stating that a sentence is effective once it is “pronounced from the bench”).

955. *State v. Miller*, 926 P.2d 652, 659 (Kan. 1996); § 21-4721(i).

956. § 22-3504(1)-(2).

957. *State v. LaBelle*, 231 P.3d 1065, 1067 (Kan. 2010) (quoting *State v. Deal*, 186 P.3d 735 (2008)).

958. *Id.* at 1068.

clerical error constituted a challenge to an illegal sentence because LaBelle was disputing the “particular use of his prior crimes” when determining his sentence.⁹⁵⁹

3. Constitutional Challenges

Statutes are presumed to be constitutional, and courts will construe them in any reasonable way to maintain that presumption.⁹⁶⁰ However, if a statutory sentence “is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity” then the appellate courts may review its constitutionality.⁹⁶¹ Kansas courts use a three part test to determine if a statutory sentence is unconstitutional:

- (1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;
- (2) A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and
- (3) A comparison of the penalty with punishments in other jurisdictions for the same offense.⁹⁶²

4. Retroactivity of Statutes

Substantive statutes may not be applied retroactively, and thus the sentence may only be given under the law at the time the defendant was convicted.⁹⁶³ Procedural statutes can be applied retroactively if the legislature gives it a retroactive effect.⁹⁶⁴ In Kansas, “[a] statute is considered substantive when it contains a body of rules which define

959. *Id.*

960. *State v. Baber*, 240 P.3d 980, 982 (Kan. Ct. App. 2010) (citing *Martin v. Kan. Dep’t of Revenue*, 176 P.3d 938 (2008)).

961. *Id.* at 982–83 (Kan. Ct. App. 2010) (quoting *State v. Freeman*, 574 P.2d 950 (Kan. 1978)).

962. *Freeman*, 574 P.2d at 956.

963. *State v. Lazos*, 87 P.3d 345, 347 (Kan. Ct. App. 2004).

964. *See id.*

what acts are punishable and proscribes punishment for the commission of those acts . . . a statute is procedural when it provides for or regulates the steps to be taken in determining whether a person has violated a criminal statute.”⁹⁶⁵

VII. POST-TRIAL ISSUES

A. Appeals

To preserve most grounds for appeal, objections must be made contemporaneously at trial.⁹⁶⁶ “The contemporaneous objection rule requires each party to make a specific and timely objection at trial in order to preserve evidentiary issues for appeal” under section 60-404 of the Kansas Statutes.⁹⁶⁷ “The purpose of the rule is to avoid the use of tainted evidence and thereby avoid possible reversal and a new trial.”⁹⁶⁸

One exception to the general rule is for constitutional challenges. Courts may consider constitutional issues for the first time on appeal under certain circumstances:

- (1) The newly asserted claim involves only a question of law arising on provided or admitted facts and is determinative of the case;
- (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or
- (3) the district court is right for the wrong reason.⁹⁶⁹

But the Kansas Supreme Court, in *State v. Dukes*, recently clarified that it will still not review all fundamental rights without the defendant making a timely and specific objection.⁹⁷⁰ In *Dukes*, the court made it clear that a defendant always has the burden to raise a contemporaneous confrontation clause objection at trial to preserve it for appeal.⁹⁷¹

965. *Id.* at 347 (quoting *State v. Brooker*, 4 P.3d 1180 (Kan. Ct. App. 2000)).

966. *State v. Brown*, 244 P.3d 267, 271 (Kan. 2011) (“As a general rule, a party must make a timely and specific objection to the admission of evidence in order to preserve the issue for appeal.”) (quoting *State v. Bryant*, 179 P.3d 1122 (Kan. 2008)).

967. *State v. Dukes*, 231 P.3d 558, 561 (Kan. 2010).

968. *Id.*

969. *Id.* (citing *State v. Spotts*, 206 P.3d 510 (Kan. 2009)).

970. *Id.* (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) and recognizing that it is consistent with Kansas law).

971. *Id.*

Allowing all constitutional rights to be raised on appeal simply because they are “fundamental” would defeat the entire purpose of the rules.⁹⁷²

Still, even if defendants properly raise an objection to errors at trial, some errors on their own may not warrant reversal.⁹⁷³ However, when there are cumulative errors in a trial, the court evaluates them under the totality of the circumstances to determine prejudice.⁹⁷⁴ “Cumulative error requires reversal when the totality of the circumstances substantially prejudiced the defendant and denied the defendant a fair trial,”⁹⁷⁵ but if the evidence against the defendant is overwhelming, the court is not required to reverse the conviction.⁹⁷⁶ In *State v. Kemble*, the Kansas Supreme Court invalidated a conviction based on two possible harmless errors.⁹⁷⁷ The court found that there were instances that prosecutorial and judicial misconduct that considered separately were possible harmless errors.⁹⁷⁸ But “when the two errors [were] viewed together, the cumulative effect clearly denied Kemble his right to a fair trial” despite the fact that the evidence against the defendant was overwhelming.⁹⁷⁹ Similarly in *State v. Martinez*, the court found that two harmless errors—a video admission and a prosecutor’s statement during a closing argument—did not constitute cumulative error because they were unrelated and did not deny Martinez the right to a fair trial.⁹⁸⁰

B. *New Trial*

Defendants may make a motion for a new trial under section 22-3501 of the Kansas Statutes, and the court may grant the motion “if required in the interest of justice.”⁹⁸¹ Motions based on newly discovered evidence must be made within two years of final judgment,⁹⁸² or within fourteen

972. *Id.*

973. *State v. Ackward*, 128 P.3d 382, 397 (Kan. 2006).

974. *Id.* at 400.

975. *State v. McCaslin*, 245 P.3d 1030, 1052 (Kan. 2011) (citing *State v. Sharp*, 210 P.3d 590 (Kan. 2009)).

976. *Id.*; *State v. Edwards*, 243 P.3d 683, 697 (Kan. 2010).

977. 238 P.3d 251, 262–63 (Kan. 2010).

978. *Id.* at 263.

979. *Id.*

980. 236 P.3d 481, 498–99 (Kan. 2010).

981. KAN. STAT. ANN. § 22-3501(1) (Supp. 2010).

982. *Id.*

days for all other reasons.⁹⁸³ The court is then required to rule on the motion within forty-five days.⁹⁸⁴

C. Sufficiency of the Evidence

A defendant may challenge the sufficiency of the evidence, but the court will not overturn if, “after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.”⁹⁸⁵

D. Habeas Corpus Relief

To vacate or modify a sentence after final disposition and appeal, a convict must file a motion for habeas corpus relief within one year of the final order from direct appeal or the denial of a petition for writ of certiorari.⁹⁸⁶ Grounds for challenging a sentence using habeas corpus relief include

[c]laiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.⁹⁸⁷

The convict may also file a state habeas corpus petition under subsection 60-1507(d) as an appeal from final judgment.⁹⁸⁸ But this remedy is exclusive, meaning that the court will not hear the motion “if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced said applicant, or that such court has denied said applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of said applicant’s detention.”⁹⁸⁹ The Court of Appeals has held that the one year time limit

983. *Id.*

984. *Id.* § 22-3501(2).

985. *State v. Penn*, 23 P.3d 889, 890–91 (Kan. 2001) (citing *State v. Mincey*, 963 P.2d 403 (1998)).

986. § 60-1507(f).

987. *Id.* § 60-1507(a).

988. *Id.* § 60-1507(d).

989. *Id.* § 60-1507(e).

1300

KANSAS LAW REVIEW

[Vol. 59

for habeas petitions begins when the availability of direct appeal expires.⁹⁹⁰

990. *State v. Baker*, 219 P.3d 827, 827–28 (Kan. Ct. App. 2009).