

## Kansas Law Review Criminal Procedure Survey\*

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## I. INTRODUCTION

This Survey is a practitioner's guide to changes in Kansas criminal procedure law over roughly the last year. The survey examines the present state of Kansas criminal procedure law by discussing changes in case law and statutes. Cases from the United States Supreme Court, the Tenth Circuit Court of Appeals, the Kansas Supreme Court, and the Kansas Court of Appeals are examined, as are the Kansas Statutes. This Survey should provide a useful resource to practicing attorneys and judges by clearly and concisely tracking changes in Kansas criminal procedure law and presenting the current status of that law.

## II. SEARCHES

### A. *Fourth Amendment Issues*

The Fourth Amendment of the Constitution—through its Reasonableness Clause and Warrant Clause—governs searches of persons and property by government officials.<sup>1</sup> With respect to searches, the applicable language of the Fourth Amendment reads:

The 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 particularly describing the place to be searched, and the persons or things to be seized.<sup>2</sup>

The Supreme Court has found that “warrantless searches are generally unreasonable.”<sup>3</sup> A court must determine reasonableness by “examining [objectively] the totality of the circumstances.”<sup>4</sup> This determination turns on a balance of the individual's right to be free from a warrantless search against the State's interest in performing such a search.<sup>5</sup>

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

2. *Id.*

3. *Common v. Mun. Court*, 387 U.S. 523, 528–29 (1967).

4. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 250, 211 (1991)) (internal quotation marks omitted).

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

Section 15 of the Kansas Constitution's Bill of Rights contains similar language to the Fourth Amendment.<sup>6</sup> The Kansas Supreme Court has held that Kansas courts should interpret section 15 in lock-step with the United States Supreme Court's interpretation of the Fourth Amendment.<sup>7</sup> Thus, Kansas does not provide any more protection to its residents than that afforded by the United States Constitution.

### 1. Scope of the Fourth Amendment

The Fourth Amendment protects only against governmental action.<sup>8</sup> Thus, the Amendment is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'"<sup>9</sup> Nevertheless, "if the government coerces, dominates, or directs the actions of a private person, a resultant search and seizure may implicate the guarantees of the Fourth Amendment."<sup>10</sup> In analyzing whether a private individual violates the Fourth Amendment, courts must consider the facts and circumstances of the case.<sup>11</sup> To determine whether a search by governmental officials constitutes government action, Kansas applies a two-step inquiry: "(1) whether the government knew of and 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."<sup>12</sup>

In determining whether a search has occurred, the United States Supreme Court adopted a two-part test that focuses on reasonableness.<sup>13</sup> The first inquiry asks whether the individual, by his conduct, exhibited an actual expectation of privacy.<sup>14</sup> The second question ascertains whether the individual's expectation of privacy is one that society

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6. Compare U.S. CONST. amend. IV with KAN. CONST. Bill of Rights § 15.

7. See *State v. Morris*, 72 P.3d 570, 576 (Kan. 2003) (holding that section 15 "provides protections identical to that provided under the Fourth Amendment to the United States Constitution" (citing *State v. Johnson*, 856 P.2d 134 (1993))).

8. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

9. *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

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

11. *Id.* (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)).

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

13. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (analyzing the reasonableness clause of the Fourth Amendment and creating the two-part test).

14. *Id.*

recognizes as reasonable.<sup>15</sup> A court determines this objective reasonableness by looking at the totality of the circumstances.<sup>16</sup> Courts must also balance the interests of the State against an individual's interest in being secure from unwarranted governmental intrusion.<sup>17</sup>

## 2. Requirements for a Search Warrant

Warrantless searches are per se unreasonable.<sup>18</sup> The Fourth Amendment articulates three textual requirements for a valid warrant. A warrant must (1) rest upon probable cause, (2) arise after an oath or affirmation, and (3) describe with particularity the place to be searched.<sup>19</sup> Probable cause exists when “the facts and circumstances within the knowledge of the officer making the arrest or search, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”<sup>20</sup> More simply, “[p]robable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime.”<sup>21</sup> A warrant satisfies the oath or affirmation requirement when statements of a person under oath support the search warrant.<sup>22</sup> A search warrant contains sufficient particularity when it “describe[s] the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings.”<sup>23</sup>

Once these requirements are met, the warrant is presumed valid.<sup>24</sup> Nevertheless, a court may invalidate a warrant for a number of reasons:

- (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

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15. *Id.*

16. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Smith*, 184 P.3d 890, 895 (Kan. 2008).

17. *Terry*, 392 U.S. at 20–21.

18. *State v. Platten*, 594 P.2d 201, 205 (Kan. 1979).

19. U.S. CONST. amend. IV.

20. *State v. Fewell*, 184 P.3d 903, 909 (Kan. 2008) (quoting *State v. Hays*, 557 P.2d 1275, 1278 (Kan. 1976)) (internal quotation marks omitted).

21. *Id.* at 910 (alteration in original) (quoting *State v. Aikins*, 932 P.2d 408, 420 (Kan. 1997)) (internal quotation marks omitted).

22. *See State v. Francis*, 145 P.3d 48, 59 (Kan. 2006).

23. *Crowther v. State*, 249 P.3d 1214, 1222 (Kan. Ct. App. 2011) (citing *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999)).

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

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.<sup>25</sup>

In 2011, the Kansas Court of Appeals heard a case in which the defendant argued that the trial court should have invalidated the search warrant used because the affidavit contained facts provided by a known, dishonest person.<sup>26</sup> According to the defendant, the magistrate judge relied on facts provided by this person in granting the search warrant.<sup>27</sup> The court of appeals, however, disagreed because in its view, the magistrate had notice that a known, dishonest person supplied the facts contained in the affidavit.<sup>28</sup> In addition, even without the information provided by the dishonest person, other facts supported probable cause to justify the warrant.<sup>29</sup>

### 3. Types of Search Warrants

There are generally three types of search warrants. First, the standard search warrant requires officers to “knock and announce” their presence.<sup>30</sup> The standard search warrant finds its roots in common law, where law enforcement officers were required to knock and announce their presence before entering a residence.<sup>31</sup> Second, the no-knock search warrant allows officers to bypass this general rule in certain circumstances.<sup>32</sup> “[T]o justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”<sup>33</sup>

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

26. *State v. Hamon*, 262 P.3d 1061, 1066 (Kan. Ct. App. 2011).

27. *Id.*

28. *Id.* at 1066–67.

29. *Id.* at 1067.

30. *See State v. Shively*, 999 P.2d 259, 262–63 (Kan. 2000) (discussing the common law requirement of law enforcement officers announcing their presence before attempting to enter).

31. *Id.*

32. *Id.*

33. *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 386 (1997)).

The last type of search warrant—the anticipatory warrant<sup>34</sup>—requires heightened particularity.<sup>35</sup> Most commonly used in contraband cases, an anticipatory search warrant “only becomes effective upon the happening of a future event—often called the ‘triggering event.’”<sup>36</sup> “Anticipatory warrants are generally permissible under the Fourth Amendment, but care must be taken to describe the triggering event with sufficient specificity to ensure that any judgment call regarding probable cause is made by a neutral magistrate and not by the enforcing officer.”<sup>37</sup> In most cases, the triggering event involves an undercover law enforcement officer posing as a drug dealer and delivering contraband to buyers.<sup>38</sup>

#### 4. Exceptions to the Warrant Requirement

Because warrantless searches are “per se unreasonable” under the Fourth Amendment, governmental officials wishing to conduct a warrantless search must meet an exception to the warrant requirement.<sup>39</sup> The following is a list of exceptions recognized by both the United States Supreme Court and the Kansas Supreme Court.

##### a. Consent

Governmental officials who receive proper consent to search may do so without a warrant.<sup>40</sup> The State has the burden of proving that an individual gave proper consent.<sup>41</sup> The Kansas Supreme Court stated the general rule that “[f]or a consent to search to be valid, two conditions must be met: (1) [t]here must be clear and positive testimony that consent was unequivocal, specific, and freely given and (2) the consent must have been given without duress or coercion, express or implied.”<sup>42</sup>

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34. *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1326 (10th Cir. 2003) (defining an “anticipatory warrant” (citing *United States v. Hugoboom*, 112 F.3d 1081, 1085 (10th Cir. 1997))).

35. *Id.* (discussing the care that is needed to identify the “trigger” to justify an anticipatory warrant).

36. *Id.* (citing *Hugoboom*, 112 F.3d at 1085).

37. *Id.*

38. *Id.* (citing *Hugoboom*, 112 F.3d at 1085).

39. *State v. Platten*, 594 P.2d 201, 205 (Kan. 1979).

40. *See State v. Thompson*, 166 P.3d 1015, 1025–26 (Kan. 2007) (discussing the consent exception to the warrant requirement).

41. *Id.*

42. *Id.* (citing *United States v. Guerrero*, 472 F.3d 784, 789–90 (10th Cir. 2007); *State v. Moore*, 154 P.3d 1, 13 (Kan. 2007)).

Courts must evaluate the totality of the circumstances in each case to determine whether the government official obtained voluntary consent.<sup>43</sup> The Kansas Supreme Court has identified several relevant factors to assess the voluntariness of consent, including (1) the length and nature of any interrogation, (2) whether the person has been advised of his right to refuse to consent, (3) whether the officer told the person that he was free to leave, (4) whether the officer's behavior was threatening or coercive, and (5) the number of officers present.<sup>44</sup>

In *State v. Hogan*, the Kansas Court of Appeals focused much of its analysis on whether the defendant could reasonably believe he was "free to go."<sup>45</sup> Additionally, the court criticized two law enforcement officers' behavior by holding that the behavior was threatening and coercive.<sup>46</sup> Officers stopped the defendant's vehicle because the brake and tail lights did not function properly and the defendant failed to signal a lane change.<sup>47</sup> Officers noticed a baseball bat in the backseat of the defendant's vehicle and asked the defendant about the bat.<sup>48</sup> According to the officers, the defendant began to sweat profusely, act nervous, and stumble over his words.<sup>49</sup> This led one of the officers to believe that the defendant may have had other weapons in the vehicle.<sup>50</sup>

Nevertheless, the officers told the defendant that he was free to go after issuing him a citation.<sup>51</sup> As one officer walked back to his patrol car, he turned towards the defendant's car and asked the defendant whether he could search the vehicle for weapons.<sup>52</sup> The defendant denied having weapons.<sup>53</sup> The officer asked a second time, and the defendant walked to his trunk, opened it, and again denied having weapons.<sup>54</sup> After being asked a third time whether the officer could search his vehicle, the defendant replied, "Yeah go ahead."<sup>55</sup> Instead of

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43. *Id.*

44. *See, e.g.*, *State v. Ransom*, 212 P.3d 203, 209–13 (Kan. 2009) (applying the factors); *Thompson*, 166 P.3d at 1025–46 (applying the factors).

45. 252 P.3d 627, 633–37 (Kan. Ct. App. 2011).

46. *Id.*

47. *Id.* at 630.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (internal quotation marks omitted).

searching the trunk, the officer began searching the backseat of the vehicle.<sup>56</sup>

While searching the backseat, the officer found a black bag.<sup>57</sup> The defendant protested that the officer had accessed his “personal stuff.”<sup>58</sup> The officer sought confirmation of the consent, and the defendant provided it.<sup>59</sup> After searching the black bag, the officer found a scale with residue, small clear plastic baggies, and other drug paraphernalia.<sup>60</sup> The officers then arrested the defendant.<sup>61</sup> A search of the defendant produced two bags of crystal methamphetamine.<sup>62</sup> The defendant was tried and convicted for possession of methamphetamine and no drug stamp.<sup>63</sup>

The Kansas Court of Appeals reversed the trial court and held that the trial court should have suppressed the evidence used to convict the defendant.<sup>64</sup> In reaching its conclusion, the court determined that although the defendant was told that he was free to leave, the officers’ returning to his car and reinitiating contact created a second encounter.<sup>65</sup> The court focused its attention on the second encounter and held that in the totality of the circumstances, a reasonable person would not feel free to leave.<sup>66</sup> The police held the defendant at the rear of the vehicle and overrode the defendant’s objection to the search of his “personal stuff” by reminding him of his giving general consent to search.<sup>67</sup> The court found that this “would lead a reasonable person to believe that once consent was generally given, there could be no turning back.”<sup>68</sup>

Moreover, the court of appeals held that the officers’ behavior amounted to intimidation because of the implication they gave that the defendant could not revoke his consent.<sup>69</sup> As a result, the defendant did

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 630–31.

61. *Id.* at 631.

62. *Id.*

63. *Id.* 631–32.

64. *Id.* at 636–37.

65. *Id.* at 635.

66. *Id.* at 635–36.

67. *Id.* at 635 (internal quotation marks omitted).

68. *Id.*

69. *Id.*

not give voluntary consent.<sup>70</sup> The *Hogan* decision not only reaffirms the importance of voluntariness with respect to consent, but it also provides a case upon which defense practitioners may rely if they feel that law enforcement officers unduly coerced or intimidated their client.

To consent to a search, individuals must have the proper authority to consent. Kansas recognizes three types of authority to consent: actual authority, common authority, and apparent authority.<sup>71</sup> The owner or joint owner of property has actual authority to consent to a search.<sup>72</sup> Common authority arises from the

mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.<sup>73</sup>

Apparent authority exists “when the facts available to the officer would warrant a person of reasonable caution to believe that the consenting party had authority over the premises to be searched.”<sup>74</sup> This rule, however, “will save a warrantless search only where officers made a mistake of fact, not where they made a mistake of law.”<sup>75</sup>

A recent Kansas Court of Appeals case provides an example of authority to consent. In *State v. Jackson*, the court of appeals held that police exceeded the scope of a search warrant when they searched the purse of a female guest in a home without obtaining her consent.<sup>76</sup>

Consent to search motor vehicles during traffic stops gives rise to many disputes because drivers often provide some form of consent. Many issues stem from claims that police exceeded the scope of consent, which limits the scope of the search.<sup>77</sup> The Tenth Circuit, in *United*

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70. *Id.* at 636.

71. *See State v. Porting*, 130 P.3d 1173, 1176–79 (Kan. 2006) (discussing the different types of authority relative to consent).

72. *See United States v. Matlock*, 415 U.S. 164, 170–71 (1974) (discussing the parameters of actual authority).

73. *Id.* at 171 n.7.

74. *Porting*, 130 P.3d at 1178–79 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 177 (1990)).

75. *Id.* at 1179 (citing *United States v. Salinas-Cana*, 959 F.2d 861, 865–66 (10th Cir. 1992)).

76. *See State v. Jackson*, 260 P.3d 1240, 1246–47 (Kan. Ct. App. 2011) (finding that police had constructive notice that several purses in a man’s home were outside of the scope of the search warrant when the purses were present during a social gathering attended by several women).

77. *United States v. Lyons*, 510 F.3d 1225, 1239 (10th Cir. 2007) (citing *United States v. Osage*, 235 F.3d 518, 520 (10th Cir. 2000)).

*States v. Lyons*, stated that “[i]n determining the scope of a defendant’s consent, [the question is] what a reasonable person would have understood by the exchange between the defendant and police officer.”<sup>78</sup> Courts look at the totality of the circumstances, in a light most favorable to the government, to determine whether the search remained within the bounds of consent.<sup>79</sup> The court noted that “where a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.”<sup>80</sup> Thus, to limit the search area of a vehicle, one must make such limitations clear and unequivocal to the law enforcement officers.

b. Probable Cause Plus Exigent Circumstances

The existence of probable cause plus exigent circumstances provides another exception to the warrant requirement.<sup>81</sup> The Kansas Court of Appeals stated that “[p]robable cause exists when the facts and circumstances within a law enforcement officer’s knowledge and about which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed.”<sup>82</sup> Again, the court looks at the totality of the circumstances, encompassing “all of the information in the officer’s possession, including fair inferences therefrom, and any other relevant facts.”<sup>83</sup> The standard of proof for probable cause is less than beyond a reasonable doubt, but it is “more than mere suspicion.”<sup>84</sup>

To determine exigency, Kansas courts apply a nonexclusive list of factors to the specific facts of the case, including:

- (1) the gravity or violent nature of the offense to be charged;
- (2) whether the suspect is reasonably believed to be armed;
- (3) a clear showing of probable cause;
- (4) strong reasons to believe the suspect is

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78. *Id.* (second alteration in original) (quoting *United States v. Patten*, 183 F.3d 1190, 1194 (10th Cir. 1999)) (internal quotation marks omitted).

79. *Id.* (quoting *United States v. West*, 219 F.3d 1171, 1177 (10th Cir. 2000)).

80. *Id.* (citing *West*, 219 F.3d at 1177).

81. *State v. Stevenson*, 262 P.3d 689, 691 (Kan. Ct. App. 2011) (citing *State v. Fitzgerald*, 192 P.3d 171, 174 (Kan. 2008), *abrogated by State v. Sanchez-Loredo*, No. 101,912, 2012 WL 975421 (Kan. Mar. 23, 2012)).

82. *Id.* at 692 (quoting *Fitzgerald*, 192 P.3d at 174) (internal quotation marks omitted).

83. *Id.* (citing *Fitzgerald*, 192 P.3d at 171).

84. *State v. Boyle*, 486 P.2d 849, 853 (Kan. 1971).

in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; (6) the peaceful circumstances of the entry; and (7) the possible loss or destruction of evidence.<sup>85</sup>

One exigency recognized in Kansas is the hot pursuit doctrine, which is triggered when law enforcement officers pursue a suspect from a public place into a private dwelling.<sup>86</sup> Under these circumstances, the officers do not need a warrant to enter the dwelling, even when a third party owns the property.<sup>87</sup>

Kansas also recognizes the emergency aid doctrine as an exception to the warrant requirement.<sup>88</sup> Previous cases have combined this doctrine with exigent circumstances; however, the emergency aid doctrine is separate and distinct from exigent circumstances.<sup>89</sup> The Kansas Court of Appeals explained that:

The exigent circumstances exception is triggered when the police, with probable cause but no warrant, enter a dwelling in the reasonable belief that the delay necessary to obtain a warrant threatens the destruction of evidence . . . or when they have a reasonable belief that a crime is in progress or has just been committed in a dwelling and the delay attendant to obtaining a warrant endangers the safety or life of a person therein. . . .

Conversely, the emergency aid doctrine is triggered when the police enter a dwelling in the reasonable, good-faith belief that there is someone within in need of immediate aid or assistance. In cases in which this doctrine applies there is no probable cause which would justify issuance of a search warrant, . . . and the police are not entering to arrest, search, or gather evidence.<sup>90</sup>

#### c. Automobiles and Vehicles

The automobile exception to the warrant requirement allows officers to conduct a warrantless search of an automobile when they have probable cause to believe that the automobile contains evidence of a

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85. *State v. Mell*, 182 P.3d 1, 9 (Kan. Ct. App. 2008) (quoting *State v. Platten*, 594 P.2d 201, 206 (Kan. 1979)).

86. *State v. Thomas*, 124 P.3d 48, 53 (Kan. 2005) (citing *United States v. Santurn*, 427 U.S. 38, 43 (1976)).

87. *Id.*

88. *State v. Geraghty*, 163 P.3d 350, 357 (Kan. Ct. App. 2007).

89. *Id.* (referencing the trial court's decision that combined the two warrant exceptions).

90. *Id.* (quoting *State v. Jones*, 947 P.2d 1030, 1037 (Kan. Ct. App. 1997)) (internal quotation marks omitted).

crime.<sup>91</sup> Kansas courts consider the automobile exception an exigency because of the mobility of the vehicle.<sup>92</sup> An officer has probable cause to search a vehicle if “under the ‘totality of the circumstances’ there is a ‘fair probability’ that the car contains contraband or evidence.”<sup>93</sup>

The United States Supreme Court has held that when such probable cause exists, officers may lawfully search any area of the vehicle that may contain evidence of the suspected illegal activity without first obtaining a search warrant.<sup>94</sup> This rule permits police to search every part of the vehicle that could conceivably contain contraband or evidence that is the object of the search to the same extent that “a magistrate could legitimately authorize by warrant.”<sup>95</sup>

Interestingly, both the United States Supreme Court and the Kansas Supreme Court have held that a canine sniff does not constitute a search under the Fourth Amendment, so long as the canine sniff is of the exterior of the vehicle.<sup>96</sup> If the canine smells contraband, this alone justifies probable cause to search the vehicle.<sup>97</sup> The State has the burden of establishing that the canine is “trained and certified to detect narcotics.”<sup>98</sup>

d. Other Circumstances that Allow Limited Searches Without a Warrant or Probable Cause

i. *Terry* Frisks

Police officers may perform limited searches of persons, or “*Terry* frisks,” for weapons when they have reasonable suspicion that they are “dealing with an armed and dangerous individual, regardless of whether

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91. *State v. Conn*, 99 P.3d 1108, 1114 (Kan. 2004) (citing *State v. Boyd*, 64 P.3d 419, 422 (Kan. 2003)).

92. *Id.* (citing *State v. Tucker*, 878 P.2d 855, 860 (Kan. Ct. App. 1994)).

93. *United States v. Nielsen*, 9 F.3d 1487, 1489–90 (10th Cir. 1993) (emphasis omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

94. *United States v. Ross*, 456 U.S. 798, 824 (1982).

95. *Id.* at 825.

96. *United States v. Place*, 462 U.S. 696, 707 (1983); *State v. Barker*, 850 P.2d 885, 891 (Kan. 1993).

97. *United States v. Roberts*, 572 F. Supp. 2d 1240, 1249 (D. Kan. 2008) (citing *United States v. Rosborough*, 366 F.3d 1145, 1152 (10th Cir. 2004)).

98. *United States v. Ruiz*, 664 F.3d 833, 840 (10th Cir. 2012) (quoting *United States v. Kennedy*, 131 F.3d 1372, 1376–77 (10th Cir. 1997)).

[there is] probable cause to arrest the individual for a crime.”<sup>99</sup> These frisks require neither a warrant nor probable cause.<sup>100</sup> The Kansas legislature has essentially codified *Terry* frisks with section 22-2402 of the Kansas Statutes, which authorizes such searches based on reasonable suspicion.<sup>101</sup> If a police officer does not have reasonable suspicion and a reasonable person would not feel free to leave an encounter with a police officer, however, the Kansas Supreme Court has recognized that such a stop is an unreasonable seizure under the Fourth Amendment.<sup>102</sup> Further, the officer must limit the scope of a *Terry* frisk to the circumstances justifying reasonable suspicion.<sup>103</sup>

In *State v. Smith*, the defendant moved “to suppress cocaine found in his shoe during a warrantless, nonconsensual search conducted after a valid traffic stop.”<sup>104</sup> Officers initiated the valid traffic stop after they noticed that the defendant’s car displayed improper registration tags.<sup>105</sup> One of the officers testified that he could smell burnt marijuana as he approached the car and that the defendant also smelled of raw marijuana when the officer asked him to exit the car.<sup>106</sup> After the defendant exited the car, a different officer frisked him and found \$370.<sup>107</sup> An officer placed the defendant in handcuffs, escorted him behind a patrol car, and asked him to remove his shoes.<sup>108</sup> When the defendant refused to remove his shoes, an officer removed his shoes, and three baggies of cocaine fell out of one shoe.<sup>109</sup> The defendant admitted ownership of the cocaine when the baggies fell out.<sup>110</sup>

The Kansas Court of Appeals held that the trial court should have

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99. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

100. *Id.* at 30–31.

101. The statute authorizes a police officer to stop a person when the “officer reasonably suspects [the person] is committing, has committed[,] or is about to commit a crime and may demand of the name, address of such suspect[,] and an explanation of such suspect’s actions.” KAN. STAT. ANN. § 22-2402(1) (2007). Further, the statute provides that an officer may “frisk such person” if the officer reasonably believes the frisk is necessary for officer’s safety. *Id.* § 22-2402(2).

102. *See State v. Thomas*, 246 P.3d 678, 686–88 (Kan. 2011).

103. *Terry*, 392 U.S. at 19 (citing *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

104. *State v. Smith*, No. 103,736, 2011 WL 4563077, at \*1 (Kan. Ct. App. 2011) (per curiam).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

suppressed the cocaine.<sup>111</sup> The court concluded that under the totality of circumstances, the defendant's nervousness, the odor of marijuana, and the discovery of \$370 did not support probable cause for the more intrusive search of the defendant's shoe.<sup>112</sup> While reasonable suspicion supported both the traffic stop and the initial frisk, the court held that the more stringent probable cause standard did not support the search of the shoe.<sup>113</sup>

The result in *Smith* adheres to the standards set forth in *Terry*. The *Terry* Court closely tethered initial frisks to the rationale of officer safety and preserved probable cause for other officer-citizen interactions.<sup>114</sup> In *Smith*, the defendant posed little threat after the officer handcuffed him, and it is implausible that he could have retrieved a weapon from his shoe while handcuffed. *Smith* is thus consistent with the limitation that *Terry* searches depend on the circumstances that initiated the search.<sup>115</sup> Put differently, *Smith* exemplifies the slippery relationship between reasonable suspicion and probable cause. The first standard may justify some initial searching for officer safety, but the second, more demanding standard will come into play once a search becomes more intrusive.

## ii. Plain View and Plain Feel

Under the "plain view" doctrine, police officers may seize incriminating items without a warrant if there is no initial Fourth Amendment violation, the item is in plain view, the item's "incriminating character [is] 'immediately apparent,'" and the officer has "a lawful right of access to the object itself."<sup>116</sup> The plain view doctrine allows these seizures even if the discovery is purposeful.<sup>117</sup> The plain view doctrine does not extend to all items in plain view and is limited by the original and legal justifications for a search.<sup>118</sup> "The extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may

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111. *Id.* at \*5.

112. *Id.* at \*4.

113. *Id.*

114. *Terry v. Ohio*, 329 U.S. 1, 26 (1968).

115. *Id.* at 19.

116. *Horton v. California*, 496 U.S. 128, 136-37 (1990) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)).

117. *Id.* at 139-40.

118. *Id.* at 136 (citing *Coolidge*, 403 U.S. at 466).

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not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.”<sup>119</sup>

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119. *Id.* (quoting *Coolidge*, 403 U.S. at 466) (internal quotation marks omitted).

The “plain feel” doctrine parallels the plain view doctrine and allows seizures of an item “whose contour or mass makes its identity immediately apparent.”<sup>120</sup> In *State v. Wonders*, the Kansas Supreme Court recognized the plain feel exception.<sup>121</sup>

### iii. Protective Sweeps of Premises

In *Maryland v. Buie*, the Supreme Court held that a police officer may perform a “limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>122</sup> The Court limited the *Buie* holding by characterizing a protective sweep as “a cursory inspection of those spaces where a person may be found.”<sup>123</sup>

### iv. Search Incident to a Lawful Arrest

*Chimel v. California* authorizes warrantless searches incident to a lawful arrest, but it limits such searches to the “area ‘within [the suspect’s] immediate control.’”<sup>124</sup>

When an occupant of a vehicle is arrested, the police may search the car on two grounds. First, the police may conduct a *Chimel*-style search of the vehicle if the arrestee is unsecured and within reaching distance of the vehicle.<sup>125</sup> Because police will ordinarily be able to restrain an arrestee from accessing the vehicle, searches of cars authorized under *Chimel* are rare.<sup>126</sup> Second, police may search a car if they have a reasonable basis to believe that evidence “relevant to the crime of [the] arrest might be found in the vehicle.”<sup>127</sup>

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120. *Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993).

121. 952 P.2d 1351, 1359 (Kan. 1998).

122. 494 U.S. 325, 337 (1990).

123. *Id.* at 335.

124. 395 U.S. 752, 763 (1969).

125. *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

126. *See id.* at 343 n.4.

127. *Id.* at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)) (internal quotation marks omitted).

## v. Inventory Searches

The Fourth Amendment prohibits unreasonable searches of personal “effects.”<sup>128</sup> The context of a search of one’s effects is crucial, however, because another major exception to the general warrant requirement for searches is an inventory search conducted after a lawful arrest.<sup>129</sup> Such searches, the Supreme Court has held, have different justifications from pre-arrest searches and, thus, do not require warrants or probable cause.<sup>130</sup>

*South Dakota v. Opperman* extended the inventory exception to impounded automobiles.<sup>131</sup> There are three justifications for inventory searches of vehicles, which are the same justifications for other inventory searches: “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 the police from potential danger.”<sup>132</sup>

Kansas courts have combined the standards for inventory searches with inevitable discovery doctrine.<sup>133</sup> If the police would have properly and inevitably discovered illegally seized evidence during a proper inventory search, then the trial court should not suppress the evidence.<sup>134</sup> Still, inventory searches may not be completely arbitrary, and an inventory search will not cure all defective searches; the officer must conduct the inventory search pursuant to standardized procedures.<sup>135</sup> Thus, where the State does not demonstrate through a preponderance of the evidence that the officer would have inevitably discovered the illegally seized evidence pursuant to standardized inventory procedures, the Kansas Supreme Court has held that the exclusionary rule still applies.<sup>136</sup>

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128. U.S. CONST. amend. IV.

129. *See Illinois v. Lafayette*, 462 U.S. 640, 648 (1983).

130. *Id.* at 643.

131. 428 U.S. 364, 375–76 (1976).

132. *United States v. Martinez*, 512 F.3d 1268, 1274 (10th Cir. 2008) (quoting *United States v. Tueller*, 349 F.3d 1239, 1243 (10th Cir. 2003)) (internal quotation marks omitted).

133. *See State v. Waddell*, 784 P.2d 381, 386 (Kan. Ct. App. 1989). For discussion of inevitable discovery doctrine, *see infra* Part II.A.5.c.

134. *Waddell*, 784 P.2d at 386.

135. *Lafayette*, 462 U.S. at 648.

136. *See State v. Stowell*, 182 P.3d 1214, 1217–18 (Kan. 2008); *State v. Oram*, 266 P.3d 1227, 1239 (Kan. Ct. App. 2011).

In *State v. Oram*, the Kansas Court of Appeals held that the State failed to prove that police would have inevitably discovered contraband during an inventory search.<sup>137</sup> In analyzing inevitability, the court focused on the dearth of evidence of a valid inventory search, including the State's failure to demonstrate the officer's use of standardized procedures and the lack of an itemized inventory.<sup>138</sup>

*Oram* demonstrates a prudent limiting principle on the relationship between the inevitable discovery doctrine and an inventory search in Kansas: the officer must discover evidence pursuant to a *valid* inventory search. Such a limiting principle prevents an inventory search and the inevitable discovery doctrine from circumventing the more protective standards of reasonable suspicion and probable cause.<sup>139</sup>

#### vi. Administrative Searches

The Fourth Amendment calculus slightly reorients when the government searches a person's house or business pursuant to its administrative authority rather than in search of specific criminal wrongdoing. Absent consent, the government generally must secure a warrant when performing "administrative" searches.<sup>140</sup> But administrative warrants need a more general probable cause than that required to support a warrant for a criminal investigation.<sup>141</sup> According to the Supreme Court, "'probable cause' to issue a warrant to inspect [pursuant to an administrative search] must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."<sup>142</sup> If the place to be searched is a "closely regulated" business such as a junkyard, however, warrants are not required in some instances.<sup>143</sup>

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137. 266 P.3d at 1239.

138. *Id.* at 1239–40.

139. *See id.* (stating that the purpose of inventory searches should be to produce inventory and not to give police officers a general tool to discover evidence to a crime).

140. *See Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (holding that administrative searches significantly intrude on one's Fourth Amendment rights).

141. *See id.* at 538–39 (stating that although the probable cause test varies from the standard applied in criminal cases, the ultimate standard is still one of reasonableness).

142. *Id.* at 538.

143. *See New York v. Burger*, 482 U.S. 691, 702 (1987) (allowing such searches when (1) the inspection furthers substantial regulatory interest, (2) the warrantless inspection is necessary, and (3) the statute authorizing the inspection provides notice of the inspection and limits the inspector's discretion).

## 5. The Exclusionary Rule

### a. General Exclusion of Evidence from Unlawful Searches

Subject to significant exceptions and countervailing concerns, evidence obtained in violation of the United States Constitution is subject to the exclusionary rule and will be excluded at trial.<sup>144</sup> In *Mapp v. Ohio*, the Supreme Court applied the exclusionary rule to illegally seized evidence offered in state courts.<sup>145</sup> Further, a trial court must also exclude evidence derived from unlawful police conduct.<sup>146</sup> Commonly referred to as the “fruit of the poisonous tree” doctrine, this doctrine includes significant exceptions.<sup>147</sup>

### b. Good Faith Exception

While earlier courts suggested that the Fourth Amendment mandated the exclusionary rule, the Supreme Court has more recently characterized the rule as a judicially created remedy and held that exclusion of evidence is only proper when the rule will deter police misconduct.<sup>148</sup> Thus, in situations where deterrence of misconduct would be nonexistent or minimal—such as when an officer has in “good faith” relied on an invalid warrant—the exclusionary rule does not apply.<sup>149</sup> The Kansas Supreme Court held that the good faith exception applies when an officer reasonably relied on a Kansas statute that a court later declared unconstitutional.<sup>150</sup>

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144. See *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (recognizing the application of the exclusionary rule in federal courts and extending it to state courts).

145. *Id.*

146. See *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963) (“The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.” (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920))).

147. See *id.* at 487–88 (stating that a court need not exclude all illegally seized evidence as fruit of the poisonous tree).

148. See *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (collecting cases suggesting that the exclusionary rule was an implicit mandate of the Fourth Amendment); see also *United States v. Leon*, 468 U.S. 897, 920–21 (1984) (articulating the rationale for the good faith exception).

149. See *Leon*, 468 U.S. at 920–21 (reasoning that in cases where a police officer has obtained a warrant in good faith and acted within its scope, there has been no police illegality to deter).

150. *State v. Daniel*, 242 P.3d 1186, 1189 (Kan. 2010).

i. *Davis v. United States*

In *Davis v. United States*, the Supreme Court considered whether the good faith exception applies when the police conduct a search “in objectively reasonable reliance on binding appellate precedent” that a court later overruled.<sup>151</sup> In *Davis*, a police officer searched an automobile after arresting the driver for driving while intoxicated and the passenger for giving a false name to the police.<sup>152</sup> This search was improper under *Arizona v. Gant* because *Gant* limited automobile searches incident to arrest to situations where the arrestee “is unsecured and within reaching distance of the passenger compartment” or the officer reasonably believes that the car contains “evidence relevant to the crime of arrest.”<sup>153</sup> But because *Gant* had not been decided at the time of the search, the Court held that deterrence would not be served by applying the exclusionary rule.<sup>154</sup> Thus, the Court concluded that “[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.”<sup>155</sup>

*Davis* suggests that the label good faith “exception” may be misleading in the sense that the “exception” continues to significantly erode the exclusionary rule.<sup>156</sup> The Court continues to confine the exclusionary rule to the sole purpose of deterrence,<sup>157</sup> and as the dissent in *Davis* recognized, such confinement raises doubts about the future vitality of the exclusionary rule.<sup>158</sup> Further, the Court rejected the argument that the exclusionary rule should apply to searches conducted pursuant to binding precedent because failure to apply the rule in such a situation would discourage challenges to precedential decisions.<sup>159</sup>

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151. 131 S. Ct. at 2423–24.

152. *Id.* at 2425.

153. *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)). Since neither of these conditions were present in *Davis*, the search was improper. *Davis*, 131 S. Ct. at 2434.

154. *Davis*, 131 S. Ct. at 2429.

155. *Id.*

156. *Cf. id.* at 2428 (describing the variety of cases in which the Court has used the good faith exception).

157. *Id.* at 2432 (stating that “the sole purpose of the exclusionary rule is to deter misconduct by law enforcement” and gathering cases).

158. *Id.* at 2438–39 (Breyer, J., dissenting) (cautioning that the good faith exception could eventually “swallow the exclusionary rule”).

159. *Id.* at 2433.

ii. *United States v. Estrada-Ayala*

Current jurisprudence continues to distinguish good faith searches from cases where the police officer knew or should have known that she conducted an illegal search or simply made a mistake of law.<sup>160</sup> In *United States v. Estrada-Ayala*, a highway trooper stopped the defendants because she could not read the temporary registration tag placed in the back of the defendants' car.<sup>161</sup> Once she initiated the traffic stop, the officer walked by the rear of the car and glanced at the temporary registration tag placed in the rear window.<sup>162</sup> According to the court, "At that point, [the officer] should have been able to clearly read the temporary registration[,] which was valid. There was nothing obscuring her vision of it."<sup>163</sup> The police officer then informed the driver that she had pulled him over for an improperly placed license or registration.<sup>164</sup> After checking the driver's license and insurance, the officer returned the documents and headed back towards her patrol car.<sup>165</sup> The officer stopped after a few steps, however, and asked the driver a few more questions.<sup>166</sup> The officer eventually obtained consent to search the vehicle and discovered methamphetamine after a "lengthy search."<sup>167</sup>

In considering the defendant's motion to suppress, the court recognized that section 8-133 of the Kansas Statutes requires licenses and tags be placed on the "rear" of a vehicle and be "clearly visible . . . and in a condition to be clearly legible."<sup>168</sup> The court also recognized a Tenth Circuit case, *United States v. Edgerton*,<sup>169</sup> which held that a driver's detention should have ended immediately when the officer realized that the driver had not violated section 8-133.<sup>170</sup> The *Estrada-Ayala* court found that *Edgerton* controlled and that "[o]nce [the officer] was able to read the temporary tag, she should have explained to

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160. See, e.g., *United States v. Estrada-Ayala*, Nos. 11-40038-01-RDR, 11-40038-02-RDR, 11-40038-03-RDR, 2011 WL 4337142, at \*3 (D. Kan. Sept. 15, 2011).

161. *Id.* at \*1.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at \*2 (quoting KAN. STAT. ANN. § 8-133 (2001 & Supp. 2010)) (internal quotation marks omitted).

169. 438 F.3d 1043, 1051 (10th Cir. 2006).

170. *Estrada-Ayala*, 2011 WL 4337142, at \*2-3.

defendants the reason for the initial stop and then allowed them to continue on their way.”<sup>171</sup>

The government alternatively argued that the good faith exception should trump the application of the exclusionary rule.<sup>172</sup> The court held that the good faith exception was not applicable because the officer knew or should have known that the stop and search was unreasonable under the Fourth Amendment.<sup>173</sup> In other words, the officer should have known that she was legally required to end the defendants’ detention once it became clear that they had not violated section 8-133.<sup>174</sup>

iii. *State v. Oram*

Similarly, the Kansas Court of Appeals recently held that the good faith exception does not apply when officers should have known that a vehicle search exceeded its lawful scope.<sup>175</sup> In *State v. Oram*, the defendant was convicted for possession of marijuana after the drug was discovered in her vehicle.<sup>176</sup> Before the marijuana was discovered, the officer had handcuffed the defendant and placed her in the back of a patrol car.<sup>177</sup>

Because the defendant was not within the immediate presence of her vehicle, the court held that the search was not justified as a valid search incident to arrest.<sup>178</sup> Further, the court held that Kansas law on the issue of immediate presence was sufficiently clear at the time of the search such that “well-trained deputies in Kansas would not have believed in good faith that they had the authority to search a car after the defendant had been handcuffed, searched, and placed in the back seat of a patrol car on October 2, 2008.”<sup>179</sup> As in *Estrada-Ayala*, the court noted that police officers are presumed to know the law.<sup>180</sup>

*Estrada-Ayala* and *Oram* demonstrate that while the good faith exception may excuse some isolated negligence on behalf of law

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171. *Id.* at \*3.

172. *Id.*

173. *Id.*

174. *Id.*

175. *State v. Oram*, 266 P.3d 1227, 1237–38 (Kan. Ct. App. 2011).

176. *Id.* at 1231.

177. *Id.*

178. *Id.* at 1234.

179. *Id.* at 1237.

180. *Id.*

enforcement officers,<sup>181</sup> the good faith exception does not excuse ignorance of the law. “As a rule, if a defendant is presumed to know the law, [courts] must expect as much from law enforcement”<sup>182</sup>

### c. Inevitable Discovery Exception

If the State can prove that police would have inevitably discovered evidence obtained either illegally or as the “fruit” of unlawful police conduct absent a violation, the exclusionary rule does not apply.<sup>183</sup> Further, the State need only establish the “inevitability” of discovery through a preponderance of the evidence.<sup>184</sup> If the State does not meet this burden, then the court must suppress the evidence.<sup>185</sup>

## 6. Search of Curtilage, Trash, and Open Fields

The Fourth Amendment provides an expectation of privacy in the home, and courts generally extend the protection to the curtilage of the home.<sup>186</sup> Courts have defined curtilage as “the area to which extends the intimate activity associated with the sanctity of a man’s home and the privacies of life.”<sup>187</sup> To determine whether an area around a home is curtilage, courts generally consider four factors: “(1) the area’s proximity to the home; (2) whether the area is included within an enclosure surrounding the house; (3) the manner in which the area is used; and (4) the steps the resident has taken to protect the area from observation.”<sup>188</sup>

To determine whether the Fourth Amendment protects a person’s trash from searches, courts apply a two-part test.<sup>189</sup> First, the trash must

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181. See *Herring v. United States*, 555 U.S. 135, 147 (2009) (concluding that mistakes caused by police negligence do not automatically trigger suppression under the exclusionary rule).

182. *United States v. Orduna-Martinez*, 561 F.3d 1134, 1138, n.2 (10th Cir. 2009) (citing *United States v. Hodson*, 77 U.S. (Wall.) 395, 409 (1870)).

183. See *Nix v. Williams*, 467 U.S. 431, 448 (1984) (holding that where evidence would have inevitably been discovered absent police error or misconduct, the evidence is admissible).

184. *Id.* at 444.

185. See *Oram*, 266 P.3d at 1240–41 (finding that the State failed to meet its burden in showing inevitable discovery).

186. *United States v. Maestas*, 639 F.3d 1032, 1036–37 (10th Cir. 2011) (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *Oliver v. United States*, 466 U.S. 170, 180 (1984); *Reeves v. Churchich*, 484 F.3d 1244, 1254 (10th Cir. 2007)).

187. *Id.* at 1037 (quoting *Lundstrom v. Romero*, 616 F.3d 1108, 1128 (10th Cir. 2010)) (internal quotation marks omitted).

188. *Id.* (quoting *Lundstrom*, 616 F.3d at 1128).

189. *State v. Hoffman*, 196 P.3d 939, 940–41 (Kan. Ct. App. 2008).

be located within the curtilage of the residence.<sup>190</sup> Second, if the trash is within the curtilage of the home, the person must have a subjective and reasonably objective expectation of privacy in the trash.<sup>191</sup> In *United States v. Maestas*, the Tenth Circuit held that the defendant did not have a reasonable expectation of privacy in a garbage storage area.<sup>192</sup> The court reached this decision even though the garbage storage area satisfied three of the four curtilage factors: the area touched one unit of the triplex, and a fence enclosed the area and shielded it from view.<sup>193</sup> Still, the court reasoned that “it is difficult to imagine anyone using an area in which garbage was regularly deposited for the intimate activities of the home,” which precluded the area from satisfying the definition of curtilage.<sup>194</sup> The court also stated that the defendant did not have a subjective expectation of privacy in the garbage storage area that society is willing to accept as being objectively reasonable because the area was a common area shared by all three tenants and the landlord.<sup>195</sup> Because the defendant shared access to the area, the area resembled more of a semi-public area than an area in which he could claim that he had an expectation of privacy.<sup>196</sup>

The United States Supreme Court held that the Fourth Amendment protection of “persons, houses, papers, and effects” that extends to the home and the curtilage of the home does not extend to open fields.<sup>197</sup> It explained that “open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities . . . that occur in open fields.”<sup>198</sup> The Court did not determine when curtilage ends and an open field begins, but it stated that an open field does not need to be an actual field or open.<sup>199</sup> The Court also found that fences or “No Trespassing” signs

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190. See *State v. Loyd*, No. 103,596, 2011 WL 1377003, at \*4 (Kan. Ct. App. Apr. 8, 2011) (per curiam) (noting that the trash cans were not within the curtilage of the property).

191. *Hoffman*, 196 P.3d at 941 (citing *State v. Fisher*, 154 P.3d 455, 471 (Kan. 2007)).

192. *United States v. Maestas*, 639 F.3d 1032, 1037 (10th Cir. 2011).

193. *Id.*

194. *Id.* (quoting *United States v. Long*, 176 F.3d 1304, 1308 (10th Cir. 1999)) (internal quotation marks omitted).

195. *Id.* at 1037–39.

196. See *id.* at 1039–40.

197. *Oliver v. United States*, 466 U.S. 170, 176 (1984) (citing *Hester v. United States*, 265 U.S. 57, 59 (1924)).

198. *Id.*

199. *Id.* at 180 n.11.

do not effectively bar the public from viewing open fields because the public and the police may view the land lawfully from the air.<sup>200</sup> Therefore, an “expectation of privacy in open fields is not an expectation that society recognizes as reasonable.”<sup>201</sup> The Tenth Circuit has since held that a driveway that is clearly visible from an adjoining public street does not provide a forum for intimate activities associated with a home and, thus, is more like an open field.<sup>202</sup>

## 7. Standing to Object to a Search

### a. Generally

To object to the seizure of evidence, a person must have standing to challenge the validity of the search.<sup>203</sup> A search violates a person’s Fourth Amendment rights only when he has a “legitimate expectation of privacy in the area searched.”<sup>204</sup> To determine whether a person had a legitimate expectation of privacy, courts consider “whether the defendant manifested a subjective expectation of privacy in the area searched” and “whether society is prepared to recognize that expectation as objectively reasonable.”<sup>205</sup> The defendant bears the burden of establishing that he had an expectation of privacy in the property searched.<sup>206</sup> He must show by a preponderance of evidence that he was “personally aggrieved” by the search and seizure.<sup>207</sup> It is immaterial if the evidence that the defendant wants suppressed was obtained in violation of a third person’s Fourth Amendment rights.<sup>208</sup> The expectation of privacy must be personal to the defendant.<sup>209</sup>

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200. *Id.* at 179.

201. *Id.* (internal quotation marks omitted).

202. *Rieck v. Jensen*, 651 F.3d 1188, 1193–94 (10th Cir. 2011).

203. *State v. Ralston*, 257 P.3d 814, 817–18 (Kan. Ct. App. 2011) (citing *State v. Gonzalez*, 85 P.3d 711, 713 (Kan. Ct. App. 2004)).

204. *United States v. Ruiz*, 664 F.3d 833, 838 (10th Cir. 2012) (quoting *United States v. Anderson*, 154 F.3d 1225, 1229 (10th Cir. 1998)) (internal quotation marks omitted).

205. *Id.* (quoting *United States v. Allen*, 235 F.3d 482, 489 (10th Cir. 2000)) (internal quotation marks omitted).

206. *Ralston*, 257 P.3d at 817 (citing *Gonzalez*, 85 P.3d at 713).

207. *United States v. Sherrill*, No. 11-cr-40027-JAR, 2011 WL 5570841, at \*4 (D. Kan. Nov. 16, 2011) (citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *United States v. Conway*, 854 F. Supp. 834, 837 (D. Kan. 1994)).

208. *Id.* at \*4 (citing *United States v. Carr*, 939 F.2d 1442, 1444 (10th Cir. 1991)).

209. *Id.* (citing *Carr*, 939 F.2d at 1444).

b. Searches of Third Parties

i. Residents and Overnight Guests

The Fourth Amendment gives people a reasonable expectation of privacy in their own homes.<sup>210</sup> Because of the reasonable expectation of privacy, the resident of the home has standing to challenge a search of his home.<sup>211</sup> For guests of the resident, the Supreme Court stated that “in some circumstances a person may have a legitimate expectation of privacy in the house of someone else.”<sup>212</sup> For example, an overnight guest in a residence has a reasonable expectation of privacy in the home of his host.<sup>213</sup> As explained by the Court, “[s]taying overnight in another’s home is a longstanding social custom that serves functions recognized as valuable by society,”<sup>214</sup> which supports the recognition of a reasonable expectation of privacy in the home of the guest’s host.

ii. Vehicle Passengers

As stated above, the general test to determine whether a person has standing to challenge the validity of a search is whether she had a legitimate expectation of privacy in the area searched.<sup>215</sup> Someone who does not have an ownership or possessory interest in the property searched does not have a legitimate expectation of privacy in that property.<sup>216</sup> Based on Kansas case law, the lack of ownership or possessory interest is dispositive on the issue of standing.<sup>217</sup>

When a passenger leaves her purse in a car and tries to suppress the evidence seized from the search, the court will also look at the issue of abandonment to determine whether the passenger has standing.<sup>218</sup> The Kansas Court of Appeals has barred an individual who abandons

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210. *United States v. Maestas*, 639 F.3d 1032, 1035 (10th Cir. 2011) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 884 (1987)).

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

212. *Carter*, 525 U.S. at 89.

213. *Maestas*, 639 F.3d at 1035 (citing *Minnesota v. Olson*, 495 U.S. 91, 98 (1990)).

214. *Olson*, 495 U.S. at 98.

215. *State v. Ralston*, 257 P.3d 814, 819 (Kan. Ct. App. 2011) (citing *State v. Wickliffe*, 826 P.2d 522, 526 (Kan. Ct. App. 1992)).

216. *Id.* at 819–20 (citing *Wickliffe*, 826 P.2d at 576).

217. *Id.* at 819 (citing *Wickliffe*, 826 P.2d at 526).

218. *Id.* at 817–18.

property from contesting the legality of the search and seizure of the abandoned property.<sup>219</sup>

One's personal right to Fourth Amendment protection of property against search and seizure is lost when that property is abandoned, absent a manifested reasonable expectation of privacy. . . . The issue is whether, by any good, sound, ordinary sense standard, the defendant abandoned any reasonable expectation to a continuation of his personal right against having his car searched.<sup>220</sup>

In the context of the Fourth Amendment, abandonment of property has two elements: "(1) [the] defendant must intend to abandon the property; and (2) the defendant must freely decide to abandon the property and the decision must not merely be the product of police misconduct."<sup>221</sup> When a passenger in a car leaves her purse behind, the court will apply the two prongs of the abandonment test.<sup>222</sup> In *State v. Ralston*, the Kansas Court of Appeals held that when a passenger denied ownership of the purse and all property in the car, and when she knew the property was going to be searched, the passenger could not have an objectively reasonable expectation of privacy in her purse.<sup>223</sup> Thus, she did not have standing to suppress evidence obtained from that search because she had abandoned the property.<sup>224</sup>

Another issue present in *Ralston* is whether a passenger in a *stolen* vehicle has standing to challenge the validity of the search.<sup>225</sup> No Kansas court had addressed the issue before *Ralston*; however, the court relied on a treatise on the Fourth Amendment that stated:

A person's standing depends upon his justified expectation of privacy, and this is not determined upon the basis of what the police believe or even necessarily upon the actual facts. For example, a passenger in a vehicle might have standing notwithstanding the car's actual character as stolen property if the passenger believed that the person giving him the ride had lawful possession of it.<sup>226</sup>

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219. *Id.* at 818 (citing *State v. Grissom*, 840 P.2d 1142, 1177 (Kan. 1992)).

220. *Id.* (quoting *Grissom*, 840 P.2d at 1178).

221. *Id.* (quoting *State v. Likins*, 903 P.2d 764, 770 (Kan. Ct. App. 1995)).

222. *Id.*

223. *Id.* at 818–19.

224. *Id.*

225. *Id.* at 819–20.

226. *Id.* at 820 (quoting 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.3(e), at 204 (4th ed. 2004)).

Based on this rationale, a passenger with knowledge that the driver had stolen the vehicle would not have standing to challenge any alleged Fourth Amendment violation.<sup>227</sup>

In *Ralston*, the defendant did not present evidence of her knowledge of whether the vehicle was stolen.<sup>228</sup> Because she failed to establish that she was unaware that the vehicle was stolen, she failed to meet her burden of showing that she had an expectation of privacy in the property.<sup>229</sup> This defeated the defendant's claim regarding standing to challenge the search of the stolen vehicle, so the court then discussed whether she also lacked standing to challenge the search of her purse inside the vehicle.<sup>230</sup> The court reasoned that

an automobile thief has neither an ownership nor a possessory interest in the property stolen, and “[a]s a result, that individual cannot have a legitimate expectation of privacy in the vehicle stolen and does not have standing to object to the search of the vehicle and seizure of items therefrom.”<sup>231</sup>

Thus, the defendant lacked standing to challenge the search of her purse because the police seized it from the stolen car.<sup>232</sup>

Because Kansas courts had not determined whether a passenger in a car had standing to challenge a search of a stolen vehicle before this case, the defendant did not have the opportunity to establish a legitimate expectation of privacy by presenting evidence that the car was stolen.<sup>233</sup> Even if the defendant would have had the opportunity to present evidence that she did not know the car was stolen, the court still could have admitted the evidence because she effectively abandoned the purse.<sup>234</sup> As applied to future cases, the requirement of knowledge is fair because a passenger in a known stolen vehicle knows that the vehicle does not belong to someone they know and trust, which limits the amount of privacy the passenger should reasonably expect. Also, known illegal activity should not receive the same protection as legal activity

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227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* (alteration in original) (quoting *State v. Wickliffe*, 826 P.2d 522, 526–27 (Kan. Ct. App. 1992)).

232. *Id.*

233. *Id.*

234. *Id.* at 817–19.

because of the nature and societal views of that activity. When a person engages in known illegal activity, society has a strong interest in limiting the protection that this person receives from her expectation of privacy.

## 8. Technology and Searches

### a. Wiretapping

The Federal Wiretap Act makes it a crime to “intentionally intercept[] . . . any wire, oral, or electronic communication”<sup>235</sup> without proper authorization for wire communication interception.<sup>236</sup> The 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”<sup>237</sup> and “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.”<sup>238</sup>

The Tenth Circuit has interpreted this statute to require less than total exhaustion of other investigative procedures before law enforcement may utilize a wiretap.<sup>239</sup> “[T]he government [should] act ‘in a common sense’ fashion.”<sup>240</sup> Authorization of a wiretap by a district court is presumed proper, and the defendant “bears the burden of proving its invalidity.”<sup>241</sup>

### b. Electronic Surveillance

In January 2012, the United States Supreme Court decided whether the attachment of a global positioning system (GPS) tracking device to a person’s vehicle, and the use of the GPS to monitor the vehicle’s movements on public streets, constituted a search or seizure within the meaning of the Fourth Amendment.<sup>242</sup> Police suspected the defendant of trafficking narcotics,<sup>243</sup> and government agents installed the device on

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235. 18 U.S.C. § 2511(1)(a) (2006).

236. *Id.* § 2516.

237. *Id.* § 2518(1)(b).

238. *Id.* § 2518(1)(c).

239. *United States v. Verdin-Garcia*, 516 F.3d 884, 890 (10th Cir. 2008).

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

241. *Id.* (citing *United States v. Radcliff*, 331 F.3d 1153, 1160 (10th Cir. 2003)).

242. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

243. *Id.*

the undercarriage of the defendant's wife's vehicle while it sat in a public parking lot.<sup>244</sup> The defendant possessed the vehicle when the agents attached the GPS device.<sup>245</sup> Over the next twenty-eight days, the agents used the device to track the vehicle's movements.<sup>246</sup> The intermediate appellate court found that the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.<sup>247</sup> The Supreme Court determined that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"<sup>248</sup> Under a Fourth Amendment theory based on common law trespass, the government agents must physically occupy private property for the purpose of obtaining information in order to effectuate a search.<sup>249</sup> The Court later extended the definition to include instances where the government invades a person's "reasonable expectation of privacy."<sup>250</sup> The Court reasoned that "[a] trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information[,] and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy."<sup>251</sup> The Court stated that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."<sup>252</sup>

The Court distinguished the defendant's situation in *Jones* from two prior Supreme Court cases involving tracking via beepers.<sup>253</sup> In *United States v. Knotts*, police officers placed a beeper in a container of chloroform; this allowed the officers to track the location of the container.<sup>254</sup> There "had been no infringement of [the defendant's] reasonable expectation of privacy [because] the information obtained—the location of the automobile carrying the container on public roads and the location of the off-loaded container in open fields near [the

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244. *Id.*

245. *Id.* at 952.

246. *Id.* at 948.

247. *Id.* at 949 (citing *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *rev'd sub nom. Jones*, 132 S. Ct. 945 (2012)).

248. *Id.*

249. *See id.* at 949–50.

250. *Id.* at 950 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)) (internal quotation marks omitted).

251. *Id.* at 951 n.5.

252. *Id.* at 952.

253. *Id.* at 951–52.

254. *Id.* at 951 (citing *United States v. Knotts*, 460 U.S. 276, 278 (1983)).

defendant's] cabin—had been voluntarily conveyed to the public.”<sup>255</sup> Also, the officer placed the beeper in the container with the consent of the then-owner before the defendant received it.<sup>256</sup> The Court noted that the “‘limited use [that] the government made of the signals from this particular beeper,’ and reserved the question of whether ‘different constitutional principles may be applicable’ to ‘dragnet-type law enforcement practices,’” such as GPS tracking.<sup>257</sup>

In *United States v. Karo*, the Court “addressed the question left open by *Knotts*[:] whether the installation of a beeper in a container amounted to a search or seizure.”<sup>258</sup> The container belonged to a third party when police installed the beeper, and “it did not come into possession of the defendant until later.”<sup>259</sup> “The Government . . . came into physical contact with the container only before it belonged to the defendant. . . .”<sup>260</sup> In *Jones*, the defendant possessed the Jeep when the government agents installed the GPS device via a trespass, distinguishing *Jones* from *Karo*.<sup>261</sup>

The *Jones* Court ultimately concluded that the actual attachment of the GPS device to the Jeep “encroached on a protected area.”<sup>262</sup> The Court also stated that it has not “deviated from the understanding that mere visual observation does not constitute a search.”<sup>263</sup> Therefore, the Court found that precedent would likely consider traditional surveillance of *Jones* for a four week period constitutionally permissible, although it would require “a large team of agents, multiple vehicles, and perhaps aerial assistance.”<sup>264</sup>

Because this case does not discuss the actual visual surveillance of *Jones*, but rather the attachment of the GPS device, it leaves an opportunity for officers to attach a GPS device to an object that they know will come into contact with the suspect, as in the beeper cases. This scenario would allow officers to take advantage of the benefits of GPS technology but, according the Court in *Jones*, possibly stay within

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255. *Id.* at 951–52 (citing *Knotts*, 460 U.S. at 281–82).

256. *Id.* at 952 (citing *Knotts*, 460 U.S. at 278).

257. *Id.* at 952 n.6 (citation omitted) (quoting *Knotts*, 460 U.S. at 284).

258. *Id.* at 952 (citing *United States v. Karo*, 468 U.S. 705, 713 (1984)).

259. *Id.* (citing *Karo*, 468 U.S. at 708).

260. *Id.* (citing *Karo*, 468 U.S. at 712).

261. *Id.*

262. *Id.*

263. *Id.* at 953 (citing *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001)).

264. *Id.* at 953–54 (quoting *id.* at 963 (Alito, J., concurring)) (internal quotation marks omitted).

the parameters of the Fourth Amendment.

c. Chemical Drug Tests

The Kansas Implied Consent Law provides that a person who attempts to operate a vehicle shall be deemed to have consented to “one or more tests of the person’s blood, breath, urine[,] or other bodily substance to determine the presence of alcohol or drugs.”<sup>265</sup> An officer shall request such a test “[i]f 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 if at least one other condition is present.<sup>266</sup> Such conditions include that the person was arrested “for any offense involving operation . . . of a vehicle while under the influence” or that the person was involved in an accident resulting in non-serious personal injury or property damage.<sup>267</sup> An officer may request a person to take a preliminary breath test “if the officer has reasonable suspicion to believe the person has been operating or attempting to operate a vehicle while under the influence of alcohol or drugs.”<sup>268</sup> An officer may use the breath test results to help determine whether to arrest the suspect or request additional testing.<sup>269</sup> An officer may arrest a person based on the results of the breath test.<sup>270</sup> The test results, however, only aid an officer’s determination of whether there is probable cause to arrest or reasonable grounds to request additional testing.<sup>271</sup> The test results cannot be used in a civil or criminal action.<sup>272</sup>

Kansas courts use probable cause standards to determine whether an officer had reasonable grounds to request a breath test.<sup>273</sup> The Kansas Supreme Court also acknowledged that “an officer may have reasonable grounds to believe a person is operating a vehicle under the influence sufficient to request a test . . . but not have the probable cause required to make an arrest under [section] 8-1001.”<sup>274</sup> The officer must determine

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265. KAN. STAT. ANN. § 8-1001(a) (2001 & Supp. 2011).

266. *Id.* § 8-1001(b)(1).

267. *Id.* § 8-1001(b)(1)(A)–(B).

268. *Id.* § 8-1012(b).

269. *Id.* § 8-1012(d).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Allen v. Kan. Dep’t of Revenue*, 256 P.3d 845, 848 (Kan. 2011).

274. *Id.* (quoting *Smith v. Kan. Dep’t of Revenue*, 242 P.3d 1179, 1182–83 (Kan. 2010)) (internal quotation marks omitted).

whether the officer had probable cause based on “the information and fair inferences therefrom, known to the officer at the time of the arrest.”<sup>275</sup> This amounts to a totality of the circumstances test.<sup>276</sup> The Kansas Supreme Court stated that “courts should not merely count the facts or factors that support one side of the determination or the other.”<sup>277</sup>

### III. SEIZURES

#### A. *Fourth Amendment Issues*

Under the Fourth Amendment to the United States Constitution, “[t]he 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.”<sup>278</sup> Section 15 of the Kansas Bill of Rights provides the same guarantee in similar language,<sup>279</sup> and the Kansas Supreme Court has stated the protection provided by both provisions is identical.<sup>280</sup> The Fourth Amendment does not govern a private individual’s seizure of property or persons; instead, it applies only when government actors seize property or persons.<sup>281</sup> Not all seizures by police officers or other government actors violate the Fourth Amendment.<sup>282</sup> The central concern is whether the seizure was reasonable under all of the circumstances.<sup>283</sup>

The Supreme Court has interpreted the Warrant Clause of the Fourth Amendment as related to the Reasonableness Clause.<sup>284</sup> “A seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial

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275. *Id.* (citing *Bruch v. Kan. Dep’t of Revenue*, 148 P.3d 538, 546 (Kan. 2006)).

276. *Id.* (citing *State v. Hill*, 130 P.3d 1, 8 (Kan. 2006)).

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

278. U.S. CONST. amend. IV.

279. KAN. CONST. Bill of Rights § 15.

280. *State v. Morris*, 72 P.3d 570, 576 (Kan. 2003) (citing *State v. Johnson*, 865 P.2d 134, 138 (Kan. 1993)).

281. *City of Overland Park v. Rhodes*, 257 P.3d 864, 866–67 (Kan. Ct. App. 2011) (citing *State v. Barker*, 850 P.2d 885, 889 (Kan. 1993)).

282. *See Elkins v. United States*, 364 U.S. 206, 222 (1960) (“[T]he Constitution forbids . . . not all searches and seizures, but unreasonable searches and seizures.”).

283. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

284. *See United States v. Place*, 462 U.S. 696, 701 (1983).

warrant . . . .”<sup>285</sup> Additionally, the Kansas Supreme Court has held that entry into a home for the purpose of seizing a person is presumptively unreasonable without a warrant, unless the government actor can point to exigent circumstances.<sup>286</sup>

### 1. Seizure of Property

The Fourth Amendment governs seizures of property. A seizure of property “occurs when ‘there is some meaningful interference with an individual’s possessory interests’ in [that] property.”<sup>287</sup> Meaningful interference occurs “when a police officer exercis[es] control over . . . property by removing it from an individual’s possession or when an officer informs an individual that he is going to take his property.”<sup>288</sup> Picking up an object to get a closer look is not meaningful interference with a possessory interest.<sup>289</sup> Additionally, for a Fourth Amendment violation, a person must have a reasonable expectation of privacy in the property at issue.<sup>290</sup>

In *State v. McCammon*, the Kansas Court of Appeals examined whether a law enforcement officer had effectuated a seizure implicating the Fourth Amendment by recording vehicle identification numbers.<sup>291</sup> The court found that merely recording the numbers “did not meaningfully interfere with any possessory interest in the vehicles.”<sup>292</sup> Further, the court found that there is no reasonable expectation of privacy in a number easily viewable to the general public.<sup>293</sup>

Courts have recognized “that individuals have a right to be free from unreasonable . . . seizures of items they place in the mail.”<sup>294</sup> Despite this general rule, “temporary detention of mail for investigative purposes

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285. *Id.* (emphasis omitted).

286. *State v. Thomas*, 124 P.3d 48, 51 (Kan. 2005) (citing *Payton v. New York*, 445 U.S. 573, 586 (1980)).

287. *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

288. *United States v. Wood*, 6 F. Supp. 2d 1213, 1224 (D. Kan. 1998) (citation omitted) (citing *Place*, 462 U.S. at 707–08).

289. *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 324 (1987); *New York v. Class*, 475 U.S. 106, 114 (1986)).

290. *Id.* at 1222 (citing *Rakas v. Illinois*, 439 U.S. 128, 140–45 (1978)).

291. *State v. McCammon*, 250 P.3d 838, 841–42 (Kan. Ct. App. 2011).

292. *Id.* at 841 (citing *Hicks*, 480 U.S. at 324; *Macon*, 472 at 469).

293. *Id.*

294. *State v. Duhon*, 109 P.3d 1282, 1287 (Kan. Ct. App. 2005) (citing *United States v. Van Leeuwen*, 397 U.S. 249, 251–53 (1970); *United States v. Dennis*, 115 F.3d 524, 531 (7th Cir. 1997)).

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is not an unreasonable seizure when authorities have reasonable suspicion of criminal activity.”<sup>295</sup> Some factors that may lead a government official to reasonably suspect that a package contains drugs include emanation “from a narcotics source state,” handwritten labels, lack of a return zip code, misspellings and corrections in the return address, and “a nonexistent return address street number.”<sup>296</sup>

## 2. Seizure of Persons

The Fourth Amendment also governs seizures of persons.

[A] seizure of a person . . . occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave and the person submits to the show of authority.<sup>297</sup>

Voluntary encounters between police officers and persons are not seizures under the Fourth Amendment.<sup>298</sup> Besides voluntary encounters, Kansas courts have identified three other kinds of interactions between police officers and citizens: investigatory detentions or *Terry* stops, public safety stops, and arrests.<sup>299</sup> These three types of encounters may potentially violate the Fourth Amendment. Courts examine the totality of the circumstances to determine whether a voluntary encounter or seizure has occurred and whether one kind of encounter becomes another.<sup>300</sup>

### a. Detention of Third Parties During a Search

The Supreme Court has held that “a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is

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295. *United States v. Scarborough*, 128 F.3d 1373, 1378 (10th Cir. 1997) (citing *Van Leeuwen*, 397 U.S. at 250).

296. *Id.*

297. *State v. Morris*, 72 P.3d 570, 576–77 (Kan. 2003) (citations omitted) (citing *California v. Hodari D.*, 499 U.S. 621, 624, 628–29 (1991)).

298. *Id.* at 577 (citing *State v. Crowder*, 887 P.2d 698, 701 (Kan. Ct. App. 1994)).

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

300. *See State v. Johnson*, 259 P.3d 719, 722 (Kan. 2011) (quoting *State v. McGinnis*, 233 P.3d 246, 251 (Kan. 2010)) (describing use of the totality-of-the-circumstances test).

conducted.”<sup>301</sup> “[A]uthority to detain relates to all persons present on the premises,” including the owner, the resident, and any third parties.<sup>302</sup> Detaining occupants prevents destruction of evidence, keeps officers safe, and facilitates the search.<sup>303</sup> Additionally, the likelihood that officers will “exploit the detention to gain information” is low because the search warrant provides a legitimate means to obtain any information that they might require.<sup>304</sup>

b. Detention During a Traffic Stop

Traffic stops are seizures under the Fourth Amendment<sup>305</sup> and are similar to *Terry* stops.<sup>306</sup> An officer who stops and detains a driver must show some “reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime.”<sup>307</sup> The officer must justify the traffic stop from its inception, and the scope of the stop must bear a reasonable relation to the initial justification.<sup>308</sup> Permissible activities for routine traffic stops include “request[ing] a driver’s license and vehicle registration, run[ning] a computer check, and issu[ing] a citation.”<sup>309</sup> An officer may continue the stop after addressing the original purpose only when the driver consents or when the officer develops reasonable suspicion of criminal activity.<sup>310</sup> “An officer’s inquiries or actions unrelated to the justification for an initial traffic stop do not convert the stop into an unlawful seizure so long as they do not measurably extend or prolong the stop.”<sup>311</sup>

In *State v. Butts*, the Kansas Court of Appeals examined the

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301. *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (footnote omitted).

302. *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir. 2009) (citing *United States v. Pace*, 898 F.2d 1218, 1238–39 (7th Cir. 1990)).

303. *Summers*, 452 U.S. at 702–03.

304. *Sanchez*, 555 F.3d at 916 (citing *Summers*, 452 U.S. at 701).

305. *State v. Butts*, 269 P.3d 862, 869 (Kan. Ct. App. 2012) (citing *State v. Fitzgerald*, 192 P.3d 171, 173 (Kan. 2008), *abrogated on other grounds*, *State v. Sanchez-Loredo*, 272 P.3d 34 (Kan. 2012)).

306. *State v. Thompson*, 166 P.3d 1015, 1024 (Kan. 2007) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)).

307. *Id.* (quoting *State v. DeMarco*, 952 P.2d 1276, 1282 (Kan. 1998)).

308. *State v. Smith*, 184 P.3d 890, 897 (Kan. 2008).

309. *State v. White*, 241 P.3d 591, 596 (Kan. Ct. App. 2010) (quoting *State v. Mitchell*, 960 P.2d 200, 203 (Kan. 1998)) (internal quotation marks omitted).

310. *Id.* (citing *Thompson*, 166 P.3d at 1025).

311. *State v. Coleman*, 257 P.3d 320, 324 (Kan. 2011).

development of reasonable suspicion to make a traffic stop.<sup>312</sup> Two officers stopped the defendant for speeding and swerving within his lane.<sup>313</sup> One officer used “his observations, training, and experience with radar and speed detection” to estimate the defendant’s speed at forty-five miles per hour, which was fifteen miles per hour above the posted limit.<sup>314</sup> The officer’s determination “was not confirmed by any speed measurement device, stopwatch, or pacing of the vehicle by the officer.”<sup>315</sup> The officer followed the defendant’s vehicle for four blocks and then initiated the traffic stop.<sup>316</sup> The defendant exhibited signs of intoxication and admitted to alcohol consumption.<sup>317</sup> A search incident to arrest yielded the discovery of crack cocaine on the defendant.<sup>318</sup>

On appeal, the defendant challenged the district court’s admission of evidence obtained from the traffic stop.<sup>319</sup> The Kansas Court of Appeals looked to whether the officer had reasonable suspicion to stop the defendant for speeding.<sup>320</sup> To resolve the issue, the court looked first at *State v. Guy*<sup>321</sup> and *State v. Whitehurst*.<sup>322</sup> In *Guy*, an officer estimated the speed of a vehicle by looking at his speedometer as he followed the defendant.<sup>323</sup> The Kansas Supreme Court found the use of the speedometer “plus the estimate of an experienced officer” sufficient to convict the defendant of speeding.<sup>324</sup> In *Whitehurst*, an officer again estimated the speed of a vehicle through observation, but “there was also evidence of reckless driving.”<sup>325</sup> These cases—in conjunction with examination of several unpublished Kansas Court of Appeals cases<sup>326</sup>—led the court to “conclude that a law enforcement officer’s observation of a moving vehicle [that] results in the officer’s estimation that the vehicle is [speeding] may constitute, under the totality of the circumstances,

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312. *State v. Butts*, 269 P.3d 862, 866 (Kan. Ct. App. 2012).

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 867.

317. *Id.*

318. *Id.*

319. *Id.* at 866.

320. *Id.* at 867.

321. *Id.* at 869 (citing *State v. Guy*, 752 P.2d 119 (Kan. 1988)).

322. *Id.* (citing *State v. Whitehurst*, 772 P.2d 1251 (Kan. Ct. App. 1988)).

323. *Id.* (discussing *Guy*, 741 P.2d at 122).

324. *Id.* at 870 (emphasis omitted) (quoting *Guy*, 752 P.2d at 122).

325. *Id.* (discussing *Whitehurst*, 772 P.2d at 1261).

326. *Id.* at 870–71.

reasonable suspicion that the driver is [violating the] law.”<sup>327</sup> Therefore, a defendant who challenges the validity of a traffic stop for speeding based solely on the lack of corroborating measures of a vehicle’s speed

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327. *Id.* 871.

faces a tough argument because an officer can develop reasonable suspicion without outside confirmation.

c. Detention During a Public Safety Stop

An officer may stop a person, in his capacity as a community caretaker, for public safety reasons.<sup>328</sup> Public safety stops are unrelated to the investigation of crimes.<sup>329</sup> While this kind of stop does not require probable cause or reasonable suspicion that the person has committed a crime,<sup>330</sup> the public safety reasons for the stop must arise from “objective, specific, and articulable facts [that] would lead a law enforcement officer to reasonably suspect that a citizen is in need of help or is in peril.”<sup>331</sup> Investigation by an officer—absent probable cause or reasonable suspicion—turns a public safety stop into an unreasonable detention in violation of the Fourth Amendment.<sup>332</sup>

In *State v. Kacsir*, the Kansas Court of Appeals looked at the validity of an alleged public safety stop.<sup>333</sup> A trooper with the Kansas Highway Patrol sat in his patrol car on the shoulder of Interstate 70 at night.<sup>334</sup> Two cars pulled onto the shoulder less than 100 yards ahead of the trooper’s car.<sup>335</sup> The trooper believed that the drivers had seen him and required help.<sup>336</sup> He moved his patrol car behind the stopped vehicles and turned on his lights.<sup>337</sup> One car left, and when the trooper interacted with the remaining driver, he smelled alcohol and noticed her eyes were bloodshot.<sup>338</sup>

The court first found that the encounter was not voluntary because the trooper’s lights were a show of authority, and the defendant, by

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328. See *State v. Vistuba*, 840 P.2d 511, 514 (Kan. 1992), *overruled on other grounds by State v. Field*, 847 P.2d 1280 (Kan. 1993).

329. *State v. Gonzales*, 141 P.3d 501, 509 (Kan. Ct. App. 2006).

330. See *State v. Marx*, 215 P.3d 601, 605 (Kan. 2009) (“Safety reasons alone may justify the [public safety] stop . . .” (quoting *Vistuba*, 840 P.2d at 514) (internal quotation marks omitted)).

331. *State v. Kacsir*, 251 P.3d 632, 637 (Kan. Ct. App. 2011) (citing *Gonzales*, 141 P.3d at 509).

332. See *id.* (finding that a law enforcement officer may conduct an investigation when he has a reasonable belief that a motorist needs assistance).

333. *Id.* at 634.

334. *Id.* at 635.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

staying and answering questions, submitted to the show of authority.<sup>339</sup> The seizure was lawful, however, as a valid public safety stop.<sup>340</sup> The court focused on the trooper's testimony—in conjunction with the fact that it is unlawful to stop on the side of a highway absent an emergency—to determine that there were specific facts that indicated that the defendant might have required help.<sup>341</sup> The analysis employed by the court here suggests that the subjective thoughts of the officer may have bearing on the reasonableness of the stop.

d. Police Interrogations

Whether a police interrogation constitutes a seizure depends on the type of encounter that has taken place. An officer may ask a person questions in a voluntary encounter, and this does not rise to the level of a seizure under the Fourth Amendment.<sup>342</sup> An encounter is voluntary if “a reasonable person would feel free ‘to disregard the police and go about his business.’”<sup>343</sup> If an officer has reasonable suspicion that a person “committed, is about to commit, or is committing a crime,” then the officer may lawfully detain that person to investigate.<sup>344</sup> “[A] minimal level of objective justification” must support reasonable suspicion,<sup>345</sup> and an officer must have “more than an ‘inchoate and unparticularized suspicion or hunch’ of criminal activity.”<sup>346</sup> The Kansas Supreme Court considered the reasonableness of investigatory detentions in three recent cases.

i. *State v. Walker*

In *State v. Walker*, a pedestrian whose truck had just been

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339. *Id.* at 636.

340. *Id.* at 637.

341. *Id.*

342. *See State v. Young*, 157 P.3d 644, 647 (Kan. Ct. App. 2007) (citing *State v. Hill*, 130 P.3d 1, 6 (Kan. 2006)) (noting that voluntary encounters are not seizures under the Fourth Amendment).

343. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari, D.*, 499 U.S. 621, 628 (1991)).

344. *State v. Johnson*, 259 P.3d 719, 722 (Kan. 2011) (quoting *State v. Thomas*, 246 P.3d 678, 687 (Kan. 2011)).

345. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

346. *Id.* at 123–24 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)) (internal quotation marks omitted).

burglarized alerted a nearby police officer.<sup>347</sup> The pedestrian described the burglar as “a black male wearing a black shirt and black shorts.”<sup>348</sup> The officer began to search for the suspect and traveled in the direction indicated by the pedestrian.<sup>349</sup> About two blocks from the crime scene, the officer observed the defendant—a black male wearing similar clothing to the description provided by the victim—sitting at a bus stop.<sup>350</sup> The officer testified that he asked the defendant for identification and, when a records check turned up an outstanding arrest warrant, arrested him.<sup>351</sup> The defendant, however, testified that the officer arrested him as he began to take off his backpack to find his identification.<sup>352</sup> A search incident to the arrest revealed drugs on the defendant’s person.<sup>353</sup> On appeal, the defendant contested the validity of the stop by arguing that the officer lacked reasonable suspicion.<sup>354</sup>

The court determined that reasonable suspicion supported the investigatory stop, which rendered it legal.<sup>355</sup> The tip that the officer received was from an identified citizen, the defendant was found close to the crime scene and in the direction the victim indicated, and the defendant’s appearance was “consistent with the description provided.”<sup>356</sup> Even though the defendant asserted that the shirt he wore was actually “midnight blue and featured Mickey Mouse on its front,” the court noted that the officer and the victim described the shirt as black.<sup>357</sup> This case emphasizes that small mistakes such as identifying a dark blue shirt as black are not fatal to a determination of reasonable suspicion. Additionally, an officer can rely on a general description of a suspect so long as other factors are present, such as proximity to the crime scene.

ii. *State v. Coleman*

In *State v. Coleman*, a deputy sheriff pulled over the defendant for

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347. *State v. Walker*, 251 P.3d 618, 620 (Kan. 2011).

348. *Id.* (internal quotation marks omitted).

349. *Id.*

350. *Id.*

351. *Id.* at 621.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 625–26.

356. *Id.*

357. *Id.* at 626.

speeding.<sup>358</sup> The defendant was driving a rental car, and the rental agreement for the car had expired.<sup>359</sup> Through a records check, the deputy sheriff identified the defendant as a parolee.<sup>360</sup> The deputy sheriff then received two calls—one from a drug enforcement officer stating the defendant was moving drugs and another from the defendant’s parole officer asking the deputy sheriff to search the defendant.<sup>361</sup> Between thirty-five minutes to an hour after the initial stop, the parole officer arrived, advised the defendant that he was not under arrest, but still handcuffed the defendant.<sup>362</sup> A search by the officers produced cash on the defendant’s person and drugs in the car.<sup>363</sup>

The court considered whether the extension of the original traffic stop was justified by reasonable suspicion and whether the officers had authority to arrest and search the defendant and the car.<sup>364</sup> The court found “the expired rental agreement, in combination with [the defendant’s] parolee status and the reports [of likely] drug transportation, provided [the officer] with a reasonable suspicion of criminal activity, justifying temporary detention and allowing further investigation.”<sup>365</sup> This reasonable suspicion, however, did not permit the deputy sheriff to detain the defendant for an extended length of time so the parole officer could arrive.<sup>366</sup> The court makes it clear in this case that parolee status can permissibly contribute to reasonable suspicion, but officers cannot simply disregard established Fourth Amendment law when dealing with a parolee. Additionally, the timing of the search was critical here. If the deputy sheriff had conducted a search within the scope of the detention immediately after gaining reasonable suspicion, then the search would likely have been legal since the seizure would not have been impermissibly lengthened.

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358. *State v. Coleman*, 257 P.3d 320, 323 (Kan. 2011).

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 324.

365. *Id.* at 326.

366. *See id.* at 328 (“[A]n officer may not arbitrarily detain a driver in order to obtain the presence of a parole officer.”).

iii. *State v. Johnson*

In *State v. Johnson*, officers with the Federal Bureau of Investigation (FBI) wanted to arrest a person named Shane Thompson.<sup>367</sup> The officers had a “face sheet” that included a picture of Thompson and described him as a “black male with short hair and facial hair, who weighed about 160 pounds and was 5’2” tall.”<sup>368</sup> The officers first looked for Thompson at his mother’s home; he was not there, so the officers left.<sup>369</sup> Five blocks from that home, the officers noticed the defendant walking with another man.<sup>370</sup> The defendant and his companion were black men with facial hair and stood about 5’11” and 5’9” respectively.<sup>371</sup> The officers stopped their cars and approached the two men.<sup>372</sup> Eventually, the officers searched Johnson and found drugs on his person.<sup>373</sup>

The court first determined that the officers seized the defendant when they exited their vehicles.<sup>374</sup> The officers had activated their emergency lights, drawn their weapons, and surrounded the defendant.<sup>375</sup> Therefore, “a reasonable person would not feel free to refuse [them] or otherwise end the encounter.”<sup>376</sup> The court then examined whether the officers had reasonable suspicion to detain the defendant.<sup>377</sup> Because the location of the seizure had no relation to any crime, the officers failed to use reliable information.<sup>378</sup> Further, the part of the description that matched the defendant—“black man with facial hair”—was too general, so the court concluded the officers lacked reasonable suspicion to seize the defendant.<sup>379</sup> The court emphasized that “the task-force officer’s own testimony indicate[d] either the face sheet was unreliable or the officers chose to simply ignore it,” finding that either scenario rendered the seizure unreasonable.<sup>380</sup> “[T]he State may not justify the seizure

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367. *State v. Johnson*, 259 P.3d 719, 720 (Kan. 2011).

368. *Id.*

369. *Id.* at 720–21.

370. *Id.* at 721.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 722.

375. *Id.*

376. *Id.* (citing *State v. McGinnis*, 233 P.3d 246, 251 (2010)).

377. *Id.* at 722–25.

378. *Id.* at 724.

379. *Id.* at 723 (internal quotation marks omitted).

380. *Id.* at 724 (citing *State v. DeMarco*, 952 P.2d 1276, 1283 (Kan. 1998)).

based solely on a face sheet by presenting testimony that the face sheet was unreliable.”<sup>381</sup> This case emphasizes the importance of multiple factors supporting an assertion of reasonable suspicion. The unreliable face sheet in conjunction with proximity to the scene of a crime might have led the court to find the stop reasonable. The unreliable information alone, however, is not enough.

e. Arrests

Police officers may arrest a person pursuant to an arrest warrant.<sup>382</sup> An arrest warrant allows officers to enter private property to search for the individual named in the warrant.<sup>383</sup> Officers must “have a reasonable belief that the arrestee is present on the property.”<sup>384</sup> In the absence of a warrant, an officer may arrest a person based solely on probable cause.<sup>385</sup> The Kansas Supreme Court has described probable cause as:

[T]he reasonable belief that a specific crime has been committed and that the defendant committed the crime. Probable cause exists where the facts and circumstances within the arresting officers’ knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.<sup>386</sup>

3. Standing to Object to a Seizure

A defendant “has standing only to challenge the violation of his own Fourth Amendment rights.”<sup>387</sup> In the case of traffic stops, vehicle passengers—not just the driver—“may challenge the constitutionality of the stop.”<sup>388</sup> Standing to object to seizures can relate to whether a defendant has standing to object to a search.<sup>389</sup> Defendants “seek[ing] to

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381. *Id.*

382. KAN. STAT. ANN. § 22-2401(a) (2007).

383. *See State v. Beal*, 994 P.2d 669, 673 (Kan. Ct. App. 2000) (“An arrest warrant gives officers the right to search for a person.”).

384. *Id.*

385. *See* KAN. STAT. ANN. § 22-2401(c).

386. *State v. Ramirez*, 100 P.3d 94, 97 (Kan. 2004) (quoting *State v. Abbott*, 83 P.3d 794, 795 (Kan. 2004)).

387. *United States v. Beckstead*, 500 F.3d 1154, 1163 (10th Cir. 2007) (quoting *United States v. Ladeaux*, 454 F.3d 1107, 1112 (10th Cir. 2006)) (internal quotation marks omitted).

388. *Brendlin v. California*, 551 U.S. 249, 251 (2007).

389. *See State v. Gonzalez*, 85 P.3d 711, 713 (Kan. Ct. App. 2004) (“[A] defendant cannot object to the seizure of evidence without proper standing to challenge the validity of the search.”).

challenge the legality of a search as a basis for suppressing relevant evidence must claim . . . to have owned or possessed the property seized.”<sup>390</sup> Additionally, the Supreme Court has declared that standing in the Fourth Amendment context turns on “whether governmental officials violated any legitimate expectation of privacy held by [the defendant].”<sup>391</sup> A person “who abandons property is not permitted to contest the legality of the search and seizure of the property.”<sup>392</sup> Kansas courts use a two prong test to determine if property was abandoned: “(1) A defendant must intend to abandon the property; and (2) the defendant must freely decide to abandon the property and the decision must not merely be the product of police misconduct.”<sup>393</sup>

### *B. Fifth and Sixth Amendment Issues*

#### 1. Protections of the Fifth and Sixth Amendments

The Fifth Amendment provides 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.”<sup>394</sup> Bolstered by the Due Process Clause of the Fourteenth Amendment, the Fifth Amendment serves as a shield for defendants against self-incriminating statements they may make in the course of an interrogation by law enforcement officials.<sup>395</sup>

The Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>396</sup> When analyzing the Sixth Amendment, one must identify the circumstances that constitute a “critical period” of the prosecution relative to statements made by the accused, so as to entitle the accused to the assistance of counsel under the Sixth Amendment.<sup>397</sup> Statements by the defendant that have been “[d]eliberately elicited by the

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390. *State v. McCammon*, 250 P.3d 838, 841 (Kan. Ct. App. 2011) (citing *State v. Jakeway*, 558 P.2d 113, 116–17 (Kan. 1976)).

391. *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980).

392. *State v. Ralston*, 257 P.3d 814, 818 (Kan. Ct. App. 2011).

393. *Id.* (quoting *State v. Likins*, 903 P.2d 764, 770 (Kan. Ct. App. 1995)).

394. U.S. CONST. amend. V.

395. *See id.*

396. U.S. CONST. amend. VI.

397. *Massiah v. United States*, 377 U.S. 201, 205 (1964) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

police after the defendant [has] been indicted”<sup>398</sup> and “adversary judicial proceedings”<sup>399</sup> best illustrate the periods that necessitate Sixth Amendment protection. Adversary judicial proceedings also include, but are not limited to, arraignments, grand jury proceedings, and complaints.<sup>400</sup>

## 2. *Miranda* Warnings: Additional Protections to the Fifth and Sixth Amendments

### a. *Miranda v. Arizona*

*Miranda v. Arizona* created prophylactic rules that protect suspects from the “inherently compelling pressures [that] work to undermine the [defendant’s] will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>401</sup> Before a custodial interrogation, a police officer must give the suspect the *Miranda* warnings, which instruct that the suspect has the right to remain silent; that anything he says may be used against him in a court of law; and that the suspect has the right to an attorney, which the State will appoint if the suspect is unable to afford one.<sup>402</sup> Kansas requires that a police officer provide *Miranda* warnings when a police encounter renders a suspect in custody or when police interrogate the suspect.<sup>403</sup>

### b. Custodial Interrogations

A two-part inquiry ascertains whether a custodial interrogation has taken place under *Miranda*.<sup>404</sup> The first part of the inquiry analyzes “the circumstances surrounding the interrogation.”<sup>405</sup> In Kansas, courts analyze the following eight factors:

- (1) when and where the interrogation occurred; (2) how long it lasted;

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398. *Id.* at 204.

399. *See* Rothgory v. Gillespie Cnty., 554 U.S. 191, 213 (2008) (describing the “start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel”).

400. *Massiah*, 377 U.S. at 204–05.

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

402. *Id.* at 444.

403. *State v. Schultz*, 212 P.3d 150, 155 (Kan. 2009) (citing *State v. Morton*, 186 P.3d 785, 791 (Kan. 2006)).

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

405. *Id.*

(3) how many police officers were present; (4) what the officers and defendant said and did; (5) the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door; (6) whether the defendant is being questioned as a suspect or a witness; (7) how the defendant got to the place of questioning, that is, whether he came completely on his own in response to a police request or was escorted by police officers; and (8) what happened after the interrogation—whether the defendant left freely, was detained, or was arrested.<sup>406</sup>

The second inquiry is objective and analyzes whether “under the totality of [the] circumstances . . . a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation.”<sup>407</sup>

In *State v. Summers*, the Kansas Supreme Court recently determined whether a defendant was subject to a custodial interrogation for *Miranda* purposes.<sup>408</sup> In *Summers*, police officers arrived at the defendant’s father’s home to question him about a recent killing.<sup>409</sup> Upon arrival, officers were dressed casually and displayed their badges and firearms on their belts.<sup>410</sup> The defendant’s wife, grandfather, father, and mother were present during the interview conducted by the officers at the dining room table.<sup>411</sup> Before starting the interview, the officers explained to the defendant that he was not in custody and that they did not need to read him his *Miranda* rights.<sup>412</sup> After speaking with the defendant for thirty minutes, the officers collected his oral swab and fingerprints.<sup>413</sup> The defendant told the officers that he did not know or recognize the victim and that he had never been to the victim’s home, where the murder took place.<sup>414</sup> At this point, officers became hostile and told the defendant they did not think he was being honest.<sup>415</sup> The defendant then asked the officers to leave the home, and they complied.<sup>416</sup> Though the defendant did not confess to the murder, “he did make statements that were

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406. *State v. Jones*, 151 P.3d 22, 31 (2007) (quoting *State v. Deal*, 23 P.3d 840, 852 (Kan. 2001), abrogated on other grounds by *State v. Anthony*, 145 P.3d 1 (Kan. 2006)).

407. *Id.*

408. *State v. Summers*, No. 101,902, 2012 WL 335648, at \*3 (Kan. Feb. 3, 2012).

409. *Id.* at \*3.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

inconsistent with the evidence.”<sup>417</sup> He sought to suppress his inconsistent statements at trial and argued that the interrogation was “custodial because he was being questioned as a suspect, not a witness.”<sup>418</sup> The defendant claimed that the court should suppress the

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417. *Id.*

418. *Id.*

statements because the officers did not inform him of his *Miranda* rights.<sup>419</sup>

The trial court identified that the following circumstances attended interrogation: the defendant “arranged the meeting with officers at his parents’ home”;<sup>420</sup> the officers conducted the interview “in the presence of his family”;<sup>421</sup> “[t]he interview lasted less than an hour”;<sup>422</sup> “the officers were cordial”;<sup>423</sup> when the interview “became confrontational,” the officers complied with the defendant’s request that they leave;<sup>424</sup> and finally, police did not arrest the defendant until a month after the interview.<sup>425</sup> Under a totality of the circumstances review, the court held that the interrogation was not custodial and *Miranda* warnings were unnecessary.<sup>426</sup> The Kansas Supreme Court held that a reasonable defendant would have felt he was free to terminate the interview, giving great weight to the fact that when the defendant asked the officers to leave, they obeyed his request.<sup>427</sup>

The court reached the correct decision in *Summers*. The officers did not become suspicious or confrontational until the defendant started making incriminating statements that were inconsistent with the evidence in the case. Further, the defendant’s inconsistent statements occurred before the officers were confrontational about the validity of his claims concerning the victim. Regardless, whether the defendant is in custody “depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.”<sup>428</sup>

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419. *Id.* at \*5–6.

420. *Id.* at \*6.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at \*6–7.

427. *Id.*

428. *State v. Morton*, 186 P.3d 785, 793 (Kan. 2008) (quoting *State v. Jones*, 151 P.3d 22, 30 (Kan. 2007)) (internal quotation marks omitted).

## c. Police Officers' Duties During Interrogations

i. Waiver of *Miranda* Rights

A “defendant may waive effectuation of [*Miranda*] rights, provided the waiver is made voluntarily, knowingly[,] and intelligently.”<sup>429</sup> In *United States v. Sanchez-Chaparro*, the Tenth Circuit recently considered whether a Hispanic defendant’s incriminating statements made during the course of an interrogation were made knowingly and voluntarily in light of the defendant’s understanding of the English language.<sup>430</sup>

In *Sanchez-Chaparro*, police officers stopped a vehicle driven by a Hispanic suspect targeted for drug trafficking.<sup>431</sup> An officer spoke to the defendant in English, and the defendant agreed to go to the police station for questioning.<sup>432</sup> At the police station, an officer read the defendant his *Miranda* rights in English.<sup>433</sup> Based on the defendant’s responses in English, the officer believed the defendant understood his *Miranda* rights.<sup>434</sup> To avoid any possible misunderstanding, another officer asked the defendant in Spanish whether he comprehended his rights.<sup>435</sup> The defendant confirmed that he understood and signed a form waiving his *Miranda* rights.<sup>436</sup>

The defendant moved to suppress his incriminating statements and argued “that his waiver of his *Miranda* rights was not knowing and voluntary because he did not understand enough English to comprehend the warnings.”<sup>437</sup> The Tenth Circuit looked at various reasons for denying the motion to suppress. First, the defendant responded in English to questions asked in English during the initial traffic stop.<sup>438</sup> Second, though the defendant asked whether a translator would be available at the station, he did not request a translator when he arrived at

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429. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

430. *United States v. Sanchez-Chaparro*, 392 F. App’x 639, 644–45 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 671 (2010).

431. *Id.* at 641–42.

432. *Id.* at 642.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *See id.* at 644 (noting that the defendant “responded appropriately to [the officer’s] questioning during the traffic stop”).

the station.<sup>439</sup> Third, when it seemed that the defendant may have failed to understand the warnings given during the interview, an officer used Spanish to ask whether he understood the warnings, and he confirmed that he did.<sup>440</sup> Lastly, the “defendant conversed with officers in English during a search of his trailer.”<sup>441</sup>

While the various facts discussed by the court show that the defendant understood some English, his understanding of his *Miranda* rights deserved more attention. Interrogations involve “inherently compelling pressures”<sup>442</sup> and may have lead the defendant to waive his *Miranda* rights when, in fact, he had a minimal understanding of the importance of waiving his *Miranda* rights.

## ii. Public Safety Exception

In *New York v. Quarles*, the United States Supreme Court held that the “public safety” exception may justify a failure to provide a *Miranda* warning before a custodial interrogation.<sup>443</sup> Kansas courts continue to recognize the public safety exception under *Quarles*.<sup>444</sup>

The Kansas Court of Appeals recently considered the applicability of the *Quarles* exception to an officer’s pre-*Miranda* questioning regarding potentially harmful objects prior to patting down a suspect.<sup>445</sup> In *State v. Johnson*, police officers stopped a vehicle driven by the defendant when they noticed a small child sitting on Johnson’s lap.<sup>446</sup> The defendant told the “officers that his driver’s license was suspended”;<sup>447</sup> he also lacked proof of insurance.<sup>448</sup> “After [one officer] confirmed that [the defendant] was driving on a suspended license, he was arrested and placed in handcuffs.”<sup>449</sup> Before the police patted down the defendant, the officer asked him “if he had any weapons, sharp objects, or anything else on his

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439. *Id.*

440. *Id.*

441. *Id.*

442. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

443. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

444. *See State v. Cosby*, 169 P.3d 1128, 1137 (Kan. 2007) (discussing the public safety exception as applied in Kansas case law).

445. *State v. Johnson*, 264 P.3d 1018, 1024 (Kan. Ct. App. 2011).

446. *Id.* at 1021.

447. *Id.*

448. *Id.*

449. *Id.*

person [the officer] should know about.”<sup>450</sup> The defendant admitted that he had marijuana in his pocket.<sup>451</sup> Johnson was later booked into jail and again subjected to a search.<sup>452</sup> The district court ruled that the officer’s questioning did not amount to a custodial interrogation and that *Miranda* warnings were not necessary.<sup>453</sup> On appeal, the defendant argued that the officer’s “questions before conducting [the] pat-down search constituted a custodial interrogation.”<sup>454</sup> The Kansas Court of Appeals concluded that the officer’s “question prior to the pat-down search [that asked] whether [the defendant] had any weapons, sharp objects, or anything that would [harm] the officer fits within the narrow public safety exception as set out in *Quarles*.”<sup>455</sup> The court noted that “[a]n officer has an immediate need to protect himself or herself from weapons or sharp objects, and the officer may pose this question to a suspect prior to giving *Miranda* warnings.”<sup>456</sup> Despite this rule, the court held that the officer’s question concerning whether “he had anything on his person that she should know about” went beyond the scope of the officer’s safety, and the officer reasonably could anticipate this question eliciting an incriminating response.<sup>457</sup>

The defendant cited, and the Kansas Court of Appeals approved of, *State v. Strozier*, an Ohio Court of Appeals decision.<sup>458</sup> In *Strozier*, officers stopped a vehicle after running its plates and discovered that the vehicle was stolen.<sup>459</sup> According to the Ohio Court of Appeals, although the danger of suffering injury during a search of the defendant was a legitimate safety concern, the court found that “to invoke the public-safety exception to *Miranda* under these circumstances, the officer’s questions must be narrowly tailored to address *only* that concern.”<sup>460</sup>

Here, the defendant was undoubtedly under arrest and in custody when the officer asked whether “he had anything on his person that she should know about.”<sup>461</sup> That question encompassed more than just

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450. *Id.*

451. *Id.*

452. *Id.*

453. *See id.*

454. *Id.* at 1023.

455. *Id.* at 1024.

456. *Id.*

457. *Id.* (internal quotation marks omitted).

458. *Id.* (citing *State v. Strozier*, 876 N.E.2d 1304 (Ohio Ct. App. 2007)).

459. *Id.* (citing *Strozier*, 876 N.E.2d at 1306–07).

460. *Id.* (quoting *Strozier*, 876 N.E.2d at 1311–12) (internal quotation marks omitted).

461. *Id.* at 1023 (internal quotation marks omitted).

weapons likely to harm the officer and, instead, included a broad spectrum of illegality. The question was reasonably likely to elicit an incriminating response from the defendant and actually did in this case. Thus, it appears the court's decision in *Johnson* was appropriate under the circumstances.

d. Invocation of Right to Remain Silent and Right to Counsel

In *Miranda*, the Supreme Court held that when a suspect invokes either the right to remain silent or the right to counsel, the police must stop custodial interrogation immediately.<sup>462</sup> In Kansas, courts analyze two aspects when determining whether a suspect invoked his or her right to counsel. First, courts consider whether the suspect articulated the desire to have an attorney present clearly enough so the officer could reasonably "understand the statement to be a request for an attorney."<sup>463</sup> Second, courts determine whether the request for an attorney was "for assistance with the custodial interrogation, not for later hearings or proceedings."<sup>464</sup> Further, when a defendant argues that he requested counsel, "[t]he 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 in dealing with a custodial interrogation by law enforcement officers."<sup>465</sup>

In *State v. Swann*, the Kansas Court of Appeals considered whether a defendant's "mention of the word, 'lawyer' on . . . two occasions . . . constituted an unambiguous assertion of the right to counsel."<sup>466</sup> The defendant and several accomplices planned to burglarize a drug dealer and steal a large amount of marijuana.<sup>467</sup> The defendant served as the potential getaway driver to two other individuals who attacked the drug dealer and stole the marijuana.<sup>468</sup> Upon arrival of the police, the attackers fled but were quickly apprehended.<sup>469</sup> The defendant fled in his vehicle, and police later interrogated him about his involvement in the

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

463. *State v. Bowlin*, 229 P.3d 402, 411 (Kan. Ct. App. 2010) (citing *State v. Walker*, 80 P.3d 1132, 1136–37 (Kan. 2003)).

464. *Id.* (citing *Walker*, 80 P.3d at 1136–37).

465. *State v. Appleby*, 221 P.3d 525, 548 (Kan. 2009).

466. *State v. Swann*, No. 102,023, 2011 WL 1344728, at \*9 (Kan. Ct. App. Apr. 1, 2011).

467. *Id.* at \*1–2.

468. *Id.*

469. *Id.* at \*1.

robbery.<sup>470</sup> After twenty minutes of interrogation, the detectives asked the defendant about the individuals whom he drove.<sup>471</sup> The defendant responded by explaining that the question made him “uncomfortable” and that he would “rather have a lawyer present to be saying all this kind of stuff.”<sup>472</sup> The detective acknowledged the statement, but he allowed the defendant to continue to speak and finally asked the defendant how he would like to proceed.<sup>473</sup> The defendant did not directly respond; still, he said that he wished to cooperate but did not want to be a snitch.<sup>474</sup> Again, detectives told the defendant that he needed to tell them whether he wanted counsel present.<sup>475</sup> He told the detectives that he understood that he could have counsel present, yet he agreed to continue the interview.<sup>476</sup> Later in the interview, when admitting to purchasing marijuana, the defendant said, “Oh my God. I need a lawyer present after this, man.”<sup>477</sup> Officers then reiterated that the interview must stop if he wanted counsel present and asked the defendant whether he wanted to continue.<sup>478</sup> The defendant responded, “For right now, yes. Just for right now, I just want to talk (inaudible).”<sup>479</sup> The detective again reminded the defendant of his rights, but he continued to answer their questions.<sup>480</sup>

The court relied on *Davis v. United States*, as adopted by the Kansas Supreme Court in *State v. Appleby*, and held that the officers need not “cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney.”<sup>481</sup> The defendant’s statements were ambiguous and did not invoke the right to counsel.<sup>482</sup> Further, the defendant’s statement about needing counsel “after *this*” was too vague because it could have meant that he wanted counsel *after* the interrogation rather than in that moment, and “a request for counsel under the Fifth Amendment must relate to the particular custodial

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470. *Id.* at \*2–3.

471. *Id.* at \*9.

472. *Id.* (internal quotation marks omitted).

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* (internal quotation marks omitted).

478. *Id.*

479. *Id.* (internal quotation marks omitted).

480. *Id.*

481. *Id.* at \*10 (quoting *State v. Appleby*, 221 P.3d 525, 542 (Kan. 2009)) (internal quotation marks omitted).

482. *Id.*

interrogation not to a later hearing or proceeding.”<sup>483</sup> The defendant’s statements, while arguably referencing the need for an attorney at some point in time, were without certainty and possibly unrelated to the need for an attorney at that very moment.

e. Voluntariness of Statements Made During Police Interrogation

When determining whether a defendant’s confession is voluntary, courts consider: “(1) the accused’s mental condition; (2) the duration and manner of the interrogation; (3) the accused’s ability to communicate on request with the outside world; (4) the accused’s age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused’s fluency with the English language.”<sup>484</sup> Ultimately, courts analyze all of these factors under the totality of the circumstances.<sup>485</sup> The Kansas Court of Appeals recently considered the voluntariness of a defendant’s confession in *State v. Brooks*.<sup>486</sup> In *Brooks*, police officers arrested the defendant after his girlfriend accused him of attacking and stealing from her.<sup>487</sup> Before the officer interrogated the defendant, the officer read him his *Miranda* rights, and he consented to questioning.<sup>488</sup> The defendant then confessed to the attack and told the officer that he had taken thirty doses of Adderall before the officers arrested him.<sup>489</sup> The defendant moved to suppress the statements that he made to the detective, claiming his confession was involuntary because he was without sleep and under the influence of Adderall.<sup>490</sup> The trial court denied his motion.<sup>491</sup>

The court of appeals affirmed and reasoned that the defendant clearly understood his *Miranda* rights when he waived them.<sup>492</sup> He did not appear to be under the influence of alcohol or drugs, and he “was able to express his thoughts clearly.”<sup>493</sup> Further, he asked questions, he was not

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483. *Id.* (citing *State v. Bowlin*, 279 P.3d 402, 411 (Kan. Ct. App. 2010)).

484. *State v. Brooks*, No. 104,185, 2011 WL 5143042, \*2 (Kan. Ct. App. Oct. 28, 2011) (per curiam) (citing *State v. McMullen*, 221 P.3d 92, 95 (Kan. 2009)).

485. *Id.* (citing *State v. Drown*, 182 P.3d 1205, 1208–09 (Kan. 2008)).

486. *Id.*

487. *Id.* at \*1.

488. *Id.*

489. *Id.*

490. *Id.* at \*2.

491. *Id.*

492. *Id.* at \*3.

493. *Id.*

threatened during the course of the interview, and he provided coherent answers.<sup>494</sup> Looking at the totality of these circumstances, the court of appeals found that the defendant's statements were the product of his free will; therefore, the trial court properly admitted his confession.

#### IV. PRETRIAL ISSUES

The Fifth and Sixth Amendments afford the accused vital pretrial rights. The Fifth Amendment provides that “[n]o person shall 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.”<sup>495</sup> The Supreme Court has not incorporated against the states the Fifth Amendment's right to indictment by grand jury, and accordingly, it only applies in federal felony criminal cases.<sup>496</sup> The Fourteenth Amendment to the United States Constitution protects a defendant's due process rights during state prosecutions.<sup>497</sup>

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be informed of the nature and cause of the accusation . . . , and to have the Assistance of Counsel for his defence.”<sup>498</sup> Unlike the Fifth Amendment's right to indictment by grand jury, the Supreme Court has incorporated the rights to a speedy and public trial, notice of accusations, and assistance of counsel against the states under the Due Process Clause of the Fourteenth Amendment.<sup>499</sup> Accordingly, in state criminal proceedings, the prosecution must comply with these Sixth Amendment requirements.

Section 10 of the Bill of Rights of the Kansas Constitution provides many of the same protections included in the Fifth and Sixth

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494. *Id.*

495. U.S. CONST. amend. V.

496. *See* *Hurtado v. California*, 110 U.S. 516, 538 (1884) (refusing to incorporate the Fifth Amendment's right to grand jury indictment to the states).

497. U.S. CONST. amend. XIV.

498. U.S. CONST. amend. VI.

499. *See* *Klopper v. North Carolina*, 386 U.S. 213, 223–26 (1967) (incorporating the Sixth Amendment's speedy trial right to the states); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (incorporating the Sixth Amendment's right to the assistance of counsel to the states); *In re Oliver*, 333 U.S. 257, 272–73 (1948) (incorporating the Sixth Amendment's rights to a public trial and notice of accusations against the accused to the states).

Amendments of the United States Constitution.<sup>500</sup> Section 10 provides that “[i]n all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him . . . and to have . . . a speedy public trial by an impartial jury.”<sup>501</sup> Although most of these protections overlap with the incorporation of federal guarantees to state criminal proceedings, the interpretation and application of specific protections could vary in specific cases.

#### A. *Formal Charge*

##### 1. Charging Documents: Complaint, Information, and Indictment

Kansas law requires that “[p]rosecutions . . . shall be upon complaint, indictment[,] or information.”<sup>502</sup> The statute mandates that the “complaint, information[,] or indictment shall be a plain and concise written statement of the essential facts constituting the crime charged.”<sup>503</sup> Although the statute does not command the charging document to state the time that the accused allegedly committed the crime, it does require a showing of time with enough specificity to ensure that the statute of limitations has not expired.<sup>504</sup> The prosecutor’s choice of charging document in a criminal proceeding may vary. Because the primary difference between the three types of charging documents relates to who must attest to the factual allegation contained in the document,<sup>505</sup> the prosecution often bases this decision on the availability of the various witnesses or other parties.

The first method by which the State may bring criminal prosecutions in Kansas is by the presentation of a criminal complaint.<sup>506</sup> First, and most importantly, the criminal complaint must set forth the essential allegations of fact for the crime charged.<sup>507</sup> Of the three charging

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500. See KAN. CONST. Bill of Rights § 10.

501. *Id.*

502. KAN. STAT. ANN. § 22-3201(a) (2007). It is worth noting that Kansas recently re-codified many of its criminal statutes. Unless otherwise noted, the re-codification from prior statutes effected no substantive change in the law.

503. *Id.* § 22-3201(b).

504. *Id.* The statute provides an exception to this leniency with respect to the time the alleged crime was committed in cases where “the time is an indispensable ingredient in the offense.” *Id.*

505. *Id.*

506. *Id.* § 22-3201(a).

507. *Id.* § 22-3201(b).

documents, criminal complaints impose the “lowest” threshold with respect to attestation of the facts alleged. Kansas law requires that only “some person with knowledge of the facts” sign the complaint.<sup>508</sup>

Prosecutors may also bring criminal charges with an information.<sup>509</sup> Like a complaint, an information must set forth the essential facts of the alleged crime, but in addition to the facts, “the county attorney, the attorney general[,] or any legally appointed assistant or deputy of either must sign the information.”<sup>510</sup>

The final—and most formal—charging document is an indictment, which requires the signature of the presiding juror of a grand jury following a grand jury proceeding.<sup>511</sup> As noted above, the Fifth Amendment requires use of a grand jury in felony prosecutions in federal court,<sup>512</sup> and states often use them for more serious charges.

Defendants in Kansas have occasionally challenged convictions based on alleged defects in the charging documents.<sup>513</sup> Under well-established case law, such challenges may succeed because “[i]f a crime is not specifically stated in the [charging document] or is not a lesser included offense of the crime charged, the district court lacks jurisdiction to convict a defendant of the crime, regardless of the evidence presented.”<sup>514</sup> The Kansas Supreme Court has enunciated a test for the sufficiency of the charging document that varies depending on when the defendant raises the issue.<sup>515</sup> When a defendant challenges the sufficiency of the charging document before trial, the prosecution will often provide the defense with a bill of particulars that clarifies the documents.<sup>516</sup> But because an inadequate charging document presents a jurisdictional bar, a challenge to the charging document may be raised for the first time on appeal.<sup>517</sup> In such cases, the “test used to evaluate the sufficiency of the charging document [requires that] the

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508. *Id.*

509. *Id.* § 22-3201(a).

510. *Id.* § 22-3201(b).

511. *Id.*

512. *See* U.S. CONST. amend. V; *see also* *Hurtado v. California*, 110 U.S. 516, 538 (1884).

513. *See e.g.*, *State v. Gonzales*, 212 P.3d 215, 225–27 (Kan. 2009) (challenging a conviction on the grounds that the specific crime was not included in the charging document).

514. *Id.* at 225 (quoting *State v. Belcher*, 4 P.3d 1137, 1141 (Kan. 2000)) (internal quotation marks omitted).

515. *See id.* at 226.

516. *See infra* Part IV.A.2.

517. *See, e.g.*, *Gonzales*, 212 P.3d at 226 (challenging the sufficiency of a charging document post-conviction).

defendant . . . show that the alleged defect either: (1) prejudiced the defendant's preparation of a defense; (2) impaired the defendant's ability to plead the conviction in any subsequent prosecution; or (3) limited the defendant's substantial rights to a fair trial."<sup>518</sup>

## 2. Bill of Particulars

Kansas uses a statute to extend the constitutional protection that the accused must know the charges against him.<sup>519</sup> Regardless of whether the State files charges with an information, indictment, or criminal complaint, the defendant may request a bill of particulars when the charging document "fails to specify the particulars of the crime sufficiently to enable the defendant to prepare a defense."<sup>520</sup> The defendant must make a request by written motion, and this determination falls within the discretion of the court.<sup>521</sup> If ordered by the court, the bill of particulars should clarify the charges brought against the criminal defendant.<sup>522</sup> Additionally, the court will not permit the State to introduce evidence at trial that falls outside the scope of the bill of particulars.<sup>523</sup>

In *State v. Gamble*, the Kansas Court of Appeals recently reaffirmed the deferential treatment afforded to trial courts regarding their decisions about whether the defendant deserves a bill of particulars.<sup>524</sup> The defendant in *Gamble* was convicted of five counts of rape and five counts of aggravated criminal sodomy.<sup>525</sup> On appeal, the defendant argued that the trial court erred in refusing to grant his motion for a bill of particulars to clarify the time and place that the alleged crime occurred.<sup>526</sup> In applying an abuse of discretion standard, the court noted that the defendant could have obtained the requested information by reviewing the state's evidence, which was available.<sup>527</sup> The court additionally noted that the defendant moved for a bill of particulars

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518. *Id.* at 226 (citing *State v. Gracey*, 200 P.3d 1275, 1278 (Kan. 2009)).

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

520. *Id.*

521. *Id.* ("[T]he court *may* . . . require the prosecuting attorney to furnish the defendant with a bill of particulars." (emphasis added)).

522. *Id.*

523. *Id.* ("At the trial[,] the state's evidence shall be confined to the particulars of the bill.").

524. 236 P.3d 541, 550–51 (Kan. Ct. App. 2010).

525. *Id.* at 545.

526. *Id.* at 549.

527. *Id.* at 550–51.

merely two days before trial, which was more than one year after the defendant was charged.<sup>528</sup> The appellate court accordingly affirmed the trial court's decision to deny the motion.<sup>529</sup>

The decision in *Gamble* confirms the appellate court's hesitancy to second-guess trial court decisions with respect to motions for bills of particulars. It is also worth noting that the court was concerned with the defense's apparent attempt to use the motion either to extend the time frame for plea bargaining or preserve the issue for appeal. Under *Gamble*, it is crucial that—when necessary to understand the charges against a criminal defendant—a defendant move for a bill of particulars formally and early in the proceeding.

### 3. Changes to the Charging Documents

#### a. Amendments and Variances

With the court's permission, "a complaint or information [may] be amended at any time before verdict . . . if substantial rights of the defendant are not prejudiced."<sup>530</sup> The State may not amend charges brought under a grand jury indictment, unless the new or different charges receive approval by a grand jury.<sup>531</sup>

*State v. Bischoff* remains a principal case interpreting section 22-3201(e) of the Kansas Statutes and the extent to which the State may amend charging documents after the initial prosecution has commenced.<sup>532</sup> In *Bischoff*, the court noted that the State should be given "considerable latitude" in determining whether to amend the complaint prior to trial.<sup>533</sup> In allowing this latitude, appellate courts have only overturned a trial court's determination to permit amendment "when no reasonable person would take the view adopted by the district court."<sup>534</sup> The Kansas Court of Appeals recently confirmed as controlling law *Bischoff's* approach to granting the government broad authority to make changes to charging documents before trial.<sup>535</sup>

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528. *Id.* at 551.

529. *Id.*

530. KAN. STAT. ANN. § 22-3201(e) (2007).

531. *See id.* § 22-3201(b), (e).

532. 131 P.3d 531, 533 (Kan. 2006).

533. *Id.* at 538 (citing *State v. Woods*, 825 P.2d 514, 519 (Kan. 1992)).

534. *Id.* (citing *State v. Sanchez-Cazares*, 78 P.3d 55, 59 (Kan. 2003)).

535. *State v. Calderon-Aparicio*, 242 P.3d 1197, 1209–11 (Kan. Ct. App. 2010) (citing *Bischoff*).

b. Challenges

Under *Bischoff*, defendants have rarely succeeded with their challenges to amendments or variances to the charging documents. In *State v. Calderon-Aparicio*, the Kansas Court of Appeals unambiguously recognized *Bischoff* as the relevant authority.<sup>536</sup> The defendant faced charges of possession of marijuana with intent to sell and failure to obtain a tax stamp.<sup>537</sup> Two days before trial, the prosecution moved to amend the complaint from possession of marijuana with intent to sell to possession of marijuana with intent to sell, distribute, or deliver.<sup>538</sup> A jury convicted the defendant of the amended charges.<sup>539</sup>

On appeal, the defendant argued that the trial court committed reversible error by permitting the prosecution to amend its complaint two days before trial to include the “intent to . . . distribute or deliver” with the initial charge.<sup>540</sup> The defendant argued that the amendment substantially prejudiced his rights because it charged him with a different crime composed of different elements than the crime contained in the initial complaint.<sup>541</sup> The court of appeals rejected this argument and reasoned that the amendment to the complaint did not change the crime actually charged.<sup>542</sup> Instead, the court concluded that the amended complaint merely “allowed alternative ways of committing a single offense.”<sup>543</sup> Thus, the court held that the amended complaint did not compromise the defendant’s rights because it charged the same crime and required the State to prove the same elements.<sup>544</sup>

In light of *Bischoff* and *Calderon-Aparicio*, it is apparent that a trial court’s decisions regarding amended charging documents will receive extraordinarily deferential treatment. Although the appellate court noted that the prosecution in *Calderon-Aparicio* amended the complaint only two days before trial to include “more ways of committing a single

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131 P.3d at 538).

536. *Id.*

537. *Id.* at 1203.

538. *Id.*

539. *Id.*

540. *Id.* at 1209.

541. *Id.* at 1210.

542. *Id.*

543. *Id.*

544. *Id.*

offense,”<sup>545</sup> the court still concluded that this was insufficient to prejudice the defendant.<sup>546</sup> Arguably, the amendment may also have prejudiced the defendant because his counsel only had two days to prepare any defense on those issues. Nonetheless, the court deferred to the determination of the trial judge and extended the well-established standard of review for amendments to the charging documents.

### *B. Initial Appearance*

#### 1. Speedy Public Trial

Kansas has augmented the state and federal constitutional guarantees of a speedy trial with a statutory complement.<sup>547</sup> Under section 22-3402(1) of the Kansas Statutes, “[i]f 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.”<sup>548</sup> But if the court grants bail to the accused and releases him on an appearance bond, the provision extends deadline to 180 days.<sup>549</sup>

The Kansas Court of Appeals recently addressed the extended 180 day period in *State v. Palmquist*.<sup>550</sup> In *Palmquist*, the State appealed the district court’s ruling that the 180-day period in section 22-3402(2) had run, which required the court to grant the defendant’s motion to dismiss.<sup>551</sup> The State argued that section 22-3402(2) did not apply to the defendant because he had not been subject to an appearance bond as required by statute.<sup>552</sup> Instead, the district court ordered the defendant to appear at the next hearing.<sup>553</sup> The State argued that an appearance bond was a statutory prerequisite to the application of section 22-3402(2) and, because the provision did not apply, claimed that the trial court should

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545. *Id.*

546. *Id.*

547. See KAN. STAT. ANN. § 22-3402 (2007).

548. *Id.* § 22-3402(1).

549. *Id.* § 22-3402(2).

550. No. 103,914, 2011 WL 767861, at \*2 (Kan. Ct. App. Feb. 18, 2011) (per curiam).

551. *Id.* at \*5–6.

552. *Id.* at \*3.

553. *Id.* at \*5.

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have denied the defendant's motion to dismiss.<sup>554</sup>

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554. *Id.* at \*6-7.

Relying on the Kansas Supreme Court's decision in *City of Elkhart v. Bollacker*,<sup>555</sup> a divided court of appeals panel held that the trial court's admonition to appear operated essentially as a security bond.<sup>556</sup> Accordingly, although there was no formal agreement for the defendant to appear, the appellate court concluded that "the [district] court's actions in permitting [the defendant] to remain outside of custody while charges were pending [we]re akin to release on a personal recognizance bond."<sup>557</sup> Thus, the court calculated that the number of days that elapsed between the defendant's arrest and his ultimate trial exceeded the 180-day limit mandated by Kansas law.<sup>558</sup> The outcome in *Palmquist* appears to contradict the plain statutory language used in section 22-3402(2). Nonetheless, the court's conclusion that the outcome was "practical" is difficult to refute because the defendant's failure to appear would have exposed him to additional criminal liability.<sup>559</sup> Thus, the court reached a sound decision because the practical effect of the statute remains the same. The only difference is between the sanction imposed in the event of the defendant's failure to appear— forfeiture of the bond amount or contempt of court charges.

## 2. Right to Counsel

The Sixth Amendment right to the assistance of counsel in criminal prosecutions applies in both state and federal courts.<sup>560</sup> But this right is specific and it may not "be invoked once for all future prosecutions."<sup>561</sup> Additionally, the right to counsel does not attach until "the filing of formal charges, indictment, or information; on arraignment; or on arrest on warrant and arraignment thereon."<sup>562</sup> Implicit in the Sixth Amendment's right to counsel is the right of criminal defendants to self-representation.<sup>563</sup>

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555. 757 P.2d 311 (Kan. 1988).

556. See *Palmquist*, 2011 WL 767861, at \*5 (citing *Bollackes*, 757 P.2d at 313–14).

557. *Id.*

558. *Id.* at \*7.

559. See *id.* at \*4.

560. See *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963); *State v. Appleby*, 221 P.3d 525, 544 (Kan. 2009).

561. *State v. Gamble*, 236 P.3d 541, 545 (Kan. Ct. App. 2010) (quoting *Appleby*, 221 P.3d at 544).

562. *Id.* (citing *Appleby*, 221 P.3d at 544).

563. See *Faretta v. California*, 422 U.S. 806, 819 (1975); *State v. Jones*, 228 P.3d 394, 398 (Kan. 2010).

*C. Pretrial Release and Bail*

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required.”<sup>564</sup> The Kansas Bill of Rights states that “[a]ll persons shall be bailable by sufficient sureties except for capital offenses . . . [and] excessive bail shall not be required.”<sup>565</sup> The excessive bail provision in the Eighth Amendment has almost surely been incorporated against the states.<sup>566</sup> Because the Kansas proscription is coextensive and uses the same language as the Eighth Amendment, the Kansas Constitution’s guarantee that all non-capital suspects be bailable is an additional level of protection that encompasses the federal rights as well.

Kansas law provides a statutory basis for an accused defendant’s right to release on bond pending a preliminary hearing or trial.<sup>567</sup> Section 22-2802 of the Kansas Statutes provides that “[a]ny person charged with a crime shall . . . be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate.”<sup>568</sup> In addition to the constitutional limitations discussed below, statutory provisions specify that the court should set bond at an amount “sufficient to assure the appearance of such [accused] person before the magistrate” and “assure the public safety.”<sup>569</sup> These statutory guides are subject to the constitutional protections against excessive bail.

Kansas Courts have largely defined the breadth of the protection afforded by the constitutional provisions against excessive bail.<sup>570</sup> The Kansas Supreme Court has granted to the trial judge significant discretion regarding the appropriate amount of bail.<sup>571</sup> Bail “insure[s] the presence of the prisoner at a future hearing[,] and the amount to be required in each case rests in the sound discretion of the presiding

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564. U.S. CONST. amend. VIII.

565. KAN. CONST. Bill of Rights § 9.

566. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (stating in dicta that “the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment” (citing *Pilkinton v. Circuit Court*, 324 F.2d 45, 46 (8th Cir. 1963))).

567. *See* KAN. STAT. ANN. § 22-2802(1) (2007 & Supp. 2011).

568. *Id.*

569. *Id.*

570. *See e.g.*, *State v. Foy*, 582 P.2d 281, 286 (Kan. 1978) (“[N]o hard and fast rule can be laid down for fixing the amount of bail on a criminal charge, and each must be governed by its own facts and circumstances.” (citing *State v. Robertson*, 455 P.2d 570, 572 (Kan. 1969))).

571. *State v. Way*, 461 P.2d 820, 825 (Kan. 1969) (noting that the amount of bail “rests with the sound discretion of the presiding magistrate” (citing *Craig v. State*, 422 P.2d 955, 958 (Kan. 1967))).

magistrate.”<sup>572</sup> Kansas law permits a defendant to challenge the amount of bail required as a violation of their rights by either moving to reduce or modify bond or filing a writ of habeas corpus.<sup>573</sup>

#### *D. Preliminary Hearing*

##### 1. Right to a Preliminary Hearing

Section 22-2902(1) of the Kansas Statutes proscribes that every person charged with a felony shall have the right to a preliminary examination before a magistrate, unless such charge arose through an indictment by a grand jury. Because a statute creates the right to a preliminary hearing, it neither stems from general constitutional privileges nor implicates due process concerns.<sup>574</sup> An accused also has the right to counsel and the right to represent himself at a preliminary hearing.<sup>575</sup> If a court denies either of these rights, then the defendant must receive a new trial that begins with the preliminary hearing.<sup>576</sup>

A defendant may waive the right to a preliminary hearing,<sup>577</sup> after which the magistrate judge will order the defendant bound over to the district judge who has jurisdiction for trial.<sup>578</sup> Although both the defendant and the State may independently waive their right to a preliminary hearing, there is no requirement under section 22-2902 that the parties consent with each other to waive their rights.<sup>579</sup> Moreover, independent waiver of the right to a preliminary hearing by both parties does not form a contract because they did not reach an agreement.<sup>580</sup>

Even after the State initially waives its right to a preliminary hearing, it may still amend the charges to a higher offense and hold a preliminary hearing on the newly amended charges.<sup>581</sup> A defendant also has the right to challenge probable cause for those new crimes despite the defendant's

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572. *Id.* at 825 (citing *Craig*, 422 P.2d at 958).

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

574. *State v. Knighten*, 917 P.2d 1324, 1331 (Kan. 1996) (citing *State v. Ramsey*, 612 P.2d 367, 375-76 (Kan. 1983)).

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

576. *Id.* at 401.

577. KAN. STAT. ANN. § 22-2902(4) (2007 & Supp. 2011).

578. *Id.*

579. *State v. Chavez-Aguilar*, Nos. 103,878, 103,929, 2011 WL 6382742, at \*3 (Kan. Ct. App. Dec. 16, 2011).

580. *Id.*

581. *Id.*

initial waiver of a preliminary hearing.<sup>582</sup> Conversely, where amendments to a complaint are formal, not substantive, and result in no unfair surprise or prejudice to a defendant, the defendant and the State do not have the right to a new preliminary hearing.<sup>583</sup> Where a newly charged crime contains an additional element not included in the original charge, a court should order a preliminary hearing.<sup>584</sup>

Practitioners should also understand the elements of a valid waiver of preliminary hearing in a diversion agreement. Section 22–2909(a) of the Kansas Statutes states that “[t]he diversion agreement shall include specifically the waiver of all rights under the law or the constitution of Kansas or of the United States to a speedy arraignment, preliminary examinations and hearings, and a speedy trial.”<sup>585</sup>

In *State v. Moses*, the defendant argued that the court should have overturned his conviction because the diversion agreement did not explicitly waive his right to a preliminary hearing.<sup>586</sup> The agreement stated that the defendant waived “all rights to a speedy trial as they exist under the statutes and constitutions of the State of Kansas and the United States” and waived “all rights to a trial by jury.”<sup>587</sup> The Kansas Court of Appeals held that section 22-2909(a) requires that a diversion agreement contain an explicit waiver of the right to a preliminary hearing.<sup>588</sup> The court held that the diversion agreement was invalid because it did not include a waiver explicitly stating that the defendant gave up his rights to a preliminary hearing.<sup>589</sup>

## 2. Juvenile’s Right to a Preliminary Hearing

In March 2010, the Kansas Supreme Court ruled that a juvenile does not have a statutory or constitutional right to an adversarial preliminary examination, such as the type contemplated by section 22-902(1) of the Kansas Statutes.<sup>590</sup> In fact, “the district court need not conduct a full-blown [section] 22–2902 preliminary examination under any

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582. *Id.* (citing *State v. Woods*, 825 P.2d 514, 519 (Kan. 1992)).

583. *Id.*

584. *Id.* at \*4.

585. KAN. STAT. ANN. § 22-2909(a) (2007 & Supp. 2011).

586. 173 P.3d 652, 653–54 (Kan. Ct. App. 2007).

587. *Id.* at 654.

588. *Id.* at 654–55.

589. *Id.* at 656.

590. *In re D.E.R.*, 225 P.3d 1187, 1190–93 (Kan. 2010).

circumstances.”<sup>591</sup> The Kansas Court of Appeals did hold, however, that a juvenile does possess the constitutional right to a judicial determination of probable cause as a prerequisite to an extended restraint of liberty.<sup>592</sup> Thus, the full panoply of adversarial safeguards need not accompany a pretrial custody probable cause determination.<sup>593</sup>

In June 2011, the Kansas Court of Appeals heard a challenge to the sufficiency of a judicial determination of probable cause in a prosecution of a juvenile.<sup>594</sup> In the case *In re H.N.*, the defendant faced various burglary and theft charges, and the court imposed pretrial detention.<sup>595</sup> The defendant requested a probable cause determination through a preliminary hearing similar to that required in section 22-2902(1) of the Kansas Statutes.<sup>596</sup> The district court granted the request for a probable cause determination, but it denied the request for a preliminary hearing.<sup>597</sup> Instead, the district court held a hearing with the defendant and his counsel present.<sup>598</sup>

At the hearing, the State argued that an affidavit signed by the investigating detective established probable cause.<sup>599</sup> Besides the affidavit, the State offered no other evidence or witnesses.<sup>600</sup> The defendant objected to the affidavit as hearsay and claimed that it violated his Sixth Amendment right to confront the witnesses against him.<sup>601</sup> The district court overruled the objections and allowed the defendant to present evidence, but he refused.<sup>602</sup> The district court ultimately found that the affidavit alone supported a finding of probable cause.<sup>603</sup>

On appeal, the defendant first argued that the district court erred because it failed to hold a hearing similar to that required by section 22-2902.<sup>604</sup> The Kansas Court of Appeals rejected this argument, finding that the district court’s ruling was consistent with *In re D.E.R.* because

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591. *Id.* at 1193.

592. *In re H.N.*, 257 P.3d 821, 823 (Kan. Ct. App. 2011), *review denied* (Dec. 19, 2011).

593. *Id.* at 826.

594. *Id.* at 823.

595. *Id.* at 823–24.

596. *Id.* at 824.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

the district court judge held a hearing, with the defendant and his counsel present, and allowed the defendant to present any evidence.<sup>605</sup>

The defendant then challenged the affidavit as hearsay.<sup>606</sup> He relied on section 38-2354 of the Kansas Statutes, which provides that “[i]n all hearings pursuant to the code, the rules of evidence of the code of civil procedure shall apply.”<sup>607</sup> Section 60-460(b) of the Kansas Statutes provides that “[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except: . . . [a]ffidavits,”<sup>608</sup> and the Kansas Supreme Court has relaxed these rules for preliminary examinations.<sup>609</sup> The Kansas Court of Appeals held that the affidavit was admissible because “juvenile proceedings need not look like a criminal prosecution,” and juvenile proceedings did not need to have adversarial safeguards.<sup>610</sup>

### 3. Procedure of a Preliminary Hearing

A preliminary hearing enables a magistrate to determine (1) whether a felony has been committed and (2) whether probable cause exists to believe that the person charged committed it.<sup>611</sup> A judge may satisfy the first element when “there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that it appears a felony has been committed.”<sup>612</sup> After such a determination, the judge must consider probable cause by determining whether a “person of ordinary prudence and caution [would] conscientiously entertain a reasonable belief of the accused’s guilt.”<sup>613</sup> Upon satisfaction of both elements, the judge must bond over the accused for trial.<sup>614</sup> In making this determination, the judge may find

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605. *Id.* at 827.

606. *Id.* at 827–29.

607. *Id.* at 827 (alteration in original) (quoting KAN. STAT. ANN. § 38-2354 (2011)) (internal quotation marks omitted).

608. *Id.* (quoting KAN. STAT. ANN. § 60-460(b) (2011)) (internal quotation marks omitted).

609. *Id.* (citing *State v. Cremer*, 676 P.2d 59 (Kan. 1984)).

610. *Id.* at 829 (citing *In re D.E.R.*, 225 P.3d 1187, 1192 (Kan. 2010)).

611. KAN. STAT. ANN. § 22-2902(3) (2007 & Supp. 2011).

612. *State v. Engle*, 699 P.2d 47, 49 (Kan. 1985).

613. *State v. Green*, 697 P.2d 1305, 1308 (Kan. 1985) (quoting *State v. Huff*, 681 P.2d 656, 658–59 (1984)).

614. *State v. Pioletti*, 785 P.2d 963, 973 (Kan. 1990) (citing *State v. Burrell*, 699 P.2d 499, 501

that a felony has been committed even if the felony is not listed on the complaint before him.<sup>615</sup> A judge must also test the credibility and competency of witnesses at a preliminary hearing,<sup>616</sup> though “the magistrate must draw the inference favorable to the prosecution.”<sup>617</sup>

The preliminary hearing must occur within fourteen days of the arrest or personal appearance of the defendant, with a continuance granted only for good cause.<sup>618</sup> At the preliminary hearing, the defendant has the right to be present in person, to introduce evidence on the defendant’s own behalf, and to cross-examine witnesses, unless the witness is a child under the age of thirteen.<sup>619</sup> The defendant does not enter a plea at the preliminary hearing.<sup>620</sup> If the victim of the felony is less than thirteen years old, a videotape of the child’s testimony may support the finding of probable cause.<sup>621</sup> Any district court judge may preside over both the preliminary hearing and the trial in the same case.<sup>622</sup> A district court judge may also conduct an arraignment after the conclusion of the preliminary hearing.<sup>623</sup>

The rules of evidence contained in the Kansas Statutes, including the inadmissibility of hearsay, apply to a preliminary hearing held pursuant to section 22-2902(1) of the Kansas Statutes.<sup>624</sup> The State may admit the findings of a forensic examiner into evidence during a preliminary hearing “in the same manner and with the same force and effect as if the forensic examiner had testified in person.”<sup>625</sup>

#### 4. Sufficiency of Evidence at a Preliminary Hearing

A defendant may challenge the sufficiency of a preliminary examination in district court only by moving to dismiss.<sup>626</sup> On appeal, the appellate court reviews the district court’s finding of probable cause

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(Kan. 1985)).

615. *Id.* at 972–73.

616. *State v. Jones*, 660 P.2d 965, 969 (Kan. 1983).

617. *Id.* at 969–70.

618. KAN. STAT. ANN. § 22-2902(2) (Supp. 2011).

619. *Id.* § 22-2902(3).

620. *Id.*

621. *Id.*

622. *Id.* § 22-2902(5).

623. *Id.* § 22-2902(7).

624. *State v. Cremer*, 676 P.2d 59, 63–64 (Kan. 1984).

625. KAN. STAT. ANN. § 22-2902a.

626. *State v. Washington*, 268 P.3d 475, 477 (Kan. 2012).

at a preliminary hearing de novo.<sup>627</sup> In *State v. Washington*, the defendant challenged the probable cause determination that preceded his convictions of attempted aggravated burglary and felony murder.<sup>628</sup> At the preliminary hearing, the prosecution presented the testimony of a police officer, one of defendant's accomplices, and the victim's wife.<sup>629</sup> The defendant's accomplice testified that he went with the defendant to get a gun, that the defendant entered the victim's residence, and that the defendant had a gun.<sup>630</sup> An officer also testified that he found two guns near the defendant.<sup>631</sup> On these facts, the district court found that there was sufficient evidence to show that the defendant committed the crime of attempted aggravated burglary, and it affirmed the finding of probable cause.<sup>632</sup> The Kansas Supreme Court affirmed.<sup>633</sup>

#### *E. Competency to Stand Trial*

##### 1. Determination of Competency

A criminal defendant is "incompetent to stand trial' when . . . because of mental illness or defect is unable[] (a) [t]o understand the nature and purpose of the proceedings against him; or (b) to make or assist in making his defense."<sup>634</sup> Conversely, if a defendant "is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition with reference to such proceedings, and can conduct his defense in a rational manner, he is, for the purpose of being tried, to be deemed sane, although on some other subject his mind may be deranged or unsound."<sup>635</sup> Prosecution of an incompetent defendant violates due process and is unconstitutional.<sup>636</sup>

Mere evidence of a defendant's confusion or difficulty making difficult decisions is probably insufficient to rise to the level of

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627. *Id.* (citing *State v. Frederick*, 251 P.3d 48, 50 (Kan. 2011)).

628. *Id.*

629. *Id.* at 478.

630. *Id.*

631. *Id.* 479–80.

632. *Id.* at 480.

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

635. *State v. Barnes*, 262 P.3d 297, 309 (Kan. 2011) (quoting *State v. Shopteese*, 153 P.3d 1208, 1215 (Kan. 2007)).

636. *Medina v. California*, 505 U.S. 437, 453 (1992) (gathering cases).

incompetency.<sup>637</sup> In *State v. Barnes*, the defendant appeared to be confused over whether he understood the role of the judge and jury.<sup>638</sup> Despite this confusion, the court found that the defendant was competent because it appeared that he was just coming to the realization of the consequences that awaited him.<sup>639</sup>

## 2. Implications of the Determination of Competency

If a court declares that a defendant is incompetent, then it must commit the defendant for evaluation and treatment at the state security hospital; the commitment may not exceed ninety days.<sup>640</sup> Within this ninety-day period, the chief medical officer of that institution “shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future.”<sup>641</sup> If it is probable that the defendant will attain competency, then the defendant must remain in the institution for six months from the date of the original commitment or until he attains competency to stand trial, whichever occurs first.<sup>642</sup> If it is not probable that the defendant will attain competency or if the defendant fails to attain competency within six months of commitment, then the court must order the Secretary of Social and Rehabilitation Services to conduct involuntary commitment proceedings.<sup>643</sup>

If the court declares the defendant competent, then the criminal proceedings may proceed.<sup>644</sup> An appellate court reviews a finding of competency for abuse of discretion.<sup>645</sup>

## 3. Burden of Proof in a Determination of Competency

In determining whether a defendant is competent, the State may presume that the defendant is competent.<sup>646</sup> Both the court and the State

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637. *Barnes*, 262 P.3d at 310–11 (citing *State v. Harkness*, 847 P.2d 1191, 1197 (Kan. 1993)).

638. *Id.* at 310.

639. *Id.* at 311.

640. KAN. STAT. ANN. §§ 22-3302(5), 22-3303(1) (Supp. 2011).

641. *Id.* § 22-3303(1).

642. *Id.*

643. *Id.* § 22-3303(2).

644. *Id.* § 22-3302(3).

645. *State v. Hill*, 228 P.3d 1027, 1045 (Kan. 2010).

646. *State v. McKinney*, 961 P.2d 1, 4 (Kan. 1998) (citing *Medina v. California*, 505 U.S. 437, 449 (1992)).

have a duty to the defendant to afford him due process and to provide him a fair trial.<sup>647</sup> The defendant, the defendant's counsel, the prosecutor, or the judge may challenge the defendant's competency at any time before sentencing.<sup>648</sup> To provide for a fair trial for the accused, whenever one questions whether the defendant is competent, he should raise the issue of competency. Practitioners should consult the Kansas Rules of Professional Conduct for further guidance on how to handle a defendant with diminished capacity.<sup>649</sup> The Kansas Supreme Court has provided further direction:

[A] party who raises the issue of competence to stand trial has the burden of . . . [producing] evidence, which will be measured by the preponderance of the evidence standard. When the [district] court itself raises the competency issue, the court . . . can assign th[e] burden to the State because both the court and the State have a duty to provide due process and to provide a fair trial to an accused.<sup>650</sup>

Upon a party's raising the issue of competency, the judge must suspend the trial and hold a competency hearing.<sup>651</sup> To decide the issue of competency, a judge can order a psychiatric or psychological examination of the defendant and may empanel a six-person jury.<sup>652</sup>

Even after determining that the defendant is competent to stand trial, the judge still has options to address any competency issues of the defendant. If it appears that the defendant suffers from severe mental illness that will impair his ability to participate in the proceeding without assistance, then the State can insist that counsel assist the defendant.<sup>653</sup>

"The Sixth Amendment entitles a defendant to the assistance of counsel at every critical stage of a criminal prosecution."<sup>654</sup> A competency hearing qualifies as a critical stage in a criminal prosecution.<sup>655</sup> In the event that counsel and defendant are unable to communicate, the judge should consider any motion to withdraw before making a competency determination. In *United States v. Collins*, a

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647. *State v. Cellier*, 948 P.2d 616, 626 (Kan. 1997).

648. *State v. Johnson*, 218 P.3d 46, 53 (Kan. 2009).

649. KAN. RULES OF PROF'L CONDUCT R. 1.14 (2007).

650. *Cellier*, 948 P.2d at 626.

651. *Johnson*, 218 P.3d at 53–54.

652. KAN. STAT. ANN. § 22–3302(3) (2007 & Supp. 2011).

653. *Indiana v. Edwards*, 554 U.S. 164, 177–78 (2008).

654. *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005) (citing *Kirby v. Illinois*, 406 U.S. 680, 690 (1972); *United States v. Gordon*, 4 F.3d 1567, 1571 (10th Cir. 1993)).

655. *Id.*

defendant wrote a letter to the court alleging that his attorney insulted him and colluded with the prosecution and FBI.<sup>656</sup> On the day of the defendant's competency hearing, the defendant's attorney filed a motion to withdraw from the case because he could not communicate with his client.<sup>657</sup> Before addressing the motion to withdraw, the district court turned to the issue of the defendant's competency.<sup>658</sup> The defense attorney refused to address the issue of competency and only noted that he discovered new records that would help new counsel evaluate the issue of his client's competency.<sup>659</sup> Instead of appointing new counsel and reviewing the records, the district court found that the defendant was competent.<sup>660</sup> On appeal, the Tenth Circuit held that the proceedings constructively denied the defendant assistance of counsel because his counsel remained silent and refused to present records for the defendant.<sup>661</sup>

It is unclear whether a defendant has a right to self-representation at a competency hearing. In *State v. McCall*, a defendant claimed that he was competent to stand trial despite suffering from a traumatic brain injury and seeking to call the governor and attorney general as witnesses.<sup>662</sup> The district court granted the defendant permission to represent himself at the competency hearing and found that the defendant made a valid waiver of counsel.<sup>663</sup> A mental health report also supported the defendant's competency.<sup>664</sup> On appeal, the Kansas Court of Appeals declined to adopt a *per se* rule on the issue of *pro se* representation at a competency hearing and affirmed defendant's competency.<sup>665</sup>

Instead of allowing *pro se* representation, the court should have insisted that a defendant have stand-by counsel at a competency hearing. This is constitutionally permissible and does not violate a defendant's Sixth Amendment rights.<sup>666</sup> Indeed, the Kansas Court of Appeals has held that "[a] court may deny the right to self-representation if the court

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656. *Id.* at 1262.

657. *Id.*

658. *Id.* at 1262–63.

659. *Id.* at 1263.

660. *Id.*

661. *Id.* at 1265–66.

662. 163 P.3d 378, 381 (Kan. Ct. App. 2007).

663. *Id.*

664. *Id.*

665. *Id.* at 382.

666. *Indiana v. Edwards*, 554 U.S. 168, 186 (2008).

deems the defendant incompetent to handle his or her own defense.”<sup>667</sup> Thus, if the court finds that a defendant is incompetent, the court may deny the defendant the right to self-representation and appoint counsel to represent the defendant.

#### *F. Jurisdiction and Venue*

##### 1. Jurisdiction

The Kansas Constitution provides that “district courts shall have such jurisdiction in their respective districts as may be provided by law.”<sup>668</sup> Thus, state district courts have exclusive jurisdiction over “felony and other criminal cases arising under the statutes of the state of Kansas.”<sup>669</sup>

##### 2. Venue

The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>670</sup> Similarly, the Kansas Constitution provides that “the accused shall be allowed . . . trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”<sup>671</sup> Kansas law further provides that “the prosecution shall be in the county where the crime was committed.”<sup>672</sup> The location of a crime’s commission—and therefore venue for the case—is generally a question of fact for the jury and turns on the “facts and circumstances introduced in evidence from which the place or places of commission of the crime or crimes may be fairly and reasonably inferred.”<sup>673</sup> As a result, the State need not prove the issue of venue “by specific question” for the jury.<sup>674</sup>

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667. *State v. Brown*, No. 103,425, 2011 WL 3658364, at \*3 (Kan. Ct. App. Aug. 19, 2011) (per curiam).

668. KAN. CONST. art. III, § 6(b).

669. KAN. STAT. ANN. § 22-2601 (2007).

670. U.S. CONST. amend. VI.

671. KAN. CONST. Bill of Rights § 10.

672. KAN. STAT. ANN. § 22-2602.

673. *State v. Calderon-Aparicio*, 242 P.3d 1197, 1203–04 (Kan. Ct. App. 2010) (quoting *State v. Pencek*, 585 P.2d 1052, 1056 (Kan. 1978)) (internal quotation marks omitted).

674. *Id.* at 1204 (quoting *State v. Griffin*, 504 P.2d 150, 150 (Kan. 1972)).

To withstand a challenge to venue on appeal, the State must show that it presented sufficient evidence at trial to support such a finding.<sup>675</sup> For example, the fact that a police officer of a county or city made the arrest is evidence from which a jury could infer that the crime took place within that county or city.<sup>676</sup> In *State v. Calderon-Aparicio*, the officers arrested the defendants in Johnson County, and the evidence of the crime—marijuana—was taken to the Shawnee Police Department for inspection.<sup>677</sup> The court found that this information—as well as the fact that the officers responded to a traffic incident that occurred in Johnson County—sufficed to support a jury finding that the crime occurred in Johnson County.<sup>678</sup>

Kansas law also provides guidance for those cases where crimes occur in multiple counties or near borders. For instance, if a crime consists of two or more acts that occur in different counties, then the criminal case may proceed in any county where any of the acts occurred.<sup>679</sup> This rule also applies to crimes occurring in vehicles crossing through multiple counties and permits prosecution in any county through which the defendant passed during the trip if the exact county in which the crime occurred remains undetermined.<sup>680</sup> Similarly, if the acts took place along the borders of the county such that one cannot readily determine in which county the acts occurred, the prosecution may take place in any county sharing that border area.<sup>681</sup>

### 3. Change of Venue

Kansas law gives a criminal defendant the power to move for a change of venue if prejudice exists in the district to such an extent that the defendant “cannot obtain a fair and impartial trial in that county.”<sup>682</sup> This rule preserves the constitutional right to trial “by an impartial jury.”<sup>683</sup> To successfully change venue, the defendant must show that

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675. *See id.* (finding that “there was sufficient evidence from which the jury could find the offense occurred in Johnson County”).

676. *Id.* at 1206.

677. *Id.* at 1205–06.

678. *Id.*

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

680. *Id.* § 22-2608.

681. *Id.* § 22-2604.

682. *Id.* § 22-2616(1).

683. U.S. CONST. amend. VI.

“prejudice exists in the community, not as a matter of speculation but as a demonstrable reality.”<sup>684</sup> In *State v. Higgenbotham*, the Kansas Supreme Court provided several factors relevant to determining the fairness of a trial in a particular venue:

[T]he particular degree to which the publicity circulated throughout the community; the degree to which the publicity . . . circulated to other areas to which venue could be changed; the length of time [that] elapsed from the dissemination of the publicity to the date of trial; the care exercised and the ease encountered in the selection of the jury; the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; the challenges exercised by the defendant in the selection of the jury . . . ; the connection of government officials with the release of the publicity; the severity of the offense charged; and the particular size of the area from which the venire is drawn.<sup>685</sup>

The court also stressed that the defendant must demonstrate prejudice; publicity, in and of itself, is insufficient for a change of venue.<sup>686</sup>

In *Skilling v. United States*, the United States Supreme Court provided several factors for determining the level of prejudice and the corresponding likelihood of an impartial trial. Courts should consider (1) the “size and characteristics of the community in which the crime occurred”; (2) the existence or lack thereof of confessions or “blatantly prejudicial information” in the content of the media coverage; (3) the time between the trial and the media coverage; and (4) the existence of acquittal on other counts with which the defendant was charged.<sup>687</sup> A smaller community, blatantly prejudicial media coverage, a brief amount of time between media coverage of the event and the trial, or a guilty verdict on all or most of the counts charged all tend to suggest a defendant’s trial was unfair.<sup>688</sup>

In *Skilling*, a high-profile Enron Corporation executive faced trial in Houston, Texas, which housed Enron’s headquarters and provided the epicenter of the Enron accounting scandal.<sup>689</sup> In applying the first factor, the Court found that while Enron’s—and therefore Skilling’s—victims may have been quite numerous in Houston, the city’s population of 4.5

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

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

686. *Id.* at 881–82.

687. *Skilling v. United States*, 130 S. Ct. 2896, 2915–16 (2010).

688. *See id.* at 2915–17.

689. *See id.* at 2907–08.

million eligible jurors made finding twelve impartial jurors likely.<sup>690</sup> Additionally, the media coverage, while negative, contained no “blatantly prejudicial information” such as confessions.<sup>691</sup> Further, four years had elapsed since the Enron scandal, allowing a relaxation of media coverage.<sup>692</sup> Most importantly, however, the Court stressed that the jury acquitted Skilling on nine other counts of insider trading.<sup>693</sup> Generally speaking, the *Skilling* Court, like the Kansas Supreme Court, noted that media attention alone “does not necessarily produce prejudice” and set a high bar for defendants who wish to establish a presumption of juror prejudice so as to change venue.<sup>694</sup>

#### 4. Timeliness of Objection to Venue

Venue is a matter of jurisdiction.<sup>695</sup> A defendant may challenge jurisdiction—and therefore venue—at any time.<sup>696</sup>

### G. Statutes of Limitations

#### 1. Generally

Generally, prosecution of a crime in Kansas must occur within five years after its commission.<sup>697</sup> This limitation applies to most felonies, misdemeanors, traffic infractions, and cigarette or tobacco infractions.<sup>698</sup> Certain other crimes, such as murder and some sex crimes, carry unique statutes of limitation.<sup>699</sup> The prosecution “commence[s] when the

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690. *Id.* at 2915.

691. *Id.* at 2916.

692. *Id.*

693. *Id.*

694. *See id.* at 2914–15, 2917 (noting that even widespread negative publicity does not alone raise the presumption of prejudice and finding no presumption despite the “widespread community impact” in Houston as a result of the Enron scandal).

695. *See State v. Calderon-Aparicio*, 242 P.3d 1197, 1204 (Kan. Ct. App. 2010) (“[V]enue . . . is jurisdictional, and it must be proved to establish the jurisdiction of the court.” (quoting *State v. Griffin*, 504 P.2d 150, 152 (Kan. 1972))).

696. *State v. Hoffman*, 246 P.3d 992, 995 (Kan. Ct. App. 2011) (citing *State v. Patton*, 195 P.3d 753, 758 (Kan. 2008)).

697. *See KAN. STAT. ANN.* § 21-5107(d) (Supp. 2011).

698. *See id.* § 21-5102. Section 21-5107 references section 21-5102 to define crimes to which the five-year limit applies. *Id.* § 21-5107(d).

699. *See id.* § 21-5107(a) (providing that murder and terrorism carry no limitation); *id.* § 21-5107(b) (allowing that the state may prosecute crimes where the victim is the Kansas Public Employees Retirement System up to ten years after their commission); *id.* § 21-5107(c) (defining

complaint or information is filed” or when a warrant is issued and executed “without unreasonable delay.”<sup>700</sup> Despite the fact that the Revised Kansas Juvenile Code does not contain the above-mentioned exception for unreasonable delay in the execution of a warrant, the Kansas Court of Appeals extended the common law rule requiring execution of arrest warrants without unreasonable delay to juveniles.<sup>701</sup> Therefore, even in juvenile proceedings, an action has not commenced for the purposes of the statute of limitations at the time of the warrant’s issuance if there has been unreasonable delay.<sup>702</sup> For both juvenile and adult defendants, unreasonable delay bars prosecution when the execution of the warrant occurred after the statute of limitations has run.<sup>703</sup>

Despite the lack of statutory authority, extending the unreasonable delay requirement to juvenile proceedings accords with the express statutory grant applicable to adults. In the case of *In re P.R.G.*, the court acknowledged the common law basis for the adult statutory authority.<sup>704</sup> Further, the court highlighted the similar goals of the two justice systems—“punishment, deterrence, and rehabilitation”—and noted the fact that much of the “character” of the juvenile system matches that of the adult system.<sup>705</sup> As a result, the court found that despite the fact that the juvenile statute of limitations contains no ambiguity—there is no mention of unreasonable delay in executing a warrant—the court must determine the legislative intent based on the existence of the common law rule.<sup>706</sup> The court then reasoned that the common law approach—requiring no unreasonable delay in the execution of a warrant—applies unless a statute expressly overrules it.<sup>707</sup>

Because juvenile proceedings have increasingly become more like adult criminal trials,<sup>708</sup> extending a rule with such a long history in the common law seems appropriate. In fact, courts have applied more

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statutes of limitations for sexually violent crimes with the specific criminal statutes).

700. *Id.* § 21-5107(g).

701. 244 P.3d 279, 286 (Kan. Ct. App. 2010).

702. *See id.* at 286–87.

703. *See id.* (applying the rule to juveniles); *State v. McDowell*, 111 P.3d 193, 196 (Kan. Ct. App. 2005) (applying the rule to adults).

704. *See In re P.R.G.*, 244 P.3d at 282–83.

705. *See id.* at 283.

706. *See id.* at 285.

707. *Id.* at 285–86.

708. *See id.*

serious protections, such as the right to trial by jury,<sup>709</sup> to juvenile proceedings in Kansas already. While the court has declined to extend others, such as the right to a preliminary hearing,<sup>710</sup> this result is a natural and relatively moderate extension of the juvenile statute.

Finally, the statute of limitations begins to run the day after the commission of a crime upon completion of every element of the crime, unless the crime is a continuing offense.<sup>711</sup> In the case of a continuing offense, the commission occurs when “the course of conduct or the defendant’s complicity therein is terminated.”<sup>712</sup> An offense is “continuing” if it plainly appears in the definitional statute for that offense “that there is a clear legislative intent to make the prohibited course of conduct a continuing offense.”<sup>713</sup> The Kansas Supreme Court has found that the crimes of theft and conspiracy are not continuing offenses.<sup>714</sup> Conversely, identity theft is an example of the “legislature intend[ing] to prohibit a continuing offense.”<sup>715</sup> As such, the conduct ended for the purposes of the statute of limitations when the identity theft ended at arrest, rather than when it began.<sup>716</sup>

The Kansas Supreme Court has determined that the statute of limitations is an affirmative defense, as opposed to jurisdictional in nature.<sup>717</sup> As such, a defendant waives the defense by failing to raise it at trial.<sup>718</sup> In *State v. Sitlington*, the defendant attempted to contest his conviction based upon an erroneous jury instruction.<sup>719</sup> The instruction was in error, according to the defendant, because it “allowed the jury to convict based on conduct that could have occurred outside the period allowed by the applicable statute of limitations.”<sup>720</sup> The defendant did not raise the issue at trial, and the court precluded him from raising it on appeal absent clear error.<sup>721</sup> Although the court found that the dates included in the instruction extended beyond the statute of limitations, his

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709. See *In re L.M.*, 186 P.3d 164, 171–72 (Kan. 2008).

710. See *In re D.E.R.*, 225 P.3d 1187, 1189 (Kan. 2010).

711. KAN. STAT. ANN. § 21-5107(f) (Supp. 2011).

712. *Id.*

713. *State v. Palmer*, 810 P.2d 734, 738 (Kan. 1991).

714. *Id.* at 740–41.

715. *State v. Meza*, 165 P.3d 298, 302 (Kan. Ct. App. 2007).

716. See *id.*

717. *State v. Sitlington*, 241 P.3d 1003, 1008 (Kan. 2010).

718. *Id.*

719. *Id.* at 1007.

720. *Id.*

721. *Id.*

failure to raise the defense at trial proved decisive.<sup>722</sup> The court found no such error and noted that the jury could have convicted the defendant for conduct that occurred within the statutory period.<sup>723</sup>

## 2. Bar to Prosecutions

Even when the statute of limitation bars prosecution, the tolling statute cures untimeliness in some circumstances.<sup>724</sup> Such circumstances include the defendant's absence from the state, the defendant's concealing his whereabouts within the state, or the concealment of "the fact of the crime."<sup>725</sup> The Kansas Supreme Court recently offered a definition of "conceal" with respect to concealing the fact of a crime.<sup>726</sup> In *State v. Belt*, the court noted that concealment requires an affirmative act on the part of the concealing party beyond simple inaction or silence.<sup>727</sup>

## 3. Statutory Changes

Beginning July 2011, Kansas replaced the statutes controlling criminal statutes of limitations. Section 21-5107 repealed and replaced section 21-3106.<sup>728</sup> The text of this section, however, did not change.<sup>729</sup> Similarly, the section defining "crimes"—which section 21-5107 cross-references—changed from 21-3105 to 21-5102.<sup>730</sup> The text of this section remains unchanged.<sup>731</sup>

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722. *Id.* at 1007–08.

723. *Id.* at 1008.

724. See KAN. STAT. ANN. § 21-5107(d) (stating that "prosecution for any crime . . . shall be commenced within five years after it is committed," subject to specifically defined tolling exceptions).

725. *Id.* § 21-5107(e)(1)–(3).

726. *State v. Belt*, 179 P.3d 443, 449 (Kan. 2008).

727. *Id.*

728. KAN. STAT. ANN. § 21-5107.

729. Compare *id.* § 21-5107 with KAN. STAT. ANN. § 21-3106 (repealed 2011).

730. KAN. STAT. ANN. § 21-5102.

731. Compare *id.* with KAN. STAT. ANN. § 21-3105 (repealed 2011).

*H. Joinder and Severance*

## 1. Joinder of Charges

Kansas law permits the joinder of multiple crimes charged against the same defendant in the same complaint in certain circumstances.<sup>732</sup> The crimes charged must be (1) of the “same or similar character,” (2) “based on the same act or transaction,” or (3) “connected together or constituting parts of a common scheme or plan.”<sup>733</sup> If the crimes charged do not meet any of these conditions, then the State may not join them.<sup>734</sup> To be of the same or similar character, the crimes charged should require the same evidence, form of trial, and kind of punishment.<sup>735</sup>

The Kansas Supreme Court notes three situations in which the crimes charged are connected together.<sup>736</sup> The first “occurs when the defendant provides evidence of one crime while committing another.”<sup>737</sup> For example, if a defendant brags about a previous crime while selling drugs to an undercover officer, then the crimes satisfy the connected together condition.<sup>738</sup> The second is when “some of the charges are precipitated by other charges.”<sup>739</sup> The Kansas Supreme Court found such a relationship where the State charged the defendant with attempted murder after breaking into a police garage to kill an officer to stop him from testifying at the defendant’s trial for a previous unlawful possession of a firearm charge.<sup>740</sup> Conversely, the Kansas Court of Appeals found that this standard was not met in *State v. Paredes*.<sup>741</sup> The defendant first faced charges of residential burglary and other crimes, which did not precipitate his later charge of aggravated escape from custody, because he was in custody on an unrelated charge when he escaped.<sup>742</sup> Therefore,

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

733. *Id.*

734. *See State v. Gaither*, 156 P.3d 602, 612 (Kan. 2007) (stating that the court must first determine whether any of these conditions apply before allowing joinder).

735. *State v. Coburn*, 176 P.3d 203, 211 (Kan. Ct. App. 2008) (quoting *State v. Barksdale*, 973 P.2d 165, 171–72 (Kan. 1999)).

736. *State v. Donaldson*, 112 P.3d 99, 105 (Kan. 2005).

737. *Id.* (citing *State v. Anthony*, 898 P.2d 1109, 1118 (Kan. 1995)).

738. *See id.* (citing *Anthony*, 898 P.2d at 1118).

739. *Id.* at 106 (citing *State v. Dreiling*, 54 P.3d 475, 497 (Kan. 2002)).

740. *State v. Pondexter*, 671 P.2d 539, 546–47 (Kan. 1983).

741. 118 P.3d 708, 714 (Kan. Ct. App. 2005).

742. *Id.*

his trials were properly maintained separately.<sup>743</sup> Finally, charges are connected together if “all of the charges stem from a common event or goal.”<sup>744</sup> The Kansas Supreme Court has found a common goal in murder and domestic battery charges against two participants in an extramarital affair.<sup>745</sup>

The Kansas Supreme Court has identified a very specific application of the abuse of discretion standard to review the process of joinder decisions made by trial courts.<sup>746</sup> First, the appellate court must ask whether the trial court determined that one of the three statutory conditions exists.<sup>747</sup> To do this, the trial court must have made findings of fact, which receive deference from the appellate court.<sup>748</sup> The appellate court then reviews de novo the trial court’s determination as to whether one of the conditions has been met, as this is a conclusion of law.<sup>749</sup> Finally, if the trial court finds that a condition has been satisfied, then the appellate court reviews the court’s decision to grant the joinder on an abuse of discretion standard.<sup>750</sup>

In addition to joining charges, defendants may be joined for trial in the same proceeding.<sup>751</sup> Like joinder of multiple charges for one defendant, multiple defendants must meet a condition precedent before the law permits joinder. If the defendants allegedly “participated in the same act or transaction or in the same series of acts or transactions constituting the crime or crimes,” then the State may try them together.<sup>752</sup> The Kansas Supreme Court has provided three situations that satisfy this standard:

- (1) when each of the defendants is charged with accountability for each offense included, or (2) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offense alleged to be in furtherance of the conspiracy, or (3) when in the absence of a conspiracy it is alleged the several offense[s] charged were part of a common scheme or were so closely connected in

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743. *Id.*

744. *Donaldson*, 112 P.3d at 106 (citing *State v. Simkins*, 3 P.3d 1274, 1279 (Kan. 2000)).

745. *See Simkins*, 3 P.3d at 1279.

746. *State v. Caither*, 156 P.3d 602, 612 (Kan. 2007) (citing *State v. Bunyard*, 133 P.3d 14, 20 (Kan. 2006)).

747. *Id.*

748. *Id.*

749. *Id.*

750. *Id.*

751. KAN. STAT. ANN. § 22-3202(3) (2007).

752. *Id.*

time, place, and occasion that proof of one charge would require proof of the others.<sup>753</sup>

Joinder is at the discretion of the trial judge, and the judge should not join defendants if doing so would result in prejudice.<sup>754</sup>

## 2. Joinder and Severance of Codefendants

Multiple criminal defendants who are charged in the same proceeding may move to sever the proceeding into distinct cases. The permissive language used in the statute providing for joinder of multiple defendants implies such an option.<sup>755</sup> Further, Kansas law affirmatively provides that the court has discretion to sever trials “for any one defendant when requested by such defendant or by the prosecuting attorney.”<sup>756</sup> To sever his case from a codefendant’s, the “defendant [must] establish[] that there would be actual prejudice if a joint trial occurred.”<sup>757</sup> The court provided five factors to determine whether such prejudice exists: (1) the defendants offer “antagonistic defenses”; (2) important evidence favoring one defendant would only be admissible in a separate trial; (3) evidence admissible against one defendant but not the other could prejudice the other; (4) the proved confession of one defendant would prejudice the other; and (5) “one of the defendants who could give evidence for . . . the other defendants would become a competent and compellable witness on the separate trials of such other defendants.”<sup>758</sup>

The Kansas Supreme Court has noted that the first factor, antagonistic defenses, is generally the “most compelling ground for severance.”<sup>759</sup> In *State v. Reid*, the defendant initially relied on this

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753. *State v. Boyd*, 127 P.3d 998, 1007 (Kan. 2006) (quoting *State v. Aikins*, 932 P.2d 408, 422 (Kan. 1997)).

754. *Id.* at 1008 (citing *Aikins*, 932 P.2d at 408–09).

755. KAN. STAT. ANN. § 22-3202(3) (“Two or more defendants may be charged in the same complaint . . .”).

756. *Id.* § 22-3204.

757. *State v. Reid*, 186 P.3d 713, 730 (Kan. 2008) (citing *State v. White*, 67 P.3d 138, 146–47 (Kan. 2003)).

758. *Id.* (quoting *State v. Winston*, 135 P.3d 1072, 1085 (Kan. 2006)).

759. *White*, 67 P.3d at 147 (quoting *State v. Myrick*, 616 P.2d 1066, 1075 (1980)) (internal quotation marks omitted).

factor for his motion to sever.<sup>760</sup> To rise to the level of antagonistic, the defendants' defenses must implicate each other.<sup>761</sup> The court refined this requirement by noting that the defenses must "conflict to the point of being mutually exclusive or irreconcilable."<sup>762</sup> Inconsistency alone between the defenses is insufficient for them to qualify as antagonistic.<sup>763</sup> The codefendant's defense centered around the fact that police found his cell phone—from which calls were placed in the area and during the time of the crimes charged—in the defendant's car.<sup>764</sup> Therefore, the codefendant argued that he did not make the calls placed on his cell phone, and the defendant argued that such a defense implicated him.<sup>765</sup> The court found that this defense did not qualify as antagonistic. Rather, the defendant may not have known the codefendant's phone was in his car, and the numbers called were numbers previously called by the codefendant on the phone.<sup>766</sup> The inconsistency between the defenses did not rise to the level of antagonism.<sup>767</sup>

### I. Plea Agreements

Sections 22-3209 and 22-3210 of the Kansas Statutes govern plea agreements. Section 22-3209 establishes that a guilty plea is an "admission of the truth of the charge and every material fact alleged therein."<sup>768</sup> The defendant may also enter pleas of *nolo contendere*—not contesting the charge—or not guilty.<sup>769</sup> Section 22-3210 outlines procedural requirements detailing when a court may accept and when a defendant may withdraw a plea of guilty or *nolo contendere*.<sup>770</sup>

In *State v. Williams*, the Kansas Supreme Court evaluated the conditions within the discretion of the court for withdrawing a guilty plea.<sup>771</sup> The defendant pleaded no contest to felony murder after plea

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

761. *Id.*

762. *Id.* (quoting *White*, 67 P.3d at 147) (internal quotation marks omitted).

763. *Id.*

764. *Id.* at 731.

765. *Id.*

766. *Id.*

767. *Id.*

768. KAN. STAT. ANN. § 22-3209(1) (2007).

769. *Id.* § 22-3209(2)–(3).

770. *Id.* § 22-3210(a), (d)–(e) (2007 & Supp. 2011).

771. 236 P.3d 512, 515–17 (Kan. 2010).

negotiations.<sup>772</sup> The plea agreement specifically stated in bold type the defendant's acknowledgement that she received satisfactory legal representation, and the defendant affirmed this at the plea hearing.<sup>773</sup> Prior to sentencing, however, the defendant filed a motion to withdraw her plea,<sup>774</sup> but the district court did not see any legal rules that would support such a withdrawal.<sup>775</sup>

While the Kansas Supreme Court eventually affirmed the district court's decision in *Williams* because the defendant did not show good cause for withdrawing her plea, it set forth important standards for reviewing the discretion of the court when considering a defendant's motion to withdraw a guilty plea.<sup>776</sup> District courts should consider three factors when determining whether the defendant has shown good cause to withdraw a plea, including "whether[] (1) the defendant was represented by competent counsel, (2) the defendant was misled, coerced, mistreated, or unfairly taken advantage of, and (3) the plea was fairly and understandingly made."<sup>777</sup> These standards are not incredibly rigid; they all do not have to apply in order for the defendant to withdraw his plea, and other factors may also be used.<sup>778</sup> Thus, to determine the validity of a plea on appeal, the court will carefully evaluate whether the defendant has good cause to withdraw the plea. If so, the defendant may withdraw the plea. Typically, a defendant asserting that he understands the proceedings and the plea agreement bolsters the validity and credibility of the plea, and the court is likely to leave the plea as is.<sup>779</sup>

### J. Arraignment

Under the Kansas Statutes, "[a]rraignment shall be conducted in open court and shall consist of reading the complaint, information[,] or

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772. *Id.* at 514.

773. *Id.*

774. *Id.*

775. *Id.* at 514–15.

776. *Id.* at 515–16; *see* KAN. STAT. ANN. § 22-3210(d)(1) (2007 & Supp. 2011) ("A plea of guilty . . . , for good cause shown and within the discretion of the court, may be withdrawn at any time before the sentence is adjudged.")

777. *Id.* at 815 (quoting *State v. Schow*, 197 P.3d 825, 836 (Kan. 2008)). These are the "*Edgar* factors" from *State v. Edgar*, 127 P.3d 986, 992 (Kan. 2006), although the Kansas Supreme Court noted in *State v. Aguilar* that they "long predate *Edgar*." 231 P.3d 563, 567 (Kan. 2010).

778. *Aguilar*, 231 P.3d at 567.

779. *See State v. Anderson*, 249 P.3d 425, 431 (Kan. 2011) (noting that the defendant stated that he understood the plea agreement at the plea hearing).

indictment to the defendant.”<sup>780</sup> Arraignment is “the formal act of calling the defendant before a court having jurisdiction to impose sentence for the offense charged, informing the defendant of the offense with which the defendant is charged, and asking the defendant whether the defendant is guilty or not guilty.”<sup>781</sup> The defendant must receive a copy of the indictment or information before the court calls upon him to make a plea.<sup>782</sup> Typically, if the crime charged is a felony, then the defendant must be present for the arraignment.<sup>783</sup> For a misdemeanor charge, the defendant may appear by counsel with the approval of the court.<sup>784</sup> The statute provides that indictments for felony charges shall occur no later than the next required day of court after the defendant’s arrest, unless the parties and the court consent to another time.<sup>785</sup>

#### K. Discovery

The State has constitutional and statutory obligations to disclose specific types of evidence to defendants. Due process requires it to release evidence that may be favorable to the defendant when the evidence is material to guilt or punishment.<sup>786</sup> Section 22-3212 of the Kansas Statutes outlines the procedural requirements.<sup>787</sup> To comply with due process requirements in the Fourteenth Amendment, the State must divulge exculpatory evidence, and the “defendant has a constitutional privilege to request and obtain from the [state any] evidence that is material to the guilt or innocence of the defendant.”<sup>788</sup> During discovery, if the court orders the State to disclose certain information, then the State must furnish any additional material as required by section 22-3212(g).<sup>789</sup> In *State v. Grey*, the State failed to notify the defendant of the results of additional lab tests related to a 1997 rape case, and the court found this omission to be misconduct.<sup>790</sup> The breach occurred one week before the

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780. KAN. STAT. ANN. § 22-3205(a) (2007).

781. KAN. STAT. ANN. § 22-2202(3).

782. KAN. STAT. ANN. § 22-3205(a).

783. *Id.*

784. *Id.*

785. *Id.* § 22-3206(2).

786. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

787. KAN. STAT. ANN. § 22-3212 (2007 & Supp. 2011).

788. *State v. Grey*, 268 P.3d 1218, 1227 (Kan. Ct. App. 2012) (citing *Brady*, 373 U.S. at 87).

789. *Id.* at 1224.

790. *Id.* at 1223–24.

scheduled trial and affected the defense strategy in the case.<sup>791</sup> Parties in criminal cases must continue to comply with discovery requests

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791. *Id.* at 1223.

throughout the time leading up to the trial to avoid misconduct and uphold their obligations.<sup>792</sup>

#### *L. Pretrial Motions and Pretrial Conferences*

##### 1. Motion in Limine

Procedural rules for pretrial pleadings and motions are found in section 22-3208 of the Kansas Statutes.<sup>793</sup> Typically, these include motions in limine, which the courts use as a means of assuring a fair trial by restricting evidence.<sup>794</sup> A district court may grant a motion in limine based upon two factors:

- (1) The material or evidence in question will be inadmissible at a 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. In determining if a pretrial ruling is justified a district court should weigh whether the court will be in a better position during trial to assess the value and utility of evidence and its potential prejudice.<sup>795</sup>

The *Shadden* court applied the multistep evidentiary standard of review to the admissibility determination under the first prong, but it continued to apply the abuse of discretion standard to the second prong.<sup>796</sup>

Despite its complexity, the multistep evidentiary standard of review aligns with the “refinement and modification of the evidentiary standard.”<sup>797</sup> To analyze the admissibility of the evidence at trial—the first prong of the test—the court goes through a series of steps.<sup>798</sup> First,

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792. See *id.* at 1226 (“[W]e reject any assertion that simply forwarding a written report that does not contain the new material to the defense would somehow comply with the discovery statutes. The parties have a continuing obligation to update discovery in a meaningful way.”).

793. KAN. STAT. ANN. § 22-3208 (2007 & Supp. 2011).

794. See *State v. Crume*, 22 P.3d 1057, 1067 (Kan. 2001) (“In Kansas, our trial courts in both criminal and civil cases have broad authority to conduct pretrial conferences to consider such matters as will promote a fair and expeditious trial and to consider various matters as may aid in the disposition of the action.”).

795. *State v. Shadden*, 235 P.3d 436, 446–47 (Kan. 2010).

796. *Id.* at 447.

797. *Id.*

798. *Id.*

the court determines the relevance of the evidence using the probative and material standards in section 60-401(b) of the Kansas Statutes.<sup>799</sup> Second, the court identifies which rules of evidence or other legal principles apply to the evidence under contention, which an appellate court reviews de novo.<sup>800</sup> Third, the district court “must apply the applicable rule or principle” as directed by the evidentiary rule or legal principle.<sup>801</sup> Finally, the judge may use discretion to exclude otherwise admissible evidence under section 60-445 if the risk that the evidence may unfairly or harmfully surprise a party outweighs its probative value.<sup>802</sup> An appellate court reviews this for abuse of discretion.<sup>803</sup>

## 2. Motion to Suppress

The defendant may file a pretrial motion to suppress illegally seized evidence under section 22-3216 of the Kansas Statutes.<sup>804</sup> In *State v. Thomas*, the Kansas Supreme Court analyzed a motion to suppress that the district court had denied.<sup>805</sup> An appellate court reviews a motion to suppress evidence de novo and, ultimately, performs an independent review.<sup>806</sup> Applying this standard, the court found that the district court had erred by denying the motion to suppress evidence.<sup>807</sup> Careful analysis of the State’s seizure procedures on a case-by-case basis allows the district court to evaluate motions before trial to provide relief to aggrieved defendants.

## 3. Pretrial Conferences

A pretrial conference occurs between the State and the defense in accordance with section 22-3217 of the Kansas Statutes.<sup>808</sup> The statute does not require the conference, but the court or any party may initiate a conference to “consider such matters as will promote a fair and

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799. *Id.*

800. *Id.*

801. *Id.*

802. *Id.*

803. *Id.*

804. KAN. STAT. ANN. § 22-3216 (2007).

805. 246 P.3d 678, 681 (Kan. 2011).

806. *Id.* at 683 (citing *State v. McGinnis*, 233 P.3d 246, 251 (Kan. 2010)).

807. *Id.* at 687–88.

808. KAN. STAT. ANN. § 22-3217.

expeditious trial.”<sup>809</sup> The court then prepares a memorandum of the matters discussed and agreed upon during the conference.<sup>810</sup> The defendant cannot incriminate himself during this conference except through written and signed admissions.<sup>811</sup> The pretrial conference often addresses issues related to pretrial motions<sup>812</sup> or other important pretrial issues, such as witnesses.<sup>813</sup>

## V. TRIAL RIGHTS

### A. *Fifth Amendment Issues*

The Fifth Amendment declares that “no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor 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.”<sup>814</sup> The Fifth Amendment ensures due process, enables the defendant to avoid self-incrimination, and protects against double jeopardy.<sup>815</sup> The Kansas Constitution outlines similar rights for its citizens by providing that “[n]o person shall be a witness against himself, or be twice put in jeopardy for the same offense.”<sup>816</sup> Section 22-3102(a) of the Kansas Statutes buttresses the protections by providing that “[n]o person called as a witness . . . shall be required to make any statement [that] will incriminate such person.”

#### 1. Self-Incrimination

To receive Fifth Amendment protection, testimony must qualify as both self-incriminating and compelled.<sup>817</sup> The Supreme Court

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809. *Id.*

810. *Id.*

811. *Id.*

812. *See, e.g.,* State v. Hall, 247 P.3d 1050, 1063 (Kan. Ct. App. 2011) (reviewing the district court’s granting the defendant’s motion in limine at the pretrial conference).

813. *See* United States v. Goodman, 633 F.3d 963, 966 (10th Cir. 2011) (reviewing the district court’s deciding which witnesses the defendant could call).

814. U.S. CONST. amend. V.

815. *See* Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (“The privilege reflects a complex of our fundamental values and aspirations . . . . It can be asserted in any proceeding . . . , and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”).

816. KAN. CONST. Bill of Rights § 10.

817. Hoffman v. United States, 341 U.S. 479, 486 (1951) (calling the Fifth Amendment a

determined compelled testimony is self-incriminating when it would reasonably “furnish a link in the chain of evidence” or could result in an injurious statement.<sup>818</sup> A situation in which a person might make an incriminating statement does not necessarily excuse him completely from offering any testimony—that person may still be called as a witness but cannot be compelled to make an incriminating statement.<sup>819</sup>

The privilege against self-incrimination ends after the criminal defendant has entered a guilty plea, and the court has accepted the plea.<sup>820</sup> This concept was recently reinforced in Kansas in *State v. Bailey*.<sup>821</sup> The defendant relied on *State v. Anderson* to claim that the Court should exclude a witness’s testimony because the witness had already asserted his Fifth Amendment privilege not to testify.<sup>822</sup> By the time of the defendant’s trial, the witness had already entered a guilty plea, received a sentence, and filed a notice of appeal.<sup>823</sup> The witness, a close friend of the defendant, advised the court that he wanted to assert his Fifth Amendment privilege or, in the alternative, just did not want to testify.<sup>824</sup> The court found that the witness had no privilege to assert the Fifth Amendment because he had already pled guilty.<sup>825</sup>

The Kansas Supreme Court distinguished *Bailey* from *Anderson* and limited *Anderson*’s holding.<sup>826</sup> The defendant tried to argue that the witness still had a valid Fifth Amendment privilege because the witness had appealed his case.<sup>827</sup> In *Anderson*, the witness had maintained a valid Fifth Amendment privilege under unique circumstances: “That individual had entered a guilty plea but had filed a motion to withdraw the plea, which was denied; he had not yet been sentenced, nor had the appeal time run on the denial of his motion to withdraw his plea.”<sup>828</sup> The court upheld the defendant’s conviction in *Bailey*, declaring that the

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“guarantee against testimonial *compulsion*” (emphasis added)).

818. *Id.* (citing *Blay v. United States*, 340 U.S. 159, 160 (1950)).

819. *See State v. Turner*, 250 P.3d 286, 293–94 (Kan. Ct. App. 2011) (citing *In re Investigation into Homicide of T.H.*, 932 P.2d 1023, 1029 (Kan. Ct. App. 1997)).

820. *See State v. Longobardi*, 756 P.2d 1098, 1102 (Kan. 1988) (“[O]nce a plea of guilty has been regularly accepted by the court, and no motion is made to withdraw it, the privilege against self-incrimination ends after sentence is imposed.”).

821. 255 P.3d 19, 28–29 (Kan. 2011) (citing *Longobardi*, 756 P.2d at 1102).

822. *Id.* at 29 (citing *State v. Anderson*, 732 P.2d 732, 740 (Kan. 1987)).

823. *Id.* at 28–29.

824. *Id.* at 29.

825. *Id.*

826. *Id.*

827. *Id.*

828. *Id.* (citing *State v. Anderson*, 732 P.2d 732, 736–37 (Kan. 1987)).

witness's Fifth Amendment privilege had been properly denied, and his refusal to testify did not prejudice the defendant.<sup>829</sup>

Under Kansas statutory authority, prosecutors may grant either “[t]ransactional immunity” or “[u]se and derivative immunity.”<sup>830</sup> The latter compels the non-defendant witness to testify and leaves open the possibility of prosecution, but it precludes the State from using the testimony against the witness.<sup>831</sup>

Transactional immunity provides *total* immunity: the State may not prosecute the witness for the transactions about which he testifies.<sup>832</sup> The federal government does not recognize transactional immunity after its decision in *Kastigar v. United States*, which declared that the Constitution required only use or derivative use immunity.<sup>833</sup> Use or derivative use immunity constitutes the federal floor required by the Constitution,<sup>834</sup> and transactional immunity offers more protections than those provided by the Fifth Amendment.<sup>835</sup>

A witness or defendant cannot simply presume that he has received immunity without evidence of an actual agreement.<sup>836</sup> In *United States v. Fishman*, the defendant argued that his cooperation with the prosecution's investigation should have earned him immunity from that testimony.<sup>837</sup> The defendant filed a pretrial motion to dismiss his indictment because he thought he had been “effectively immunized” due to his cooperation.<sup>838</sup> The Tenth Circuit rejected this argument and held that a subjective belief that his “good faith” cooperation with the prosecution is insufficient to receive immunity.<sup>839</sup>

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829. *Id.*

830. KAN. STAT. ANN. § 22-3102(b)–(c) (2007 & Supp. 2011).

831. *Id.* § 22-3102(b)(2).

832. *United States v. Fishman*, 645 F.3d 1175, 1185 n.6 (10th Cir. 2011) (citing *In re Madison Guar. Sav. & Loan*, 352 F.3d 437, 443 (D.C. Cir. 2003) (per curiam)).

833. 406 U.S. 441, 453 (1972).

834. *Id.*

835. *Id.*

836. *See Fishman*, 645 F.3d at 1184–85.

837. *Id.* at 1184.

838. *Id.*

839. *Id.* at 1184–85.

## 2. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment,<sup>840</sup> provides that “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>841</sup> The mandates of the Double Jeopardy Clause protect a defendant against (1) subsequent prosecution for the same offense after being acquitted; (2) another prosecution for the same offense after being convicted; and (3) multiple criminal punishments for the same offense.<sup>842</sup> The Clause’s protections do not apply until the defendant faces initial jeopardy—that is to say, in a jury trial when the jury has been empanelled and sworn in or when the judge begins to receive evidence in a bench trial.<sup>843</sup> Thus, a defendant must suffer jeopardy as a prerequisite to suffering double jeopardy.<sup>844</sup> Section 10 of the Kansas Bill of Rights<sup>845</sup> and section 21-5110<sup>846</sup> of the Kansas Statutes also protect a defendant against double jeopardy.

In *State v. Roberts*, the Kansas Supreme Court held that a pretrial dismissal did not constitute a judgment of acquittal so as to implicate the Double Jeopardy Clause.<sup>847</sup> The defendant had been charged with unlawful possession of prescription drugs.<sup>848</sup> The defendant filed a pretrial motion to dismiss the charges, which the district court granted.<sup>849</sup> The State appealed the district court’s dismissal under section 22-3602(b) of the Kansas Statutes, which provides that the State may take an appeal to the court of appeals as a matter of right “[f]rom an order dismissing a complaint, information[, ] or indictment.”<sup>850</sup>

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840. *Thompkins v. McCune*, 433 Fed. App’x 652, 656 (10th Cir. 2011) (citing *Monge v. California*, 524 U.S. 721, 727–28 (1998)).

841. U.S. CONST. amend. V.

842. *Thompkins*, 433 Fed. App’x at 656 (citing *Monge*, 524 U.S. at 728).

843. *State v. Roberts*, 259 P.3d 691, 696 (Kan. 2011) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)).

844. *Thompkins*, 433 Fed. App’x at 656–57.

845. KAN. CONST. Bill of Rights § 10 (“No person shall . . . be twice put in jeopardy for the same offense.”).

846. KAN. STAT. ANN. § 21-5110 (Supp. 2011). Select portions of Chapter 21 of the Kansas Statutes were re-codified as of July 1, 2011. Prior to July 1, 2011, section 21-3108 of the Kansas Statutes applied to protect against double jeopardy.

847. *Roberts*, 259 P.3d at 701.

848. *Id.* at 692.

849. *Id.* at 692–93.

850. *Id.* at 694 (quoting KAN. STAT. ANN. § 22-3602(b)(1) (2007 & Supp. 2011)).

The Kansas Supreme Court considered whether the district court's pretrial ruling qualified as a judgment of acquittal, to which jeopardy attaches, so that the State could not appeal.<sup>851</sup> The court found that "an acquittal that cannot be appealed by the State [is] a judgment that (1) resolves a factual element (2) after jeopardy has attached."<sup>852</sup> The defendant argued that the district court's order was essentially a judgment of acquittal because the district court had to make factual determinations in order to decide on the motion to dismiss.<sup>853</sup> The court noted, however, that an acquittal "actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."<sup>854</sup> Although the trial court had set the defendant's case for trial, the Kansas Supreme Court found that jeopardy had not attached at the time of the motion because the trial court granted it before the trial date.<sup>855</sup> Thus, in this case, because the court issued the order before trial and therefore before jeopardy attached, the district court's order constituted an order of dismissal and not a judgment of acquittal, and the Double Jeopardy Clause did not prevent the State's appeal.<sup>856</sup>

In *State v. Miller*, the Kansas Supreme Court addressed the issue of whether a mistrial—caused by the State's repeated violations of an order in limine—followed by a retrial, subjects a defendant to double jeopardy.<sup>857</sup> A retrial only subjects a defendant to double jeopardy when the previous mistrial resulted from prosecutorial misconduct committed with the intent of provoking a mistrial.<sup>858</sup> During the defendant's first trial, the court ruled that the minor victim could not testify after she could not complete the children's oath, but it admitted some of her prior statements.<sup>859</sup> The State violated the order in limine three times during the pendency of the trial, which led the court to grant the defendant's order for mistrial.<sup>860</sup> The essential determination for double jeopardy is not whether the prosecutor committed misconduct at all, "but whether

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851. *Id.*

852. *Id.* at 695.

853. *Id.* at 698.

854. *Id.* at 699 (alteration in original) (quoting *United States v. Scott*, 437 U.S. 82, 97 (1978)) (internal quotation marks omitted).

855. *Id.* at 700.

856. *Id.* at 701.

857. 264 P.3d 461, 465 (Kan. 2011).

858. *Id.* at 470.

859. *Id.* at 467.

860. *Id.* at 467–68.

the prosecutor intended to provoke a mistrial.”<sup>861</sup> The court found that there was no evidence that the State intended to provoke a mistrial, so the bar on double jeopardy did not block the defendant’s retrial and conviction.<sup>862</sup>

### 3. Multiplicity

The Kansas Supreme Court has defined multiplicity as “the charging of a single offense in several counts of a complaint or information.”<sup>863</sup> A two-prong test determines whether a defendant’s convictions are for the same offense. First, “[d]o the convictions arise from the same conduct?”<sup>864</sup> Second, “by statutory definition are there two offenses or only one?”<sup>865</sup> The court’s analysis ends if, under the first prong, the convictions are not based on the same or “unitary” conduct.<sup>866</sup> Four factors guide the first prong of the multiplicity analysis:

- (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 when there was an intervening event;
- and (4) whether there is a fresh impulse motivating some of the conduct.<sup>867</sup>

In *State v. Sellers*, the Kansas Supreme Court addressed whether the defendant’s convictions were multiplicitous. The State charged the defendant with three counts of aggravated indecent liberties with a child: the first count was for touching the victim’s breast on November 17, 2007, and the second count was for touching the victim’s pubic area on the same date.<sup>868</sup> The jury convicted the defendant on both counts, and the defendant argued for a finding of multiplicity.<sup>869</sup> The district court judge rejected his argument and held that the two acts of touching

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861. *Id.* at 471.

862. *Id.* at 472.

863. *State v. Schoonover*, 133 P.3d 48, 66 (Kan. 2006) (quoting *State v. Patten*, 122 P.3d 350, 352 (2005)) (internal quotation marks omitted).

864. *Id.* at 79.

865. *Id.*

866. *State v. Sellers*, 253 P.3d 20, 28 (Kan. 2011) (citing *State v. Thompson*, 200 P.3d 22, 28 (Kan. 2009)).

867. *Schoonover*, 133 P.3d at 79.

868. *Sellers*, 253 P.3d at 24.

869. *Id.* at 25–26.

underlying the counts were separate.<sup>870</sup> On appeal, Sellers argued that the two counts arose from the same act and, therefore, should qualify as multiplicitous.<sup>871</sup> The State argued, however, that because there was a break between the act of touching the victim's breast and the act of touching her pubic area, the acts were not unitary.<sup>872</sup> According to the victim's testimony, the defendant touched her breast, left the room for thirty to ninety seconds, and then returned to touch her pubic area.<sup>873</sup>

In determining whether the convictions arose from the same conduct, the court found that the acts occurred at or near the same time and location because both acts occurred within minutes of each other and on the same bed.<sup>874</sup> The court ultimately found that the counts were not multiplicitous because the acts underlying counts one and two were not unitary because the defendant broke the chain of causality by leaving the room for thirty to ninety seconds.<sup>875</sup>

#### 4. Due Process

The Due Process Clause of the Fifth Amendment of the United States Constitution protects a criminal defendant from unreasonable delay in the filing of formal charges.<sup>876</sup> A defendant's rights under the Clause are not violated by pre-accusation delay if the defendant cannot show that the delay resulted in actual prejudice in his ability to defend himself and that the government intended to delay in order to harass or gain a tactical advantage over the defendant.<sup>877</sup> The trial court must determine the government's underlying reason for the delay, including the State's purpose and intent.<sup>878</sup> It is not enough, however, for the defendant to show a deliberate and intentional delay; the State must intend to harass and disadvantage the defendant.<sup>879</sup>

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870. *Id.* at 26.

871. *Id.* at 28.

872. *Id.*

873. *Id.* at 29.

874. *Id.*

875. *Id.* at 29–30.

876. U.S. CONST. amend. V.

877. *State v. Royal*, 535 P.2d 413, 417 (Kan. 1975).

878. *Id.*

879. *Id.*

*B. Sixth Amendment Issues*

## 1. Speedy and Public Trial

## a. Speedy Trial

The Sixth Amendment<sup>880</sup> and the Speedy Trial Act<sup>881</sup> protect a defendant's right to a speedy trial. A defendant's "arrest[] or indict[ment], whichever comes first," triggers the right to a speedy trial.<sup>882</sup> A court balances four factors in determining whether a defendant's Sixth Amendment right has been violated: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) whether the delay prejudiced the defendant."<sup>883</sup> No single factor alone sufficiently supports a speedy trial violation.<sup>884</sup>

The Speedy Trial Act requires that a federal criminal trial begin within seventy days of the filing of the information or indictment or the defendant's initial appearance, whichever is later.<sup>885</sup> In counting the seventy-day period, the Act excludes delays resulting from continuances granted on the basis of a finding that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."<sup>886</sup>

In Kansas, the accused also has a statutory right to a speedy trial under section 22-3402 of the Kansas Statutes.<sup>887</sup> The Kansas Supreme Court discussed the application of the statute in *State v. Thomas*.<sup>888</sup> In *Thomas*, the defendant claimed a violation of her statutory right to a speedy trial because her trial commenced after the State caused more

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880. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

881. Speedy Trial Act, 18 U.S.C. § 3161–3174 (2006).

882. *United States v. Larson*, 627 F.3d 1198, 1207 (10th Cir. 2010) (quoting *United States v. Selzer*, 595 F.3d 1170, 1175 (10th Cir. 2010)) (internal quotation marks omitted).

883. *Id.* (citing *Selzer*, 595 F.3d at 1176).

884. *Id.*

885. 18 U.S.C. § 3161(c)(1).

886. *Id.* § 3161(h)(7)(A).

887. KAN. STAT. ANN. § 22-3402(2) (2007) (stating that if a person charged with a crime is not "brought to trial within 180 days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (5)").

888. 246 P.3d 678, 688–91 (Kan. 2011).

than 180 days of delay.<sup>889</sup> The defendant argued that her speedy trial clock started on the day that she waived her right to a preliminary hearing—the day she should have been arraigned—not on the day she was actually arraigned.<sup>890</sup> The court concluded that the plain language of section 22-3402 clearly requires trial 180 days “after arraignment,” and thus, the actual arraignment started the speedy trial clock.<sup>891</sup>

b. Public Trial

The Kansas Court of Appeals considered circumstances under which a trial court may close the courtroom to the public without violating a defendant’s right to a public trial in *State v. Barnes*.<sup>892</sup> At trial, the judge closed the courtroom after several jurors complained that the defendant’s sister, who was also a witness for the defense, might have taken pictures on her cell phone of the jurors.<sup>893</sup> In determining the circumstances under which the court may close the courtroom, the court of appeals asked whether the court “had an overriding interest in closing the courtroom” and noted that such a closure must not exceed the scope necessary to effectuate the court’s overriding interest.<sup>894</sup> The court of appeals found that the district court failed to consider reasonable alternatives to closing the courtroom, such as banning cell phones or removing unruly spectators.<sup>895</sup> As a result, the court of appeals found that the judge erred in closing the court when other methods for ensuring a fair trial existed.<sup>896</sup> The court reversed Barnes’ conviction and remanded the case for a new trial.<sup>897</sup>

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889. *Id.* at 688.

890. *Id.* at 690.

891. *Id.*

892. 251 P.3d 96, 99–101 (Kan. Ct. App. 2011).

893. *Id.*

894. *Id.* at 101.

895. *Id.*

896. *Id.*

897. *Id.*

## 2. Trial by Jury

### a. Generally

In *State v. Stieben*, the Kansas Supreme Court discussed the violation of a defendant's right to a trial by jury when the judge invades the jury's role as the finder of fact.<sup>898</sup> During deliberations, the jury asked the court a question about the underlying facts of the case.<sup>899</sup> The district judge answered the jury's question by relying solely on his trial notes and memory, despite disagreement by counsel about the testimony.<sup>900</sup> Pursuant to section 22-3420(3), the court may read back the testimony to the jury, which would have prevented the judge from relying on his notes and memory.<sup>901</sup> The Kansas Supreme Court reversed because the judge's answer effectively denied the defendant her constitutional right to a jury trial.<sup>902</sup> The court noted that the "right to a jury trial includes allowing the jury to decide the materiality of evidence supporting an element of the crime charged."<sup>903</sup> Thus, the court found that the judge not only made a finding of fact for the jury, but it made a finding that was contrary to the evidence presented.<sup>904</sup>

### b. Impartial Jury

"The right to a trial by jury guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors."<sup>905</sup> The jury's verdict "must be based upon the evidence developed at the trial of a criminal prosecution."<sup>906</sup> A failure to accord this guarantee "violates even the minimal standards of due process."<sup>907</sup>

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898. 256 P.3d 796, 799–800 (Kan. 2011).

899. *Id.* at 798.

900. *Id.* at 798–99.

901. KAN. STAT. ANN. § 22-3420(3) (2007).

902. *Stieben*, 256 P.3d at 800.

903. *Id.* at 799 (citing *State v. Brice*, 80 P.3d 1113, 1119 (Kan. 2003)).

904. *Id.* at 801.

905. *State v. Leaper*, 238 P.3d 266, 272 (Kan. 2010) (quoting *State v. Cady*, 811 P.2d 1130, 1139 (1991)) (internal quotation marks omitted).

906. *Id.* (quoting *Cady*, 811 P.2d at 1139) (internal quotation marks omitted).

907. *Id.* (quoting *Morgan v. Illinois*, 504 U.S. 719, 727 (1992)) (internal quotation marks omitted).

In *State v. Leaper*, the defendant appealed an alleged deprivation of his right to a trial by an impartial jury.<sup>908</sup> A discrepancy existed in a witness' testimony, so the court excused the jury and allowed the State to play back the audio tape of the witness's police interview.<sup>909</sup> At the close of the day, the parties were unable to find the audio tape, and a juror alleged that the witness put the tape in his pocket.<sup>910</sup> The tape did not turn up after a search of the witness.<sup>911</sup> The defense filed a motion for mistrial on the premise that the jury's observation of the witness taking the tape caused irreversible prejudice.<sup>912</sup> The court denied the motion, and the jury found the defendant guilty of second-degree murder.<sup>913</sup>

The Kansas Supreme Court concluded that the issue was not jury misconduct, but whether the witness's misconduct and the court's lack of responsive action denied the defendant a fair trial.<sup>914</sup> Once the judge knew of the witness's alleged conduct, the judge had an obligation to inquire as to what the juror knew and how that information affected the juror.<sup>915</sup> Because the jury might have improperly considered matters outside of the evidence admitted at trial, the defendant did not receive a trial by an impartial jury.<sup>916</sup> The court found that the trial court abused its discretion by failing to investigate the witness's alleged taking of evidence and by failing to admonish the jury to disregard the taking of the tape.<sup>917</sup> The court, however, found that the error was harmless given a number of other factors weighing against the defendant.<sup>918</sup>

### c. Waiver of Right to Trial by Jury

A defendant waives the constitutional right to a jury trial when "(1) the trial court . . . advise[s] the defendant of his or her right to a jury trial, and (2) the defendant . . . waive[s] the right personally, either in writing

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908. *Id.* at 268.

909. *Id.* at 269.

910. *Id.*

911. *Id.*

912. *Id.*

913. *Id.* at 270.

914. *Id.* at 272.

915. *Id.* at 274 (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1995)).

916. *Id.* at 275–76.

917. *Id.* at 276.

918. *Id.*

or in open court.”<sup>919</sup> If the record is silent, the court cannot presume waiver.<sup>920</sup>

In *State v. Horn*, the Kansas Supreme Court discussed the implications of a guilty plea on the right to have a jury for upward durational departure sentence hearings.<sup>921</sup> The trial court empanelled a jury for the upward durational departure sentencing proceeding.<sup>922</sup> After the jury unanimously found the existence of an aggravating factor, the district court ordered the maximum prison sentence.<sup>923</sup> On appeal, the defendant argued that the trial court lacked statutory authority to empanel a separate jury for his departure sentencing hearing.<sup>924</sup>

The court reviewed the departure sentencing statutory scheme to determine whether a defendant’s guilty plea is sufficient to waive his right under section 21-4716(b)<sup>925</sup> of the Kansas statutes to have a jury determine beyond a reasonable doubt any factors used to increase his sentence.<sup>926</sup> Section 21-4718(b) sets out this jury requirement.<sup>927</sup> The court explained that if a defendant pleads guilty and waives his right to either a jury trial or a jury at the sentencing proceeding, then section 21-4718(b)(4) specifies that the court, not a jury, conducts the upward durational departure sentence proceeding.<sup>928</sup> A court-conducted upward durational departure proceeding violates a defendant’s constitutional rights if the defendant has not waived his right to a jury for the upward durational departure sentence hearing.<sup>929</sup> A defendant does not waive this right merely by pleading guilty.<sup>930</sup> The Kansas Supreme Court held that the district court erred in empanelling a jury for the defendant’s

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919. *State v. Duncan*, 242 P.3d 1271, 1278 (Kan. Ct. App. 2010) (citing *State v. Irving*, 533 P.2d 1225, 1228 (Kan. 1975)).

920. *Id.* (citing *Irving*, 533 P.2d at 1228).

921. 238 P.3d 238, 242–46 (Kan. 2010).

922. *Id.* at 241 (noting that the jury was empanelled to make the determination of whether a fiduciary relationship existed between the defendant and the victim, which is an aggravating factor).

923. *Id.*

924. *Id.* at 242.

925. The Kansas legislature repealed section 21-4718. See 2011 Kans. Sess. Laws § 81.

926. *Horn*, 238 P.3d at 243.

927. *Id.*

928. *Id.* at 246.

929. *Id.*

930. *Id.* Similarly, a plea of *nolo contendere*, on its face, does not waive a defendant’s right to a jury trial for the upward durational departure sentence proceedings. *State v. Duncan*, 243 P.3d 338, 342 (Kan. 2010).

departure sentence proceeding after the defendant had pleaded guilty and waived his right to a trial by jury.<sup>931</sup>

In *State v. Barnes*, the Kansas Supreme Court found that despite the defendant's history of mental illness, he made a knowing and voluntary waiver of the right to a trial by jury.<sup>932</sup> The defendant told the district court judge that he wanted to waive his right to a jury trial and proceed with a bench trial after two days of testimony before a jury.<sup>933</sup> The judge, stating that she wanted to be sure that he understood his right to a trial by jury, questioned him on his understanding of his rights and the roles of the parties and the court.<sup>934</sup> The judge found the defendant guilty of first-degree murder and aggravated assault.<sup>935</sup>

On appeal, the defendant claimed, among other things, that the district court erred when it did not further investigate his competency to stand trial before accepting his waiver.<sup>936</sup> The record contained extensive portions of conversations between the defendant and his counsel, the prosecutor, and the judge, which demonstrated his understanding of his waiver of a trial by jury.<sup>937</sup> The Kansas Supreme Court found that the defendant had knowingly and voluntarily waived his right to trial by jury.<sup>938</sup>

#### d. Jury Selection and Peremptory Challenge

Sections 22-3407 through 3413 of the Kansas Statutes govern jury selection in criminal trials.<sup>939</sup> In Kansas, "the purpose of voir dire is to enable the parties to select jurors who are competent and without bias, prejudice, or partiality."<sup>940</sup> The trial court has the authority to limit voir dire "if the court believes such examination to be harassment, is causing unnecessary delay[,] or serves no useful purpose."<sup>941</sup>

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931. *Horn*, 238 P.3d at 246.

932. 262 P.3d 297, 311 (Kan. 2011).

933. *Id.* at 301.

934. *Id.* at 201-07.

935. *Id.* at 308.

936. *Id.*

937. *Id.* at 301-08.

938. *Id.* at 313.

939. See KAN. STAT. ANN. §§ 22-3407 to -3413 (2007 & Supp. 2010).

940. *State v. Simmons*, 254 P.3d 97, 101 (Kan. 2011) (citing *State v. Reyna*, 234 P.3d 761, 775 (Kan. 2010)).

941. KAN. STAT. ANN. § 22-3408(3).

While examining potential jurors, the State, the defendant, or the defendant's attorney "may challenge any prospective juror for cause."<sup>942</sup> Examples of grounds for a challenge for cause include the potential juror being related to the defendant or victim of the alleged crime,<sup>943</sup> having "been a party adverse to the defendant in a civil action,"<sup>944</sup> or having been "a juror in a civil action against the defendant arising out of the act charged as a crime."<sup>945</sup>

In a criminal trial, each party may use an equal number of peremptory challenges to exclude potential jurors.<sup>946</sup> The specific number of peremptory challenges allowed by each party depends on the severity of the crime charged.<sup>947</sup> Generally, either party may use a peremptory challenge to remove any potential juror that belongs to a group "it believes would unduly favor the other side."<sup>948</sup> The State, however, may not exercise a peremptory challenge based solely on the prospective juror's race.<sup>949</sup>

In *United States v. Prince*, the Tenth Circuit declined to extend *Batson v. Kentucky* to prohibit peremptory challenges based on a prospective juror's political beliefs.<sup>950</sup> The defendant was charged with manufacturing marijuana.<sup>951</sup> During voir dire, the Government asked potential jurors whether they favored the legalization of marijuana.<sup>952</sup> Four potential jurors answered affirmatively, and the Government used four peremptory challenges to excuse each of these jurors.<sup>953</sup> In denying the defendant's *Batson* challenge, the Tenth Circuit noted that *Batson* applies only to peremptory challenges based on a prospective juror's race, ethnicity, or sex.<sup>954</sup>

The Tenth Circuit reached a well-reasoned decision in *Prince*.

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942. *Id.* § 22-3410(1).

943. *Id.* § 22-3410(2)(a).

944. *Id.* § 22-3410(2)(c).

945. *Id.* § 22-3410(2)(f). Section 3410(2) lists six other viable challenges. *Id.* § 22-3410(2)(b), (d)–(e), (g)–(i).

946. *Id.* § 22-3412(a)(2)(E).

947. *See id.* § 22-3412(a)(2)(A)–(D).

948. *United States v. Prince*, 647 F.3d 1257, 1263 (10th Cir. 2011) (quoting *Holland v. Illinois*, 493 U.S. 474, 481 (1990)) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 860 (2011).

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

950. *Prince*, 647 F.3d at 1261.

951. *Id.*

952. *Id.*

953. *Id.*

954. *See id.* at 1262 (discussing Equal Protection Clause jurisprudence).

Personal views on marijuana do not place a person into a protected class. In fact, using a peremptory challenge on a potential juror whose views on marijuana are known, in the trial of a defendant charged with manufacturing marijuana, is a sound use of a peremptory challenge.

e. Juror and Jury Misconduct

A Kansas district court that denies a motion for new trial based on juror misconduct abuses its discretion “if the defendant makes a two-part showing: (1) that juror misconduct occurred and (2) that it substantially prejudiced the defendant’s right to a fair trial.”<sup>955</sup> Recently, the Kansas Court of Appeals in *Bell v. State* concluded that a defendant’s satisfying step one by showing juror misconduct shifts the burden of proof to the State for step two.<sup>956</sup>

In *Bell*, a member of the jury that convicted the defendant was, himself, awaiting trial for a similar charge.<sup>957</sup> The juror intentionally concealed his own charge during voir dire.<sup>958</sup> The district court denied the defendant’s motion for a new trial, finding a lack of evidence that the juror’s participation affected the defendant’s conviction.<sup>959</sup> The Kansas Court of Appeals reversed the district court, determining that the juror’s dishonest answers to voir dire questions denied the defendant a fair trial.<sup>960</sup>

3. Right to Confront Witnesses: Cross-Examination

In Kansas, both the Confrontation Clause<sup>961</sup> and section 10 of the Kansas Bill of Rights guarantee a criminal defendant’s right to confront witnesses.<sup>962</sup> This guarantee applies to both federal and state prosecutions.<sup>963</sup> Regarding hearsay statements, the Supreme Court in

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955. *Bell v. State*, 263 P.3d 840, 843 (Kan. Ct. App. 2011) (citing *State v. Mathis*, 130 P.3d 14, 19 (Kan. 2006); *State v. Jenkins*, 2 P.3d 769, 772–73 (Kan. 2000)).

956. *Id.*

957. *Id.* at 842.

958. *Id.*

959. *Id.* at 842–43.

960. *Id.* at 846–47.

961. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

962. KAN. CONST. Bill of Rights § 10 (“In all prosecutions, the accused shall be allowed . . . to meet the witness face to face . . .”).

963. *State v. Miller*, 264 P.3d 461, 476 (Kan. 2011) (citing *Pointer v. Texas*, 380 U.S. 400, 406

*Crawford v. Washington*, declared that “testimonial” statements made by a witness who is unavailable at trial are admissible only when the witness has been subject to prior cross-examination.<sup>964</sup> If the statements are “nontestimonial,” then the Confrontation Clause offers no protection.<sup>965</sup> The *Crawford* Court declined to define the term “testimonial” but offered that “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>966</sup>

Subsequent jurisprudence has established a general test that if the primary purpose of statements made “[wa]s not to produce evidence for use at trial,” then the statements are generally nontestimonial.<sup>967</sup> In 2011, the Supreme Court in *Michigan v. Bryant* provided further guidance in the primary-purpose test by explaining that “[a]n objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment.”<sup>968</sup> The Court placed the focus on objective facts because “the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”<sup>969</sup>

After *Bryant*, the Kansas Supreme Court decided two cases analyzing whether statements made to a sexual assault nurse examiner (SANE nurse) were testimonial. In *State v. Bennington*, the SANE nurse examined the victim, questioned the victim in conjunction with a law enforcement officer, and prepared a rape kit that was provided by the Kansas Bureau of Investigation.<sup>970</sup> The court determined that because the SANE nurse’s interview of the victim occurred

in concert with the officer who asked questions, [the victim] was asked about past events, there was not an ongoing public safety or medical emergency, and the statement was given in a formal setting, we hold the admission of the [SANE nurse’s] testimony about the statements made in the presence of a law enforcement officer violated the

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(1965)).

964. 541 U.S. 36, 68 (2004).

965. *Id.*

966. *Id.*

967. *Miller*, 264 P.3d at 483.

968. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

969. *Id.*

970. 264 P.3d 440, 452 (Kan. 2011).

[defendant's] confrontation rights.<sup>971</sup>

In *State v. Miller*, the SANE nurse's interview with the victim occurred without a state actor present, and the interview primarily provided medical treatment for the victim.<sup>972</sup> The court distinguished these facts from those present in *Bennington* and held that the statements of the SANE nurse were admissible.<sup>973</sup>

Comparing *Bennington* and *Miller*, two cases with very similar facts, illustrates the difficulty in determining whether a statement made by a witness unavailable at trial is "testimonial." In *Miller*, the court offered some factors for trial courts to consider in analyzing "the nature of a witness' consent" and "whether the medical professional is following the protocols established for the collection of evidence."<sup>974</sup> It is clear that determining whether a statement is testimonial is a very fact intensive inquiry that occurs on a case-by-case basis without the benefit of a bright line rule.

#### 4. Right to Testify and Present a Defense

"A criminal defendant has a constitutional right to testify in his or her own behalf."<sup>975</sup> The defendant also has a Fifth Amendment right to remain silent at his trial.<sup>976</sup> Because these rights diametrically oppose one another, a trial court has no duty to inform a criminal defendant of his right to testify.<sup>977</sup> The trial court may infer that a defendant who remains silent to the court has waived his right to testify in his defense.<sup>978</sup> As the Court Appeals of Kansas noted, this decision is best left to the defendant after consulting with his counsel.<sup>979</sup>

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971. *Id.* at 453–54.

972. 264 P.3d 461, 487 (Kan. 2011).

973. *Id.* at 488.

974. *Id.* at 487.

975. *State v. Caldwell*, No. 104,699, 2011 WL 4716755, at \*3 (Kan. Ct. App. Oct. 7, 2011) (per curiam) (citing *Rock v. Arkansas*, 483 U.S. 44, 51–52 (1987)).

976. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

977. See *Caldwell*, 2011 WL 4716755, at \*4 (citing *Taylor v. State*, 843 P.2d 682, 688 (Kan. 1992)).

978. *Id.*

979. *Id.* at \*3 (citing *Flynn v. State*, 136 P.3d 909, 916–17 (Kan. 2006)).

## 5. Right to Counsel

### a. Invocation of Right to Counsel

Both the Sixth Amendment<sup>980</sup> and section 10 of the Kansas Bill of Rights guarantee a criminal defendant's right to counsel.<sup>981</sup> Section 22-4503 of the Kansas Statutes has further codified this right.<sup>982</sup> Specifically, section 22-4503 places the duty to invoke a criminal defendant's right to counsel on the court before which the defendant appears.<sup>983</sup>

A defendant's Sixth Amendment right to counsel includes probation hearings.<sup>984</sup> Additionally, section 22-3716(b) provides that defendants in probation-revocation hearings "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."<sup>985</sup>

### b. Personal Choice

It is the defendant's choice whether to retain counsel on his own or to have the court appoint counsel.<sup>986</sup> If the court determines that a defendant does not have the ability to hire an attorney, then the court must appoint the defendant an attorney.<sup>987</sup> The right to counsel attaches only "at critical stages of the proceedings."<sup>988</sup> A critical stage is one that "amount[s] to trial-like confrontations during which counsel would help the accused in meeting his or her adversary."<sup>989</sup> In *State v. Hamon*, the Kansas Court of Appeals determined that a post-trial hearing in which

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980. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

981. KAN. CONST. Bill of Rights § 10 ("In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel . . .").

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

983. *Id.* § 22-4503(b).

984. *State v. Grossman*, 248 P.3d 776, 780 (Kan. Ct. App. 2011) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)).

985. KAN. STAT. ANN. § 22-3716(b) (2007 & Supp. 2011).

986. *Id.*

987. *Id.* § 22-4503(c).

988. *State v. Hamon*, 262 P.3d 1061, 1069 (Kan. Ct. App. 2011) (citing *State v. Andrews*, 614 P.2d 447, 455 (Kan. 1980)).

989. *Id.* (citing *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 & n.16 (2008)).

the defendant stated reasons for a change in attorney did not rise to the level of a critical stage in the proceedings because it “did not involve a trial-like confrontation.”<sup>990</sup>

A defendant must show “justifiable dissatisfaction” with his appointed counsel to warrant a change in counsel.<sup>991</sup> This includes “a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant.”<sup>992</sup> The trial court has the discretion to refuse to appoint new counsel if it “has a reasonable basis for believing the attorney–client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense.”<sup>993</sup>

c. Waiver of Right to Counsel

A criminal defendant may knowingly and intelligently waive his Sixth Amendment right to counsel.<sup>994</sup> The trial court should not consider the defendant’s legal knowledge when evaluating the defendant’s request to proceed pro se, nor should the trial court attempt to determine the best interests of the defendant.<sup>995</sup>

In 2010, the Kansas Court of Appeals reversed a trial court’s denial of a motion for self-representation in *City of Arkansas City v. Sybrant*.<sup>996</sup> The defendant moved to proceed pro se on the day of the trial;<sup>997</sup> the jury had been summoned and was about to be selected.<sup>998</sup> The defendant stated that “[h]e did not want to pay an attorney, and [that] he did not believe that his attorney could adequately prepare for trial.”<sup>999</sup> The trial court denied the defendant’s motion by noting the untimely nature of the request and observing that his concerns “were adequately allayed.”<sup>1000</sup>

In addressing the timeliness issue of the request to proceed pro se,

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990. *Id.*

991. *State v. Boggness*, 268 P.3d 481, 489 (Kan. 2012) (quoting *State v. Sappington*, 169 P.3d 1096, 1102 (Kan. 2007)) (internal quotation marks omitted).

992. *Id.* (quoting *Sappington*, 169 P.3d at 1102) (internal quotation marks omitted).

993. *Id.* (quoting *Sappington*, 169 P.3d at 1102) (internal quotation marks omitted).

994. *See City of Arkansas City v. Sybrant*, 241 P.3d 581, 589 (Kan. Ct. App. 2010) (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

995. *Id.* at 590 (citing *State v. Jones*, 228 P.3d 394, 399 (Kan. 2010)).

996. *Id.*

997. *Id.* at 589.

998. *Id.*

999. *Id.*

1000. *Id.*

the Kansas Court of Appeals noted two balancing tests that are essentially the same. The first test considers “the reasons for the motion for self-representation; the quality of counsel’s representation; the length and the stage of the proceedings; and the potential disruption and delay [that] could be expected from granting the motion.”<sup>1001</sup> The second test “involves a balancing of the alleged prejudice to the defendant arising from the denial of his or her request with the disruption of the proceedings, inconvenience and delay in the proceedings, and juror confusion potentially arising if the request is granted.”<sup>1002</sup>

The court of appeals did not find that the record supported the trial court’s denial of the defendant’s request to proceed pro se.<sup>1003</sup> It found that there would have been no more “greater disruption to the proceedings than normally attends pro se litigation” and that the jury would not have been confused by the change in representation because they had yet to be empanelled.<sup>1004</sup>

d. Effective Assistance of Counsel

i. Generally

Implicit in the Sixth Amendment’s right to counsel is the right to have effective assistance of counsel. A defendant who claims ineffective assistance of counsel must satisfy the test enunciated in *Strickland v. Washington*.<sup>1005</sup> The first prong requires a showing that “counsel committed serious errors that undermined the Sixth Amendment’s guarantee to effective assistance.”<sup>1006</sup> The second prong requires the defendant to show that “counsel’s deficient performance prejudiced the defendant.”<sup>1007</sup> In other words, the defendant must show that the outcome of the trial would have been different but for the ineffective assistance of counsel.<sup>1008</sup>

When applying the first *Strickland* prong, the court uses an

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1001. *Id.* at 590 (quoting *State v. Cuddy*, 921 P.2d 219, 223 (Kan. Ct. App. 1996)).

1002. *Id.* (citing *State v. Cromwell*, 856 P.2d 1299, 1308 (Kan. 1993)).

1003. *Id.*

1004. *Id.*

1005. *State v. Adams*, 254 P.3d 515, 525 (Kan. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

1006. *Id.* (citing *Strickland*, 466 U.S. at 687).

1007. *Id.* (citing *Strickland*, 466 U.S. at 687).

1008. *Id.* at 526 (citing *Chamberlain v. State*, 694 P.2d 468, 475 (Kan. 1985)).

objective-reasonableness standard in determining whether counsel's representation was effective.<sup>1009</sup> This is a "highly deferential" standard, and "[t]he sphere of permissible, reasonable professional conduct is broad."<sup>1010</sup> "[V]irtually unchallengeable" are the strategic choices made by counsel after a "thorough investigation of law and facts relevant to plausible options."<sup>1011</sup> Even if counsel failed to perform a thorough investigation, the strategic decisions still receive a presumption of reasonableness "to the extent that reasonable professional judgments support the limitations on investigation."<sup>1012</sup> Finally, the defendant bears the burden of proof to show the alleged ineffectiveness of his counsel.<sup>1013</sup>

Included in the right to counsel found in the Sixth Amendment and section 10 of the Kansas Bill of Rights is the right to counsel free from conflicts of interest.<sup>1014</sup> Once a defendant raises the issue of a potential conflict of interest with his counsel, the trial court has a duty to investigate the potential conflict of interest.<sup>1015</sup> The trial court has no duty to investigate "a nonexistent, possible conflict of interest" between the defendant and his appointed counsel.<sup>1016</sup> In other words, to invoke the trial court's duty to investigate a potential conflict of interest, the defendant must assert that a potential conflict exists.<sup>1017</sup> It is not sufficient for a defendant to imply that a conflict of interest exists between the defendant and his appointed counsel.

## ii. Appellate Counsel

When a defendant claims ineffective assistance of counsel based on work done in a case on appeal, the nature of the second prong of the *Strickland* test changes slightly. The defendant merely must show that "but for counsel's inadequate work there [is] a reasonable probability

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1009. *Id.* at 525 (citing *Chamberlain*, 694 P.2d at 475).

1010. *Id.*

1011. *Id.* at 525–26 (quoting *State v. Gleason*, 88 P.3d 218, 233 (Kan. 2004)) (internal quotation marks omitted).

1012. *Id.* at 525–26 (quoting *Gleason*, 88 P.3d at 233) (internal quotation marks omitted).

1013. *Id.* at 526 (citing *Gleason*, 88 P.3d at 233).

1014. *State v. Hulett*, 263 P.3d 153, 157 (Kan. 2011).

1015. *See id.* at 157–58 (citing *State v. Taylor*, 975 P.2d 1196 (Kan. 1999); *State v. Vann*, 127 P.3d 307 (Kan. 2006)).

1016. *Id.* at 159 (quoting *State v. Williams*, 236 P.3d 512, 517 (Kan. 2010)) (internal quotation marks omitted).

1017. *See id.* (discussing the factual differences from *Taylor* and *Vann* to *Hulett*).

that the appeal would have been successful.”<sup>1018</sup>

The Kansas Supreme Court recently illustrated this distinction in *Mattox v. State*.<sup>1019</sup> In *Mattox*, the defendant claimed his appellate attorney did not properly argue for the exclusion of certain evidence.<sup>1020</sup> While the court agreed that the evidence was incorrectly admitted, it found that the exclusion of that evidence would not have changed the result of the appeal because the strength of the remaining evidence against the defendant demanded the same outcome.<sup>1021</sup>

### iii. Standard of Review

The Kansas Supreme Court has applied de novo review to ineffective assistance of counsel based on deficient performance.<sup>1022</sup> It is less clear, however, when an ineffective assistance of counsel claim arises from an alleged conflict of interest. In 2009, the Kansas Supreme Court asserted in *Boldridge v. State* that it uses de novo review for “[a]llegations of ineffective assistance of counsel, whether based on claims of deficient performance or on a conflict of interest.”<sup>1023</sup>

Recently, without addressing or citing *Boldridge*, the Kansas Supreme Court in *State v. Hulett* found that “it is well established that a district judge’s decision on disqualification of counsel for conflict of interest, a[nd] refusal to appoint new counsel, . . . are all decisions reviewed on appeal under an abuse of discretion standard.”<sup>1024</sup> The court in *Hulett* did specify that the trial court’s decision “must have been based upon a correct understanding of the law” for this discretionary standard to apply.<sup>1025</sup>

With the *Hulett* court’s clarification that there must first be a correct understanding of the law in mind, the comparison of the standard of reviews used in *Boldridge* and *Hulett* may amount to no more than a distinction without a difference. The court has stated that an ineffective

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1018. *Mattox v. State*, 267 P.3d 746, 749 (Kan. 2011) (citing *Baker v. State*, 753 P.2d 493, 498 (Kan. 1988)).

1019. *See id.*

1020. *Id.* at 748.

1021. *Id.* at 751.

1022. *See Thompson v. State*, 270 P.3d 1089, 1098 (Kan. 2011) (citing *State v. Adams*, 254 P.3d 515, 525 (Kan. 2011)).

1023. *Boldridge v. State*, 215 P.3d 585, 591 (Kan. 2009) (citing *State v. Gleason*, 88 P.3d 218, 233 (Kan. 2004)).

1024. *State v. Hulett*, 263 P.3d 153, 157 (Kan. 2011) (gathering cases).

1025. *Id.* (citing *State v. White*, 211 P.3d 805, 809 (Kan. 2009)).

assistance of counsel claim involves issues of fact and law and therefore requires de novo review.<sup>1026</sup> By stating that a discretionary review is predicated on a correct understanding of the law, the court is then left to look at issues of fact. The trial court has much discretion when evaluating an attorney's assistance to a defendant.

### C. Evidentiary Issues

#### 1. Prior Acts by the Defendant

Section 60-455 of the Kansas Statutes provides that evidence that a person previously committed a crime or a civil wrong is inadmissible as proof that such person is predisposed to commit crimes or civil wrongs as the basis for an inference that such person committed a crime or civil wrong.<sup>1027</sup> That evidence is admissible, however, to prove a material fact in the case at hand, "including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>1028</sup> The Kansas Supreme Court has held that these eight exclusions to the rule of inadmissibility are simply examples and not an exclusive list.<sup>1029</sup> Such evidence must qualify as relevant, its prejudicial effect should not outweigh its probative value, and the court must give a limiting instruction to the jury.<sup>1030</sup> The Kansas Court of Appeals has found that where a fact has already been established, a prior conviction is no longer material to establish that fact.<sup>1031</sup> When intent is an element of the crime charged, the court may not admit prior actions by the defendant to show intent when the defendant has not claimed that his actions were innocent.<sup>1032</sup> Further, simply pleading not guilty to a charge is not

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1026. See *Adams*, 254 P.3d at 525 ("A claim alleging ineffective assistance of counsel presents mixed questions of law and fact requiring de novo review." (citing *Harris v. State* 264 P.3d 557, 560 (Kan. 2009)); *Boldridge*, 215 P.3d at 591 ("Allegations of ineffective assistance of counsel, whether based on claims of deficient performance or on a conflict of interest, involve mixed questions of fact and law.").

1027. KAN. STAT. ANN. § 60-455(a) (Supp. 2011).

1028. *Id.* § 60-455(b).

1029. See *State v. Gunby*, 144 P.3d 647, 659 (Kan. 2006) (stating that the list of material facts is "exemplary rather than exclusive").

1030. *Id.*

1031. See *State v. Cook*, 249 P.3d 454, 460 (Kan. Ct. App. 2011) (citing *State v. Reid*, 186 P.3d 713, 722 (Kan. 2008)) (explaining that a defendant's prior conviction should not have been admitted because the material fact at issue had already been proven).

1032. *State v. Brown*, 236 P.3d 551, 558 (Kan. Ct. App. 2010) (citing *State v. Boggs*, 197 P.3d 441, 444 (Kan. 2008)).

enough to place a defendant's intent in dispute.<sup>1033</sup> Evidence of gang affiliation is admissible when it is material and relevant to a case because it shows "motive for what would otherwise be an inexplicable act."<sup>1034</sup> Gang affiliation must be related to the crime charged in order to be admissible.<sup>1035</sup> Additionally, under the statute, evidence of method or modus operandi relating to the commission of a similar but unrelated crime is admissible in a non-sex offense criminal case so long as it is so similar to the method or modus operandi used in the current case to allow the fact-finder to draw a reasonable inference that the same person committed the two crimes.<sup>1036</sup>

For a sex offense, evidence of the defendant's prior acts of sexual misconduct is admissible and may be considered "for its hearing on any matter to which it is relevant and probative."<sup>1037</sup> In *State v. Hart*, the Kansas Court of Appeals held that the State may only offer evidence of prior sexual misconduct offered to prove a material fact in the case pursuant to section 60-455(b).<sup>1038</sup> Another panel of the Kansas Court of Appeals, however, disagreed with this interpretation of section 60-455(d) and held that subsection (d) is an additional and independent exception to the general exclusion of a defendant's prior criminal actions put in place by the Kansas Legislature specifically to allow a showing of propensity in sexual misconduct cases.<sup>1039</sup>

## 2. Silence from the Defendant

The Fifth Amendment of the United States Constitution protects any person from being compelled to act as a witness against himself in a criminal matter.<sup>1040</sup> This right provides the basis for a police officer's obligation to read a suspect his *Miranda* rights before engaging in a custodial interrogation.<sup>1041</sup>

The Supreme Court has held that the State cannot use a defendant's

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1033. *Id.*

1034. *State v. Davis*, No. 104,711, 2012 WL 401618, at \*2 (Kan. Ct. App. Feb. 3, 2012).

1035. *Id.* (citing *State v. Brown*, 173 P.3d 612, 637–38 (Kan. 2007)).

1036. *See* KAN. STAT. ANN. § 60-455(c) (Supp. 2011).

1037. *Id.* § 60-455(d).

1038. *State v. Hart*, 242 P.3d 1230, 1253 (Kan. Ct. App. 2010), *rev. granted* No. 107,723, 2010 WL 4674037 (Kan. May 16, 2011).

1039. *State v. Young*, No. 102,121, 2012 WL 401600, at \*15 (Kan. Ct. App. Feb. 3, 2012).

1040. U.S. CONST. amend. V.

1041. *See supra* Part III.B.2.

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post-arrest silence to impeach his credibility.<sup>1042</sup> References made by the State to the defendant's inconsistent statements made after arrest and

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1042. Doyle v. Ohio, 426 U.S. 610, 619 (1976).

through the time of trial do not violate this rule when the State does not reference the fact that the defendant invoked his right to remain silent.<sup>1043</sup>

### 3. Evidence Implicating Third Parties

A defendant may present evidence that a third party committed the crime with which the State has charged him if evidence beyond mere motive connects the third party to the crime.<sup>1044</sup> The court should decide admissibility based on all of the facts and circumstances of the case at hand.<sup>1045</sup>

A defendant also has to the right to due process protections on the admission of eyewitness identification when police arranged for the identification under suggestive circumstances that would lead the witness to identify a particular person.<sup>1046</sup> While a court need not automatically exclude an improperly influenced identification, it must screen such evidence prior to commencement of the trial.<sup>1047</sup> The court should exclude the evidence “[i]f there is ‘a very substantial likelihood of irreparable misidentification,’” but the court should admit the evidence where it is reliable enough to outweigh the corrupting effects of the circumstances under which the State obtained it.<sup>1048</sup> In the absence of improper State action in the procurement of the evidence, the defendant must rely on other system checks, such as cross-examination and jury instructions on the fallibility of eyewitness testimony.<sup>1049</sup>

A defendant also has a right to a psychological examination of a witness when the totality of the circumstances provides compelling circumstances for ordering the exam.<sup>1050</sup> The court may consider any number of circumstances involving “demonstrable evidence of a mental condition that requires further investigation, [but it must amount to more than] the mere allegation of some untoward mental condition.”<sup>1051</sup>

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1043. *State v. Hollingshead*, No. 101,471, 2010 WL 5490723, at \*6 (Kan. Ct. App. Dec. 23, 2010) (citing *State v. Drayton*, 175 P.3d 861, 875 (Kan. 2008)).

1044. *State v. Tahah*, 262 P.3d 1045, 1050 (Kan. 2011) (citing *State v. Marsh*, 102 P.3d 445, 455 (Kan. 2004), *rev'd on other grounds*, 548 U.S. 163 (2006)).

1045. *Id.* (gathering cases).

1046. *Perry v. New Hampshire*, 132 S. Ct. 716, 720 (2012).

1047. *Id.*

1048. *Id.* at 720 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

1049. *Id.* at 720–21, 728–29.

1050. *State v. Berriozabal*, 243 P.3d 352, 362–63 (Kan. 2010) (citing *State v. Gregg*, 602 P.2d 85, 91 (Kan. 1979)).

1051. *Id.* at 363.

#### 4. Cross-Examination

A defendant has a constitutional right to confront anyone who acts as a witness against him in a criminal matter.<sup>1052</sup> The Supreme Court has held that witness testimony is inadmissible as hearsay against a defendant unless the witness appears at the trial or, if such appearance is not possible, the defendant had an opportunity outside of the courtroom to cross-examine the witness.<sup>1053</sup> If, however, the statements at issue are nontestimonial, then the statements do not implicate the defendant's right to cross-examine, and the court may admit the evidence.<sup>1054</sup>

For example, the Kansas Supreme Court held that a written statement made to a bank reporting the theft of a bank card was nontestimonial because the person making the statement did not know that it would become part of a criminal proceeding.<sup>1055</sup> Rather, it was simply a part of normal banking procedure after the theft of a bank card.<sup>1056</sup> Law enforcement-like acts, even when made by non-law enforcement actors, appear to be key in these decisions.<sup>1057</sup>

#### 5. Proof Beyond a Reasonable Doubt

In order to convict a defendant of a crime, the State must prove each element of that crime beyond a reasonable doubt. The standard for review on appeal is "whether, after review of all the evidence, viewed in the light most favorable to the [State], the appellate court is convinced that a rational fact finder could have found the defendant guilty beyond a reasonable doubt."<sup>1058</sup> A jury may convict a defendant based solely on inferences drawn from circumstantial evidence so long as those "inferences are fairly deducible" from the evidence.<sup>1059</sup>

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1052. U.S. CONST. amend. VI.

1053. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

1054. *Id.*

1055. *State v. Bennington*, 264 P.3d 440, 451 (Kan. 2011).

1056. *Id.*

1057. For a discussion of the distinction between testimonial and non-testimonial statements in the context of post-sexual assault medical exams, see *supra* Part V.B.3.

1058. *State v. McCaslin*, 245 P.3d 1030, 1040–41 (Kan. 2011) (citing *State v. Drayton*, 175 P.3d 861, 876 (Kan. 2008)) (internal quotation marks omitted).

1059. *Id.* at 1041 (quoting *Drayton*, 175 P.3d at 877) (internal quotation marks omitted).

*D. Actions by Different Actors During a Trial*

## 1. Prosecutors

## a. Prosecutorial Discretion and Selective Prosecution

Prosecutors have discretion within constitutional bounds to charge and try any crime for which they have probable cause and believe they can prove beyond a reasonable doubt.<sup>1060</sup> Impermissible factors, such as race and religion, cannot play a part in the prosecutor's decision.<sup>1061</sup> To show selective prosecution, a defendant must show discriminatory effect—that is, the prosecutor declined to prosecute another similarly situated person—and discriminatory intent.<sup>1062</sup>

## b. Prosecutorial Misconduct

When determining whether a prosecutor's improper comments to the jury amount to misconduct, the reviewing court first must decide whether the comments fall "outside of the wide latitude" given to the prosecutor in discussing the evidence.<sup>1063</sup> If so, the court must then determine whether those comments "prejudiced the jury . . . and denied the defendant a fair trial."<sup>1064</sup> The second part of this analysis requires the court to consider "whether the misconduct was gross and flagrant," whether it showed the prosecutor's "ill will," and whether the evidence was so overwhelming that the prosecutor's misconduct would bear little weight in the minds of the jurors.<sup>1065</sup> The Kansas Supreme Court has recently found prosecutorial misconduct when the prosecutor argued facts not in evidence because of the value jurors tend to place on prosecutor's statements.<sup>1066</sup>

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1060. *United States v. Bradshaw*, 580 F.3d 1129, 1135 (10th Cir. 2009) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

1061. *United States v. Curtis*, 344 F.3d 1057, 1064 (10th Cir. 2003).

1062. *United States v. Deberry*, 430 F.3d 1294, 1299 (10th Cir. 2005) (citing *Armstrong*, 517 U.S. at 565).

1063. *State v. Inkelaar*, 264 P.3d 81, 92 (Kan. 2011) (quoting *State v. Tosh*, 91 P.3d 1204, 1212 (Kan. 2004)).

1064. *Id.* (quoting *Tosh*, 91 P.3d at 1212).

1065. *Id.* (quoting *State v. Adams*, 253 P.3d 5, 11 (Kan. 2011)).

1066. *See, e.g., State v. Simmons*, 254 P.3d 97, 103 (Kan. 2011) (determining that the prosecutor effectively testified about Stockholm Syndrome to prospective jurors during voir dire).

c. Undue Influence

To support a claim of undue influence against a prosecutor, a defendant must show that the prosecutor “substantially interfere[d] with a defense witness’s decision to testify.”<sup>1067</sup> “[T]hreats of prosecution, intimidation, and coercive badgering” are types of active discouragement that qualify as substantial interference.<sup>1068</sup> Informing a potential defense witness that he may incriminate himself through his testimony is not considered substantial interference when the prosecutor does not overstate or misrepresent his concern.<sup>1069</sup>

2. Trial Judges

Trial judges have broad discretion when making decisions on legal questions.<sup>1070</sup> So long as those decisions are rational, “fair in the circumstances[,] and guided by the rules and principles of law,” an appellate court will not substitute its opinion for that of the trial judge.<sup>1071</sup> Only where the trial judge’s decision is legally or factually erroneous or “manifests a clear error of judgment” will the decision be reversed on appeal.<sup>1072</sup>

The Kansas Supreme Court has recently redefined the standard that appellate courts must use when assessing whether an error is fatal to the trial. When only Kansas state law is at issue, the court must apply the standard set forth in section 60-261 of the Kansas Statutes, which requires the court to assess whether there is a reasonable probability that the error did or will impact the outcome of the trial.<sup>1073</sup> If, however, a constitutional issue arises, the court must assess the error under the standards set out in *Chapman v. California*, which held that the party who stands to benefit from the error must show beyond a reasonable

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1067. *United States v. Pablo*, 625 F.3d 1285, 1296 (10th Cir. 2010) (quoting *United States v. Serrano*, 406 F.3d 1208, 1215 (10th Cir. 2005)) (internal quotation marks omitted).

1068. *Id.* at 1297 (quoting *Serrano*, 406 F.3d at 1215).

1069. *Id.*

1070. *United States v. Hutchinson*, 573 F.3d 1011, 1024 (10th Cir. 2009).

1071. *Id.* (quoting *Shook v. Bd. of Cnty. Comm’rs*, 543 F.3d 597, 603 (10th Cir. 2008)) (internal quotation marks omitted).

1072. *Id.* (quoting *United States v. McComb*, 519 F.3d 1049, 1054 (10th Cir. 2007)) (internal quotation marks omitted).

1073. *State v. Ward*, 256 P.3d 801, 820 (Kan. 2011) (citing KAN. STAT. ANN. § 60-261 (Supp. 2011)).

doubt that the error did not or will not affect the outcome of the trial.<sup>1074</sup> Under this standard, the probability that a conviction may be overturned is much higher.

a. Admissibility of Evidence

“All relevant evidence is admissible unless statutorily prohibited.”<sup>1075</sup> When reviewing a trial court’s decision on the admissibility of evidence, the court must first determine whether the evidence was relevant, meaning that it was material and had probative value.<sup>1076</sup> If admitted in error, the court must then determine whether the error was harmless as described above.<sup>1077</sup>

b. Jury Instructions

When a defendant offers a specific defense to a crime, the Kansas Supreme Court has stated that the “defendant is entitled to instructions on the law applicable to his . . . defense” so long as evidence supports such defense.<sup>1078</sup> To warrant such an instruction, there must be evidence in support of the defense theory such that “a rational factfinder” would find in favor of the defendant on that theory when the evidence is viewed in a light most favorable to the defendant.<sup>1079</sup>

The Kansas Supreme Court has found reversible error when a judge improperly instructs the jury on the elements of the crime charged.<sup>1080</sup> On appeal, an appellate court will reverse a lower court’s decision on the basis of an erroneous jury instruction when it is “firmly convinced there is a real possibility the jury would have rendered a different verdict if the error had not occurred.”<sup>1081</sup> Reversal is not necessary, however, if an

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1074. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

1075. *State v. Hart*, 242 P.3d 1230, 1246–47 (Kan. Ct. App. 2010) (citing *State v. Riojas*, 204 P.3d 578, 581 (Kan. 2009)), *rev. granted*, No. 101,723, 2010 WL 4674037 (Kan. May 16, 2011).

1076. *Hart*, 242 P.3d at 1246–47 (citing KAN. STAT. ANN. § 60-401(b) (2007)).

1077. *State v. Raskie*, 269 P.3d 1268, 1274 (Kan. 2012). The updated standard of review applicable to trial court errors is laid out in *State v. Ward*, 256 P.3d 801, 820 (Kan. 2011).

1078. *State v. Brown*, 244 P.3d 267, 272 (Kan. 2011) (quoting *State v. Anderson*, 197 P.3d 409, 414 (Kan. 2008)).

1079. *Id.* at 272–73 (Kan. 2011) (quoting *Anderson*, 197 P.3d at 415).

1080. *State v. Hunt*, 894 P.2d 178, 185 (Kan. 1995) (citing *State v. Castoreno*, 874 P.2d 1173, 1180 (Kan. 1994)).

1081. *Brown*, 244 P.3d at 275 (quoting *State v. Salts*, 200 P.3d 464, 466 (Kan. 2009)) (internal quotation marks omitted).

erroneous instruction “fairly state[s] the law . . . and could not have reasonably misled the jury.”<sup>1082</sup> When a party does not object to an instruction given at trial, the instruction is reviewed on appeal to determine if it was clearly erroneous.<sup>1083</sup>

Failure to instruct the jury on the elements of the offense charged is clear error.<sup>1084</sup> Such error can be harmless if the appellate court determines beyond a reasonable doubt that the erroneous instruction did not change the outcome of the trial.<sup>1085</sup>

A trial court may issue an *Allen* instruction to a jury that has indicated it may not be able to reach a unanimous decision on an offense charged.<sup>1086</sup> The *Allen* instruction encourages jurors to reexamine the evidence in “a conscientious search for truth rather than a dogged determination to have one’s way in the outcome.”<sup>1087</sup> On appeal the court will examine the specific *Allen* instruction to determine its permissibility based on the language of the instruction, the presentation of the instruction with or without other instructions, the timing of the instruction, and the length of time the jury deliberated after being given the instruction.<sup>1088</sup> The Kansas Supreme Court has held that an *Allen* instruction that informs the jury that a retrial would burden both parties in the case is an error,<sup>1089</sup> but the error is only reversible where “there is a real possibility the jury would have rendered a different verdict” without the instruction.<sup>1090</sup>

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1082. *State v. Baughman*, 242 P.3d 196, 197 (Kan. Ct. App. 2010) (citing *State v. McKissack*, 156 P.3d 1249, 1257 (Kan. 2007)).

1083. *State v. Reed*, 247 P.3d 1074, 1084 (Kan. Ct. App. 2011) (citing KAN. STAT. ANN. § 22-3414(3) (2007 & Supp. 2011)).

1084. *State v. Rider*, No. 102,755, WL 426360, at \*2 (Kan. Ct. App. Feb. 4, 2011) (citing *State v. Rush*, 877 P.2d 386, 390–91 (Kan. 1994)).

1085. *Id.* (citing *State v. Watson*, 885 P.2d 1226, 1232 (Kan. 1994)).

1086. *United States v. Arney*, 248 F.3d 984, 987 (10th Cir. 2001) (citing *Allen v. United States*, 164 U.S. 497, 501–02 (1896)).

1087. *Id.* (quoting *United States v. Smith*, 857 F.2d 682, 683–684 (10th Cir. 1988)) (internal quotation marks omitted).

1088. *Id.* at 988 (citing *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1557 (10th Cir. 1991); *United States v. Porter*, 881 F.2d 878, 888 (10th Cir. 1989)).

1089. *State v. Salts*, 200 P.3d 464, 466 (Kan. 2009).

1090. *Id.* (quoting *State v. Carter*, 160 P.3d 457, 467 (Kan. 2007)) (internal quotation marks omitted).

c. Recusal

A trial judge has a duty to recuse himself from presiding over a matter when circumstances exist that would “create a reasonable doubt concerning the judge’s impartiality” in the mind of a reasonable person.<sup>1091</sup> Courts have found it impracticable to require the recusal of a judge when that judge has previously presided over a case involving the same defendant.<sup>1092</sup> The Kansas Supreme Court has held that merely ruling against a defendant is not enough to show bias.<sup>1093</sup>

*E. Potential Trial Actions*

1. Motion of Acquittal

At the close of evidence for either the State or the defendant, either the defendant or the court on its own motion may move for a judgment of acquittal.<sup>1094</sup> The court will grant the motion and acquit the defendant “if the evidence is insufficient to sustain a conviction of such crime or crimes.”<sup>1095</sup> When the court determines there was not enough evidence for a rational factfinder to find the defendant guilty beyond a reasonable doubt, granting a motion for acquittal is not discretionary.<sup>1096</sup>

The State cannot appeal a judgment of acquittal because doing so would violate the constitutional prohibition on trying a defendant twice for the same crime.<sup>1097</sup> An order of dismissal entered *before* the beginning of the trial is not the functional equivalent of an order of acquittal, and under those circumstances, double jeopardy does not attach.<sup>1098</sup>

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1091. *State v. Sappington*, 169 P.3d 1107, 1118 (Kan. 2007) (quoting *State v. Logan*, 689 P.2d 778, 784 (Kan. 1984)) (internal quotation marks omitted).

1092. *Id.* at 1117–18.

1093. *Id.* at 1117–18 (Kan. 2007).

1094. KAN. STAT. ANN. § 22-3419(1) (2007).

1095. *Id.*

1096. *State v. Murdock*, 187 P.3d 1267, 1273 (Kan. 2008).

1097. *State v. Roberts*, 259 P.3d 691, 694–95 (Kan. 2011) (citing *State v. Gustin*, 510 P.2d 1290, 1294 (Kan. 1973)).

1098. *Id.* at 701.

2012]

CRIMINAL PROCEDURE SURVEY

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## 2. Mistrial

Section 22-3423 gives the trial court the authority to terminate a trial at any time when such a remedy becomes necessary.<sup>1099</sup> Upon such an order, the case remains on the docket for a new trial or other proceedings.<sup>1100</sup> The defendant also remains in custody for any further proceedings unless otherwise released on bond.<sup>1101</sup>

## VI. SENTENCING

### A. *Federal Sentencing*

In order to achieve a “more honest, uniform, equitable, proportional, and therefore effective sentencing system,” the federal government has a detailed set of guidelines for calculating criminal sentences for federal crimes.<sup>1102</sup> Along with the severity of the crime committed, sentencing guidelines require federal courts to use a defendant’s criminal history when determining a sentence.<sup>1103</sup> Although federal sentencing guidelines contain provisions for a wide array of aggravating and mitigating factors, “[r]elevant distinctions not reflected in the guidelines probably will occur rarely[,] and sentencing courts may take such unusual cases into account by departing from the guidelines.”<sup>1104</sup>

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1099. KAN. STAT. ANN. § 22-3423(1). The trial court may declare a mistrial when:

(a) It is physically impossible to proceed with the trial in conformity with law; or (b) There is a legal defect in the proceedings [that] 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 (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.

*Id.*

1100. *Id.* § 22-3423(2).

1101. *Id.*

1102. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2011).

1103. *Id.* §§ 1A1.3, 1B1.8.

1104. *Id.* § 1A1.3.

*B. Kansas Sentencing*

## 1. Sentence Determination

Following the lead of federal courts, Kansas also accounts for the criminal history of the defendant and the severity level of the crime when calculating a criminal punishment.<sup>1105</sup> For most felonies, the guidelines account for these two variables—criminal history and crime severity—through sentencing grids.<sup>1106</sup> One sentencing grid applies to drug offenses,<sup>1107</sup> while another governs nondrug offenses.<sup>1108</sup>

Each box in the sentencing grid contains a sentencing range and corresponds to a combination of a particular severity level and criminal history.<sup>1109</sup> The judge, however, may depart from this presumptive sentence by finding “substantial and compelling reasons to impose a departure sentence.”<sup>1110</sup> “[F]or aggravating and mitigating factors insufficient to warrant a departure,” judges have discretion to impose any sentence within the sentencing range.<sup>1111</sup> Kansas courts, however, do not use the sentencing grids for the most serious crimes,<sup>1112</sup> including capital murder<sup>1113</sup> and treason.<sup>1114</sup> The legislature classifies these crimes as “off-grid,” and the punishment is typically life imprisonment or death.<sup>1115</sup>

The distinction between off-grid and grid crimes also matters when determining parole and post-release supervision. The Kansas Supreme Court described this distinction recently when it vacated a trial court’s order that a defendant in a Jessica’s Law case submit to lifetime post-release supervision instead of parole, which applies to off-grid crimes.<sup>1116</sup>

Some crimes, such as driving under the influence, carry fines that the defendant may pay through community service performed within a year

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1105. See KAN. STAT. ANN. §§ 21-6624, -6625 (2011).

1106. See §§ 21-6804, -6805, -6806.

1107. *Id.* § 21-6805.

1108. *Id.* § 21-6804.

1109. *Id.* §§ 21-6804(f), -6805(d).

1110. *Id.* § 21-6815(a). “[A]ny fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt.” § 21-6815(b).

1111. *Id.* §§ 21-6804(e)(1), -6805(c)(1).

1112. *Id.* § 21-6806.

1113. *Id.* § 21-5401(c).

1114. *Id.* § 21-5901(b).

1115. See *id.* §§ 21-6617, -6806(c).

1116. *State v. Harsh*, 265 P.3d 1161, 1165 (Kan. 2011).

of sentencing.<sup>1117</sup> Because it would be impossible for the defendant to complete the community service within the statutorily prescribed time, a trial court need not consider the community-service option if it simultaneously sentences the defendant to more than one year in prison.<sup>1118</sup>

To help determine a defendant's sentence, a court may use information contained in a presentence investigation report.<sup>1119</sup> These reports include information about the defendant's criminal history, a victim report, the defendant's explanation of the crime, and the factual circumstances of the conviction.<sup>1120</sup>

#### a. Criminal History

The sentencing grids include nine levels of criminal history classifications, ranging from the most serious, A, to the least serious, I.<sup>1121</sup> These classifications are identical for drug and nondrug offenses.<sup>1122</sup> For courts to consider prior convictions, the State must prove their existence by a preponderance of the evidence.<sup>1123</sup> Criminal history also helps determine the amount of time that an individual has to register as a sex offender.<sup>1124</sup> In *State v. Denmark-Wagner*, the Kansas Supreme Court recently vacated a trial court's decision to require lifetime sex offender registration for a defendant with only one prior conviction under section 22-4906.<sup>1125</sup> Instead, the court held that section 22-4906 only called for ten years of registration for the defendant.<sup>1126</sup>

#### b. Crime Severity Levels

For nondrug crimes in Kansas, there are ten levels of severity, with level 1 crimes being the most severe and level 10 being the least

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1117. See KAN. STAT. ANN. § 8-1567(b)(4)(f) (Supp. 2011).

1118. *State v. Grebe*, 264 P.3d 511, 514 (Kan. Ct. App. 2011).

1119. KAN. STAT. ANN. § 21-6813.

1120. *Id.* § 21-6813(b).

1121. *Id.* § 21-6809.

1122. *See id.*

1123. *Id.* §§ 21-6811, -6811a.

1124. *Id.* § 22-4906(d).

1125. 258 P.3d 960, 969 (Kan. 2011).

1126. *Id.*

severe.<sup>1127</sup> For drug crimes, there are four levels, with level 1 crimes being the most severe.<sup>1128</sup> Furthermore, “[i]f a person is convicted of two or more crimes, then the severity level shall be determined by the most severe crime of conviction.”<sup>1129</sup>

c. Hard 40/50 Sentences

In certain situations, a defendant found guilty of first degree, premeditated murder must serve a mandatory term of fifty years before being eligible for parole—the so-called hard 50 rule.<sup>1130</sup> If the first degree, premeditated murder was committed before July 1, 1999, the hard 40 rule applies.<sup>1131</sup> These mandatory minimum sentences only apply if the trial court finds the existence of an aggravating factor listed in section 21-6624 that is not outweighed by any mitigating factors.<sup>1132</sup>

There is also a hard 40 sentence for certain sex crimes that would normally be subject to a twenty-five year sentence.<sup>1133</sup> For a hard 40 sentence to apply, the defendant (1) must commit one of the crimes listed in section 21-6627(a)(1) after July 1, 2006 and (2) must have been previously convicted of one of the crimes in section 21-6627(a)(1) or a substantially similar crime.<sup>1134</sup>

d. Aggravating Circumstances

The aggravating circumstances listed in section 21-6624 can turn a sentence of life without parole for capital murder into a death sentence,<sup>1135</sup> or they can trigger a hard 50 sentence.<sup>1136</sup> Aggravating circumstances include employing another person to commit the crime, committing the crime in order to avoid arrest, and committing the crime in an “especially heinous, atrocious[,] or cruel manner.”<sup>1137</sup>

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1127. KAN. STAT. ANN. § 21-6807(a).

1128. *Id.* § 21-6808(a).

1129. *Id.* § 21-6807(a).

1130. *Id.* § 21-6620(b).

1131. *Id.*

1132. *Id.* § 21-6620(d).

1133. *Id.* § 21-6627.

1134. *Id.* § 21-6627(b)(1).

1135. *Id.* § 21-6617(c), (e).

1136. *See supra* Part VI.B.1.c.

1137. KAN. STAT. ANN. § 21-6624.

e. Consecutive and Concurrent Sentences

When a defendant receives separate sentences delivered on the same day, the trial court holds the discretion to order the defendant to serve them either concurrently or consecutively.<sup>1138</sup> Typically, if the court is silent, the defendant will serve the sentences concurrently.<sup>1139</sup>

2. Ability to Modify a Sentence

To issue a departure from a mandatory minimum or presumptive sentence, the trial court must find aggravating or mitigating circumstances that warrant such a departure. These circumstances must be stated on the record at the original sentencing hearing, and they cannot be supplemented with later proceedings, unless an appellate court has vacated the original sentence and remanded the case for resentencing.<sup>1140</sup>

Under Kansas law, an appellate court cannot review a sentence that is within the presumptive sentence for the crime or any sentence resulting from a court-appointed agreement between the State and the defendant.<sup>1141</sup> Because of section 21-6820(c), appellate courts have no jurisdiction to hear an appeal of a presumptive sentence, even if that appeal alleges a violation of due process rights.<sup>1142</sup> Conversely, a defendant may appeal a departure sentence but only as to the question of whether the trial court was justified in issuing a departure.<sup>1143</sup> An appellate court will examine whether the evidence in the record supports the departure and “constitute[s] substantial and compelling reasons for departure.”<sup>1144</sup> An appellate court that finds grounds to reverse the sentence based on section 21-6870(d) must “remand the case to the trial court for resentencing.”<sup>1145</sup>

Courts, however, may at any time correct an illegal sentence.<sup>1146</sup> At any time, a court can also correct any clerical mistakes made in

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1138. *Id.* § 21-6606(a).

1139. *Id.*

1140. *State v. Spencer*, 248 P.3d 256, 267–68 (Kan. 2011).

1141. KAN. STAT. ANN. § 21-6820(c).

1142. *State v. Huerta*, 247 P.3d 1043, 1049–50 (Kan. 2011).

1143. *Id.* § 21-6820(d).

1144. *Id.* § 21-6820(d)(1)–(2).

1145. *Id.* § 21-5820(f).

1146. *Id.* § 22-3504(1).

“judgments, orders[,] or other parts of the record and errors in the record arising from oversight or omission.”<sup>1147</sup>

### 3. Constitutional Challenges

Even if it is not cruel or unusual, a punishment may be unconstitutional “if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.”<sup>1148</sup> In deciding whether a sentence is cruel and unusual punishment, appellate courts look to three factors: (1) the nature of the crime committed and the character of the defendant, (2) “[a] comparison of the punishment with [other] punishment[s] imposed in [Kansas] for more serious offenses,” and (3) a comparison of the sentence with those in other states for the same or similar offenses.<sup>1149</sup>

## VII. POST-TRIAL ISSUES

### A. Appeals

To raise an issue on appeal, a party generally must make a contemporaneous objection on the issue at trial.<sup>1150</sup> Regardless of whether a party objects, however, a party may seek review of a clear error—that is, when a “real possibility” exists that the jury would have returned a different verdict without the error.<sup>1151</sup> A defendant may challenge certain errors that affect his constitutional rights without a contemporaneous objection.<sup>1152</sup>

Despite a finding that a nonconstitutional error occurred, an appellate court may still affirm a lower court’s ruling if the error was harmless.<sup>1153</sup>

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1147. *Id.* § 22-3504(2).

1148. *State v. Berriozabal*, 243 P.3d 352, 368 (Kan. 2010) (quoting *State v. Gomez*, 235 P.3d 1203, 1210 (Kan. 2010)) (internal quotation marks omitted).

1149. *State v. Levy*, 253 P.3d 341, 345 (Kan. 2011) (quoting *State v. Freeman*, 574 P.2d 950, 956 (Kan. 1978)).

1150. See KAN. STAT. ANN. § 60-404 (2005).

1151. *State v. Gatlin*, 253 P.3d 357, 360 (Kan. 2011) (quoting *State v. Vasquez*, 194 P.3d 563, 573 (Kan. 2008)) (internal quotation marks omitted).

1152. *State v. Chanthaseng*, 261 P.3d 889, 893 (Kan. 2011) (citing *State v. Dukes*, 231 P.3d 558, 561 (Kan. 2010) (“[I]f the issue falls within one of three recognized exceptions: (1) [t]he 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 right; or (3) the district court is right for the wrong reason.”)).

1153. See *State v. Ward*, 256 P.3d 801, 820 (Kan. 2011).

In *State v. Ward*, the Kansas Supreme Court recently clarified the definition of harmless error by holding that harmless error exists if there is not a “reasonable probability that the error will or did affect the outcome of the trial in light of the entire record.”<sup>1154</sup> The court disregarded its past use of “reasonable possibility” in favor of “reasonable probability.”<sup>1155</sup>

Courts may determine that multiple, smaller errors, which on their own would be harmless errors, collectively constitute cumulative error, which demands reversal because it affects substantial justice.<sup>1156</sup>

Appellate courts do not have jurisdiction to hear an appeal if the defendant pled guilty to the crime, unless the defendant first withdraws the plea.<sup>1157</sup> Further, the trial court may only grant a withdrawal of a guilty plea after sentencing “[t]o correct manifest injustice,”<sup>1158</sup> and the defendant must generally file the motion for withdrawal of the plea within one year of the termination of appellate jurisdiction.<sup>1159</sup> The legislature did not enact the one-year statute of limitations on withdrawals until April 16, 2009, and the Kansas Court of Appeals ruled that this statute does not apply retroactively because it would violate an individual’s substantive rights.<sup>1160</sup> Instead, it ruled that a one-year grace period began running on April 16, 2009.<sup>1161</sup> Thus, the defendant whose case terminated in 1994 could attempt to withdraw his plea when he filed his motion on January 28, 2010.<sup>1162</sup>

## 1. New Trial

Upon a motion by the defendant, a court may order a new trial if the “interest of justice” requires one.<sup>1163</sup> The defendant may move for a new trial within two years after final judgment, if the motion is based on newly discovered evidence.<sup>1164</sup> Otherwise, the defendant has fourteen

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1154. *Id.* This comports with the federal rule. *Chapman v. California*, 386 U.S. 18, 22 (1967).

1155. *Ward*, 256 P.3d at 818–20.

1156. *State v. Rollins*, 257 P.3d 839, 848 (Kan. Ct. App. 2011) (citing *State v. Holmes*, 102 P.3d 406, 432 (Kan. 2004)).

1157. *State v. Hall*, 257 P.3d 263, 266–67 (Kan. 2011).

1158. KAN. STAT. ANN. § 22-3210(d)(2) (Supp. 2011).

1159. *Id.* § 22-3210(e)(1).

1160. *State v. Benavides*, 263 P.3d 863, 867 (Kan. Ct. App. 2011).

1161. *Id.*

1162. *Id.*

1163. KAN. STAT. ANN. § 22-3501(1).

1164. *Id.*

days from the date of the guilty verdict to file his appeal, though the court may allow more time.<sup>1165</sup>

## 2. Sufficiency of Evidence

When a defendant challenges a conviction by alleging that the record contained insufficient evidence to support a guilty verdict, the reviewing court looks at the evidence “in the light most favorable to the [State].”<sup>1166</sup> If it finds “that a rational factfinder could have found the defendant guilty beyond a reasonable doubt,” then it must uphold the conviction.<sup>1167</sup> In *State v. Timley*, the Kansas Supreme Court held that when a jury receives an instruction on alternative means for committing a crime, there must be sufficient evidence of each means to ensure a unanimous jury verdict.<sup>1168</sup> This decision conflicted with *State v. Dixon*,<sup>1169</sup> which found harmless error where “there was strong evidence supporting at least one theory of each burglary and no evidence of at least one other theory.”<sup>1170</sup> In *Wright*, the Kansas Supreme Court recently abandoned its logic from *Dixon* in favor of its previous holding in *Timley*.<sup>1171</sup>

When a criminal defendant stipulates that a crime occurred, he cannot challenge on appeal the sufficiency of the evidence supporting the crime.<sup>1172</sup> A Kansas appellate court recently has extended this principle to situations where defense counsel admits that the evidence would be sufficient to prove a crime but does not formally stipulate to it.<sup>1173</sup>

## 3. Judgment of Acquittal

In Kansas, a defendant may make or renew a motion for judgment of acquittal after the State’s case in chief, after the close of all evidence, or within seven days following discharge of the jury.<sup>1174</sup> In *State v. Roberts*, the Kansas Supreme Court noted that the distinction between a

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1165. *Id.*

1166. *State v. Wright*, 224 P.3d 1159, 1164 (Kan. 2010) (quoting *State v. Gutierrez*, 172 P.3d 18, 22 (2007)) (internal quotation marks omitted).

1167. *Id.*

1168. 875 P.2d 242, 246 (Kan. 1994).

1169. 112 P.3d 883, 913 (Kan. 2005), *overruled by Wright*, 224 P.3d 1159.

1170. *Id.*

1171. *Wright*, 224 P.3d at 1167.

1172. *State v. Downey*, 2 P.3d 191, 199 (Kan. Ct. App. 2000).

1173. *State v. McCammon*, 250 P.3d 838, 843 (Kan. Ct. App. 2011).

1174. KAN. STAT. ANN. § 22-3419 (2007).

judgment of acquittal and an order of dismissal is “often not easily determined,”<sup>1175</sup> and the labeling placed on it by a party or the district court does not control the determination.<sup>1176</sup> Further, this distinction is critical because, constitutionally and statutorily, the State may not appeal a judgment of acquittal,<sup>1177</sup> but the State may appeal an order of dismissal.<sup>1178</sup> If the order “(1) resolves a factual element (2) after jeopardy has attached,” then the court considers it a judgment of acquittal, which bars appeal by the state.<sup>1179</sup> Ultimately, the court in *Roberts* held that jeopardy had never attached to the case because the district court dismissed the charges before the trial ever began.<sup>1180</sup>

### *B. Post-Conviction Remedies*

#### 1. Habeas Corpus

Inmates who have exhausted their direct appeals may file a habeas corpus petition with the district court where they were sentenced, requesting the court to set aside the judgments against them.<sup>1181</sup> Section 60-1507 of the Kansas Statutes gives state inmates in Kansas the authority to file for habeas relief, but they must bring the action within one year of the final appellate court order or the denial of writ of certiorari by the United States Supreme Court.<sup>1182</sup> Section 60-1507 petitions may allege that there was a violation of the laws or constitution of Kansas or the United States, that the district court lacked jurisdiction for the sentence, or that the sentence was greater than the maximum allowable sentence.<sup>1183</sup> If state inmates are unsuccessful with their section 60-1507 motion and subsequent appeals, they may file for federal relief under 28 U.S.C. § 2254 and allege a violation of the Constitution

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1175. 259 P.3d 691, 695 (quoting *State v. Beerbower*, 936 P.2d 248, 252 (Kan. 1997)) (internal quotation marks omitted).

1176. *Id.* (citing *State v. Wharton*, 589 P.2d 610, 612–13 (Kan. 1979)).

1177. See U.S. CONST. amend. V (prohibiting multiple trials for the same crime); see also KAN. STAT. ANN. § 21-5110(a)(1) (Supp. 2011) (barring prosecution of the same defendant for the same crime if a former prosecution resulted in an acquittal).

1178. See KAN. STAT. ANN. § 22-3602(b)(1) (2007 & Supp. 2011) (permitting appeals of orders of dismissal).

1179. *Roberts*, 259 P.3d at 695.

1180. *Id.* at 701.

1181. KAN. STAT. ANN. § 60-1507 (2007); see also 28 U.S.C. § 2255 (2006) (granting the federal habeas right).

1182. KAN. STAT. ANN. § 60-1507(f).

1183. *Id.* § 60-1507(a).

or laws of the United States.<sup>1184</sup> The only habeas recourse for federal inmates is through 28 U.S.C. § 2255, which is similar to section 60-1507 except that it lacks the state law component.<sup>1185</sup>

In *Thompson v. State*, the defendant filed a timely section 60-1507 motion, alleging ineffective assistance by his trial counsel.<sup>1186</sup> Five months after the one-year deadline, he attempted to amend his motion to allege ineffective assistance by his appellate counsel.<sup>1187</sup> Ultimately, the court looked to section 60-215(c) for the rules on relating back amendments to pleadings, and it rejected the amendment because it did not arise out of the same “conduct, transaction, or occurrence” as the original claim against the trial attorney.<sup>1188</sup>

In *State v. Stephens*, the defendant alleged ineffective assistance of counsel because his attorney failed to research and discover all of the defendant’s prior convictions before sentencing.<sup>1189</sup> Despite the fact that this resulted in a longer sentence than the defendant and his attorney expected, a Kansas appellate court ruled that this did not constitute ineffective assistance of counsel because counsel does not have a duty to independently investigate past convictions and the defendant was well aware of his past convictions and failed to disclose them to his attorney.<sup>1190</sup>

## 2. Post-Conviction DNA Testing

Under section 21-2512 of the Kansas Statutes, a person imprisoned in Kansas for rape or murder may obtain DNA testing of any material in the possession of the State that is related to the person’s conviction.<sup>1191</sup> The material must not have been previously tested or must be subject to new testing techniques that may provide more favorable results.<sup>1192</sup> In *Goldsmith v. State*, the district court ordered DNA testing of more than thirty-five items related to the defendant’s conviction.<sup>1193</sup> The Kansas

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1184. 28 U.S.C. § 2254.

1185. Compare *id.* § 2255, with KAN. STAT. ANN. § 60-1507.

1186. 270 P.3d 1089, 1093 (Kan. 2011).

1187. *Id.*

1188. *Id.* at 1097 (quoting KAN. STAT. ANN. § 60-215(c) (Supp. 2011)).

1189. 256 P.3d 574, 576 (Kan. Ct. App. 2011).

1190. *Id.* at 577.

1191. KAN. STAT. ANN. § 21-2512(a) (2007).

1192. *Id.*

1193. 255 P.3d 14, 16 (Kan. 2011).

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Supreme Court ruled that neither the State nor the district court could immediately stop testing of multiple items after a single test unfavorable to the defendant.<sup>1194</sup> In such a situation, however, the State may petition for an order to stop testing, which the district court may grant after an evidentiary hearing, which the defendant must be permitted to attend with the assistance of counsel.<sup>1195</sup> In certain situations, federal prisoners also have a statutory right to post-conviction DNA testing under 18 U.S.C. § 3600.<sup>1196</sup>

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1194. *Id.* at 17–18.

1195. *Id.* at 19.

1196. 18 U.S.C. § 3600(a)(8) (2006).