

## Kansas Law Review Criminal Procedure Survey\*

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## I. INTRODUCTION

The Kansas Law Review Criminal Procedure Survey is a guide to changes in Kansas criminal procedure for legal practitioners and judges. The Survey reflects the evolution of Kansas case law and statutes over roughly the last year to provide a snapshot of the current state of the law. It examines United States Supreme Court, Tenth Circuit Court of Appeals, Kansas Supreme Court, and Kansas Court of Appeals precedent. It further notes applicable Kansas statutes and developments in the substantive law. We intend this Survey to serve as a useful reference for practitioners and judges.

## II. SEARCHES AND THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution prohibits the government from conducting unreasonable searches and seizures.<sup>1</sup> The language of the Fourth Amendment that applies to searches states:

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>

Similarly, section 15 of the Kansas Constitution's Bill of Rights reads, "The right of the people to be secure in their persons and property against unreasonable searches . . . shall be inviolate . . ."<sup>3</sup> The Kansas Supreme Court has consistently interpreted section 15 as affording the same protection as the Fourth Amendment of the United States Constitution.<sup>4</sup> Accordingly, with respect to unreasonable searches, the Kansas Supreme Court considers itself bound by United States Supreme Court's precedent.<sup>5</sup>

Reasonableness is the touchstone of the Fourth Amendment.<sup>6</sup> To determine whether a search was reasonable, courts objectively examine

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

2. *Id.*

3. KAN. CONST. bill of rights § 15.

4. *State v. Garza*, 286 P.3d 554, 559 (Kan. 2012) (citing *State v. Daniel*, 242 P.3d 1186, 1191 (Kan. 2010), *cert. denied*, 131 S. Ct. 2114 (2011)).

5. *State v. Henning*, 209 P.3d 711, 718 (Kan. 2009).

6. *State v. Spagnola*, 289 P.3d 68, 74 (Kan. 2012) (citing *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

the totality of the circumstances.<sup>7</sup> In doing so, courts assess the degree to which the search intrudes on an individual's privacy and the degree to which the search promotes legitimate governmental interests.<sup>8</sup>

#### A. *Scope of the Fourth Amendment*

##### 1. Fourth Amendment "Search"

For the protections of the Fourth Amendment to apply, there must be a "search" within the meaning of the Fourth Amendment.<sup>9</sup> The Supreme Court has set forth two tests to determine whether a search has been conducted as defined by the Fourth Amendment.<sup>10</sup> One is the trespass doctrine, under which a search occurs when the government physically intrudes into a constitutionally protected area.<sup>11</sup> However, in light of modern technology that allows the government to electronically intercept information without any physical intrusion, the Supreme Court has set forth a second test, called the *Katz* test, to determine whether a search has occurred within the meaning of the Fourth Amendment.<sup>12</sup> Under the *Katz* test, the Court first asks whether the person exhibited a subjective expectation of privacy, and then asks whether that person's expectation of privacy was objectively reasonable by society's standards.<sup>13</sup>

Although the *Katz* test arguably supplanted the trespass doctrine, the Supreme Court recently clarified that *Katz* is not the exclusive test.<sup>14</sup> That is, "*Katz* did not erode the principle that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment."<sup>15</sup> Thus, where the government obtains information by physically invading a constitutionally protected area, a

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7. *Robinette*, 519 U.S. at 39; *United States v. Cooper*, 654 F.3d 1104, 1123 (10th Cir. 2011).

8. *State v. Uhlig*, 170 P.3d 894, 897 (Kan. Ct. App. 2007).

9. *See State v. Lambert*, 710 P.2d 693, 696 (Kan. 1985) (citing *Katz v. United States*, 389 U.S. 347 (1967)).

10. *See Katz*, 389 U.S. at 360–62 (Harlan, J., concurring) (setting forth the reasonable expectation of privacy test while the prevailing legal test was the trespass doctrine); *United States v. Jones*, 132 S. Ct. 945, 952 (2012) ("[T]he *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.").

11. *Katz*, 389 U.S. at 353 (majority opinion).

12. *Id.* at 361 (Harlan, J., concurring); *Jones*, 132 S. Ct. at 950 (referencing the adoption of the test set forth in Justice Harlan's concurrence in *Katz*).

13. *Katz*, 389 U.S. at 361.

14. *Jones*, 132 S. Ct. at 950.

15. *Id.* at 951 (citing *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)) (internal quotation marks omitted).

search within the original, trespass-based meaning of the Fourth Amendment has occurred.<sup>16</sup> However, even in the absence of such physical encroachment, “a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”<sup>17</sup>

## 2. Government Action

The Fourth Amendment’s protections against unreasonable searches do not apply to searches conducted by private persons not acting as agents of the government or those conducted without the participation or knowledge of the government.<sup>18</sup> However, the Fourth Amendment is applicable when the “government coerces, dominates, or directs the actions of a private person . . . .”<sup>19</sup> To determine whether a person has acted as an agent of the government, Kansas and the Tenth Circuit consider: “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>20</sup>

The Kansas Supreme Court recently grappled with the issue of government action. In *State v. Brittingham*, the court refused to exclude evidence obtained in a case where public housing employees entered an apartment to check for damage from a sewage leak, but happened upon two unconscious people, drugs, and drug paraphernalia in plain sight.<sup>21</sup> The crux of the case was whether the housing authority employees were government actors for the purposes of search and seizure law.<sup>22</sup> Although the housing employees had entered the apartment without a warrant and within the scope of their employment, the court held that their actions implicated neither the Fourth Amendment nor section 15 of the Kansas Bill of Rights.<sup>23</sup> The court reasoned that only government

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16. *Id.* at 950.

17. *Id.* at 954–55 (Sotomayor, J., concurring) (quoting *Kyllo v. United States*, 533 U.S. 27, 31–33 (2001)).

18. *United States v. Cintron*, 482 F. App’x 353, 356 (10th Cir. 2012) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *State v. Brittingham*, 218 P.3d 441, 444 (Kan. Ct. App. 2009), *aff’d*, 294 P.3d 263 (Kan. 2013).

19. *Brittingham*, 218 P.3d at 444.

20. *Cintron*, 482 F. App’x at 357 (quoting *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000)); *Brittingham*, 218 P.3d at 444 (quoting *Pleasant v. Lovell*, 876 F.2d 787, 797 (10th Cir. 1989)).

21. *State v. Brittingham*, 294 P.3d 263, 265, 269–70 (Kan. 2013).

22. *Id.* at 266.

23. *Id.* at 269–70.

employees performing “investigatory-type activity for the benefit of his or her employer” could be constitutionally constrained.<sup>24</sup> That was not the case with these employees, who simply entered the apartment for protective, maintenance reasons.<sup>25</sup> This holding created an exception to the rule that a government employee’s acts implicate the Fourth Amendment unless those acts occur outside the scope of the employee’s job duties.<sup>26</sup>

Once it is established that a government actor conducted a “search” within the meaning of the Fourth Amendment, its protections apply and the court can then address the reasonableness of the search. By imposing a standard of reasonableness, the Fourth Amendment protects against “arbitrary invasions” and ensures that individuals’ reasonable expectations of privacy are not subject to broad discretion by government actors.<sup>27</sup>

### *B. Search Warrant Requirement*

Generally, a warrantless search is *per se* unreasonable under the Fourth Amendment.<sup>28</sup> Thus, unless a search falls within one of the recognized exceptions to the warrant requirement, a government actor must obtain a search warrant in accordance with the Fourth Amendment before conducting a search.<sup>29</sup> The Fourth Amendment allows warrants to issue only upon satisfaction of certain requirements.<sup>30</sup> That is, the Fourth Amendment expressly requires that warrants be based on probable cause, supported by oath or affirmation, and particularly describe the places to be searched.<sup>31</sup>

In pursuit of a search warrant, a government actor must first present sufficient information to a magistrate to allow the magistrate to determine the existence of probable cause.<sup>32</sup> The magistrate’s issuance

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24. *Id.* at 269.

25. *Id.*

26. *See State v. Smith*, 763 P.2d 632, 639 (Kan. 1988) (holding the Fourth Amendment inapplicable where the government employee was not acting within the scope of his job).

27. *City of Overland Park v. Rhodes*, 257 P.3d 864, 866–67 (Kan. Ct. App.), *review denied*, 257 P.3d 864 (Kan. 2011).

28. *State v. James*, 288 P.3d 504, 512 (Kan. Ct. App. 2012).

29. *See id.* (listing exceptions to the warrant requirement); *State v. Dugan*, 276 P.3d 819, 826 (Kan. Ct. App. 2012) (noting the “carefully circumscribed situations” that constitute exceptions for entering a dwelling without a warrant).

30. *See State v. Lundquist*, 286 P.3d 232, 235 (Kan. Ct. App. 2012) (citing U.S. CONST. amend. IV).

31. U.S. CONST. amend. IV.

32. *United States v. Cooper*, 654 F.3d 1104, 1124 (10th Cir. 2011).

of a search warrant cannot be a mere approval of the “bare conclusions of others.”<sup>33</sup> To determine whether probable cause to issue a search warrant existed, reviewing courts look to the supporting affidavit for “facts that would lead a prudent person to believe there [wa]s a fair probability that contraband or evidence of a crime w[ould] be found in a particular place.”<sup>34</sup> An affidavit in support of a search warrant is presumed valid and the facts contained therein generally cannot be disputed, with limited exception.<sup>35</sup> “Hard evidence or personal knowledge of illegal activity” is not required, but the affidavit must describe circumstances that would warrant a person of reasonable caution to believe that the evidence sought is at a particular place.<sup>36</sup>

To satisfy the oath or affirmation requirement, an oath must be duly administered to the person who submits statements in support of the search warrant.<sup>37</sup> A sworn affidavit offered in support of a search warrant is sufficient.<sup>38</sup> Section 22-2502 of the Kansas Statutes allows for oral or written statements of any person under oath or affirmation to demonstrate probable cause for a search warrant.<sup>39</sup> Oral statements are sworn to under oath and either taken down by a shorthand reporter or recorded and later transcribed.<sup>40</sup>

Lastly, to satisfy the particularity requirement, the description must enable the person executing the search warrant to reasonably ascertain and identify the place to be searched and the items to be seized.<sup>41</sup> This test requires practical accuracy as opposed to technical accuracy.<sup>42</sup> Accordingly, absolute precision is not necessary to identify the place to be searched.<sup>43</sup> The degree of particularity required partly depends on the

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33. *Id.*

34. *United States v. Stout*, 439 F. App'x 738, 745 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1599 (2012); *see also United States v. Garcia*, 707 F.3d 1190 (10th Cir. 2013).

35. *State v. Adams*, 273 P.3d 718, 724 (Kan. 2012) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

36. *Id.* (quoting *United States v. Bigelow*, 562 F.3d 1272, 1279 (10th Cir. 2009)).

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

38. KAN. STAT. ANN. § 22-2502 (Supp. 2012).

39. *Id.*

40. *Id.*

41. *United States v. Cooper*, 654 F.3d 1104, 1126 (10th Cir. 2011); *Garcia*, 707 F.3d at 1197.

42. *Garcia*, 707 F.3d at 1197 (citing *United States v. Dorrrough*, 927 F.2d 498, 500 (10th Cir. 1991)); *United States v. Burke*, 633 F.3d 984, 992 (10th Cir.), *cert. denied*, 131 S. Ct. 2130 (2011) (citing *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998)).

43. *See Burke*, 633 F.3d at 984 (holding that an inaccurate description and address of the place to be searched in a warrant did not invalidate a warrant where the agents involved in the search had enough knowledge and information from the warrant to locate the proper residence).

nature of the crime being investigated.<sup>44</sup> A warrant relating to a complex and far-reaching criminal scheme may require less particularity than a warrant relating to more mundane criminal matters.<sup>45</sup> The particularity requirement serves to prevent general exploratory searches and limit the scope of a search to the particularly described evidence of a crime for which probable cause has been established.<sup>46</sup>

A neutral and detached magistrate judge must evaluate the sufficiency of the government's basis for a search warrant.<sup>47</sup> Strict judicial oversight ensures that government actors are not afforded "unchecked authority to carry out searches . . . on their own assessment of the need for and propriety of those [searches]."<sup>48</sup>

### C. *Types of Search Warrants*

There are two types of search warrants: general and anticipatory. A general search warrant requires officers to knock on the door, announce their presence, and state their purpose.<sup>49</sup> However, if police reasonably suspect that the "knock and announce" requirement would endanger them or result in the destruction of evidence, they may obtain a "no-knock" warrant.<sup>50</sup> The standard for a showing of reasonable suspicion justifying a no-knock warrant is low.<sup>51</sup>

Anticipatory search warrants may issue on a showing of probable cause that, in the future, specific evidence of a crime will be present at a specific location.<sup>52</sup> An anticipatory search warrant cannot be executed until the "triggering condition"—generally the arrival of the evidence at the location—has occurred.<sup>53</sup> There are two prerequisites for an anticipatory warrant. First, there must be a "fair probability that contraband or evidence of a crime will be found in a particular place."<sup>54</sup>

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44. *Cooper*, 654 F.3d at 1127.

45. *Id.*

46. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (stating that a search warrant must be sufficiently particular to prevent "exploratory rummaging" through personal belongings); *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985) (stating the reasons for the limited scope of search warrants).

47. *State v. Dugan*, 276 P.3d 819, 825 (Kan. Ct. App. 2012).

48. *Id.*

49. *United States v. Esser*, 451 F.3d 1109, 1112 (10th Cir. 2006) (citing *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995)).

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

51. *Id.*

52. *United States v. Grubbs*, 547 U.S. 90, 94 (2006).

53. *Id.*

54. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Second, there must be “probable cause to believe the triggering condition will occur.”<sup>55</sup>

*D. Exceptions to the Search Warrant Requirement*

A warrantless search conducted by a government actor is *per se* unreasonable under the Fourth Amendment unless it falls within one of the exceptions to the warrant requirement.<sup>56</sup> Those exceptions include consent, probable cause plus exigent circumstances, the emergency aid doctrine, search incident to a lawful arrest, stop and frisk, inventory searches, plain view, plain feel, and administrative searches of closely regulated businesses.<sup>57</sup> Although searches that fall within one of these categories do not require warrants, the Fourth Amendment’s protections are not diluted.<sup>58</sup> That is, these searches must still be limited in scope, and the law enforcement officers conducting the searches should still make use of the least intrusive investigation methods reasonably available.<sup>59</sup>

1. Consent

An exception to the warrant requirement occurs when the person subject to the search provides voluntary, knowing, and intelligent consent to the search.<sup>60</sup> When property is to be searched, the person giving consent must own the property or possess common authority over the property.<sup>61</sup> In the absence of such actual authority, apparent authority is sufficient to justify the warrantless search.<sup>62</sup> To determine the presence of apparent authority, courts consider whether 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

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55. *Id.* (citing *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989)).

56. *State v. Sanchez-Loredo*, 272 P.3d 34, 38 (Kan. 2012).

57. *Id.*

58. *State v. Spagnola*, 289 P.3d 68, 75 (Kan. 2012) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

59. *Id.*

60. *State v. Edgar*, 294 P.3d 251, 260 (Kan. 2013).

61. *State v. Kerestessy*, 233 P.3d 305, 309 (Kan. Ct. App. 2010) (citing *State v. Porting*, 130 P.3d 1173, 1176 (Kan. 2006)).

62. *Id.* at 310.

searched.”<sup>63</sup> Without actual or apparent authority, consent to a search of property is not valid.<sup>64</sup>

For consent to be voluntary, two conditions must be satisfied: “(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>65</sup> Implied consent is as valid as express consent.<sup>66</sup> Implied consent to a search occurs when the person subject to the search says or does something that would lead law enforcement officers to reasonably believe that the person was authorizing them to conduct the search.<sup>67</sup> Thus, when a law enforcement officer receives express or implied consent that was freely and voluntarily given, the officer may conduct a warrantless search within the scope of that consent without violating the Fourth Amendment.<sup>68</sup>

The State has the burden of proving that consent was obtained and that it was freely and voluntarily given.<sup>69</sup> Showing mere submission to a claim of authority is insufficient.<sup>70</sup> To determine whether consent to a search was given freely and voluntarily, courts look to the totality of the circumstances and ask whether a reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter.<sup>71</sup> Some relevant considerations include the following:

Physical mistreatment, use of violence, threats, promises, inducements, deception, trickery, or an aggressive tone, the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons. Whether an officer reads a defendant his *Miranda* rights, obtains consent pursuant to a claim of lawful authority, or informs a defendant of his or her right to refuse

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63. *Id.*

64. *See id.* (noting that where the authority of the person giving consent is questionable, “warrantless entry without further inquiry is unlawful.” (quoting *Illinois v. Rodriguez*, 479 U.S. 177, 188–89 (1990))).

65. *State v. Spagnola*, 289 P.3d 68, 75 (Kan. 2012) (citing *State v. Ransom*, 212 P.3d 203, 209 (Kan. 2009)).

66. *Id.*

67. *United States v. Jones*, 701 F.3d 1300, 1321 (10th Cir. 2012).

68. *United States v. Pikyavit*, 527 F.3d 1126, 1130 (10th Cir. 2008).

69. *Id.* at 1317 (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983); *State v. Murphy*, 293 P.3d 703, 706 (Kan. 2013)).

70. *Jones*, 701 F.3d at 1318.

71. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)); *Spagnola*, 289 P.3d at 75 (citing *United States v. Drayton*, 536 U.S. 194, 207 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

consent also are factors to consider in determining whether consent given was voluntary under the totality of the circumstances.<sup>72</sup>

Courts consider even subtle coercion because “no matter how subtly the coercion [was] applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.”<sup>73</sup> Thus, consent that is a product of coercion is not consent at all.<sup>74</sup> People do not lose their constitutional rights simply because government officials coerce them into complying with requests that they would otherwise refuse.<sup>75</sup>

In the 2012 case *United States v. Jones*, the Tenth Circuit addressed whether a defendant had given police officers valid consent to search his home.<sup>76</sup> The court considered whether consent was freely and voluntarily given when one of the officers said, “I’m here for your marijuana plants,” and “let’s clear up what we have here today . . . [and] make sure that there [are no marijuana plants] here at your house.”<sup>77</sup> The officers also held the defendant’s driver’s license during the purported consent.<sup>78</sup> The court also addressed the issue of whether the officers could have reasonably interpreted the defendant’s actions alone as communicating consent to search his residence.<sup>79</sup>

In addressing the first issue, the court noted that although the defendant was seized under the meaning of the Fourth Amendment when he gave the purported consent, voluntary consent to a search is possible while the person is legally detained because detention is only one factor in determining whether consent was freely and voluntarily given.<sup>80</sup> Thus, considering the totality of the circumstances, the court looked to the officers’ statements to determine if they created an atmosphere in which the defendant reasonably believed that he was not free to decline the officers’ request to search his residence.<sup>81</sup> In addressing the first statement, the court concluded that although the “statement was accusatory and may have been jolting to a reasonable person,” a

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72. *Jones*, 701 F.3d at 1318 (quoting *United States v. Sawyer*, 441 F.3d 890, 895 (10th Cir. 2006)) (internal quotation marks omitted).

73. *Id.*

74. *Spagnola*, 289 P.3d at 75 (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

75. *Id.*

76. *Jones*, 701 F.3d at 1317

77. *Id.* at 1318 (internal quotation marks omitted).

78. *Id.* at 1317.

79. *Id.* at 1320–21.

80. *Id.* at 1318.

81. *Id.* at 1318–20.

reasonable person would not have felt so threatened or intimidated by the statement that the person would have involuntarily consented to the search.<sup>82</sup> With respect to the second statement, the court concluded that such a statement of investigative intent was objectively insufficient to overpower a reasonable person's free will and thus would not have rendered a person incapable of declining the officers' request to search.<sup>83</sup>

In addressing the second issue, the court noted that if the defendant did or said something that allowed the officers to form a reasonable belief that the defendant was authorizing them to follow him into his residence, the court would deem the defendant as impliedly consenting to their request to search.<sup>84</sup> Considering the facts and the surrounding circumstances, the court found there was no doubt the defendant's actions constituted implied consent.<sup>85</sup> First, after the officers told the defendant they would like to search his house, the defendant responded by turning and walking towards the back door of his residence.<sup>86</sup> Further, the defendant unlocked the door and made no attempts to stop the officers from following him into his residence.<sup>87</sup> According to the court, these actions, along with other affirmative acts by the defendant, are actions a reasonable officer would have interpreted as communicating the defendant's consent.<sup>88</sup> Thus, in light of the totality of the circumstances, the court concluded that, for Fourth Amendment purposes, the defendant provided legally sufficient consent.<sup>89</sup>

The Kansas Court of Appeals recently addressed the voluntariness of consent in the context of a vehicle stop.<sup>90</sup> In *State v. Hamilton*, an officer found methamphetamine and drug paraphernalia in the driver's vehicle after the driver gave consent for the officer to search the vehicle during a traffic stop.<sup>91</sup> The Kansas Court of Appeals affirmed the district court's grant of the driver's motion to suppress the evidence, reasoning that the consent was not voluntary because a reasonable person would not "feel free to refuse the request and terminate the encounter."<sup>92</sup> The court

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82. *Id.* at 1318–19.

83. *Id.* at 1319–20.

84. *Id.* at 1320–21.

85. *Id.* at 1321.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *State v. Hamilton*, No. 107,317, 2012 WL 3136804 (Kan. Ct. App. July 27, 2012) (mem.) (per curiam) (unpublished table decision).

91. *Id.* at \*1.

92. *Id.* at \*4 (citing *State v. Pollman*, 190 P.3d 234, 239 (Kan. 2008)).

relied on the facts that the officer had not given the driver a traffic citation, had made the driver get out of the vehicle and stand beside the police car, did not allow the driver to return to the vehicle until after a canine arrived, and never told the driver he was free to leave.<sup>93</sup> The cumulative effects of these facts rendered the defendant's consent involuntary.<sup>94</sup>

## 2. Probable Cause Plus Exigent Circumstances

Another exception to the search warrant requirement is the exigent circumstances doctrine.<sup>95</sup> Under this doctrine, law enforcement officers may act without a warrant if there is probable cause coupled with particularized exigent circumstances.<sup>96</sup> Where the validity of a search rests on this exception, the State has the burden of proving both that the law enforcement officer had probable cause to search and that the immediate search was justified by exigent circumstances.<sup>97</sup>

Probable cause to support a search requires that law enforcement officers possess specific facts that would lead a reasonable person to conclude evidence of a crime may be found in a particular place.<sup>98</sup> Based on the totality of the circumstances, there must be at least a fair probability that evidence will be found in the place to be searched.<sup>99</sup> But probable cause standing alone does not permit law enforcement officers to enter a residence and search; there must be an exigent circumstance that justifies the warrantless search.<sup>100</sup>

The types of exigent circumstances recognized in Kansas that support a warrantless search include but are not limited to: "(1) preventing harm to law enforcement officers or others by capturing a dangerous suspect; (2) securing evidence in the face of its imminent loss; (3) hot pursuit of a fleeing suspect; and (4) thwarting escape of a suspect."<sup>101</sup> Any exigency created by a government actor cannot be used to circumvent the warrant requirement.<sup>102</sup> The United States Supreme

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93. *Id.*

94. *Id.* at \*5.

95. *State v. Sanchez-Loredo*, 272 P.3d 34, 38 (Kan. 2012); *State v. Dugan*, 276 P.3d 819, 826 (Kan. Ct. App. 2012).

96. *Sanchez-Loredo*, 272 P.3d at 38; *Dugan*, 276 P.3d at 826.

97. *State v. Parker*, 282 P.3d 643, 656 (Kan. Ct. App. 2012).

98. *Dugan*, 276 P.3d at 827 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

99. *Id.*

100. *Id.*

101. *Id.* at 828 (internal citations omitted).

102. *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011).

Court noted that “the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable.”<sup>103</sup>

Kansas courts recognize a nonexclusive list of circumstances, known as the *Platten* factors, that bear on the sufficiency of the exigency.<sup>104</sup> These are

(1) the gravity or violent nature of the offense with which the suspect is 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 that the suspect is in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended and (6) the peaceful circumstances of the entry.<sup>105</sup>

For a warrantless search to fall within the exigent circumstances exception when it is based on the exigency of preventing harm, two elements must be satisfied.<sup>106</sup> First, the law enforcement officers must have had “an objectively reasonable basis to believe there [was] an immediate need to protect the lives or safety of themselves or others.”<sup>107</sup> Second, the manner and scope of the search must have been reasonable.<sup>108</sup> For a warrantless entry and search based on the exigency of preventing the imminent loss of evidence, searches must be:

(1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of the evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indicators<sup>109</sup> of exigency that are not subject to police manipulation or abuse.

With these requirements met, law enforcement officers may conduct warrantless entries and searches without violating the Fourth Amendment.

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103. *Id.*

104. *Dugan*, 276 P.3d at 831–32 (citing *State v. Platten*, 594 P.2d 201, 206 (Kan. 1979)).

105. *Id.* at 832.

106. *Storey v. Taylor*, 696 F.3d 987, 992–93 (10th Cir. 2012) (citing *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006)).

107. *Id.*

108. *Id.*

109. *United States v. Hendrix*, 664 F.3d 1334, 1338 (10th Cir. 2011) (citing to *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir. 1988)).

Another type of exigent circumstance recognized in Kansas is hot pursuit.<sup>110</sup> Hot pursuit occurs when “law enforcement officers chase a person who then attempts to evade their efforts to arrest or otherwise take him or her into custody.”<sup>111</sup> If the person attempts to evade officers by entering a residence or some other private place, the officers may pursue the person into that place without a warrant to keep the suspect from defeating the arrest.<sup>112</sup> The hot pursuit exception rests on the fact that a person fled from a location unprotected by the Fourth Amendment to a protected location in a deliberate attempt to evade arrest.<sup>113</sup>

### 3. Emergency Aid Doctrine

The emergency aid doctrine “stands on a somewhat different legal footing” than the exigent circumstances exception.<sup>114</sup> Unlike the exigent circumstances exception, the emergency aid doctrine does not require probable cause, and it does not involve situations where law enforcement officers engage in conventional law enforcement functions such as taking individuals into custody or securing evidence.<sup>115</sup> Rather, the emergency aid doctrine justifies a warrantless entry when a law enforcement officer enters a private place for the purpose of rendering emergency aid to a person in serious danger.<sup>116</sup>

For this exception to apply, a law enforcement officer must have a reasonable factual basis to believe a warrantless entry is necessary.<sup>117</sup> The officer must reasonably believe that there is an imminent or ongoing emergency threatening life or property, and the place to be entered is associated with that threat.<sup>118</sup> The purpose of the warrantless entry under this exception must be limited to rendering emergency aid and cannot be used to justify a warrantless entry to search for evidence or seize a criminal suspect.<sup>119</sup>

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110. *Dugan*, 276 P.3d at 828 (citing *United States v. Santana*, 427 U.S. 38, 42–43 (1976)).

111. *Id.* at 829 (citing *Santana*, 427 U.S. at 42–43).

112. *Id.*

113. *Id.*

114. *Id.* at 828.

115. *Id.* (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *State v. Geraghty*, 163 P.3d 350, 357 (Kan. Ct. App. 2007)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (citing *Geraghty*, 163 P.3d at 358).

#### 4. Automobiles and Vehicles

A law enforcement officer does not need a warrant to search a motor vehicle if the officer has probable cause to believe that criminal evidence or contraband may be found within it.<sup>120</sup> The Kansas Supreme Court has held that a vehicle's ability to mobilize and destroy evidence constitutes exigent circumstances permitting an officer to perform a warrantless search. Hence, the requirement of exigent circumstances has been abrogated in Kansas in the car context, and officers need only show probable cause to meet the automobile exception.<sup>121</sup>

Automobiles that are not readily mobile may also be subject to probable cause searches under some circumstances.<sup>122</sup> In *United States v. Mercado*, a law enforcement officer in civilian clothes overheard a defendant and tow shop owner discussing the towing of the defendant's broken down automobile.<sup>123</sup> Based on the defendant's paranoid behavior and suspicious alterations to the lining of the interior ceiling of the vehicle, the officer believed he had probable cause to search the vehicle, and he did so.<sup>124</sup> The court found the search constitutional because the automobile "had not lost its inherent mobility" where mechanical problems were its only defect.<sup>125</sup> The court found that because the repair shop remained open overnight, the temporary immobility could change at any time and therefore exigent circumstances existed.<sup>126</sup>

Kansas courts recognize warrantless automobile searches for four types of police-citizen encounters: voluntary encounters, investigatory stops, public safety stops, and arrests.<sup>127</sup> To determine whether a public safety stop is valid, Kansas courts balance the prospective endangerment to the public if the investigation were not conducted with the rights of the individual.<sup>128</sup>

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120. *Id.* (citing *Maryland v. Dyson*, 527 U.S. 465, 466–67 (1999); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *United States v. Ross*, 456 U.S. 798, 809 (1982); *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

121. *State v. Sanchez-Loredo*, 272 P.3d 34, 40 (Kan. 2012).

122. *United States v. Medina-Gonzalez*, 437 F. App'x 714, 718 (10th Cir. 2011) (citing *United States v. Mercado*, 307 F.3d 1226, 1227–29 (10th Cir. 2002)).

123. *Mercado*, 307 F.3d at 1227.

124. *Id.* at 1227–28.

125. *Id.* at 1229.

126. *Id.*

127. *State v. McCaddon*, 185 P.3d 309, 312 (Kan. Ct. App. 2008) (citing *State v. Gonzales*, 141 P.3d 501, 505 (Kan. Ct. App. 2006)).

128. *Id.*

Using a properly certified drug-detection canine to sniff the external surfaces of a vehicle on public property does not implicate the Fourth Amendment and therefore does not require reasonable suspicion.<sup>129</sup> A certified canine's "alert," indicating illegal substances are in an automobile, creates "general probable cause to search a vehicle."<sup>130</sup> The failure to locate contraband in a vehicle after a positive canine alert does not retroactively dismiss the presence of probable cause so long as there was a fair probability the automobile contained contraband under the totality of the circumstances.<sup>131</sup> To suppress evidence obtained through a positive canine alert, the defendant must establish that the Kansas Police Dog Association certified canine is unqualified.<sup>132</sup>

A traffic stop may take no longer than necessary to carry out the original purpose of the stop.<sup>133</sup> The Kansas Supreme Court has held that "[d]etaining a driver for even a few minutes in order to allow a drug-sniffing dog to arrive unreasonably extends the detention when the officer did not need additional time to ask exploratory questions or to write a traffic citation."<sup>134</sup> Any additional exploratory detention time must be based on the driver's consent or on reasonable suspicion of a serious crime.<sup>135</sup> For example, in *State v. Jones*, the Kansas Court of Appeals found that the reasons for both the canine sniff and the extended duration of the stop violated the Fourth Amendment.<sup>136</sup> In *Jones*, a defendant was pulled over for driving erratically.<sup>137</sup> During the stop, the law enforcement officer observed that the defendant had cottonmouth and was slurring her words.<sup>138</sup> The officer did not smell drugs or alcohol on the driver's person or vehicle, but the officer did observe the corner of

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129. *United States v. Engles*, 481 F.3d 1243, 1245 (10th Cir. 2007).

130. *United States v. Rosborough*, 366 F.3d 1145, 1153 (10th Cir. 2004); *see also* *United States v. Kitchell*, 653 F.3d 1206, 1222 (10th Cir.) (referring to the dog-sniff rule as a "well-established principle"), *cert. denied sub nom. Shigemura v. United States*, 132 S. Ct. 435 (2011).

131. *United States v. Vazquez-Villa*, No. 09-40061-01-SAC, 2012 WL 1473443, at \*5 (D. Kan. Apr. 27, 2012) (quoting *United States v. Bradford*, 423 F.3d 1149 (10th Cir. 2005)).

132. *See* *United States v. King*, No. 12-10131-JTM, 2012 WL 5363001, at \*3 (D. Kan. Oct. 31, 2012) (citing *Kitchell*, 653 F.3d at 1224) (holding that the Kansas Police Dog Association's certification of a dog as qualified is reliable, and the burden is on the defendant to prove otherwise).

133. *State v. Wendler*, 274 P.3d 30, 37 (Kan. Ct. App. 2012) (quoting *State v. Thompson*, 166 P.3d 1015, 1018 (Kan. 2007)).

134. *State v. Jones*, 280 P.3d 824, 833 (Kan. Ct. App. 2012) (quoting *State v. Coleman*, 257 P.3d 320, 327 (Kan. 2011)).

135. *Id.* at 830.

136. *Id.* at 833.

137. *Id.* at 829.

138. *Id.*

an empty plastic sandwich bag inside the defendant's vehicle.<sup>139</sup> The officer did not proceed to investigate the defendant for driving under the influence of drugs or alcohol, but rather for suspicion of transporting a controlled substance.<sup>140</sup> The officer called a K-9 unit for further investigation, which arrived after twenty minutes.<sup>141</sup> The Kansas Court of Appeals found that the extended investigation was not supported by reasonable suspicion and was an invasion of privacy.<sup>142</sup> Moreover, the court recognized that the stop extended beyond the time normally allotted to a traffic stop.<sup>143</sup> That alone was enough for the court to find that suppression of the drug evidence was warranted.<sup>144</sup>

## 5. Other Circumstances Where Limited Searches Are Allowed Without a Warrant or Probable Cause

### a. *Terry* Frisks

Without making an arrest, a police officer may stop and question a person who the officer reasonably suspects has committed, is committing, or is about to commit a crime.<sup>145</sup> During this "*Terry* stop,"<sup>146</sup> a law enforcement officer may frisk the person for firearms and other items to ensure the officer's personal safety and the safety of the public if there is reasonable suspicion the individual is armed and dangerous.<sup>147</sup> Once the law enforcement officer removes an item from the defendant's person for safety reasons and the danger has dissipated, the officer may not further inspect the item during an investigatory detention.<sup>148</sup> Officers may handcuff defendants during a *Terry* stop if it is reasonable under the circumstances.<sup>149</sup>

However, an officer can invade the privacy of a suspect during a *Terry* stop when the search extends beyond the scope of safety concerns.

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139. *Id.*

140. *Id.* at 831.

141. *Id.*

142. *Id.* at 831–32.

143. *Id.* at 832–33.

144. *Id.* at 833.

145. KAN. STAT. ANN. § 22-2402(1) (Supp. 2012).

146. The name is derived from the famous case that engraved this type of search in American legal tradition, *Terry v. Ohio*, 392 U.S. 1, 18 (1968).

147. KAN. STAT. ANN. § 22-2402(2); *State v. Johnson*, 270 P.3d 1135, 1140 (Kan. 2012).

148. *See Johnson*, 270 P.3d at 1141 (holding that once a pack of cigarettes was removed from the defendant, no further search of the pack was permitted).

149. *United States v. Salas-Garcia*, 698 F.3d 1242, 1250 (10th Cir. 2012).

In *State v. Johnson*, an officer inappropriately searched a defendant's cigarette pack during a *Terry* stop.<sup>150</sup> The officer testified he conducted the search because he suspected the cigarette package contained razorblades that could endanger the officer.<sup>151</sup> The court found the search exceeded the scope of the *Terry* stop because the cigarette pack presented no immediate risk once it was out of the defendant's possession.<sup>152</sup>

b. Plain View and Plain Feel

Kansas recognizes that plain view searches do not violate Fourth Amendment privacy rights.<sup>153</sup> The plain view doctrine states that if a law enforcement officer views unlawful activity or evidence of a crime after justifiably intruding into a constitutionally protected area, it is not a search.<sup>154</sup> However, if the evidence the officer sees in plain view is within a constitutionally protected area that the officer has not already entered legally, the officer must obtain a warrant to enter unless another recognized exception to the warrant requirement applies.<sup>155</sup> For example, if an officer approaches a building to perform a "knock and talk" and the door inadvertently swings open and reveals the interior of the room to plain view, anything the officer sees accidentally is searchable without a warrant. But, if the officer peers into the room intentionally, that act may constitute a search.<sup>156</sup>

Similarly, Kansas recognizes the plain feel doctrine.<sup>157</sup> Under the plain feel doctrine, if a law enforcement officer clearly detects an illegal item during a frisk for weapons, the officer may seize the item in a lawful manner.<sup>158</sup> Courts weigh the need for frisks to protect officer safety with the intrusion of the search.<sup>159</sup> For the plain feel doctrine to apply, the initial privacy intrusion must be lawful, discovery of the

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150. *Johnson*, 270 P.3d at 1141.

151. *Id.* at 1138.

152. *Id.* at 1141–42.

153. *State v. Fisher*, 154 P.3d 455, 472 (Kan. 2007).

154. *Id.* at 473.

155. *Id.* at 472–73.

156. *Id.* at 476; *see also* *United States v. Sherrill*, No. 11-cr-40027-JAR, 2011 WL 5570841, \*5–6 (D. Kan. Nov. 16, 2011) (finding a plain view search valid when law enforcement officers were surprised when the hotel door opened and inadvertently revealed contraband).

157. *State v. Lee*, 156 P.3d 1284, 1290 (Kan. 2007).

158. *State v. Wray*, No. 105,877, 2012 WL 2476986, at \*8 (Kan. Ct. App. June 22, 2012) (unpublished table decision) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)).

159. *Id.*

evidence must be an inadvertent result of the intrusion, and the illegal character of the article must be immediately apparent.<sup>160</sup>

In *State v. Wray*, an experienced law enforcement officer believed, upon an initial pat down, that the arrestee had a pipe in his pocket.<sup>161</sup> What the officer thought to be a pipe turned out to be a bag of marijuana and a small container with pills.<sup>162</sup> The court found that the search was constitutional and stated that, for the plain feel exception to apply, an officer does not need an “unduly high degree of certainty as to the incriminatory character of evidence.”<sup>163</sup> The court noted the importance of the initial impression of the pat down as to whether the incriminating character of the object was immediately evident.<sup>164</sup> The court further recognized that officers are authorized to assure themselves that no weapons are present by manipulating the object, but not beyond what is necessary to determine its character as a weapon.<sup>165</sup>

#### c. Protective Sweeps of Premises

Another exception to the warrant requirement permits an officer to make “a quick and limited [in-home] search . . . incident to an arrest and conducted to protect the safety of police officers or others.”<sup>166</sup> Law enforcement officers may execute protective sweeps if reasonable under the totality of the circumstances.<sup>167</sup> The presence of a guest in a home does not defeat the exception, even though the guest also has a legitimate expectation of privacy.<sup>168</sup>

#### d. Search Incident to a Lawful Arrest

The warrantless search of an arrestee and areas immediately surrounding the arrestee during a lawful arrest does not violate the Fourth Amendment.<sup>169</sup> The scope of the search is limited to weapons

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160. *Lee*, 156 P.3d at 1290.

161. *Wray*, 2012 WL 2476986, at \*1.

162. *Id.* at \*2.

163. *Id.* at \*6 (quoting *State v. Wonders*, 952 P.2d 1351 (Kan. 1998)).

164. *Id.* at \*7 (*Wonders*, 952 P.2d at 1351 (Kan. 1998)).

165. *Id.* at \*8 (citing *United States v. Yamba*, 506 F.3d 251, 259 (3d Cir. 2007)).

166. *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

167. *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108 (1977)).

168. *United States v. Taylor*, No. 12-10080-MLB, 2012 WL 4758357, \*2 (D. Kan. Oct. 5, 2012).

169. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

that could endanger officer safety and evidence of the crime that the defendant could conceal or destroy.<sup>170</sup> A search incident to arrest requires some level of timeliness to its execution. For instance, it is unreasonable to search a vehicle incident to arrest after the arrestee has been detained away from the vehicle.<sup>171</sup>

The United States Supreme Court has held that police may search containers found on a person incident to a lawful arrest.<sup>172</sup> The Kansas Court of Appeals recently held that officers may view information stored on a cell phone found on an arrestee as part of a search incident to arrest.<sup>173</sup>

e. Inventory Searches After Arrest

Inventory searches of vehicles, bags, and personal belongings are also excepted from the search warrant requirement.<sup>174</sup> Kansas permits vehicular inventory searches of the “customary storage areas” within a vehicle.<sup>175</sup> The storage areas include the glove box, trunk, and console of the vehicle.<sup>176</sup> Police officers must conduct an inventory search in accordance with official departmental procedures that establish “standardized criteria” for inventories.<sup>177</sup> Adequate inventory policies and procedures can cure the defects of otherwise illegally obtained evidence.<sup>178</sup> Evidence obtained without a warrant and in a manner that does not fit into any of the warrant exceptions may be saved from suppression if it inevitably would have been discovered during a proper inventory.<sup>179</sup>

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170. *Id.* at 763.

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

172. *United States v. Robinson*, 414 U.S. 218, 236 (1973).

173. *See State v. James*, 288 P.3d 504, 514 (Kan. Ct. App. 2012) (finding that text messages stored on a cellular phone found on the person of an arrestee could be probative of criminal conduct and were therefore fair game in a search incident to arrest).

174. *See Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (approving such searches under the U.S. Constitution); *State v. Fortune*, 689 P.2d 1196, 1202–03 (Kan. 1984) (allowing warrantless searches of vehicles in police custody in order to inventory the personal property found therein, including property in trunks and glove boxes); *State v. Oram*, 266 P.3d 1227, 1239 (Kan. Ct. App. 2011).

175. *Fortune*, 689 P.2d at 1202–03.

176. *Id.*

177. *See Oram*, 266 P.3d at 1239 (finding that rummaging through the vehicle after the arrest of defendants was not the proper procedure and invaded the defendant’s privacy).

178. *See infra* Part II.E.3.

179. *See infra* Part II.E.3; *see also Oram*, 266 P.3d at 1240 (noting that evidence obtained in violation of the Constitution will not be suppressed if it would have eventually been obtained despite the violation).

f. Administrative Searches of Closely Regulated Industries

While the Fourth Amendment applies in a commercial setting, there is a diminished expectation of privacy in commercial property.<sup>180</sup> If the commercial industry is closely regulated, the privacy expectation is even more attenuated.<sup>181</sup> A closely regulated industry is one that has “a long tradition of close government supervision.”<sup>182</sup>

Generally, the government must obtain a search warrant for administrative searches.<sup>183</sup> While section 22-2502 of the Kansas Statutes requires a showing of probable cause before a warrant can issue,<sup>184</sup> the Kansas Court of Appeals has held that “the existence of an administrative policy or ordinance which specifies the purpose, frequency, scope, and manner of the inspection provides a constitutional substitute for probable cause that a violation has occurred.”<sup>185</sup> A magistrate or judge must determine if the regulation meets this standard prior to issuing a warrant.<sup>186</sup>

However, a warrantless inspection of a closely regulated commercial enterprise might not violate the Fourth Amendment if it is reasonable.<sup>187</sup> A warrantless search is reasonable if the commercial regulations serve a substantial government interest, the inspection is necessary to further the purpose of the regulations, and the regulations put commercial property owners on notice “that the search is being made pursuant to the law and has a properly defined scope.”<sup>188</sup> The regulation must also grant inspectors only limited discretion regarding the time, place, and scope of such searches.<sup>189</sup>

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180. *New York v. Burger*, 482 U.S. 691, 699–701 (1987).

181. *Id.*

182. *Id.* at 700; *see, e.g., Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970) (finding the liquor industry to be subject to close government supervision).

183. *See Camara v. Mun. Court*, 387 U.S. 523, 524 (1967) (holding that administrative searches implicate the Fourth Amendment).

184. *See KAN. STAT. ANN. § 22-2502* (2007 & Supp. 2012) (stating that a warrant shall issue only upon a statement made under oath or affirmation that states facts sufficient to show probable cause that a crime has or is being committed).

185. *City of Overland Park v. Niewald*, 893 P.2d 848, 852 (Kan. Ct. App. 1995).

186. *Id.*

187. *Burger*, 482 U.S. at 702.

188. *Id.* at 702–03.

189. *Id.* at 703.

### *E. The Exclusionary Rule*

#### 1. General Exclusion of Evidence from Illegal Searches

The exclusionary rule prohibits the introduction of evidence obtained or derived from illegal searches or seizures.<sup>190</sup> Not all evidence may be excluded. Rather, “[T]he more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’”<sup>191</sup>

The exclusionary rule serves to deter the government from unreasonably intruding on the lives and property of citizens.<sup>192</sup> Evidence suppressed under this rule should possess some rational nexus to the rule’s purpose.<sup>193</sup> To that end, courts have established several exceptions to the exclusionary rule.

#### 2. Good Faith Exception

The exclusionary rule does not apply where a search warrant is found to be unsupported by probable cause but the officer obtained the warrant in good faith.<sup>194</sup> Good faith requires a minimal nexus between the illegal activity and the place to be searched.<sup>195</sup> The good faith exception can be based on an officer’s good faith mistake of fact,<sup>196</sup> but does not excuse an officer’s mistake of settled law.<sup>197</sup> Where the law is “unsettled,” an officer cannot be said to know the law and the good faith exception can apply.<sup>198</sup>

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190. *Nardone v. United States*, 308 U.S. 338, 341–42 (1939); *see also* *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (extending the exclusionary rule to the states).

191. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (Clark, Harlan, Stewart & White, JJ., dissenting) (internal citations omitted).

192. *State v. Brittingham*, 294 P.3d 263, 268 (Kan. 2013) (quoting *State v. Smith*, 763 P.2d 632, 639 (Kan. 1988)).

193. *Id.*

194. *United States v. Barajas*, 710 F.3d 1102, 1110 (10th Cir. 2013).

195. *Id.* at 1110–11.

196. *United States v. Prince*, 593 F.3d 1178, 1185 (10th Cir. 2010) (citing *United States v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003)).

197. *See Barajas*, 710 F.3d at 1111 (noting that the court presumes that an officer knows the law, and that the good faith exception does not apply where the officer should have known the search warrant was invalid).

198. *Id.* (allowing a good faith exception to the exclusionary rule because the law on GPS surveillance is unsettled).

### 3. Inevitable Discovery

The inevitable discovery doctrine is an exception to the exclusionary rule that allows admission of evidence obtained in violation of the Fourth Amendment if police would have inevitably discovered the evidence lawfully.<sup>199</sup> The government must show by a preponderance of the evidence that the evidence to be suppressed would ultimately have been discovered without a Fourth Amendment violation.<sup>200</sup>

#### *F. Search of Curtilage, Trash, and Open Fields*

While the Fourth Amendment accords an expectation of privacy within the home, one's other private property is not so stringently protected. However, curtilage—an area “intimately tied to the home”—cannot be searched without a valid warrant.<sup>201</sup> Because there is an expectation of privacy within one's home, curtilage is protected as an extension of “the intimate activity associated with the sanctity of a man's home and the privacies of life.”<sup>202</sup> The United States Supreme Court has said that the front porch of a home is the “classic exemplar” of curtilage.<sup>203</sup> While an officer is not required to have a warrant to enter the front porch area for the purpose of knocking on the door, an officer cannot approach the same door with a drug sniffing canine for the purpose of discovering incriminating evidence or gaining probable cause to get a warrant to search the house.<sup>204</sup> Using a canine in this manner or similarly inside the home is a search.<sup>205</sup>

Conversely, under the open fields doctrine, private property lying outside the home's curtilage may be searched without a warrant.<sup>206</sup> To determine if an area or outbuilding lies within the curtilage of a home, courts look to four factors: “the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and

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199. *State v. Johnson*, 264 P.3d 1018, 1025 (Kan. Ct. App. 2011) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

200. *Id.* (citing *State v. Ingram*, 113 P.3d 228 (Kan. 2005)).

201. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

202. *Id.* at 300 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

203. *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).

204. *Id.* at 415–16.

205. *Id.* at 1417–18.

206. *See United States v. Oliver*, 466 U.S. 170, 180 (1984) (affirming that there is no legitimate expectation of privacy in open fields).

the steps taken by the resident to protect the area from observation by people passing by.<sup>207</sup>

Usually, courts do not liberally construe these factors. In *Rieck v. Jensen*, police entered property that was completely fenced in.<sup>208</sup> The entrance to the property had a locked gate marked with “no trespassing” signs.<sup>209</sup> Police entered through the gate onto the driveway.<sup>210</sup> The court found that although the entire property was completely fenced in, all seventeen acres could not be deemed “immediately adjacent to the house.”<sup>211</sup> Trees shielded the house and much of the property from public view, but did not block the section of driveway that was in question.<sup>212</sup> That section was visible from a public highway and not linked to intimate activities that were associated with the home.<sup>213</sup> Thus, there was no Fourth Amendment violation in this case as the incident occurred on open fields.<sup>214</sup>

Observations of private property made from public places or open fields themselves are not subject to the warrant requirements of the Fourth Amendment.<sup>215</sup> Government agents may make observations from public roads and from areas that are outside the curtilage of a home.<sup>216</sup> Police and the public can also view open lands from the air.<sup>217</sup> Because open fields are so exposed to public view and do not implicate the privacy expectations innately associated with one’s home, the Supreme Court has held that an expectation of privacy in open fields is not one that society recognizes as reasonable.<sup>218</sup>

Structures attached to a home are not necessarily curtilage in the context of seizures. In *State v. King*, defendant argued that a screened-in porch was part of the curtilage of his home and thus his resulting unwarranted arrest was illegal.<sup>219</sup> Generally, unwarranted arrests are not

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207. *State v. King*, 274 P.3d 599, 604 (Kan. 2012) (quoting *Dunn*, 480 U.S. at 301).

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

209. *Id.* at 1189.

210. *Id.*

211. *Id.* at 1193 (quoting *Dunn*, 480 U.S. at 302).

212. *Id.* at 1189.

213. *Id.* at 1193.

214. *Id.*

215. *See United States v. Jones*, 132 S. Ct. 945, 952–53 (2012) (noting that viewing the exterior of a car in a public place is not a search, and that trespass into open fields is not subject to the Fourth Amendment because it is not enumerated as a protected area under the amendment).

216. *See Oliver v. United States*, 466 U.S. 170, 179–80 (1984) (stating the differing levels of protection afforded to curtilage versus open fields).

217. *Id.* at 179.

218. *Id.* at 179–80.

219. 274 P.3d 599, 603 (Kan. 2012).

permissible in the home but are permissible if the arrestee steps outside the home, even if in acquiescence to an officer's request.<sup>220</sup> In *King*, officers appeared on the defendant's property and asked him to step into the doorway of the porch, which he did.<sup>221</sup> Then the officers arrested him.<sup>222</sup> The Kansas Supreme Court held that the curtilage of the defendant's home did not extend to the screened-in porch.<sup>223</sup>

The court touched on the privacy of the porch in its decision, citing an unpublished Kansas Court of Appeals that held a glass-enclosed porch not to be curtilage and reiterating the *Dunn* factors advanced by the United States Supreme Court.<sup>224</sup> An area, despite being enclosed, must be considered part of the main house and not simply an extension of the entryway into the home to receive Fourth Amendment protection in the context of seizures.<sup>225</sup>

However, in the search context, courts have recognized garages to be within the curtilage of the home. If a garage is attached to the home, it "is as much a part of his castle as the rest of his home" and, thus, [is] protected by the Fourth Amendment."<sup>226</sup> When one lowers a garage door, it is as though she closed a door to the home.<sup>227</sup> Courts look beyond the property owner's desire to keep an area private.<sup>228</sup> Instead, courts focus on whether "the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."<sup>229</sup>

Law enforcement officers do not need a warrant to search through trash left on the curb for disposal by city trash collectors.<sup>230</sup> In Kansas, courts use a two-part test to decide the constitutionality of such an act by first determining whether the trash is located in the curtilage and then whether the defendant had a reasonable expectation of privacy in the trash.<sup>231</sup> Even when trash is located in the curtilage of a home, the court

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220. *Id.* at 604 (citing *State v. Riddle*, 788 P.2d 266, 270 (Kan. 1990)).

221. *Id.* at 602.

222. *Id.*

223. *Id.* at 604.

224. *Id.*

225. *Id.*

226. *State v. Dugan*, 276 P.3d 819, 830 (Kan. Ct. App. 2012) (quoting *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000)).

227. *Id.*

228. *See Rieck v. Jensen*, 651 F.3d 1188, 1192 (10th Cir. 2011) (discussing *Oliver* and how attempts to conceal activities from the public do not provide absolute Fourth Amendment protection).

229. *Id.* at 1192 (quoting *Oliver*, 466 U.S. at 182–83).

230. *California v. Greenwood*, 486 U.S. 35, 41 (1988) (holding that there is no reasonable expectation of privacy in trash left out in an area accessible to the general public).

231. *State v. Fisher*, 154 P.3d 455, 467 (Kan. 2007).

has held that if the location is easily accessible to the public, the expectation of privacy is unreasonable.<sup>232</sup> Kansas courts have upheld as reasonable the privacy expectation of rural residents who leave their garbage exposed to the public but in a location so remote that they would be shocked to find a member of the public rummaging through it.<sup>233</sup>

### G. *Standing to Object to a Search*

#### 1. Generally

To challenge the validity of a search, a defendant must have standing.<sup>234</sup> The Fourth Amendment protects one's personal right to privacy, so to have standing to contest a search, one must have a reasonable expectation of privacy in the property searched.<sup>235</sup> Additionally, the expectation of privacy must be objectively "reasonable in light of all the surrounding circumstances."<sup>236</sup>

#### 2. Search of Third Parties

##### a. Social Guests

In *State v. Jackson*, the court considered whether social guests have standing to challenge a search of their personal property pursuant to a warrant to search their host's premises.<sup>237</sup> The court recognized that there are several tests available to determine if personal property is subject to search.<sup>238</sup> The possession test allows searches of objects not worn by or in close proximity to the guests.<sup>239</sup> The notice test allows searches of social guests' personal property if the police have no actual or reasonable notice that the property is not subject to the search warrant.<sup>240</sup> Some jurisdictions utilize a hybrid approach of the two tests.<sup>241</sup>

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232. *Greenwood*, 486 U.S. at 51.

233. *State v. Hoffman*, 196 P.3d 939, 941–42 (Kan. Ct. App. 2008).

234. *See Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (finding that standing is not available for those whose interests have not been infringed).

235. *State v. Gilbert*, 254 P.3d 1271, 1273–74 (Kan. 2011) (citing *Rakas*, 439 U.S. at 148).

236. *Id.* (quoting *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002)).

237. 260 P.3d 1240, 1242–43 (Kan. Ct. App. 2011).

238. *Id.* at 1243–44.

239. *Id.* at 1243.

240. *Id.*

241. *Id.* at 1244.

The notice test has two elements: (1) “actual or reasonable constructive notice to police that an object within the premises may not be subject to the warrant or, without such notice, police may assume that the object is subject to the warrant,” and (2) the guest has a “special relationship to the premises.”<sup>242</sup> A search is allowed if a person has a “special relationship to the premises” because that person is more than a “casual social visitor.”<sup>243</sup> Thus, one who is a social visitor on a premises subject to search cannot be lawfully searched. The visitor may be searched, however, if there is a belief that the visitor is connected to “the illegal activities described in the warrant.”<sup>244</sup>

While Kansas has not officially recognized a test, the Kansas Court of Appeals relied on past cases that are “highly suggestive” that Kansas employs the notice test with the relationship exception.<sup>245</sup> Further, the court found that the possession test could be “potentially arbitrary and inflexible” and may not fully protect the privacy interests of social guests.<sup>246</sup>

#### b. Residents and Overnight Guests

Residents of a home have a legitimate expectation of privacy in the home under the Fourth Amendment.<sup>247</sup> Overnight guests may share this expectation of privacy in the home of another.<sup>248</sup> A guest must establish a meaningful connection to the home to be protected.<sup>249</sup> However, persons in the home “solely for commercial or business reasons” do not have a reasonable connection with the home and therefore do not have a reasonable expectation of privacy.<sup>250</sup>

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242. *Id.* at 1243–44.

243. *Id.* (citing *People v. Frederick*, 48 Cal. Rptr. 3d 585, 595 (Cal. Ct. App. 2006)).

244. *Id.* (citing *Frederick*, 48 Cal. Rptr. 3d at 585) (“For example, police were authorized to search the jacket of a visitor found at a residence at 3:45 a.m. because his presence at such an unusual hour suggested he was not a casual visitor.”).

245. *Id.* at 1246 (stating that both *State v. Lambert*, 710 P.2d 693 (Kan. 1985), and *State v. Tonroy*, 92 P.3d 1116 (Kan. Ct. App. 2004), are “highly suggestive that the notice test together with the relationship exception should be applied in Kansas to protect social guests from unreasonable search and seizure of their persons and personal property during execution of a search warrant.”).

246. *Id.* at 1241.

247. *United States v. Maestas*, 639 F.3d 1032, 1035 (10th Cir. 2011).

248. *Id.* at 1035–36 (citing *United States v. Poe*, 556 F.3d 1113, 1122 (10th Cir. 2009)); *see also State v. Jackson*, 260 P.3d 1240, 1247 (Kan. Ct. App. 2011) (stating that social guests have a legitimate expectation of privacy in their belongings).

249. *Maestas*, 639 F.3d 1032, 1036 (citing *United States v. Rhiger*, 315 F.3d 1283, 1287 (10th Cir. 2003)).

250. *Id.* (citing *Rhiger*, 315 F.3d at 1286).

## c. Passengers in Vehicles

Kansas's baseline for determining third-party standing regarding vehicle passengers is found in *State v. Gilbert*,<sup>251</sup> which relied on *Rakas v. Illinois*.<sup>252</sup> Mere status as a passenger in a car does not give the passenger standing to challenge a search of the car.<sup>253</sup> However, a passenger may challenge the constitutionality of the stop.<sup>254</sup>

In *Gilbert*, police arrested a passenger in a parked car and found contraband in the car during a subsequent search.<sup>255</sup> *Gilbert*, the passenger, did not own the car.<sup>256</sup> While *Gilbert* did not assert a privacy interest in the vehicle, he advanced a theory that the law changed after *Brendlin v. California*.<sup>257</sup> In *Brendlin*, the United States Supreme Court allowed a passenger of a car to challenge a police stop that was not based on reasonable suspicion or probable cause.<sup>258</sup> A police stop detains the passenger as well as the driver because a reasonable passenger would not feel free to leave the scene.<sup>259</sup> *Gilbert* asserted standing to challenge the search of the vehicle—in which he had no possessory interest—in light of the *Brendlin* holding.<sup>260</sup> The Kansas Supreme Court disagreed.<sup>261</sup> The court pointed out that *Brendlin* allowed passengers to challenge the vehicle's initial seizure by police but did not give passengers without a privacy interest standing to challenge the subsequent search of a vehicle.<sup>262</sup> The Kansas Supreme Court hinted that this case could come out differently if the defendant claimed an ownership or possessory interest in either the vehicle or the property searched within the vehicle.<sup>263</sup>

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251. 254 P.3d 1271 (Kan. 2011).

252. 439 U.S. 128 (1978).

253. *Gilbert*, 254 P.3d at 1274 (Kan. 2011).

254. *See id.* at 1275 (explaining that the issue in *Brendlin v. California*, 551 U.S. 249 (2007), was the constitutionality of the initial stop, which differentiates it from *Rakas v. Illinois*, 439 U.S. 128 (1978)).

255. *Id.* at 1271–72.

256. *Id.* at 1271.

257. *Id.* at 1274 (citing *Brendlin*, 551 U.S. at 249).

258. *Id.* (citing *Brendlin*, 551 U.S. at 254).

259. *Id.* (citing *Brendlin*, 551 U.S. at 257).

260. *Id.* at 1274.

261. *Id.* at 1275.

262. *Id.* at 1274–75.

263. *Id.* at 1275.

## H. Technology and Searches

### 1. Wiretapping

The federal Omnibus Crime Control and Safe Streets Act of 1968 regulates wiretaps utilized in criminal investigations.<sup>264</sup> A warrant seeking permission to wiretap must include all alternative procedures police utilized in an attempt to obtain the desired evidence.<sup>265</sup> However, it is not required that police exhaust all alternative procedures.<sup>266</sup> If “traditional investigative techniques” are likely to be successful in obtaining the same information that the warrant requests, the warrant will be denied.<sup>267</sup> In reviewing a warrant, courts weigh “all the facts and circumstances in order to determine whether the government’s showing of necessity is sufficient to justify a wiretap.”<sup>268</sup>

Kansas’s wiretapping statutes are virtually identical to their federal counterparts.<sup>269</sup> Those provisions—because of their implications for individuals’ privacy—“must be strictly construed.”<sup>270</sup> In *State v. Bruce*, a Kansas assistant attorney general applied for a general wiretap order.<sup>271</sup> The district court suppressed the evidence obtained through the wiretap.<sup>272</sup> Although the assistant attorney general was delegated the authority to apply for the wiretap warrant as an agent of the attorney general pursuant to a separate Kansas statute, the two statutes combined were more permissive than their federal counterpart.<sup>273</sup> Thus, the

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264. The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2522 (2006).

265. See 18 U.S.C. § 2518(1)(c) (requiring “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”).

266. *United States v. Verdin-Garcia*, 516 F.3d 884, 889–90 (10th Cir. 2008) (citing *United States v. Ramirez*, 479 F.3d 1229, 1240 (10th Cir. 2007)).

267. *Id.* (citing *United States v. Green*, 175 F.3d 822, 828 (10th Cir. 1999)).

268. *Id.* at 890 (quoting *United States v. Ramirez-Encarnacion*, 291 F.3d 1219, 1222 (10th Cir. 2002)).

269. See *State v. Bruce*, 287 P.3d 919, 921–22 (Kan. 2012) (“Applications for wiretaps in the Kansas court system are subject to both 18 U.S.C. § 2515 *et seq.* and Kansas wiretap statutes that largely mirror the federal provisions.”). The Kansas wiretap statutes are codified in KAN. STAT. ANN. §§ 22-2514 to -2518 (2007).

270. *Bruce*, 287 P.3d at 921 (citing *Olander ex rel. Ireland v. Stein*, 515 P.2d 1211, 1215 (Kan. 1973)).

271. *Id.* at 920.

272. *Id.* at 921.

273. See KAN. STAT. ANN. § 75-710 (allowing assistants appointed by the attorney general to exercise powers delegated to them by the attorney general).

evidence was obtained illegally.<sup>274</sup> The state's principal prosecuting attorney must personally apply for the wiretap warrant.<sup>275</sup>

The Kansas Supreme Court has adopted a three-question inquiry to determine the existence of a violation of the federal wiretapping statute: (1) does the defendant establish "a violation of federal wiretap law?"; (2) "did any violation run afoul of a provision intended to play a central role in the statutory scheme?"; and (3) "if the provision was intended to play a central role, was its purpose achieved in spite of the violation and thus the violation harmless?"<sup>276</sup> The court discussed the importance of following "clear statutes" and not establishing "new, court-created rules in its analysis upholding the district court's suppression order."<sup>277</sup>

## 2. Electronic Surveillance

Last year, global positioning system (GPS) tracking entered the legal limelight in *United States v. Jones*.<sup>278</sup> The Supreme Court held that the warrantless attachment of a GPS tracking device to defendant's vehicle was a trespass on defendant's personal property, or "effects," and therefore a violation of the Fourth Amendment.<sup>279</sup> This year, the Tenth Circuit addressed GPS "pinging" of cellular phones in *United States v. Barajas*.<sup>280</sup>

In *Barajas*, Drug Enforcement Administration (DEA) agents applied for numerous wiretap warrants while investigating a drug trafficking conspiracy.<sup>281</sup> While the affidavits establishing probable cause for the warrants did not request GPS data, the warrants issued by the judge included authorization to use real-time GPS pinging and tracking of cellular phone calls.<sup>282</sup> *Barajas* sought suppression of evidence obtained through GPS pinging, asserting that the affidavits in support of the

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274. *Id.*

275. 18 U.S.C. § 2516(2) (2006).

276. *Bruce*, 287 P.3d at 921.

277. *Id.* at 926–27 ("But the sensitive area of wiretaps seems an especially poor environment for judicial policy making. We thus maintain the position of our earlier cases: When there is a violation of a central provision of the wiretap statutes, exclusion is required by both the federal and state statutes.").

278. 132 S. Ct. 945 (2012).

279. *Id.* at 952.

280. 710 F.3d 1102 (10th Cir. 2013).

281. *Id.* at 1104–05.

282. *Id.* at 1105–06.

warrants did not provide probable cause for the pinging, which was never requested.<sup>283</sup>

As the search was conducted pursuant to the warrant, the Tenth Circuit reviewed the matter only to ensure there was a “substantial basis” for the issuing judge to conclude that the affidavit in question established probable cause.<sup>284</sup> Probable cause is established by an affidavit if, taken as a whole, it establishes “the fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>285</sup> The court dismissed the notion that a warrant authorizing more than one kind of search violates the Fourth Amendment.<sup>286</sup> However, for any kind of warrant, there must be a nexus between the criminal activity—here, drug trafficking—and the place to be searched.<sup>287</sup> Though the court admitted that it could not be sure probable cause existed to show that uncovering the location of Barajas would somehow contribute to proving a drug trafficking conspiracy, it declined to analyze the issue, holding that “any deficiency in probable cause [was] cured by the good-faith exception.”<sup>288</sup>

The good faith exception to the exclusionary rule provides that, where an officer has a good faith belief that a warrant was properly issued, evidence resulting from the search will not be suppressed.<sup>289</sup> The good faith exception does not apply, however, where the officer “knows or should have known that a search warrant was invalid.”<sup>290</sup> The Court concluded that the law on electronic surveillance is so unsettled, the DEA agents could not be said to be on notice that the warrant could be invalid.<sup>291</sup>

In light of this decision, it appears that courts may be apprehensive to suppress evidence obtained by electronic means even where a warrant’s validity is questionable. Until the law on electronic surveillance becomes clearer, the good faith exception to the exclusionary rule is likely to keep evidence from being suppressed.

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283. *Id.* at 1108.

284. *Id.* (citing *United States v. Burkhart*, 602 F.3d 1202, 1205 (10th Cir. 2010)).

285. *Id.* (quoting *United States v. Roach*, 582 F.3d 1192, 1200 (10th Cir. 2009)).

286. *Id.* at 1109.

287. *Id.* at 1108 (citing *Roach*, 582 F.3d at 1200).

288. *Id.* at 1109.

289. *Id.* at 1110 (quoting *United States v. Campbell*, 603 F.3d 1218, 1225 (10th Cir. 2010)).

290. *Id.* at 1111 (quoting *United States v. Henderson*, 595 F.3d 1198, 1202 (10th Cir. 2010)).

291. *Id.*

### 3. Internet Search History

Individuals have a reasonable expectation of privacy in their effects, including computers. In *State v. Robinson*, police seized the workplace computer of a third party Reisig that the defendant Robinson had used.<sup>292</sup> Police then conducted an “internal search” of the computer pursuant to a search warrant and found evidence incriminating Robinson.<sup>293</sup> A jury convicted Robinson of murder and other serious offenses in the death of a fourteen-year-old girl who was nine months pregnant with his baby.<sup>294</sup> Before the murder of the victim, “Robinson searched the Internet for information on how to kill a baby, how to have a miscarriage, and how to find a missing person.”<sup>295</sup>

Robinson argued that his Internet search activity should be excluded because the computer he used required him to log in using a password.<sup>296</sup> The trial court disagreed and the Kansas Supreme Court affirmed the trial court.<sup>297</sup> Robinson’s argument failed because:

- (1) Reisig’s company owned the computer; (2) Robinson accessed the Internet through the company’s network; (3) as a network systems administrator, Reisig could access Robinson’s computer and monitor Robinson’s Internet activity; and (4) Reisig informed Robinson the company could monitor Robinson’s use of the company’s network, including the use of the Internet.<sup>298</sup>

The Kansas Supreme Court further noted that the investigating detective found the defendant’s Internet searches by looking at non-password-protected computer tracking files.<sup>299</sup>

Although utilizing a password can protect an individual’s expectation of privacy,<sup>300</sup> Kansas courts tend to look at other factors surrounding the evidence as well. These include ownership of the computer, ownership of the network, and any company policies pertinent

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292. 270 P.3d 1183, 1192 (Kan. 2012).

293. *Id.*

294. *Id.* at 1189.

295. *Id.* at 1191.

296. *Id.* at 1193 (“Robinson generally argues he had a legitimate expectation of privacy in the contents of the computer because his account on the computer was password protected.”).

297. *See id.* at 1193–94 (providing the trial court’s reasoning, which determined that Robinson was precluded from having a reasonable expectation of privacy in his Internet search activity).

298. *Id.* at 1193.

299. *Id.* at 1194.

300. *See State v. James*, 288 P.3d 504, 509 (Kan. Ct. App. 2012) (noting that text messages searched by an officer on defendant’s cell phone were not password protected).

to Internet usage and privacy.<sup>301</sup> The individual challenging the search must show she had “a subjective expectation of privacy in the area searched and that her expectation was objectively reasonable.”<sup>302</sup>

#### 4. Chemical Drug Tests

Several changes have been made to the Kansas statute concerning the process and penalties relating to Breathalyzer tests. Currently, by operating or attempting to operate a vehicle, a person gives implied consent to a chemical test to determine her blood alcohol content (BAC).<sup>303</sup> A person’s consent extends to any test of “blood, breath, urine or other bodily substance.”<sup>304</sup> This is called the implied consent provision. Under the new statute, a “law enforcement officer shall request a person to submit to” any of the tests listed under the implied consent provision if the person has been arrested or in an accident resulting in property damage or personal injury.<sup>305</sup>

The penalties are strict if a person declines to submit to testing. For example, the first refusal to submit to sobriety tests suspends a person’s driving privileges for one year, and thereafter restricts the person’s driving privileges for three years by requiring an ignition interlock device be installed.<sup>306</sup> The penalties become increasingly strict if the person has a prior DUI or refusal on record.

In *Sloop v. Kansas Department of Revenue*, the defendant challenged the validity of his arrest and the suspension of his driving privileges after refusing to take a breath test.<sup>307</sup> Sloop did not exhibit slurred speech, “he did not fumble while producing his license, and he did not stumble when exiting his vehicle and was steady when walking to the rear [of his car].”<sup>308</sup> He did have bloodshot eyes, smelled of alcohol, and admitted to drinking a beer earlier that evening.<sup>309</sup> Nonetheless, Sloop was arrested

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301. See *id.* at 1193 (citing *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002) (explaining that what is reasonable depends on the circumstances in each case).

302. *Id.*

303. See KAN. STAT. ANN. § 8-1001(a) (2001 & Supp. 2012) (“Any person who operates or attempts to operate a vehicle . . . is deemed to have given consent . . . to one or more tests of the person’s blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs.”).

304. *Id.* (“The testing deemed consented to herein shall include all quantitative and qualitative tests for alcohol and drugs.”).

305. *Id.* § 8-1001(b).

306. *Id.* § 8-1014(a)(1).

307. 290 P.3d 555 (Kan. 2012).

308. *Id.* at 561.

309. *Id.* at 557.

for DUI, and his driving privileges were suspended for one year for refusing to take a breath test.<sup>310</sup> The lower courts relied on pre-arrest evidence as well as post-arrest field sobriety tests to uphold the suspension.<sup>311</sup> The Kansas Supreme Court explained that the arrest must be lawful for the suspension to be imposed.<sup>312</sup> For an arrest to be lawful, police must have probable cause.<sup>313</sup> The court made clear that probable cause is not “a mere possibility.”<sup>314</sup> Probable cause to arrest 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>315</sup> Although there was some indication that Sloop was driving drunk, it did not amount to probable cause for arrest.<sup>316</sup>

Police must have reasonable suspicion to ask a driver to submit to a preliminary breath test (PBT), determined based on the totality of the circumstances.<sup>317</sup> A panel for the Kansas Court of Appeals held that horizontal gaze nystagmus (HGN) tests can be considered as part of the evidence prior to trial to determine if police had reasonable suspicion to perform a PBT.<sup>318</sup> A HGN test is performed by holding a pen twelve to fifteen inches in front a person and asking her to track the movement of the pen using her eyes while keeping her head still.<sup>319</sup> The officer must have training in administering HGN tests to testify to this evidence prior to trial.<sup>320</sup>

To be excluded from trial by a motion to suppress, breath test evidence must have been obtained by an illegal search or seizure.<sup>321</sup> In *State v. Smith*, the defendant petitioned to have his breath test excluded because the State did not establish that the officer followed Kansas

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310. *Id.* at 561.

311. *See id.* at 557 (“The court also relied upon the following postarrest evidence: Sloop’s failure to step properly on three occasions, his failure to turn as instructed during the walk-and-turn test, and his swaying on the one-leg stand test.”).

312. *Id.* at 559.

313. *Id.* (citing KAN. STAT. ANN. § 22-2401(c) (2012)).

314. *Id.* at 560 (quoting *Bruch v. Kan. Dep’t of Revenue*, 148 P.3d 538, 546 (Kan. 2006)).

315. *Id.* (alteration in original) (quoting *Draper v. United States*, 358 U.S. 307, 313 (1959)).

316. *See id.* at 561.

317. *City of Wichita v. Molitor*, 268 P.3d 498, 501–02 (Kan. Ct. App. 2012) (citing KAN. STAT. ANN. § 8-1012(b) (Supp. 2010)).

318. *Id.* at 503.

319. *See id.* at 500–01.

320. *Id.* at 503.

321. *State v. Smith*, 268 P.3d 1206, 1209 (Kan. Ct. App. 2011) (citing KAN. STAT. ANN. § 22-3216).

Department of Health and Environment (KDHE) protocol for the administration of a breath test.<sup>322</sup> However, the Kansas Court of Appeals found that “an alleged failure of a law enforcement officer to follow KDHE protocol does not constitute the violation of a constitutional right and is not legally sufficient to support a motion to suppress.”<sup>323</sup> For a nonconstitutional violation of this type, a motion in limine is the appropriate remedy.<sup>324</sup>

If a person is capable of giving a breath sample for testing, but provides an inadequate breath sample, it is considered a refusal.<sup>325</sup> This refusal can be rescinded if the person consents

- (1) within a very short and reasonable time after the prior first refusal;
- (2) when a test administered upon the subsequent consent would still be accurate;
- (3) when testing equipment is still readily available;
- (4) when honoring the request will result in no substantial inconvenience or expense to the police; and
- (5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest.<sup>326</sup>

If a person is denied an opportunity to rescind her refusal after providing an inadequate breath sample, testimony regarding refusal to submit to a breath test should be prohibited at trial, and the deficient test results should be suppressed.<sup>327</sup>

## 5. DNA Testing

The Kansas Court of Appeals recently upheld a district court’s refusal to suppress DNA evidence obtained without a warrant.<sup>328</sup> The defendant was found in the hospital bed of a ninety-four-year-old woman, attempting to rape her.<sup>329</sup> Hospital staff restrained the defendant until the police arrived and handcuffed him.<sup>330</sup> A sexual assault nurse

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322. *Id.* at 1209.

323. *Id.*

324. *Id.*

325. *See* *State v. May*, 269 P.3d 1260, 1264 (Kan. 2012) (stating that May’s performance during the breath test did not provide an adequate sample, constituting a “refusal,” rather than a failure pursuant to KAN. STAT. ANN. § 8-1001 (1)).

326. *Id.* (quoting *Standish v. Dep’t of Revenue*, 683 P.3d 1276, 1280 (Kan. 1984)).

327. *Id.* at 1266.

328. *State v. Parker*, 282 P.3d 643, 656 (Kan. Ct. App. 2012).

329. *Id.* at 648.

330. *Id.*

then swabbed his hands for DNA evidence.<sup>331</sup> All four DNA swabs contained the victim's DNA.<sup>332</sup>

The defendant argued that, as he was handcuffed and in police custody, a warrant was required before police could swab his hands, and the trial court should have suppressed the DNA evidence.<sup>333</sup> Finding the officers had probable cause to believe the defendant had committed a felony, the appellate court further found that officers reasonably believed valuable evidence was in danger of imminent destruction.<sup>334</sup> As the defendant could have wiped his hands on his pants at any moment, thereby destroying "fragile DNA evidence," the court held that the probable cause plus exigent circumstances warrant exception<sup>335</sup> applied, and the evidence was properly admitted at trial.<sup>336</sup>

In *Goldsmith v. State*, the defendant was granted DNA testing of thirty-five items after being convicted of several crimes.<sup>337</sup> One item was tested and found to have DNA evidence of both the victim and the defendant.<sup>338</sup> The State then discontinued testing of the remaining thirty-four items because to continue with testing "would not be utilizing resources wisely."<sup>339</sup> The Kansas Supreme Court held that the State may not make this decision, as the Kansas statute vests authority for these decisions solely with the court.<sup>340</sup> If the court instructs the Kansas Bureau of Investigation to test thirty-five items, it must test all thirty-five items.<sup>341</sup> One piece of unfavorable evidence is not enough to discontinue testing.<sup>342</sup> If the State believes testing to be pointless, the court must hold a hearing with the defendant present and represented by counsel to consider the matter.<sup>343</sup>

The statute granting a magistrate the power to approve a warrant for collecting DNA evidence was at issue in *State v. Powell*.<sup>344</sup> At the time

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331. *Id.*

332. *Id.*

333. *Id.* at 656.

334. *Id.*

335. *See supra* Part II.D.2.

336. *Id.*

337. 255 P.3d 14, 16 (Kan. 2011).

338. *Id.*

339. *Id.*

340. *See id.* at 18 ("Nothing in K.S.A. [§] 21-2512 permits the State to take any unilateral action to limit or cease testing previously ordered by the court.").

341. *Id.*

342. *Id.*

343. *Id.* at 19.

344. 257 P.3d 1244 (Kan. Ct. App. 2011), *review granted*, No. 102,749, 2012 Kan. LEXIS 138

of this Survey's publication, the Kansas Supreme Court had granted review of this case. Powell, the defendant, damaged a police car.<sup>345</sup> A warrant was issued "to obtain a blood sample, hair sample, oral swab, and fingerprints" from Powell.<sup>346</sup> At trial, Powell objected to the issuance of the warrant because the application did not assert that the police car contained blood or tissue.<sup>347</sup> Therefore, there were not enough facts to establish probable cause to execute a valid warrant.<sup>348</sup> The district court disagreed, finding that the good faith exception saved the warrant's validity.<sup>349</sup> On appeal, the court agreed that the warrant application did not contain any mention of DNA or other bodily evidence on the police car.<sup>350</sup> However, the appellate court agreed with the lower court that the officers had a reasonable belief that they had a valid warrant.<sup>351</sup> Powell also asserted that the statute that allows magistrates to issue search warrants does not specifically authorize collection of "blood, hair, spit, or any other part of the human body."<sup>352</sup> The court found that the legislature's broad language encompassing "[a]ny things which have been used in the commission of a crime" and "any property which constitutes or may be considered a part of the evidence" would allow the collection of DNA evidence.<sup>353</sup> Property, according to the court, encompasses blood and tissue, which were used to commit the crime.<sup>354</sup> Thus, the DNA sample was properly admitted.<sup>355</sup>

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(Kan. Feb. 17, 2012).

345. *Id.* at 1246.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*; *see generally* United States v. Leon, 468 U.S. 897 (1984) (holding that some warrants, while technically invalid, are allowed under a good faith exception).

350. *Powell*, 257 P.3d at 1247.

351. *Id.* at 1248.

352. *Id.* Section 22-2502(a)(1) of the Kansas Statutes allows a search warrant to seize the following:

Any things which have been used in the commission of a crime, or any contraband or any property which constitutes or may be considered a part of the evidence, fruits or instrumentalities of a crime under the laws of this state, any other state or of the United States. The term "fruits" as used in this act shall be interpreted to include any property into which the thing or things unlawfully taken or possessed may have been converted.

KAN. STAT. ANN. § 22-2502(a)(1) (2007 & Supp. 2012).

353. *Id.* at 1249 (quoting KAN. STAT. ANN. § 22-2502(a)(1)) (internal quotation marks omitted).

354. *See id.* ("We would also note that [blood and tissue] would be 'things which have been used in the commission of a crime.'").

355. *Id.* at 1249.

## III. SEIZURES

A. *Fourth Amendment Issues*

The Fourth Amendment states in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized.”<sup>356</sup>

The Kansas Constitution’s Bill of Rights contains a parallel provision.<sup>357</sup> In accord with the Kansas Supreme Court, it effectively provides the same protection as the Fourth Amendment.<sup>358</sup>

The protection afforded by the Fourth Amendment is not absolute, but only prohibits unreasonable seizures<sup>359</sup> by government actors.<sup>360</sup> A seizure is presumptively unreasonable if executed in a home without a warrant based on probable cause.<sup>361</sup> “The warrant requirement, thus, interposes an independent reviewing authority—a judge—to assess the sufficiency of the grounds . . . advanced for interfering with citizens,” rather than leaving that assessment to the agents carrying out the seizure.<sup>362</sup>

## 1. Seizure of Items

Under the Fourth Amendment, the seizure of property involves a “meaningful interference” with an individual’s possessory interest in her property.<sup>363</sup> Accordingly, a seizure by a government actor must be significant to necessitate probable cause. Where a detention minimally

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356. U.S. CONST. amend. IV.

357. See KAN. CONST. bill of rights § 15 (“The right of the people to be secure in their persons and property against unreasonable . . . seizures shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the . . . persons or property to be seized.”).

358. See *State v. Daniel*, 242 P.3d 1186, 1191 (Kan. Ct. App. 2010) (noting that the court has declined to extend the state constitutional protections beyond federal guarantees).

359. See *State v. Bennett*, 200 P.3d 455, 459 (Kan. 2009) (noting that reasonableness is the touchstone of the Fourth Amendment).

360. *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)), *review denied*, No. 10-103762-A, 2012 Kan. LEXIS 323 (Kan. May 21, 2012).

361. *State v. Dugan*, 276 P.3d 819, 826 (Kan. Ct. App. 2012) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)).

362. *Id.* at 825.

363. *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (citing *Maryland v. Macon*, 472 U.S. 463, 469 (1985)).

interferes with a person's Fourth Amendment interests, "the opposing law enforcement interests can support a seizure based on less than probable cause."<sup>364</sup> The Kansas Supreme Court recently upheld the warrantless seizure of a cigarette pack for officer safety reasons where a woman continued to reach for it despite being told not to do so.<sup>365</sup>

Furthermore, "[a] defendant cannot object to the seizure of evidence without proper standing to challenge the validity of the search";<sup>366</sup> an individual must have legal possession and a reasonable expectation of privacy.<sup>367</sup> For example, items placed in the mail are subject to Fourth Amendment protection.<sup>368</sup> Government actors may detain a mailing item only for a "reasonable length of time" when they have a reasonable suspicion concerning the contents of the item.<sup>369</sup>

Characteristics of [the United States Postal Service's narcotics] profile are: (1) the size and shape of the package; (2) whether the package is taped to close all openings; (3) handwritten or printed labels; (4) an unusual return name and address; (5) unusual odors coming from the package; (6) a fictitious return address; and (7) the package's destination.<sup>370</sup>

Moreover, "[a] combination of seemingly independent innocent factors may create a reasonable suspicion justifying detention for a dog sniff if the factors substantially reflect elements of a suspicious profile."<sup>371</sup> Accordingly, the totality of the circumstances rather than one characteristic alone will be determinative.<sup>372</sup>

The same standard outlined for administrative searches, which disregards the ordinary need for probable cause, applies to seizures resulting from an administrative search.<sup>373</sup>

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

365. *State v. Johnson*, 270 P.3d 1135, 1141 (Kan. 2012).

366. *State v. McCammon*, 250 P.3d 838, 841 (Kan. Ct. App. 2011) (quoting *State v. Gonzalez*, 85 P.3d 711, 714 (Kan. Ct. App. 2004)), *review denied*, 2011 Kan. LEXIS 367 (Kan. 2011).

367. *See United States v. Conway*, 73 F.3d 975, 979–81 (10th Cir. 1995) (noting that mere physical possession is not enough).

368. *State v. Duhon*, 109 P.3d 1282, 1287–88 (Kan. Ct. App. 2005) (discussing how the United States Postal Service is subject to a reasonable suspicion analysis).

369. *Id.* at 1287.

370. *Id.*

371. *United States v. Scarborough*, 128 F.3d 1373, 1378 (10th Cir. 1997).

372. *Duhon*, 109 P.3d at 1287.

373. *See supra* Part II.D.5.f. (discussing administrative searches of closely regulated businesses).

## 2. Seizure of Persons

Under the Fourth Amendment, “a person is ‘seized’ only when, by means of physical force or a show of authority, *his freedom of movement is restrained.*”<sup>374</sup> Thus, a seizure occurs when a reasonable person, under the circumstances, believes “he or she is not free to leave” and yields to the seizure by the government actor.<sup>375</sup>

Kansas Courts have delineated three police–citizen encounters that constitute a seizure: (1) investigatory detentions (or *Terry* stops<sup>376</sup>), (2) public safety stops, and (3) arrests.<sup>377</sup> A voluntary encounter between a citizen and police officer, which involves the objectively reasonable perception that the citizen may freely refuse to cooperate, is not a seizure.<sup>378</sup>

Courts use the “totality of the circumstances” test to determine whether a police–citizen encounter is voluntary or constitutes a seizure,<sup>379</sup> “[b]ecause the determination of whether a reasonable person would feel free to terminate an encounter or refuse to answer questions is fact-driven, no list of factors can be exhaustive or exclusive.”<sup>380</sup> The standard is objective and does not consider the subjective perception of the person seized.<sup>381</sup>

An investigatory detention arises when a law enforcement officer stops a person in a public place, without making an arrest, based on the officer’s reasonable suspicion that the person “is committing, has committed or is about to commit a crime.”<sup>382</sup> The “hunch” of an experienced officer does not rise to the level of reasonable suspicion required under the Kansas statute.<sup>383</sup>

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374. *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010).

375. *State v. Morris*, 72 P.3d 570, 576–77 (Kan. 2003).

376. *See generally Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (stating that an investigatory stop is permissible and does not constitute an arrest when prompted by: (1) observation of unusual conduct, (2) reasonable suspicion, and (3) the ability to point to specific and articulable facts to justify suspicion).

377. *State v. Moralez*, 242 P.3d 223, 226 (Kan. Ct. App. 2010).

378. *Id.*

379. *Id.* at 228.

380. *Id.* (citing *State v. McGinnis*, 233 P.3d 246, 249 (Kan. 2010)).

381. *Id.* at 229.

382. KAN. STAT. ANN. § 22-2402(1) (2007).

383. *State v. Martinez*, 293 P.3d 718, 723 (Kan. 2013).

a. Detention of Third Parties During a Search

Under the Fourth Amendment, a search warrant includes the limited authority “to detain the occupants of the premises while a proper search is conducted.”<sup>384</sup> Kansas law specifically provides that any person present at the place and time of the search warrant’s execution may be reasonably detained and searched to protect those conducting the search or to “prevent the disposal or concealment of any things particularly described in the warrant.”<sup>385</sup> The rationale for detention is also justified to prevent the flight of occupants if incriminating evidence is uncovered during the search.<sup>386</sup> The authority extends to all occupants of a residence or automobile being searched, including third parties.<sup>387</sup> Courts consider the limited detention considerably less invasive than the search itself.<sup>388</sup>

While the detention of those in or just outside of a residence during the execution of a search warrant has been deemed reasonable by courts for some time, the United States Supreme Court recently held that it is unreasonable to detain an occupant who left the residence just prior to the search.<sup>389</sup> In *Bailey v. United States*, officers observed two men leave an apartment and drive away just prior to the execution of a search warrant on the apartment.<sup>390</sup> Officers detained the men about a mile away from the apartment while other officers conducted the search, and then drove the men back to the apartment in handcuffs.<sup>391</sup> The Court took this case to settle a circuit split as to whether occupants may be justifiably detained “beyond the immediate vicinity of the premises covered by the search warrant.”<sup>392</sup>

Normally, detentions during a search are justified by concerns for officer safety, facilitating completion of the search, and preventing flight.<sup>393</sup> As none of these concerns apply “with the same or similar

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384. *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013) (citing *Michigan v. Summers*, 452 U.S. 692, 705 (1981)).

385. KAN. STAT. ANN. § 22-2509.

386. *United States v. Sanchez*, 555 F.3d 910, 916 (10th Cir. 2009) (quoting *Summers*, 452 U.S. at 702–03).

387. *See id.* at 918 (stating that “the authority to detain relates to all persons present on the premises”).

388. *Id.* at 917 (quoting *Summers*, 452 U.S. at 701–03).

389. *Bailey*, 133 S. Ct. at 1043–45.

390. *Id.* at 1036.

391. *Id.*

392. *Id.* at 1037.

393. *Id.* at 1038.

force” once an occupant has left the immediate vicinity, the Court limited detention incident to the execution of a search warrant to those “in the immediate vicinity of the premises to be searched.”<sup>394</sup>

#### b. Detention During Traffic Stops

A traffic stop qualifies as a seizure under the Fourth Amendment.<sup>395</sup> “An investigatory traffic stop is reasonable, and thus constitutional, if (1) the stop is justified at its inception and (2) the scope and duration of the stop are reasonably related to the initial justification for the stop.”<sup>396</sup> For instance, a traffic violation is an example of an objectively valid reason for a stop.<sup>397</sup> Moreover, a law enforcement officer’s subjective estimation that a car is traveling in excess of the speed limit “may constitute, under the totality of the circumstances, reasonable suspicion that the driver is speeding in violation of law.”<sup>398</sup>

A permissible traffic stop may include an officer’s examination of the driver’s license and registration, a computer check, and any inquiries that “do not measurably extend the duration of the stop.”<sup>399</sup> Unless the officer gains a “reasonable and articulable suspicion of illegal activity” or the stop becomes consensual, the driver must be permitted to leave once the purpose of the stop is complete.<sup>400</sup> The traffic stop cannot be extended in time beyond what is appropriate for the purpose of the stop.<sup>401</sup>

In *State v. Coleman*,<sup>402</sup> the Kansas Court of Appeals recently reiterated the principle that “[d]etaining a driver for even a few minutes in order to allow a drug-sniffing dog to arrive unreasonably extends the detention when the officer did not need additional time to ask exploratory questions or to write a traffic citation.”<sup>403</sup> In sum, an investigatory detention resulting from an automobile stop must be based

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394. *Id.* at 1041.

395. *State v. Butts*, 269 P.3d 862, 869 (Kan. Ct. App. 2012).

396. *State v. Diaz-Ruiz*, 211 P.3d 836, 840 (Kan. Ct. App. 2009) (citing *State v. Smith*, 184 P.3d 890, 897 (Kan. 2008); *State v. Mitchell*, 960 P.2d 200, 203 (Kan. 1998)).

397. *State v. Anderson*, 136 P.3d 406, 411 (Kan. 2006) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996); *State v. DeMarco*, 952 P.2d 1276, 1281 (Kan. 1998)).

398. *Butts*, 269 P.3d at 871.

399. *Id.* (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)).

400. *State v. Wendler*, 274 P.3d 30, 37 (Kan. Ct. App. 2012) (quoting *State v. Thompson*, 166 P.3d 1015, 1024 (Kan. 2007)).

401. *State v. Jones*, 280 P.3d 824, 833 (Kan. Ct. App. 2012).

402. 257 P.3d 320, 327 (Kan. 2011) (citing *State v. Mitchell*, 960 P.2d 200, 204 (Kan. 1998)).

403. *Jones*, 280 P.3d at 833.

on reasonable suspicion, and the extent of the detention is determined by the nature of the suspicion, though that may be broadened during the stop.<sup>404</sup>

i. The Evolution to a Consensual Encounter

Assuming that the officer does not develop a reasonable suspicion of illegal activity after the purpose of the stop has been fulfilled, the “totality of the circumstances test” is applied to the police–citizen encounter to determine whether the citizen has been impermissibly seized or the citizen has given consent to further interaction.<sup>405</sup>

For example, if an officer tells a citizen she is free to leave but then says, “by the way, can I ask you a few questions?” and the citizen proceeds to answer questions or grants permission for a search, there is evidence that the interaction is consensual.<sup>406</sup> “Physical disengagement before further questioning”—such as walking away—is another factor to be considered.<sup>407</sup> Finally, when “a reasonable person would feel free to refuse to continue the interaction,” the stop has likely evolved into a consensual encounter.<sup>408</sup>

The following case, reviewed by the Kansas Court of Appeals, further explores the relationship between a traffic stop and a consensual encounter by setting forth the principles involved when an unconstitutional detention potentially taints the consent to a search.<sup>409</sup>

ii. *State v. Wendler*

In *State v. Wendler*, a police officer initiated a traffic stop involving an RV because it was following another vehicle too closely.<sup>410</sup> After informing the officer the RV was rented, “Wendler said he was driving from San Diego, California, to Florida. The district court surmised that

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404. *See id.* (“[E]ven if there was any reasonable suspicion developed at all, it may have supported an investigation for DUI, but not for possession of controlled substances, and DUI is not generally pursued by using a drug-sniffing dog.”); *Wendler*, 274 P.3d at 39 (“[O]fficers may broaden the inquiry during a traffic stop to investigate their suspicions provided the traffic stop is not measurably extended.”)

405. *See State v. Murphy*, 219 P.3d 1223, 1227 (Kan. Ct. App. 2009) (discussing “whether a reasonable person would feel free to refuse any requests or to otherwise terminate the encounter”) *aff’d*, 293 P.3d 703 (Kan. 2013).

406. *Id.*

407. *Id.*

408. *Id.* at 1228.

409. *Wendler*, 274 P.3d at 43.

410. *Id.* at 34.

‘the minute [Officer Youse] heard rental, California, [and] Florida, . . . he was going to . . . keep [the RV] as long as he possibly could’ [to investigate drug-related criminal activity].”<sup>411</sup> According to the officer’s testimony, the purpose of the stop was fulfilled in approximately nine minutes.<sup>412</sup> Focusing on what the officer knew at the nine-minute mark in the encounter, the court found that the officer was unable to develop reasonable suspicion, based on Wendler’s travel plans, the rented vehicle, and an air freshener in the RV, that justified Wendler’s detention beyond that point.<sup>413</sup> Accordingly, based on the totality of the circumstances, the court found that the traffic stop became an illegal detention after the purpose of the stop was fulfilled.<sup>414</sup>

The officer asked Wendler to exit the RV about twenty-five minutes into the traffic stop.<sup>415</sup> Afterwards, the officer “made the very standard attempt to effectuate a release from custody” by giving Wendler a warning, pivoting away, and then reengaging him with a number of questions, eventually asking to search the RV.<sup>416</sup> Wendler agreed to the search after being told it would take “just a few minutes.”<sup>417</sup> The actual search took well over fifteen minutes.<sup>418</sup> The officer eventually found “20 bundles of marijuana packed around the microwave.”<sup>419</sup>

In assessing the issue of Wendler’s consent to the search, the court noted,

An unconstitutional seizure may infect or taint the consent to search as well as any fruits of the encounter if the nature of the seizure renders the consent to search involuntary. . . . Conversely, a voluntary consent to search can purge the primary taint of an illegal seizure where the connection between the lawless conduct of law enforcement officers and the discovery of the challenged evidence has become so attenuated as to dissipate the taint.”<sup>420</sup>

In determining whether Wendler’s consent was properly attenuated and effectively purged the taint of the illegal seizure, the court considered “the proximity in time of the Fourth Amendment violation and the

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411. *Id.*

412. *Id.* at 40.

413. *Id.* at 40–42.

414. *Id.* at 38.

415. *Id.* at 35.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at 36.

420. *Id.* at 43 (quoting *State v. Smith*, 184 P.3d 890, 902 (Kan. 2008)).

consent, intervening circumstances, and particularly the purpose and flagrancy of the officer's misconduct."<sup>421</sup>

The officer asked Wendler several questions, gave him a warning, and shook Wendler's hand saying, "thanks a lot."<sup>422</sup> Then, Wendler walked toward his RV and the officer walked toward the patrol vehicle and out of Wendler's sight.<sup>423</sup> Two seconds later, the officer called Wendler back and asked if they could continue talking.<sup>424</sup> Wendler agreed and eventually gave consent to search the RV.<sup>425</sup> The court found that the proximity in time favored no attenuation of the illegal detention.<sup>426</sup> Also, there were no intervening circumstances such as the officer advising Wendler "he was free to leave or that he had the right to refuse consent to further questions or to permit the search of the RV."<sup>427</sup> Finally, the court found that the officer exploited the unlawful detention by using stalling tactics.<sup>428</sup> As a result, the drugs seized—the "fruits of the encounter"—were suppressed.<sup>429</sup> This case emphasizes courts' intolerance for the practice of abusing traffic stops to conduct criminal investigations without reasonable suspicion. Moreover, citizen consent is not necessarily a cure for the taint of an illegal detention.

### c. Detention During a Public Safety Stop

A law enforcement officer has a "role as a public servant to assist those in distress and to maintain and foster public safety."<sup>430</sup> Accordingly, the Kansas Supreme Court has recognized the validity of public safety stops, holding, "A civil or criminal infraction is not always essential to justify a vehicle stop. Safety reasons alone may justify the stop if the safety reasons are based upon specific and articulable facts."<sup>431</sup> Therefore, a law enforcement officer may initiate a public safety stop without reasonable suspicion of illegal activity.<sup>432</sup> Moreover, public safety stops can be based on "tips from anonymous or known sources"

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421. *Id.* (quoting *State v. Hayes*, 133 P.3d 146, Syl ¶ 11, 148 (Kan. Ct. App. 2006)).

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 44.

428. *Id.*

429. *Id.*

430. *State v. Field*, 847 P.2d 1280, 1284 (Kan. 1993).

431. *State v. Vistuba*, 840 P.2d 511, 512 (Kan. 1992).

432. *City of Salina v. Ragnoni*, 213 P.3d 441, 444 (Kan. Ct. App. 2009).

instead of an officer's own observation.<sup>433</sup> Public safety stops illustrate law enforcement officers' role as public servants independent from their duty to conduct criminal investigations; in fact, public safety stops must not be used for investigatory purposes.<sup>434</sup>

"In analyzing the validity of a stop, the risks to the public that would occur if an immediate stop is not conducted must be weighed against the right of an individual to be free from such stops."<sup>435</sup> Similarly, it is fitting that the officer's ability to enter a residence without a warrant to protect public safety is limited.<sup>436</sup> Any resulting seizure will be found unconstitutional unless there is an immediate threat to life or property that serves as an objectively reasonable basis for entry.<sup>437</sup>

#### d. Police Interrogations

Whether a police interrogation is a seizure depends on the facts of the encounter. A voluntary encounter between a citizen and law enforcement is not a seizure.<sup>438</sup> Courts determine voluntariness by looking at the totality of the circumstances and deciding "whether a reasonable person would have felt free to refuse the officer's request or terminate the encounter."<sup>439</sup> Factors courts consider include whether the citizen knew he had a right to refuse, whether the right to terminate the encounter or refuse to answer questions was communicated to the citizen, whether the officer retained the citizen's identification card or other documents, and whether the officer physically disengaged from the citizen before questioning.<sup>440</sup> Courts will consider other factors as well, including the number of officers present, whether officers displayed weapons, physical contact between the officer and the citizen, and the

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433. *See id.* at 445 (noting numerous cases involving acceptable public safety stops initiated by members of the public).

434. *State v. McCaddon*, 185 P.3d 309, 312 (Kan. Ct. App. 2008).

435. *Id.*

436. *See State v. Peterman*, 216 P.3d 710, 713 (Kan. Ct. App. 2009) (applying the public safety rationale narrowly).

437. *Id.* at 713–14 ("Here, there is no objectively reasonable basis to conclude that Deputy Treaster's entry into the residence was necessary in order to save lives or property . . . Thus, the emergency doctrine and/or the public safety rationale cannot be used to justify Treaster's entry into the home.").

438. *State v. Young*, 157 P.3d 644, 647 (Kan. Ct. App. 2007).

439. *State v. Murphy*, 293 P.3d 703, 705 (Kan. 2013) (citing *State v. Thompson*, 166 P.3d 1015, 1025 (Kan. 2007)).

440. *Id.*

tone of an officer's voice, among other enumerated acts that could indicate coercion through a show of authority.<sup>441</sup>

e. Arrests

Under section 22-2202(4) of the Kansas Statutes, an arrest involves “the taking of a person into custody in order that the person may be forthcoming to answer for the commission of crime.”<sup>442</sup> Further, section 22-2401 permits an officer to arrest an individual pursuant to a warrant or when the officer has probable cause to believe that a warrant has been issued for the person's arrest for a felony.<sup>443</sup> Without a warrant, an officer can arrest an individual upon probable cause the person has committed or is committing a felony—or a misdemeanor under certain circumstances—or when the person commits any crime in the officer's presence.<sup>444</sup> Kansas defines probable cause as “the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime.”<sup>445</sup> Courts look to the information known by the officer at the time of the arrest and the inferences that can be drawn therefrom when determining if probable cause existed to make an arrest.<sup>446</sup>

A person may be seized without being placed under arrest; in fact, an officer may restrain a citizen with handcuffs during a *Terry* stop without necessarily converting the encounter into an arrest.<sup>447</sup> The Tenth Circuit recently explored the issue in *United States v. Salas-Garcia*.<sup>448</sup>

In *Salas-Garcia*, a police informant notified officers that a drug deal involving the sale of cocaine was set to take place in a parking lot.<sup>449</sup> After meeting at a separate location, the informant, driving in one car, and Salas-Garcia, driving in another, were stopped by a police officer in

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441. *State v. Spagnola*, 289 P.3d 68, 75–76 (Kan. 2012) (citing *State v. Walker*, 251 P.3d 618, 622–23 (Kan. 2011)).

442. KAN. STAT. ANN. § 22-2202(4) (2007).

443. *Id.* § 22-2401(a)–(b).

444. *Id.* § 22-2401(c)–(d). Arrest for a misdemeanor under this statute is allowed where the arrestee or evidence could be lost if the arrest is not made immediately, the arrestee may injure herself, property, or others, or the arrestee intentionally harmed another. *Id.*

445. *Sloop v. Kan. Dep't of Revenue*, 290 P.3d 555, 559 (Kan. 2012) (quoting *State v. Abbott*, 83 P.3d 794, 797 (Kan. 2004)).

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

447. *United States v. Salas-Garcia*, 698 F.3d 1242, 1248–49 (10th Cir. 2012) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

448. *Id.*

449. *Id.* at 1246.

the parking lot designated for the deal.<sup>450</sup> The officer immediately handcuffed Salas-Garcia;<sup>451</sup> an accompanying agent told Salas-Garcia he was not under arrest, but he was subject to an investigation.<sup>452</sup>

While Salas-Garcia remained handcuffed, the officer conducted a pat down and procured Salas-Garcia's agreement to stay and cooperate.<sup>453</sup> After four to ten minutes, the officer removed Salas-Garcia's handcuffs.<sup>454</sup> After being advised of his *Miranda* rights, Salas-Garcia consented to answering more investigatory questions and eventually admitted that drugs were inside the truck.<sup>455</sup> The agent obtained a search warrant and found the drugs inside Salas-Garcia's truck, and Salas-Garcia was arrested.<sup>456</sup>

Salas-Garcia sought to suppress the evidence, arguing that the officers exceeded the scope of the *Terry* stop and "lacked probable cause to handcuff and detain him prior to questioning."<sup>457</sup> Salas-Garcia invoked "[t]he poisonous tree doctrine [which] allows a defendant to exclude evidence 'come at by exploitation' of violations of his Fourth Amendment rights."<sup>458</sup>

The court noted that while the use of handcuffs "does not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment,"<sup>459</sup> such detention "becomes an unlawful arrest when there is no longer a reasonable basis to keep a suspect in handcuffs."<sup>460</sup> In this case, Salas-Garcia was restrained in handcuffs for approximately four to ten minutes while the officers determined whether he posed a safety risk.<sup>461</sup> Under these facts, the court found the brief detention was reasonable and not an unlawful arrest.<sup>462</sup>

*Salas-Garcia* defines the limits of an investigatory detention; it states that the use of restraints, such as handcuffs, does not necessarily

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450. *Id.*

451. *Id.*

452. *Id.* at 1246–47.

453. *Id.* at 1247.

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* at 1248.

458. *Id.* (quoting *United States v. Jarvi*, 537 F.3d 1256, 1259 (10th Cir. 2008)).

459. *Id.* at 1249 (quoting *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993)).

460. *Id.* at 1252 (citing *United States v. Shareef*, 100 F.3d 1491, 1508 (10th Cir. (1996)).

461. *Id.*

462. *Id.*

constitute an arrest requiring probable cause as long as the use was reasonable under the circumstances.<sup>463</sup>

### 3. Standing to Object to a Seizure

A defendant challenging a Fourth Amendment seizure must have standing to object to the initial search.<sup>464</sup> For a person to have standing for Fourth Amendment purposes, she must have “a legitimate expectation of privacy in the invaded space.”<sup>465</sup> A defendant has a legitimate expectation of privacy where the expectation is “one that society is prepared to recognize as ‘reasonable.’”<sup>466</sup> When challenging the seizure of secondary evidence as “fruits of the poisonous tree,” the defendant must have standing to object to the seizure of the primary evidence that led to the secondary evidence being challenged.<sup>467</sup> A person who abandons property does not have standing to challenge its search or seizure.<sup>468</sup> The defendant must intend to abandon the property, and the abandonment must be the result of free will, not a “product of police misconduct.”<sup>469</sup>

#### B. Fifth and Sixth Amendment Issues

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

The Fifth Amendment states that “No 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>470</sup> The Fifth Amendment protection against self-incrimination means “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>471</sup> A violation of the protection against self-incrimination

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463. *Id.*

464. *State v. Ralston*, 257 P.3d 814, 817 (Kan. Ct. App. 2011) (citing *State v. Cruz*, 809 P.2d 1233, 1239 (Kan. Ct. App. 1991)), *review denied*, 2012 Kan. LEXIS 42 (Kan. Jan. 20, 2012).

465. *Minnesota v. Olson*, 495 U.S. 91, 95 (1990) (citing *Rakas v. Illinois*, 39 U.S. 128, 143 (1978)).

466. *Id.* at 95–96 (citing *Rakas*, 39 U.S. at 143–44 n.12).

467. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1119 (10th Cir. 2006).

468. *Ralston*, 257 P.3d at 818 (citing *State v. Grissom*, 840 P.2d 1142, 1177 (Kan. 1992)).

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

470. U.S. CONST. amend. V.

471. *State v. Johnson*, 264 P.3d 1018, 1023 (Kan. Ct. App. 2011) (quoting *Miranda v. Arizona*,

can occur only when a criminal case has commenced against the defendant.<sup>472</sup> It is not clear exactly when a criminal case is deemed to have commenced.<sup>473</sup>

There is no established right not to respond to an officer's inquiries regarding name and address during a *Terry* stop, and the right against self-incrimination during a *Terry* stop is "narrowly limited . . . to pre-arrest custodial interrogations where incriminating questions are asked."<sup>474</sup>

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."<sup>475</sup> A defendant is entitled to this right at all critical stages of a criminal proceeding, including pretrial proceedings, sentencing, and appeal.<sup>476</sup> Further, the assistance of counsel implies effective assistance of counsel, which goes beyond a "lawyer's mere presence at a proceeding" and requires a lawyer's loyalty to the client without conflicts of interest.<sup>477</sup>

## 2. *Miranda* Warnings—Additional Protection to Fifth and Sixth Amendments

### a. *Miranda v. Arizona*

Before an accused may be questioned by an officer, the individual must be warned that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."<sup>478</sup> The administration of these rights is enforced as a safeguard against

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384 U.S. 436, 444 (1966)), *review denied*, 2012 Kan. LEXIS 193 (Kan. Mar. 9, 2012).

472. *Koch v. City of Del City*, 660 F.3d 1228, 1245 (10th Cir. 2011) (citing *Chavez v. Martinez*, 538 U.S. 760 (2003) (plurality opinion)), *cert. denied*, 133 S. Ct. 211 (2012), *reh'g denied*, 133 S. Ct. 684 (2012).

473. *Id.* (citing *Chavez*, 538 U.S. at 766–67).

474. *Id.* (quoting *Pallottino v. City of Rancho*, 31 F.3d 1023, 1026 (10th Cir. 1994)).

475. U.S. CONST. amend. VI.

476. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385–86 (2012).

477. *State v. Cheatham*, 292 P.3d 318, 327 (Kan. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Gonzales*, 212 P.3d 215, 220 (Kan. 2009); *State v. Galaviz*, 291 P.3d 62, 67 (Kan. 2012); *Boldridge v. State*, 215 P.3d 585, 591 (Kan. 2009)).

478. *State v. Johnson*, 264 P.3d 1018, 1023 (Kan. Ct. App. 2011) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)), *review denied*, 2012 Kan. LEXIS 193 (Kan. Mar. 9, 2012).

intimidating, police-dominated environments in which an individual may feel coerced to make self-incriminating statements.<sup>479</sup>

b. Custodial Police Interrogations

For a defendant's *Miranda* rights to be triggered, there must be a custodial interrogation<sup>480</sup> or its "functional equivalent."<sup>481</sup> "Custody," for *Miranda* purposes, is "when the person is formally taken into custody or deprived of his or her freedom of action in a significant way."<sup>482</sup> "Interrogation" occurs "when law enforcement officers use words or actions that they should reasonably know are likely to elicit an incriminating response."<sup>483</sup>

To determine whether there is an interrogation, courts look to whether questions or statements from the police are "reasonably likely to elicit an incriminating response from the suspect."<sup>484</sup>

In determining whether an individual is in custody, courts consider the totality of the circumstances, including three nonexhaustive factors.<sup>485</sup> First, they "consider[] the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will."<sup>486</sup> Second, they consider whether "the nature of the questioning . . . is likely to create a coercive environment from which an individual would not feel free to leave."<sup>487</sup> Third, courts look to "whether police dominate[d] the encounter."<sup>488</sup> The United States Supreme Court has held that "a traffic stop or *Terry* stop does not constitute *Miranda* custody."<sup>489</sup>

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479. *Miranda*, 384 U.S. at 457–58.

480. *State v. Warrior*, 277 P.3d 1111, 1122 (Kan. 2012).

481. *State v. Hebert*, 82 P.3d 470, 481 (Kan. 2004) (citing *State v. Dudley*, 957 P.2d 445, Syl. ¶ 1 (Kan. 1998) (noting that "interrogation" includes words or actions that could elicit an incriminating response)).

482. *Johnson*, 264 P.3d at 1023 (citing *State v. Bordeaux*, 172 P.3d 78, Syl. ¶ 2 (Kan. Ct. App. 2007)).

483. *Id.* at 1023–24 (citing *Bordeaux*, 172 P.3d at Syl. ¶ 4).

484. *United States v. Benard*, 680 F.3d 1206, 1212 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

485. *United States v. Jones*, 523 F.3d 1235, 1240 (10th Cir. 2008).

486. *Id.* (quoting *United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir. 1993)) (internal quotation marks omitted).

487. *Id.* (quoting *Griffin*, 7 F.3d at 1518) (internal quotation marks omitted).

488. *Id.*

489. *Howes v. Fields*, 132 S. Ct. 1181, 1190 (2012) (quoting *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010)).

Investigatory interrogation, or pre-accusatory fact-finding, is distinguished from a custodial interrogation.<sup>490</sup> In deciding whether an interrogation is investigative or custodial, courts consider the following:

(1) the time and place of the interrogation; (2) the duration of the interrogation; (3) the number of law enforcement officers present; (4) the conduct of the officers and the person subject to the interrogation; (5) the presence or absence of actual physical restraint or its functional equivalent, such as drawn firearms or a stationed guard; (6) whether the person is being questioned as a suspect or a witness; (7) whether the person being questioned was escorted by the officers to the interrogation location or arrived under his or her own power; and (8) the result of the interrogation, for instance, whether the person was allowed to leave,<sup>491</sup> was detained further, or was arrested after the interrogation.

In considering the fifth factor, the Kansas Supreme Court has held that forces outside officers' control, such as when the person interrogated is confined to a hospital room, do not cause the person to be in custody.<sup>492</sup>

In *Howes v. Fields*, the United States Supreme Court took up the issue of whether there is custodial interrogation for *Miranda* purposes when a prisoner is "isolated from the general prison population" and "questioned about conduct outside the prison."<sup>493</sup> The Court gave three reasons why imprisonment alone is not sufficient to establish *Miranda* custody.<sup>494</sup> First, if the person questioned is already imprisoned, the shock and potentially coercive effects of being taken into custody and away from familiar surroundings are not present as was envisioned in *Miranda*.<sup>495</sup> Second, a prisoner would likely not feel pressured to speak to the police in hopes of being released once the interrogation has ceased as she knows her incarceration will continue after questioning.<sup>496</sup> Third, a prisoner would know that the questioning officers lack authority to increase or decrease the prisoner's sentence based on the prisoner's cooperation or lack thereof during interrogation, so the threat of coercive cooperation is low.<sup>497</sup>

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490. *State v. Warrior*, 277 P.3d 1111, 1122 (Kan. 2012) (citing *State v. Jaques*, 14 P.3d 409, 420 (Kan. 2000)).

491. *Id.* (citing *State v. Morton*, 186 P.3d 785, 793 (Kan. 2008)).

492. *Id.* at 1123.

493. *Howes*, 132 S. Ct. 1181, 1188–89.

494. *Id.* at 1190–91.

495. *Id.*

496. *Id.* at 1191.

497. *Id.*

The Court further reasoned that being isolated from the general prison environment does not support a finding of custodial interrogation because it is not likely to isolate the prisoner from a supportive community (e.g., family and friends) as it would a nonprisoner.<sup>498</sup> Also, it is in the prisoner's best interest to be sequestered from other inmates because the interview may expose unfavorable information about the prisoner.<sup>499</sup> Finally, the Court rejected the contention that questioning a prisoner about events that took place outside of prison is more coercive than asking about events that took place within the prison, as either could result in criminal liability or punishment.<sup>500</sup> The Court stated that *Miranda* protection need only be afforded to prisoners when a situation implicates "the concerns that powered the [*Miranda*] decision."<sup>501</sup> Prisoners' voluntary confessions made outside the scope of *Miranda*, however, "should not be suppressed."<sup>502</sup>

In *Howes*, the prisoner did not invite or consent to questioning, was not told that he could refuse questioning, "[t]he interview lasted for between five and seven hours in the evening and continued well past the hour when respondent generally went to bed; the deputies who questioned respondent were armed; and one of the deputies, according to respondent, '[u]sed a very sharp tone.'"<sup>503</sup> The Court felt these facts were insufficient to establish custody because the prisoner was told at the beginning and during the interrogation that he was free to return to his cell when he wished, "was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, . . . was offered food and water, and the door to the conference room was sometimes left open."<sup>504</sup> These conditions, the Court found, would lead a reasonable prisoner to believe she could "terminate the interview and leave."<sup>505</sup>

Based on the Court's decision in *Howes*, it is clear that the issue of "custody" for the purposes of the application of *Miranda* is still a fact-intensive question, even when prisoners are being questioned in isolation from the rest of the prison population. While some courts have

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498. *Id.* at 1191–92.

499. *Id.* The officers in *Howes* questioned the prisoner about allegations that he had sexual relations with a twelve-year-old boy. *Id.*

500. *Id.* at 1192.

501. *Id.* (quoting *Berkemen v. McCarty*, 468 U.S. 420, 440 (1984)).

502. *Id.*

503. *Id.* at 1192–93.

504. *Id.* at 1193.

505. *Id.* (quoting *Yarborough v. Alvaredo*, 541 U.S. 652, 664–65 (2004)).

previously held that such circumstances result in custody *per se*,<sup>506</sup> it now appears that courts must consider the same factors applied to nonprisoner determinations of custody, although the impacts of those factors may be less severe for someone already incarcerated.

c. Police Officers' Duties During Interrogations

i. Waiver of *Miranda* Rights

Statements made during a custodial interrogation are not admissible in court proceedings if the defendant did not knowingly and voluntarily waive her *Miranda* rights before making the statements.<sup>507</sup>

[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.<sup>508</sup>

The Tenth Circuit recently concluded that a defendant was aware of the rights he was abandoning when he waived his *Miranda* rights while medicated with morphine.<sup>509</sup> Despite police testimony that the defendant was groggy when they arrived and expert testimony that the morphine could impact the defendant's cognitive functions,<sup>510</sup> the court noted that the defendant was conscious enough to ask informed questions during the interrogation and recall the responses given by police.<sup>511</sup> Further, the court found that officers calling the defendant a "cold-blooded killer" was not coercive where the evidence, absent an explanation from the defendant, pointed to that implication.<sup>512</sup>

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506. *Id.* at 1187 (citing *Mathis v. United States*, 391 U.S. 1 (1968)).

507. *Davis v. Workman*, 695 F.3d 1060, 1068 (10th Cir. 2012).

508. *Id.* (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

509. *Id.* at 1068–70.

510. *Id.* at 1068.

511. *Id.* at 1070.

512. *Id.* at 1070–71.

ii. Public Safety Exception to the *Miranda* Warnings

Kansas courts recognize the public safety exception to *Miranda* warnings when a suspect is in custody.<sup>513</sup> For the exception to apply, the pre-*Miranda* questions must be geared toward protecting the officer or the public from immediate danger.<sup>514</sup> This includes questions regarding “weapons, sharp objects, or anything that would stick the officer” prior to a pat down.<sup>515</sup>

iii. Obligation to Protect Suspects from Making a Statement

The obligation to provide suspects protection from making a statement is satisfied by the *Miranda* warnings themselves and does not require that interrogating officers obtain an express waiver of those rights.<sup>516</sup>

iv. Voluntariness of Statements Made During Police Interrogation

Courts consider a number of factors to determine whether, under the totality of the circumstances, statements were made voluntarily.<sup>517</sup> These factors include, but are not limited to: “(1) the accused’s mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused 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>518</sup>

Section 60-460(f) of the Kansas Statutes, regarding admissibility of a defendant’s statements, is instructive in determining the fairness of officers’ tactics.<sup>519</sup> The statute states:

In a criminal proceeding as against the accused, a previous statement by the accused relative to the offense charged [is admissible], but only if the judge finds that the accused (1) when making the statement was

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513. *State v. Johnson*, 264 P.3d 1018, 1024 (Kan. Ct. App. 2011), *review denied*, 2012 Kan. LEXIS 193 (Kan. Mar. 9, 2012).

514. *Id.* (citing *New York v. Quarles*, 467 U.S. 649, 657–59 (1984)).

515. *Id.*

516. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263 (2010) (citing *North Carolina v. Butler*, 441 U.S. 369, 379 (1979); *Davis v. United States*, 512 U.S. 452, 460 (1994)).

517. *State v. Robinson*, 270 P.3d 1183, 1195 (Kan. 2012).

518. *Id.* (citing *State v. Stone*, 237 P.3d 1229, 1235–36 (Kan. 2010)).

519. *See id.* (citing KAN. STAT. ANN. § 60-460(f) (Supp. 2012)).

conscious and was capable of understanding what the accused said and did and (2) was not induced to make the statement (A) under compulsion or by infliction or threats of infliction of suffering upon the accused or another, or by prolonged interrogation under such circumstances as to render the statement involuntary or (B) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same.<sup>520</sup>

Despite subsection (2)(B), however, an accused's statement will not be inadmissible for involuntariness solely because an officer "offer[s] to convey a suspect's *cooperation* to the prosecutor."<sup>521</sup> Also, an officer's threat to impart a defendant's lack of cooperation to the prosecutor, although inconsistent with the right to remain silent, does not "render a confession involuntary per se" but is a factor to consider in the totality of the circumstances.<sup>522</sup>

Further, if an officer conveys false information to a suspect to elicit a statement, the false information alone is usually insufficient to make the statement inadmissible as a product of coercion.<sup>523</sup> This was true where officers had falsely claimed they had evidence implicating a defendant in a murder<sup>524</sup> and that the defendant's cousin had been questioned and confessed.<sup>525</sup> Courts will consider the unfairness of false information as part of the totality of the circumstances.<sup>526</sup>

The Kansas Supreme Court also recently deemed a confession involuntary under the Fifth Amendment where "investigators set the rules of engagement and then did not hesitate to break them."<sup>527</sup> After assuring the defendant that he could leave his interrogation at any time, investigators continued an increasingly accusatory line of questioning after the defendant told them he was done and wanted to go home.<sup>528</sup> The defendant eventually confessed to the rape of a young girl "just to

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520. KAN. STAT. ANN. § 60-460(f) (2005 & Supp. 2012).

521. *Robinson*, 270 P.3d at 1195.

522. *Id.* at 1196 (citing *State v. Swanigan*, 106 P.3d 39, 52 (Kan. 2005)).

523. *Swanigan*, 106 P.3d at 49-50 (citing *State v. Wakefield*, 977 P.2d 941, 951 (Kan. 1999)).

524. *Id.* (citing *State v. Wakefield*, 977 P.2d 941 (Kan. 1999)).

525. *Id.*

526. *Id.*

527. *State v. Swindler*, 294 P.3d 308, 316 (Kan. 2013).

528. *Id.*

get [it] over with so [he could] go home.”<sup>529</sup> The court found that the confession should have been suppressed under these circumstances.<sup>530</sup>

Even where *Miranda* warnings are given, statements obtained from a suspect are tainted and not admissible if obtained in a coercive environment, leaving open the possibility that the statements were made involuntarily.<sup>531</sup> In *State v. Oram*, the Kansas Court of Appeals stated that the fact that the suspect was handcuffed in the back of a police car while police interrogated her could support the contention that her statements were made involuntarily because the environment was coercive.<sup>532</sup> Further, the confession came immediately following an illegal search, with no intervening events that would show the confession was not a direct “fruit” of the illegal search.<sup>533</sup> As a result, despite administration of *Miranda* warnings, the court ruled the confession should have been suppressed.<sup>534</sup>

Where two statements are made—the first made voluntarily pre-*Miranda* warnings and the second voluntarily post-*Miranda* warnings—the second statement will not be inadmissible as tainted fruit of the poisonous tree “absent deliberately coercive or improper tactics in obtaining the initial statement.”<sup>535</sup> Where two statements are made—the first coerced, pre-*Miranda* warnings and the second made post-*Miranda* warnings—the second statement may be tainted by the first as fruit of the poisonous tree.<sup>536</sup> Several factors may be relevant in determining whether the taint has been sufficiently dissipated to make the second statement voluntary and admissible.<sup>537</sup> These factors include proximity of time of the coercive conduct to the second statement, the presence of intervening circumstances that occur between the coercive interrogation and the subsequent interrogation, and the purpose and flagrancy of the coercive interrogation.<sup>538</sup> “[T]he determination of whether the coercion of one statement taints another is . . . necessarily fact specific” and requires a “case-by-case evaluation.”<sup>539</sup>

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529. *Id.*

530. *Id.*

531. *State v. Oram*, 266 P.3d 1227, 1241 (Kan Ct. App. 2011).

532. *Id.*

533. *Id.*

534. *Id.*

535. *State v. Hebert*, 82 P.3d 470, 482 (Kan. 2004) (quoting *Oregon v. Elstad*, 470 U.S. 298, 314 (1985)).

536. *State v. Swanigan*, 106 P.3d 39, 56 (Kan. 2005).

537. *Id.*

538. *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)).

539. *Id.* at 57.

v. Interpreters

Section 75-4351(e) of the Kansas Statutes requires that an interpreter be provided for those whose primary language is not English “prior to any attempt to interrogate or take a statement from a person who is arrested for an alleged violation of a criminal law of the state or any city ordinance.”<sup>540</sup> However, an interpreter is not always required when the accused’s primary language is not English.<sup>541</sup> The court must determine whether a statement made by such person was freely and voluntarily made and whether the person interrogated understood her *Miranda* rights.<sup>542</sup> To be adequate, a *Miranda* warning given through translation requires only that the substance of the rights be conveyed.<sup>543</sup> It is recommended that a certified interpreter, not a police officer, serve as the interpreter for a custodial interrogation.<sup>544</sup>

vi. Failure to Record Interrogation

The Tenth Circuit has recognized that recording an interrogation “could improve the accuracy of evidence at trial.”<sup>545</sup> However, such recording is not constitutionally required, for example, to satisfy due process.<sup>546</sup>

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

After receiving *Miranda* warnings, a person may invoke her right to remain silent or right to counsel “in any manner, at any time prior to or during questioning.”<sup>547</sup> Once a right is invoked, questioning must cease immediately and invocation of the right must be “scrupulously honored.”<sup>548</sup> Officers may question the suspect again, however, if there is a sufficient lapse of time between interrogations, the suspect is

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540. KAN. STAT. ANN. § 75-4351(e) (1997).

541. *State v. Pham*, 136 P.3d 919, 931 (Kan. 2006) (citing *State v. Nguyen*, 833 P.2d 937 (Kan. 1992)).

542. *Id.*

543. *United States v. Hernandez*, 93 F.3d 1493, 1502 (10th Cir. 1996).

544. *United States v. Silva-Arzeta*, 602 F.3d 1208, 1216 (10th Cir. 2010).

545. *Id.* at 1217.

546. *Id.* at 1216–17.

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

548. *Id.*

*Mirandized* again, and the second interrogation is on a topic unrelated to the first.<sup>549</sup>

A suspect does not invoke her right to remain silent after *Miranda* warnings simply by refusing to have statements made to law enforcement recorded in some way, such as by video.<sup>550</sup> A suspect can, however, override her own invocation of this right by reinitiating communication with investigators.<sup>551</sup>

A suspect's invocation of the right to counsel must be unambiguous.<sup>552</sup> This determination is objective and considers whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."<sup>553</sup> Where a defendant's attorney drafts a letter stating the defendant "does not wish to speak with [a government agent] . . . without counsel," and the defendant hands the letter to the agent, she has unambiguously invoked her right to counsel.<sup>554</sup> Although the attorney drafts the letter, the defendant clearly invokes the right to counsel on her own behalf by delivering the letter, thereby "adopt[ing] its contents."<sup>555</sup>

Once a suspect invokes her right to counsel, interrogation must cease immediately and until the suspect obtains counsel, unless the suspect initiates contact with the authorities,<sup>556</sup> knowingly and intelligently waiving the right earlier invoked,<sup>557</sup> or fourteen days after invocation of the right.<sup>558</sup>

## VI. PRETRIAL ISSUES

Certain pretrial rights are guaranteed to all United States citizens by the Fifth and Sixth Amendments to the United States Constitution.<sup>559</sup> The Fifth Amendment bars the federal government and, via incorporation by the Fourteenth Amendment, state governments from (1) subjecting an individual "to be twice put in jeopardy of life or limb"; (2) compelling an

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549. *Michigan v. Mosley*, 423 U.S. 96, 106 (1975).

550. *State v. Parks*, 280 P.3d 766, 773–74 (Kan. 2012).

551. *United States v. Santistevan*, 701 F.3d 1289, 1296 (10th Cir. 2012) (citing *United States v. Alexander*, 447 F.3d 1290, 1294 (10th Cir. 2006)).

552. *Id.* at 1292 (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)).

553. *Id.* (quoting *Davis*, 512 U.S. at 459).

554. *Id.* at 1292–93. The government agent in *Santistevan* was an FBI agent. *Id.* at 1290.

555. *Id.* at 1293.

556. *Id.* (citing *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)).

557. *Id.* at 1294 (citing *Smith v. Illinois*, 469 U.S. 91, 95 (1984)).

558. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

559. *See* U.S. CONST. amends. V–VI.

individual “to be a witness against himself”; or (3) depriving an individual of her “life, liberty, or property, without due process of law.”<sup>560</sup> The Fifth Amendment also requires 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.”<sup>561</sup> Unlike the federal government, state governments are permitted to prosecute absent a grand jury and by way of an information.<sup>562</sup>

The Sixth Amendment guarantees those accused of a crime the rights to: (1) “a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”; (2) “be informed of the nature and cause of the accusation”; (3) “be confronted with the witnesses against him”; (4) “have compulsory process for obtaining witnesses in his favor”; and, (5) “have the Assistance of Counsel for his defence.”<sup>563</sup> Pursuant to the Fourteenth Amendment, states are obligated to provide their citizens all rights guaranteed under the Sixth Amendment.<sup>564</sup>

Kansas codified the rights guaranteed under the Fifth and Sixth Amendments in section 10 of the Kansas Bill of Rights.<sup>565</sup> Section 10 requires that:

In 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; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.<sup>566</sup>

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560. U.S. CONST. amend. V.

561. *Id.*

562. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

563. U.S. CONST. amend. VI.

564. *See Argersinger v. Hamlin*, 407 U.S. 25, 30–31 (1972) (the right to counsel in nonfelony cases carrying a punishment of more than six months in jail); *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (the right to trial by jury to nonpetty criminal cases); *Washington v. Texas*, 388 U.S. 14, 18–19 (1967) (the right to obtain favorable witnesses); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (the right to a speedy trial); *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (the right to an impartial jury); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (the right to confront adverse witnesses); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (the right to counsel to noncapital felonies); *In re Oliver*, 333 U.S. 257, 277–78 (1948) (the right to a public trial); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (the right to counsel in capital cases).

565. KAN. CONST. bill of rights. § 10.

566. *Id.*

Section 10 also protects a person from being required to testify against herself and being placed in double jeopardy.<sup>567</sup>

A. *Formal Charge*

1. Charging Instruments: Complaint, Information, and Indictment

Kansas statutes permit prosecution by complaint, indictment, or information.<sup>568</sup> The charging instrument must contain “a plain and concise written statement of the essential facts constituting the crime charged.”<sup>569</sup> A charging instrument is considered sufficient if it is “drawn in the language of the statute.”<sup>570</sup> An indictment or information need not contain the exact time of the commission of the crime but merely demonstrate that the crime charged falls within the statute of limitations.<sup>571</sup> The charging instrument must state for each count the “statute, rule and regulation or other provision of law which the defendant is alleged to have violated.”<sup>572</sup> Charging instrument error cannot be grounds for dismissal of the charge or reversal of a conviction unless the error prejudiced the defendant.<sup>573</sup> Federal statute requires a grand jury indictment or information be filed “within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.”<sup>574</sup>

An indictment is a “formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.”<sup>575</sup> An indictment must be issued and “signed by the presiding juror of the grand jury.”<sup>576</sup> In Kansas, only the federal government is required to charge by indictment.<sup>577</sup>

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567. *Id.*

568. KAN. STAT. ANN. § 22-3201(a) (2007).

569. *Id.* § 22-3201(b).

570. *State v. Rojas-Marceleno*, 285 P.3d 361, 369 (Kan. 2012) (citing KAN. STAT. ANN. § 22-3201(b)).

571. KAN. STAT. ANN. § 22-3201(b). It is important to note that if time is an element of the crime, the exact timing of the crime is required to be included in an information or indictment. *Id.*; *see also State v. Stafford*, 290 P.3d 562, 584 (Kan. 2012) (upholding a rape conviction where the charging document contained a range of dates on which the rape may have occurred because time is not an element of a rape charge).

572. KAN. STAT. ANN. § 22-3201(b).

573. *Id.*

574. 18 U.S.C. § 3161(b) (2006).

575. BLACK'S LAW DICTIONARY 842 (9th ed. 2009).

576. KAN. STAT. ANN. § 22-3201(b).

577. U.S. CONST. amend. V.

An information is a “formal criminal charge made by a prosecutor without a grand-jury indictment.”<sup>578</sup> An information must be signed by the county attorney general, the county attorney, or “any legally appointed deputy or assistant of either.”<sup>579</sup>

A complaint is the most common of the three charging instruments. A complaint is “a written statement under oath of the essential facts constituting a crime.”<sup>580</sup> Complaints have the lowest threshold for the filing of a charge; a complaint need only be signed by “some person with knowledge of the facts.”<sup>581</sup>

A defendant may challenge her conviction on the grounds that defects in the charging instrument bar prosecution.<sup>582</sup> A charging document must inform the defendant of the particular offense or offenses with which the defendant is charged and against which the defendant is required to defend herself.<sup>583</sup> A charging document that fails to set out the essential elements of the crime charged is insufficient, and any convictions founded on an insufficient document must be reversed for lack of jurisdiction.<sup>584</sup> A charging document that fails to properly give notice to the defendant of the essential facts of the crime charged can be cured by (1) the state, by amending the complaint or information or, (2) the defendant, by requesting a bill of particulars or filing a motion for arrest of judgment.<sup>585</sup> When a defendant fails to timely challenge the sufficiency of a charging document, the document receives a greater presumption of regularity.<sup>586</sup>

A motion for arrest of judgment—a remedy available to the defendant for up to fourteen days after disposition by the district court<sup>587</sup>—is the proper statutory remedy to challenge a charging document for failure to charge a crime.<sup>588</sup> If raised prior to appeal and within the fourteen days allowed by statute, the appellate court can

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578. BLACK’S LAW DICTIONARY 849.

579. KAN. STAT. ANN. § 22-3201(b).

580. *Id.* § 22-2202(8); *see also* FED. R. CRIM. P. 3; BLACK’S LAW DICTIONARY 323.

581. KAN. STAT. ANN. § 22-3201(b).

582. *See, e.g.*, *State v. Gonzales*, 212 P.3d 215, 225–27 (Kan. 2009) (challenging a conviction where a specific criminal charge was not included in the charging document).

583. *State v. Martens*, 54 P.3d 960, 967 (Kan. 2002) (quoting *State v. Mincey*, 963 P.2d 403, 408 (Kan. 1998)).

584. *State v. Shirley*, 89 P.3d 649, 652 (Kan. 2004).

585. *State v. Tapia*, 287 P.3d 879, 884 (Kan. 2012).

586. *Id.*

587. *See* KAN. STAT. ANN. § 22-3502 (2007 & Supp. 2012).

588. *State v. Hall*, 793 P.2d 737, 760 (Kan. 1990), *overruled on other grounds* by *Ferguson v. State*, 78 P.3d 40 (Kan. 2003).

broadly review the charging document to ensure that it includes all essential elements of the crime.<sup>589</sup> If it does not include all essential elements, the district court is stripped of jurisdiction to convict the defendant.<sup>590</sup> If a defendant waits until her appeal to challenge the charging document, the court may examine the alleged defect only for indications that it:

(a) prejudiced the defendant in the preparation of his or her defense, (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution, or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United States Constitution and the Kansas Constitution Bill of Rights § 10.<sup>591</sup>

If a defendant can show any one of these three results, she can raise a defective information claim for the first time on appeal.<sup>592</sup>

## 2. Bill of Particulars

Section 10 of the Kansas Constitution Bill of Rights protects a defendant's right to "demand the nature and cause of the accusation against him."<sup>593</sup> If the charging instrument "fails to specify the particulars of the crime charged sufficiently to enable the defendant to prepare a defense," then the court may, upon written motion of the defendant, "require the prosecuting attorney to furnish the defendant with a bill of particulars."<sup>594</sup> If the defendant's motion is granted, the State must confine the State's evidence to the particulars of the bill.<sup>595</sup>

The dual functions of a bill of particulars are: "(1) to inform the defendant of the nature of the charges and the evidence to enable him to prepare a defense, and (2) to prevent further prosecution for the same offense."<sup>596</sup> District court judges have great discretion to determine whether the prosecution must provide the defendant with a bill of

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589. *State v. Marina*, 126 P.3d 427, 429 (Kan. Ct. App. 2006), *overruled on other grounds by State v. Tapia*, 287 P.3d 879 (Kan. 2012).

590. *Id.*

591. *Hall*, 793 P.2d at 765.

592. *Id.*

593. KAN. CONST. bill of rights § 10.

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

595. *Id.*

596. *State v. Rojas-Marceleno*, 285 P.3d 361, 370 (Kan. 2012) (quoting *State v. Myatt*, 697 P.2d 836, 845 (Kan. 1985)).

particulars.<sup>597</sup> To prove a district court abused its discretion, a defendant must prove that the “charging instrument is so deficient that the defendant is not informed of the charges against which he or she must defend.”<sup>598</sup>

There is no need for a bill of particulars when charges in the information are sufficiently clarified at the preliminary hearing, “absent a showing of surprise or prejudice.”<sup>599</sup> For sex crimes against children, the prosecution is permitted to generally allege the approximate time frame of the offense.<sup>600</sup>

### 3. Changes to the Charging Instruments

#### a. Amendments and Variances

A prosecuting attorney may amend a complaint or information “at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced.”<sup>601</sup> The court utilizes a two-part test to determine “whether an amendment prior to submission of the case to the jury may be permitted: (1) Does the amendment charge an additional or different crime? [and] (2) Are the substantial rights of the defendant prejudiced by the amendment?”<sup>602</sup> In *State v. Starr*, the court held that the State’s amendment of a complaint at the close of its case charged an alternative theory for committing the same crime and did not constitute the charging of an additional or different crime.<sup>603</sup>

A trial court’s decision to allow an amendment of criminal charges is discretionary.<sup>604</sup> The test for abuse of discretion as it relates to charging instrument amendments is laid out in *State v. Bischoff*.<sup>605</sup> Under *Bischoff*, abuse can be found “only when no reasonable person would

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597. *Id.*

598. *Id.* at 369–70 (citing *State v. Webber*, 918 P.2d 609 (Kan. 1996)).

599. *Id.* at 370 (citing *Myatt*, 697 P.2d at 845).

600. *Id.*

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

602. *State v. Calderon-Aparicio*, 242 P.3d 1197, 1209 (Kan. Ct. App. 2010) (quoting *State v. Matson*, 921 P.2d 790, 793 (Kan. 1996)).

603. *State v. Starr*, 915 P.2d 72, 77 (Kan. 1996) (“Premeditated and felony murder are not separate and distinct offenses but are two separate theories under which the crime of first-degree murder may be committed.”).

604. *Calderon-Aparicio*, 242 P.3d at 1210.

605. 131 P.3d 531, 538 (Kan. 2006).

take the view adopted by the district court.”<sup>606</sup> The burden of proof is on the defendant to establish a case for abuse of discretion.<sup>607</sup>

b. Challenges

The wide discretion given to the district court to allow amendments to charging instruments in *Bischoff*,<sup>608</sup> and reiterated in *State v. Calderon-Aparico*,<sup>609</sup> has made it difficult for defendants to challenge amendments. The higher abuse of discretion standard has led appellate courts to uphold amendments to charging documents made quite late in criminal proceedings.<sup>610</sup>

In *State v. Holman*, Holman argued that “the trial court erred in granting the State’s motion to amend Count II of the second amended information after the defense rested its case.”<sup>611</sup> The original complaint charged Holman with aggravated indecent liberties with a child spanning from April 1 to April 30, 2006.<sup>612</sup> The amendment increased the time frame for the commission of the crime by eighteen days and changed the date-span of the alleged crime to April 8 to May 25, 2006.<sup>613</sup> Holman asserted that the amendment was improper because his defense depended on the timing of the alleged offenses.<sup>614</sup> Specifically, Holman, relying on evidence of his work schedule and work records, argued that he was working during the times of the alleged violations.<sup>615</sup>

The State argued that “‘it is so difficult for a child to place a precise day, date, hour, minute’ on when a particular molestation occurred.”<sup>616</sup> The facts demonstrate that the victim was only eight years old at the time of molestation and identified time with adjectives that are more closely associated with seasons than specific times (e.g., “it was cold outside”).<sup>617</sup> Additionally, the court had previously held that “time is not

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606. *Id.*

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

608. *Id.*

609. 242 P.3d at 1209–11 (citing *Bischoff*, 131 P.3d at 538).

610. *See id.* (upholding an amendment to a complaint made by the prosecution two days before trial); *State v. Holman*, 284 P.3d 251, 273 (Kan. 2012) (upholding an amendment to an information after the defense rested its case).

611. *Holman*, 284 P.3d at 272.

612. *Id.*

613. *Id.*

614. *Id.*

615. *Id.*

616. *Id.*

617. *Id.* at 273.

an indispensable ingredient” in cases involving indecent liberties with a child, and the court expects some lack of clarity as to dates when children are involved.<sup>618</sup> The court declared that the victim’s pretrial statements, preliminary hearing testimony, and direct and cross-examination testimony” put Holman on notice that the dates of the offenses were uncertain.<sup>619</sup> Accordingly, the court found no prejudice or error.<sup>620</sup>

## B. Initial Appearance

### 1. Speedy Public Trial

In Kansas, the right to a speedy trial is guaranteed by the United States Constitution, Kansas Constitution, and Kansas statute.<sup>621</sup> Section 22-3402 of the Kansas Statutes requires that any person charged with a crime and held in jail must be brought to trial within 90 days or be “discharged from further liability to be tried for the crime charged.”<sup>622</sup> For those “charged with a crime and held to answer on an appearance bond,” the State is allowed up to 180 days after arraignment to commence trial.<sup>623</sup> In either case, if the delay is caused by the defendant or continuance by the court, then the 90- or 180-day time limitation is inapplicable.<sup>624</sup> The right to a speedy trial “attaches at the formal charging or arrest, whichever occurs first.”<sup>625</sup> If, upon review, a Kansas court finds a delay in prosecution to be presumptively prejudicial,<sup>626</sup> then it must apply the *Barker v. Wingo*<sup>627</sup> test to determine if the right to a speedy trial has been violated. *Barker* requires an ad hoc balancing test that weighs the conduct of both the prosecution and the defendant in

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618. *Id.* (citing *State v. Nunn*, 768 P.2d 268, 282–83 (Kan. 1989)).

619. *Id.*

620. *Id.*

621. U.S. CONST. amend. VI; KAN. CONST. bill of rights § 10; KAN. STAT. ANN. § 22-3402 (2007 & Supp. 2012).

622. KAN. STAT. ANN. § 22-3402(a).

623. *Id.* § 22-3402(b).

624. *Id.* § 22-3402(a)–(b); *see also* *State v. Breedlove*, 286 P.3d 1123, 1129 (Kan. 2012) (noting that defendant-caused delays toll the speedy trial statute).

625. *State v. Gill*, 283 P.3d 236, 242 (Kan. Ct. App. 2012) (citing *State v. Rivera*, 83 P.3d 169, 173 (Kan. 2004)).

626. Presumptively prejudicial means “that the time period was long enough that it seems objectively unreasonable under the circumstance,” not that defendant was actually prejudiced. *State v. Craven*, No. 106,476, 2012 WL 3289999, 281 P.3d 1146 (Kan. Ct. App. Aug. 18, 2012) (unpublished table decision).

627. 407 U.S. 514 (1972).

causing the delay.<sup>628</sup> There are four nonexclusive factors courts should consider in their analysis: “[L]ength of delay, the reason for the delay, the defendant’s assertion of his right, and [actual] prejudice to the defendant.”<sup>629</sup>

The right to a speedy trial was recently addressed by the Kansas Court of Appeals in *State v. Butts*<sup>630</sup> and *State v. Gill*.<sup>631</sup> In *Butts*, the court declined to adjudicate Butts’s speedy trial complaint because it was not fully argued in the appellate brief as required by *Barker v. Wingo*.<sup>632</sup>

In *Gill*, the court also applied *Barker* to determine whether Gill’s Sixth Amendment right to a speedy trial had been violated.<sup>633</sup> The court analyzed the four factors from *Barker* and declared that Gill’s rights had not been violated because: (1) the length of delay was not excessive; (2) the fault for the delay lay with the defendant; and (3) the delay caused no prejudice toward the defendant.<sup>634</sup> The only factor in defendant’s favor was that he had asserted his right to a speedy trial, but that was not enough to tip the balance against the prosecution.<sup>635</sup>

## 2. Right to Counsel

The Sixth Amendment of the United States Constitution guarantees those accused of a crime the right to assistance of counsel for their defense.<sup>636</sup> Kansas’s right to counsel is codified in section 10 of the Kansas Bill of Rights.<sup>637</sup> The right to counsel attaches upon the filing of a charging instrument.<sup>638</sup> Upon attachment, law enforcement cannot legally question a defendant about “offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.”<sup>639</sup>

The United States Supreme Court has acknowledged that “an ‘offense’ is not necessarily limited to the four corners of a charging

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628. *Id.* at 530.

629. *Id.*

630. 269 P.3d 862 (Kan. Ct. App. 2012).

631. 283 P.3d 236 (Kan. Ct. App. 2012).

632. *Butts*, 269 P.3d at 874 (citing *Barker*, 407 U.S. at 514).

633. 283 P.3d at 242–43.

634. *Id.*

635. *Id.*

636. U.S. CONST. amend. VI.

637. KAN. CONST. bill of rights § 10.

638. *Texas v. Cobb*, 532 U.S. 162, 172 (2001).

639. *Id.* at 173.

instrument.”<sup>640</sup> In *Blockberger v. United States*, the Court held that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”<sup>641</sup>

### C. Pretrial Release and Bail

The Eighth Amendment explicitly prohibits excessive bail.<sup>642</sup> Section 9 of the Kansas Bill of Rights mirrors this prohibition and requires that “all persons . . . beailable by sufficient sureties except for capital offenses, where the proof is evident or the presumption great.”<sup>643</sup>

Kansas statute governs pretrial release and bail. Section 22-2802 of the Kansas Statutes requires that anyone charged with a crime be “ordered released pending preliminary examination or trial upon her first appearance.”<sup>644</sup> The bond amount specified by the magistrate must be “sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety.”<sup>645</sup> The magistrate can also impose additional conditions for release as defined by statute to ensure that the defendant will return to court when so instructed.<sup>646</sup> In Kansas, “the amount of bail is the province of the state magistrate judges.”<sup>647</sup> The statute permits the court to “order the person to pay for any costs associated with the supervision of the conditions of release of the appearance bond in an amount not to exceed \$15 per week of such supervision.”<sup>648</sup>

When a defendant is confined before trial and unable to make bond, she has two options: “first, file a motion to reduce or otherwise modify the bond; second, file a writ of habeas corpus.”<sup>649</sup> A defendant must promptly pursue habeas corpus remedies to preserve a bail question for appeal.<sup>650</sup> A writ of habeas corpus is “an appropriate, efficacious, and

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640. *Id.*

641. 284 U.S. 299, 304 (1932).

642. U.S. CONST. amend. VIII.

643. KAN. CONST. bill of rights § 9.

644. KAN. STAT. ANN. § 22-2802(1) (2007 & Supp. 2012).

645. *Id.*

646. *Id.*

647. *State v. Smith*, 955 P.2d 1293, 1301 (Kan. 1998).

648. KAN. STAT. ANN. § 22-2802(15).

649. *Smith*, 955 P.2d at 1299.

650. *Id.*

always available method for seeking release from unlawful custody.”<sup>651</sup> A ruling on pretrial bail is typically not reviewable after trial and conviction.<sup>652</sup>

#### *D. Preliminary Hearing and Examination*

At a preliminary hearing, the magistrate considers the evidence to decide “whether a crime has been committed, and . . . whether there is probable cause to believe the accused committed the crime.”<sup>653</sup> The hearing neither determines the accused’s guilt nor evaluates the chances of a conviction; it only determines whether the accused should be bound over for trial or discharged from custody.<sup>654</sup>

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

Every person charged with a felony in Kansas has the right to receive a preliminary hearing under section 22-2902 of the Kansas Statutes, unless the charge was issued as a result of a grand jury indictment.<sup>655</sup> An accused may waive this right, in which case the accused will be bound over to the appropriate district judge for trial.<sup>656</sup> Although the preliminary hearing “is a component of the standards and procedures for arrest and detention which ‘have been derived from the Fourth Amendment and its common-law antecedents,’”<sup>657</sup> the Kansas Supreme Court has declared that the right is statutory, not constitutional, and thus does not implicate due process concerns.<sup>658</sup>

##### 2. Juveniles’ Right to a Preliminary Hearing

Juveniles have neither a constitutional nor a statutory right to a preliminary hearing in Kansas. In 2010, the Kansas Supreme Court in *In re D.E.R.* held that section 22-2902(1) does not apply to juveniles

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651. *State v. Dunnan*, 573 P.2d 1068, 1071 (Kan. 1978).

652. *Pauley v. Gross*, 574 P.2d 234, 237 n.1 (Kan. Ct. App. 1977).

653. *State v. Washington*, 268 P.3d 475, 477 (Kan. 2012) (citing *State v. Valladarez*, 206 P.3d 879, 884 (Kan. 2009)).

654. *Valladarez*, 206 P.3d at 884 (citing *State v. Boone*, 543 P.2d 945, 948–49 (Kan. 1975)).

655. KAN. STAT. ANN. § 22-2902 (1) (2007 & Supp. 2012).

656. *Id.* § 22-2902(4).

657. *In re D.E.R.*, 225 P.3d 1187, 1192 (Kan. 2010) (quoting *Gerstein v. Pugh*, 420 U.S. 103 (1975)). “The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” *Gerstein*, 420 U.S. at 114.

658. *State v. Knighten*, 917 P.2d 1324, 1331 (Kan. 1996) (citing *State v. Sherry*, 667 P.2d 367, 375–76 (Kan. 1983)).

because a juvenile is not actually charged with a felony.<sup>659</sup> Rather, a juvenile is charged with committing an offense that “if committed by an adult would constitute the commission of a felony.”<sup>660</sup>

A district court should make a finding of probable cause to justify the pre-trial detention of a juvenile, although the finding need not occur at a hearing “accompanied by the full panoply of adversarial safeguards.”<sup>661</sup> The Kansas Supreme Court has declined to detail the procedures sufficient to protect a juvenile’s constitutional rights, although the Kansas Court of Appeals has rejected challenges to preliminary hearings where the juvenile accused had counsel present and was given the opportunity to present evidence, and where the district court found probable cause based on the affidavit of the investigating detective.<sup>662</sup>

### 3. Waiver of Right to Preliminary Hearing—Diversion Agreement

A diversion agreement must contain an explicit waiver of the right to a preliminary hearing.<sup>663</sup> In *State v. Moses*, the Kansas Court of Appeals overturned the defendant’s conviction based on a revoked diversion agreement because the agreement specifically waived this right and, thus, was invalid.<sup>664</sup> The specific waiver provision, however, will not invalidate a diversion agreement where the crime charged is a misdemeanor.<sup>665</sup> While section 22-2909(a) of the Kansas Statutes requires the waiver-of-rights language to be in all diversion agreements,<sup>666</sup> the right to a preliminary hearing is only afforded to those charged with a felony.<sup>667</sup> And where there is no right, “requiring relinquishment of it is unreasonable and absurd.”<sup>668</sup>

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659. 225 P.3d at 1191.

660. *Id.* (citing KAN. STAT. ANN. § 38-2302(n) (defining “juvenile offender”).

661. *Id.* at 1192, 1193. The full panoply of adversary safeguards includes the presence of counsel, confrontation, cross-examination, and compulsory process for witnesses. *Gerstein*, 420 U.S. at 119–20.

662. *In re H.N.*, 257 P.3d 821 (Kan. Ct. App.) (rejecting juvenile defendant’s due process argument), *review denied*, 2011 Kan. LEXIS 634 (Kan. Dec. 19, 2011).

663. KAN. STAT. ANN. § 22-2909(a) (“The 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. . . .”).

664. 173 P.3d 652, 653–55 (Kan. Ct. App. 2007).

665. *State v. Bannon*, 257 P.3d 831, 837 (Kan. Ct. App. 2011), *review denied*, No. 103,368, 2012 Kan. LEXIS 139 (Kan. Feb. 17, 2012).

666. KAN. STAT. ANN. § 22-2909(a).

667. *Id.* § 22-2902(1).

668. *Bannon*, 257 P.3d at 835.

#### 4. Procedure of a Preliminary Hearing

The preliminary hearing must occur within fourteen days after the arrest or personal appearance of the accused.<sup>669</sup> A continuance will only be granted for good cause.<sup>670</sup>

The hearing is generally conducted by a magistrate, who must determine (1) whether a felony has been committed and (2) whether there is probable cause to believe that the accused committed it.<sup>671</sup> If the magistrate finds that “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>672</sup> then she must next consider probable cause. Probable cause exists if a “person of ordinary prudence and caution [would] conscientiously entertain a reasonable belief of the accused’s guilt.”<sup>673</sup> The court must draw all inferences from the evidence in favor of the prosecution.<sup>674</sup> Upon a finding of probable cause, the magistrate must order the defendant bound over to the district court judge who has jurisdiction to try the case.<sup>675</sup> However, if the evidence does not support a finding of probable cause, the magistrate must discharge the defendant.<sup>676</sup> Any district court judge may conduct a preliminary hearing<sup>677</sup> and, upon a finding of probable cause, arraign the defendant at the conclusion of the hearing.<sup>678</sup> A district court judge may preside over both the preliminary hearing and the trial of a defendant.<sup>679</sup>

A defendant has the right to have counsel present at the hearing, but may also represent herself.<sup>680</sup> The right to counsel guaranteed by the Sixth Amendment attaches to all critical stages of a criminal prosecution,

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669. KAN. STAT. ANN. § 22-2902(2).

670. *Id.*

671. *Id.* § 22-2902(3).

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

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

674. *State v. Hernandez*, 193 P.3d 915, 917 (Kan. Ct. App. 2008) (citing *State v. Huser*, 959 P.2d 908, 910 (Kan. 1998)).

675. KAN. STAT. ANN. § 22-2902(3).

676. *Id.*

677. *Id.* § 22-2902(5).

678. *Id.* § 22-2902(7).

679. *Id.* § 22-2902(5).

680. *See State v. Jones*, 228 P.3d 394, 398 (Kan. 2010) (stating that an accused who “clearly and unequivocally expresses a wish to proceed pro se” has a right to do so).

including pretrial proceedings “where the state has committed to prosecuting the accused.”<sup>681</sup> Implicit in the right to counsel is the right of self-representation.<sup>682</sup> Thus, the right of self-representation automatically attaches to the preliminary hearing.<sup>683</sup>

At the preliminary hearing, the defendant has the right to introduce evidence and must be personally present during the examination of witnesses.<sup>684</sup> However, if the defendant is voluntarily absent after the examination has begun, the examination may continue without the defendant.<sup>685</sup> Unless the witness is a child younger than thirteen years old, each witness must be examined in the presence of the defendant, and the defendant has the right to cross-examine each witness.<sup>686</sup> If the victim of a felony is a child younger than thirteen years old, the prosecution may present videotape or other recordings of statements made by the victim, and those statements may support a finding of probable cause.<sup>687</sup>

## 5. Sufficiency of Evidence

A motion to dismiss, filed with the district court, is the only means to challenge the sufficiency of a preliminary hearing.<sup>688</sup> Appellate courts review denials of motions to dismiss de novo.<sup>689</sup>

### *E. Competency to Stand Trial*

#### 1. Determination of Competency

In Kansas, a criminal defendant is presumed competent to stand trial and therefore has the burden to prove incompetency.<sup>690</sup> A person is incompetent to stand trial in Kansas when a mental illness or defect renders that person unable to understand “the nature and purpose of the

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681. *Id.* at 399 (citing *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004); *State v. Brister*, 691 P.2d 1, 3 (Kan. 1984)).

682. *Id.* at 398.

683. *Id.*

684. KAN. STAT. ANN. § 22-2902(3).

685. *Id.*

686. *Id.*

687. *Id.*

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

689. *Id.*

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

proceedings against him” or unable to “make or assist in making” a defense.<sup>691</sup> If the trial court determines that the defendant meets either of these standards, it should find the defendant incompetent.<sup>692</sup> The standard of review on appeal is abuse of discretion,<sup>693</sup> which gives trial courts considerable leeway to assess the individual characteristics and circumstances of each defendant.

The determination of competency to stand trial differs from and is unrelated to an insanity defense.<sup>694</sup> Defense counsel, the court, or the prosecution may raise competency as an issue at any time before the sentence is pronounced.<sup>695</sup> If the judge, based on her knowledge and observations, finds that there is reason to believe the defendant is incompetent to stand trial, the proceedings against the defendant must stop and the judge must conduct a hearing.<sup>696</sup> If the judge fails to suspend prosecution until competency is determined, the district court loses jurisdiction for trial and sentencing.<sup>697</sup> The party that raises the issue of competency must prove incompetency by a preponderance of the evidence.<sup>698</sup> Where the court raises the issue, it can assign the burden of proof to the State pursuant to the State’s duty to uphold due process and fair trial rights.<sup>699</sup> Statements made by the defendant during the hearing or any examinations are inadmissible in evidence against the defendant in any criminal proceeding.<sup>700</sup>

The court determines the issue of competency, and it may impanel a six-person jury and order a psychiatric or psychological examination of the defendant to assist in making the determination.<sup>701</sup>

These procedures appear to be quite robust, given the Kansas Supreme Court’s decision in *State v. Murray*.<sup>702</sup> In that case, Murray appealed his twenty-eight-year-old convictions for aggravated robbery and felony murder.<sup>703</sup> Murray challenged the district court’s jurisdiction

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

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

693. *Hill*, 228 P.3d at 1045.

694. *In re Jones*, 612 P.2d 1211, 1219 (Kan. 1980).

695. KAN. STAT. ANN. § 22-3302(1).

696. *Id.*; *see State v. Grosehang*, 36 P.3d 231, 238 (Kan. 2001).

697. *State v. Murray*, 271 P.3d 739, 742 (Kan. 2012) (citing *State v. Davis*, 130 P.3d 69, 74 (Kan. 2006)).

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

699. *Id.*

700. KAN. STAT. ANN. § 22-3302(3)

701. *Id.* § 22-3302(3).

702. *State v. Murray*, 271 P.3d 739, 742 (Kan. 2012).

703. *Id.* at 740.

to sentence him because he did not receive a required competency hearing.<sup>704</sup> Examining the trial court record, the Kansas Supreme Court noted that Murray's counsel filed a motion to determine Murray's competency under section 22-3302 of the Kansas Statutes and that the judge found good cause for Murray to undergo examination.<sup>705</sup> However, the record did not reflect whether the trial court held a post-evaluation competency hearing.<sup>706</sup> Murray claimed there was not a hearing, and the State did not address the omission in the record.<sup>707</sup> The court remanded the case to determine the validity of Murray's factual assertion that he never received the competency hearing.<sup>708</sup> Assuming that Murray would likely take the stand to swear to the truth of his assertion, the court noted that the State would bear the burden of presenting evidence that the hearing occurred.<sup>709</sup> If the State failed to prove the hearing occurred, *State v. Davis* would require the trial court to rule that it lacked jurisdiction to sentence Murray and vacate his sentence.<sup>710</sup> Therefore, *Murray* illustrates the importance of creating a clear record of the procedures used to determine a defendant's competency.

## 2. Implications of the Determination of Competency

If the defendant is found to be competent, court proceedings against the defendant will resume.<sup>711</sup> If the defendant is found to be incompetent, the defendant must be committed to an institution for evaluation and treatment for a period not to exceed 90 days.<sup>712</sup> The institution's chief medical officer must notify the court within that time frame "whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future."<sup>713</sup> If so, the court must order the defendant to remain in an appropriate institution until the earlier of the defendant being deemed competent or six months from the date of the original commitment.<sup>714</sup> If the defendant either has no

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704. *Id.*

705. *Id.* at 740–41.

706. *Id.* at 741.

707. *Id.* at 741–42.

708. *Id.* at 742.

709. *Id.*

710. *Id.*

711. KAN. STAT. ANN. § 22-3302(4) (2007 & Supp. 2012).

712. *Id.* §§ 22-3302(5), 22-3303(1).

713. *Id.* § 22-3301(1).

714. *Id.*

probability of attaining competency or is not deemed competent within six months of the date of the original commitment, involuntary commitment proceedings must begin.<sup>715</sup>

## *F. Jurisdiction and Venue*

### 1. Jurisdiction

The Kansas Constitution provides for the establishment of district courts and provides them with “such jurisdiction in their respective districts as may be provided by law.”<sup>716</sup> Section 22-2601 of the Kansas Statutes vests the district courts with jurisdiction over criminal cases.<sup>717</sup>

### 2. Venue

The accused has the right under the Sixth Amendment to a trial by a jury in the state and district “wherein the crime shall have been committed.”<sup>718</sup> Similarly, the Kansas Bill of Rights entitles the accused to “a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed,”<sup>719</sup> and section 22-2602 requires that, “[e]xcept as otherwise provided by law, the prosecution shall be in the county where the crime was committed.”<sup>720</sup>

Venue is a jury question.<sup>721</sup> To establish venue, the prosecution may introduce facts evidence “from which the place or places of commission of the crime or crimes may be fairly and reasonably inferred.”<sup>722</sup> However, while proper venue is necessary to establish the jurisdiction of the court,<sup>723</sup> “it is not necessary to prove the jurisdictional facts of venue by specific question and answer.”<sup>724</sup> Rather, “[venue] may be established by other competent evidence showing the offense was committed within

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715. *Id.* § 22-3303(2). Once involuntary commitment proceedings have commenced, the procedure under section 22-3305 governs. *State v. Johnson*, 218 P.3d 46, 57 (Kan. 2009).

716. KAN. CONST. art. III, § 6(a), (b).

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

718. U.S. CONST. amend. VI.

719. KAN. CONST. bill of rights § 10.

720. KAN. STAT. ANN. § 22-2602.

721. *State v. Calderon-Aparicio*, 242 P.3d 1197, 1203 (Kan. Ct. App. 2010) (citing *State v. Pencek*, 585 P.2d 1052, 1054 (Kan. 1978)).

722. *Id.* at 1203–04 (citing *Pencek*, 585 P.2d at 1054).

723. *Id.* at 1204 (quoting *State v. Griffin*, 504 P.2d 150, 152 (Kan. 1972)).

724. *Id.*

the jurisdiction of the court.”<sup>725</sup> Crimes that require multiple acts to be committed can be tried in any county in which an act occurred.<sup>726</sup>

### 3. Change of Venue

A motion for a change of venue must be granted “if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county.”<sup>727</sup> When considering whether a trial court should have granted a change of venue motion, Kansas appellate courts consider a number of factors, including:

The ease with which a jury was selected, the degree to which publicity had circulated to other parts of the state where the trial could have been held, the challenges exercised by the defendant during jury selection, whether government officials contributed to the pretrial publicity, the severity of the offense, and the size of the area from which jurors were drawn.<sup>728</sup>

However, the mere fact that the case has garnered media publicity is insufficient to establish prejudice.<sup>729</sup> The defendant must show “that prejudice exists in the community, not as a matter of speculation but as a demonstrable reality.”<sup>730</sup>

The Kansas Court of Appeals case of *State v. Parker*<sup>731</sup> illustrates the heavy burden facing a defendant seeking to appeal a district court’s refusal to grant a change of venue. Parker was convicted of raping a ninety-four-year-old woman in a Salina hospital.<sup>732</sup> Before trial, Parker filed a motion to change venue, alleging that the extensive pretrial publicity in Salina was “so great as to deny him an opportunity for a fair and impartial trial.”<sup>733</sup> Parker supported his allegation with several newspaper articles covering the case and his prior criminal history, as

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725. *Id.*

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

727. *Id.* § 22-2616(1).

728. *State v. Parker*, 282 P.3d 643, 651–52 (Kan. Ct. App. 2012) (citing *State v. Higgenbotham*, 23 P.3d 874 (Kan. 2001); *State v. Krider*, 202 P.3d 722 (Kan. Ct. App. 2009)).

729. *Id.* at 652 (citing *State v. Verge*, 34 P.3d 449, 454 (Kan. 2001)).

730. *Id.* (citing *Higgenbotham*, 23 P.3d at 881; *Krider*, 202 P.3d at 727).

731. 282 P.3d 643 (Kan. Ct. App. 2012).

732. *Id.* at 648–50. Parker was also convicted of attempted rape, aggravated sexual battery, battery, and aggravated burglary. *Id.*

733. *Id.* at 648.

well as biased reader comments from the Internet.<sup>734</sup> The district court twice denied the motion.<sup>735</sup> Parker renewed his motion several times during jury selection to no avail.<sup>736</sup> Despite that forty-five percent of the potential jurors were eliminated due to potential bias reflected in their written questionnaires,<sup>737</sup> the appellate court rejected Parker's argument that the publicity was so extensive that prejudice should be presumed and the sworn statements of potential jurors promising impartiality should be disregarded.<sup>738</sup> The court distinguished the United States Supreme Court case, *Irvin v. Dowd*.<sup>739</sup> In *Irvin*, "8 of the 12 jurors selected had said that they believed the defendant was guilty, and some jurors had said that they'd need evidence to overcome that belief, that they couldn't give the defendant the benefit of the doubt, and that they had a somewhat certain fixed opinion."<sup>740</sup> In *Parker*, however, only one juror selected admitted that "he had 'probably' formed an opinion," but the juror also asserted that "he could set . . . aside [his opinion] and hear the case impartially."<sup>741</sup> The *Parker* court concluded that "[e]ven in a highly publicized criminal case, 'if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court,' that's acceptable."<sup>742</sup> Ultimately, the appellate court held that Parker failed to meet his burden to demonstrate that he could not receive a fair and impartial trial in Saline County.<sup>743</sup>

Examining the *Parker* court's application of the change of venue analysis, it appears that the Kansas Court of Appeals lends significant weight to those factors bearing on the integrity of the jury selection process.<sup>744</sup> Despite the severity of Parker's offense and the small community from which the jurors were drawn, the court focused its analysis on the jury selection process after potential jurors had passed the questionnaire screening process.<sup>745</sup> Asserting that the process went "smoothly," the appellate court emphasized that the district court did not

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734. *Id.*

735. *Id.*

736. *Id.* at 649.

737. *Id.*

738. *Id.* at 652.

739. 366 U.S. 717, 727–28 (1961).

740. *Id.* (citing *Irvin*, 366 U.S. at 728).

741. *Id.*

742. *Id.* (citing *Irvin*, 366 U.S. at 723).

743. *Id.*

744. *See id.* at 651–52 (discussing the factors that courts consider on appeal to determine whether a trial court should have granted a motion to change venue).

745. *Id.* at 652.

deny any of Parker's requests to excuse a juror for bias and that Parker neither asked to strike the one potentially biased juror for cause nor used one of his peremptory challenges to remove him.<sup>746</sup> The court did not, however, squarely address the "ease with which a jury was selected" factor that, if scrupulously examined, could have prevented jury selection from proceeding as far as it did. Even the prosecution doubted the feasibility of selecting a fair and impartial jury, so much so that it asked the court to reconsider Parker's motion to change venue.<sup>747</sup> While the appellate court dutifully considered many of the factors guiding the change of venue analysis, it may have underestimated the pervasiveness of bias against a criminal defendant accused of committing a morally reprehensible and highly publicized crime in a small community and overestimated the adequacy of the venire and voir dire as methods of keeping that bias out of the jury box.

#### 4. Timeliness of Objection to Venue

The court or either party can raise the issue of subject matter jurisdiction at any time.<sup>748</sup> A defendant cannot waive jurisdiction as a defense and, thus, need not raise the issue at trial to preserve it for appeal.<sup>749</sup> Because venue is a matter of jurisdiction,<sup>750</sup> the issue of venue may likewise be raised at any time.

#### G. Statute of Limitations

Section 21-5107 of the Kansas Statutes sets the statute of limitations for commencing a criminal prosecution.<sup>751</sup> The general rule is that all prosecutions must commence within five years of the commission of the crime.<sup>752</sup> This five-year limit is tolled under certain circumstances.<sup>753</sup> Among these circumstances are (1) when the accused is absent from the state,<sup>754</sup> (2) when the accused is concealed within the state so that she cannot be served,<sup>755</sup> or (3) when the crime itself has been concealed.<sup>756</sup>

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746. *Id.*

747. *Id.* at 648-49.

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

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

750. *See State v. Calderon-Aparicio*, 242 P.3d 1197, 1204 (Kan. Ct. App. 2010).

751. KAN. STAT. ANN. § 21-5107 (Supp. 2012).

752. *Id.* § 21-5107(d).

753. *Id.* § 21-5107(e)(1)-(6).

754. *Id.* § 21-5107(e)(1).

755. *Id.* § 21-5107(e)(2).

Section 21-5107 also defines when an offense is deemed committed,<sup>757</sup> when the time starts to run on the statute of limitations,<sup>758</sup> and when prosecution is considered commenced,<sup>759</sup> and lists several exceptions to the general five-year statute of limitations.<sup>760</sup>

The Kansas Juvenile Code does not include a provision, like section 21-5107(g), that tolls the commencement of a prosecution.<sup>761</sup> Nonetheless, the rule existed at common law and applies with equal force in juvenile criminal cases.<sup>762</sup>

## H. Joinder and Severance

### 1. Joinder of Charges

Section 22-3202 of the Kansas Statutes details when charges may be joined.<sup>763</sup> Different crimes may be charged as separate counts in the same charging document against a single defendant if they “are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.”<sup>764</sup> The charges can include felonies, misdemeanors, or both.<sup>765</sup> When the charging document joins a felony and a misdemeanor charge, they will be tried together “in the trial for which the defendant is bound over on the felony count.”<sup>766</sup> But if the defendant is not bound over on the felony, she is to be tried only for the misdemeanor and according to normal misdemeanor procedures.<sup>767</sup> The court also has the discretion to consolidate multiple charging documents

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756. *Id.* § 21-5107(e)(3).

757. *Id.* § 21-5107(f) (generally, when every element of the crime has occurred).

758. *Id.* § 21-5107(f) (the day after the offense is committed or, when certain sex crimes are involved, the day after the victim’s eighteenth birthday).

759. *Id.* § 21-5107(g) (generally, when the charging document is filed and a warrant is issued, unless the warrant is issued with unreasonable delay).

760. *Id.* § 21-5107(a)–(c) (murder, terrorism, and illegal use of weapons of mass destruction have no statute of limitations for prosecution; the statute of limitations for crimes against the Kansas public employees retirement system is ten years; and prosecutions for sexually violent offenses must commence either within each offense’s individual statute of limitation or within one year of determining the identity of the suspect with DNA testing).

761. *In re P.R.G.*, 244 P.3d 279, 286 (Kan. Ct. App. 2010).

762. *Id.*

763. KAN. STAT. ANN. § 22-3202(1)–(2) (2007).

764. *Id.* § 22-3202(1).

765. *Id.*

766. *Id.* § 22-3202(2).

767. *Id.*

against a defendant if they could have been joined in one document under section 22-3202.<sup>768</sup>

If separate charges do not meet the requirements of section 22-3202(1), the court cannot join them.<sup>769</sup> In reviewing a challenge to joinder, the appellate court must determine which of the three statutory conditions the lower court relied on.<sup>770</sup> Then, applying a de novo standard of review, the appellate court considers whether there was substantial competent evidence to support the lower court's finding of an appropriate statutory condition for joining the charges.<sup>771</sup> Finally, the appellate court reviews the lower court's discretionary decision to join the charges under an abuse of discretion standard.<sup>772</sup>

In *State v. Alcorn*, the defendant argued on appeal that her three cases did not meet the statutory requirements and should not have been consolidated.<sup>773</sup> The Kansas Court of Appeals stated that “[t]he test is whether the charges are incongruous in character as to deprive the defendant of some legal advantage at trial. . . . Generally, charges involving the same victim, the same defendant, the same jurisdiction, and similar evidence have been approved for consolidation.”<sup>774</sup> The court affirmed the district court's consolidation because all three cases took place in Reno County, involved the same victim or the victim's mother, involved violations of protective orders, and involved the same witness.<sup>775</sup>

## 2. Joinder and Severance of Codefendants

Section 22-3202 permits multiple defendants to be charged in the same charging document “if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the crime or crimes.”<sup>776</sup> However, section 22-3204 allows

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768. *Id.* § 22-3203.

769. *State v. Coburn*, 176 P.3d 203, 208 (Kan. Ct. App. 2008).

770. *Id.* at 210.

771. *Id.* at 210–11.

772. *Id.* at 211.

773. 285 P.3d 395, \*1 (Kan. Ct. App. Sept. 14, 2012) (unpublished table decision).

774. *Id.* (citing *State v. Hanks*, 694 P.2d 407 (Kan. 1985); *State v. Barksdale*, 973 P.2d 165 (Kan. 1973)).

775. *Id.*

776. KAN. STAT. ANN. § 22-3202(3) (2007) (allowing codefendants to be charged together or separately and noting that each defendant does not have to be charged in each count).

the court to order a separate trial for any defendant jointly charged when that defendant or the prosecution requests.<sup>777</sup>

In *State v. Stafford*, one of the defendants argued on appeal that his motion for a separate trial should have been granted because his interests were adverse to those of his codefendant and they had different theories of defense.<sup>778</sup> Noting that the danger of prejudice to one defendant requires severance, the Kansas Supreme Court listed the factors used to determine whether such danger exists:

(1) [T]he defendants have antagonistic defenses; (2) important evidence in favor of one of the defendants which would be admissible in a separate trial would not be allowed in a joint trial; (3) evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) a confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the others; and (5) one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.<sup>779</sup>

The court affirmed the district court's denial of Stafford's motion for a separate trial, which was based solely on the first factor above.<sup>780</sup> It found that neither defendant implicated the other and that they both presented the same defense, namely that the crimes did not take place.<sup>781</sup> The court stated that "mere speculation about antagonistic defenses does not require separate trials . . . [and] defenses will not be deemed antagonistic unless the defendants blame each other for the crime."<sup>782</sup>

### I. Plea Agreements

A defendant may plead not guilty, guilty, or *nolo contendere* to a criminal charge.<sup>783</sup> A plea of guilty is an admission of every charge and material fact alleged in the charging document.<sup>784</sup> A plea of not guilty denies every material fact alleged in the charging document;<sup>785</sup> the court

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777. *Id.* § 22-3204.

778. 290 P.3d 562, 575 (Kan. 2012).

779. *Id.* (citing *State v. Reid*, 186 P.3d 713 (Kan. 2008)).

780. *Id.*

781. *Id.* at 575–76.

782. *Id.* at 575 (citing *State v. Pham*, 675 P.2d 848, 855 (Kan. 1984)).

783. KAN. STAT. ANN. § 22-3208(1) (2007 & Supp. 2012).

784. *Id.* § 22-3209(1).

785. *Id.* § 22-3209(3).

enters a plea of not guilty by default when a defendant refuses to plead or fails to appear.<sup>786</sup> If the court permits, a defendant may enter a plea of *nolo contendere*, or no contest. Such a plea is not an admission and cannot be used against the defendant in any other action, but allows the court to find the defendant guilty on the charge to which it is pled.<sup>787</sup> The court has discretion to allow the defendant to withdraw a plea of guilty or *nolo contendere* at any time before sentencing for good cause shown.<sup>788</sup> The court may set aside a judgment and allow a defendant to withdraw a plea even after sentencing to “correct manifest injustice.”<sup>789</sup> The court can accept a plea of guilty or *nolo contendere* only if four conditions are met: (1) the defendant or her attorney enters the plea in open court;<sup>790</sup> (2) the court informs the defendant, if charged with a felony, of the consequences of the plea, including specific sentencing information and the maximum penalty which could be imposed;<sup>791</sup> (3) the court speaks with the felony defendant and determines the plea is made voluntarily and with understanding of the charges and consequences;<sup>792</sup> and (4) the court is satisfied there is a factual basis for the plea.<sup>793</sup>

Section 22-3210 of the Kansas Statutes requires that motions to set aside a conviction and withdraw a plea be brought within one year of “[t]he final order of the last appellate court in [Kansas] to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction” or the United States Supreme Court’s denial of writ of certiorari or final order from the Court if certiorari is granted.<sup>794</sup> This one-year provision was added to the statute in 2009, but failed to address pre-existing claims.<sup>795</sup> In *State v. Szczygiel*, the Kansas Supreme Court found that the district court erred in dismissing a defendant’s motion to withdraw a plea entered prior to the 2009 amendment.<sup>796</sup> Kansas precedent states that the new one-year statute of limitations did not begin to run for pre-existing claims until section 22-3210 became effective as

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786. *Id.* § 22-3209(4).

787. *Id.* §§ 22-3208(1), 22-3209(2).

788. *Id.* § 22-3210(d)(1).

789. *Id.* § 22-3210(d)(2).

790. *Id.* § 22-3210(a)(1).

791. *Id.* § 22-3210(a)(2).

792. *Id.* § 22-3210(a)(3).

793. *Id.* § 22-3210(e)(1)–(2) (Supp. 2012).

794. *State v. Szczygiel*, 279 P.3d 700, 701–02 (Kan. 2012).

795. *Id.*

796. *Id.*

amended on April 16, 2009.<sup>797</sup> The defendant filed his motion to withdraw his plea on March 10, 2010, within the grace period.<sup>798</sup> The Kansas Supreme Court affirmed the district court's denial of defendant's motion to withdraw his plea because he made the plea voluntarily and with understanding.<sup>799</sup>

In *State v. Garcia*, the defendant appealed the district court's denial of his motion to withdraw his plea of *nolo contendere*, arguing manifest injustice, citing a misunderstanding of how his prior criminal record would apply to sentencing.<sup>800</sup> Garcia argued that he could not have made his plea knowingly because he entered into the agreement without understanding that his juvenile adjudications would be included in the sentencing consideration.<sup>801</sup> On appeal to the Kansas Supreme Court, Garcia argued that the district court applied the wrong legal standard by relying on *State v. Ford*, which required the defendant to allege innocence before a plea could be withdrawn.<sup>802</sup> The Kansas Supreme Court agreed and reversed the district court's denial to withdraw Garcia's plea.<sup>803</sup> It remanded Garcia's motion to withdraw plea for another hearing under the appropriate legal standard, which does not require the defendant to allege innocence as a prerequisite.<sup>804</sup>

#### J. Arraignment

Arraignment is a proceeding in open court where the defendant is read the charging document or is otherwise told the substance of the charges against her, and is called upon to plead to those charges.<sup>805</sup> The defendant must be provided a copy of the charging document before she makes a plea.<sup>806</sup> At the arraignment, the court must ensure that the

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797. *Id.*

798. *Id.* *State v. Benavides* compared the change in section 22-3210 to the 2003 amendments to section 60-1507, which also did not provide for how the statute should apply to pre-existing claims. 263 P.3d 863, 867 (Kan. Ct. App. 2011). Following the case law that developed around the section 60-1507 amendments, the court of appeals determined that a "reasonable time period must be granted for individuals to bring preexisting claims." *Id.*

799. *Szczygiel*, 279 P.3d at 703.

800. 283 P.3d 165, 167-69 (Kan. 2012).

801. *Id.* at 168.

802. *Id.* at 171 (citing *State v. Ford*, 930 P.2d 1089 (Kan. Ct. App. 1996), *abrogated by State v. Schow*, 197 P.3d 825 (Kan. 2008)).

803. *Id.* at 172.

804. *Id.*

805. KAN. STAT. ANN. §§ 22-3205(a), 22-2202(3) (2007).

806. *Id.* § 22-3205(a).

defendant has been processed and fingerprinted.<sup>807</sup> Defendants charged with a felony in an indictment must appear in court “not later than the next required day of court after arrest upon a warrant issued on the indictment, unless a later time is requested or consented to by the defendant and approved by the court or unless continued by order of the court.”<sup>808</sup> If charged with a felony by information, arraignment must be held not later than one day after the defendant is bound over for trial, absent the consent of the defendant or an order of the court.<sup>809</sup>

### *K. Discovery*

Section 22-3212b of the Kansas Statutes defines the scope of discovery in criminal proceedings. The prosecution is required to permit the defendant to inspect and copy relevant information that the prosecution either knows or should know through the exercise of due diligence, including (1) the defendant’s written or recorded statements or confessions; (2) physical or mental examination reports and scientific test results made in connection with the case; (3) defendant’s grand jury or inquisition testimony; and (4) defendant’s oral confession and a list of any witnesses of the confession.<sup>810</sup>

The prosecution must also allow “the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof . . . which are material to the case when requested.”<sup>811</sup> The prosecution does not have to turn over its own reports, memos, or internal government documents, or statements made by witnesses other than the defendant.<sup>812</sup> If the defense seeks discovery from the prosecution, the defense also must allow the prosecution to inspect or copy its scientific or medical reports, books, papers, documents, tangible objects, and the like which the defendant intends to produce and which are material to the case, including a summary of any intended expert witness testimony detailing the qualifications, opinions, and bases for the expert’s opinions.<sup>813</sup>

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807. *Id.* § 22-3205(c).

808. *Id.* § 22-3206(a)(2).

809. *Id.* § 22-3206(a)(1).

810. *Id.* § 22-3212b(a) (Supp. 2012).

811. *Id.* § 22-3212b(b)(1).

812. *Id.* § 22-3212b.

813. *Id.* § 22-3212b(c).

The court directs the sequence and time when such disclosures must be made,<sup>814</sup> but the parties must cooperate in discovery to avoid unnecessary court intervention.<sup>815</sup> Discovery must be completed within twenty-one days of arraignment or within a reasonable time at the court's discretion.<sup>816</sup> Upon motion, the court may define the scope of discovery if there is a sufficient showing that restriction, expansion, or deferral is appropriate.<sup>817</sup> If, at any time before or during trial, additional material is discovered that is subject to discovery, the discovering party must promptly notify opposing counsel or the court.<sup>818</sup> Failure to do so can result in exclusion of the evidence at trial.<sup>819</sup>

Discovery in Kansas and elsewhere has due process implications, as discussed by the United States Supreme Court in *Brady v. Maryland*.<sup>820</sup> Prosecutors have an affirmative "duty to disclose evidence favorable to the accused" if it is material to the issue of guilt or punishment.<sup>821</sup> This is true for both exculpatory evidence and impeachment evidence.<sup>822</sup> Where law enforcement has knowledge of the existence of such evidence, courts will impute that knowledge on the State.<sup>823</sup> To prove a *Brady* violation, a defendant must show that (1) the evidence not disclosed was favorable to her due to its exculpatory or impeaching nature; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) the evidence is "material so as to establish prejudice."<sup>824</sup> Evidence is material if there is a reasonable probability that its disclosure to defendant would have changed the outcome of the case.<sup>825</sup> The existence of a *Brady* violation is reviewed de novo on appeal, but denial of a motion for a new trial based on that violation only receives abuse of discretion review.<sup>826</sup> The previous "harmless error" analysis no longer applies.<sup>827</sup>

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814. *Id.* § 22-3212b(e).

815. *Id.* § 22-3212b(f).

816. *Id.* § 22-3212b(h).

817. *Id.* § 22-3212b(g).

818. *Id.* § 22-3212b(i).

819. *Id.*

820. 373 U.S. 83, 87 (1963).

821. *State v. Warrior*, 277 P.3d 1111, 1127 (Kan. 2012) (citing *Brady*, 373 U.S. at 87).

822. *Id.* (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)).

823. *Id.*

824. *Id.* at 1127–28 (citing *Wilkins v. State*, 190 P.3d 957, 972 (Kan. 2008); *Haddock v. State*, 146 P.3d 187, 211 (Kan. 2006)).

825. *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

826. *Id.* at 1129.

827. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

*L. Pretrial Motions and Pretrial Conference*

## 1. Motions in Limine

Section 22-3208 of the Kansas Statutes allows for pre-trial motions to obtain a ruling on any defense or objection.<sup>828</sup> A motion in limine may be filed requesting the court “prohibit[] inadmissible evidence, prejudicial statements, and improper questions by counsel” to prevent prejudice during trial.<sup>829</sup> A trial court should grant a motion in limine where the material or evidence at issue would be inadmissible under the rules of evidence and would likely to prejudice the jury.<sup>830</sup> District court rulings on such motions are reviewable by appellate courts to determine the relevance of the evidence at issue and whether the lower court abused its discretion.<sup>831</sup>

A successful motion in limine results in a temporary protective order.<sup>832</sup> The order is, however, subject to change during the trial.<sup>833</sup> If the subject of an order in limine is nonetheless offered into evidence during trial, the offer must be made out of the presence of the jury.<sup>834</sup> A conviction will not be reversed where an order in limine was violated by prosecutorial misconduct unless the court finds that the violation resulted in prejudice to the defendant.<sup>835</sup>

In *State v. Parks*, the defendant argued on appeal that he was entitled to reversal of his conviction because a State witness violated an order in limine by referring to marijuana seized from the defendant’s home.<sup>836</sup> The court cited the established rule in Kansas that “[w]here the trial court sustains an objection and admonishes the jury to disregard the objectionable testimony, reversal is not required unless the remarks are so prejudicial as to be incurable.”<sup>837</sup> The court was not compelled to reverse because the violation of the order was brief and vague, possession of marijuana was minor compared to the crimes charged, and

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828. KAN. STAT. ANN. § 22-3208(2) (2007 & Supp. 2012).

829. *State v. Crume*, 22 P.3d 1057, 1067 (Kan. 2001) (citing *State v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979)).

830. *Id.*

831. *State v. Kline*, 283 P.3d 194, 199 (Kan. 2012).

832. *State v. Breedlove*, 286 P.3d 1123, 1133 (Kan. 2012) (citing *State v. Bloom*, 44 P.3d 305, 314 (Kan. 2002)).

833. *Id.*

834. *Bloom*, 44 P.3d at 314.

835. *Breedlove*, 286 P.3d at 1133.

836. 280 P.3d 766, 795 (Kan. 2012).

837. *Id.* at 796 (citing *State v. Angelo*, 197 P.3d 337, 353 (Kan. 2008)).

there was strong evidence against the defendant. The court found that the district court judge acted appropriately and “the curative oral instruction he gave was precisely that requested by the defense.”<sup>838</sup>

## 2. Motions to Suppress

Prior to trial, defendants may move to have illegally seized evidence suppressed and returned.<sup>839</sup> The motion must be in writing and state facts showing how the search and seizure were unlawful.<sup>840</sup> The prosecution has the burden of proving the search and seizure were lawful.<sup>841</sup> The court has discretion to hear motions to suppress at trial as well.<sup>842</sup> If the motion is granted, the illegally seized evidence is returned to its owner at the conclusion of the case or, if the defendant is not bound over for trial, within 90 days after the order is granted, unless it is “otherwise subject to lawful detention.”<sup>843</sup>

Prior to the preliminary examination or trial, a defendant may also make a motion to suppress any confession or admission.<sup>844</sup> The motion must be made in writing and allege the grounds for inadmissibility.<sup>845</sup> If the alleged grounds would cause the admission or confession to be inadmissible, a hearing must be held,<sup>846</sup> the prosecution has the burden of proving the admissibility of the evidence.<sup>847</sup> The judge determines the admissibility of the confession or admission, and, if allowed, the confession and the circumstances surrounding it may be submitted to the jury on the issue of credibility.<sup>848</sup> The court has discretion to allow motions to suppress confessions or admissions during preliminary examinations or at trial.<sup>849</sup>

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838. *Id.*

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

840. *Id.* § 22-3216(2).

841. *Id.*

842. *Id.* § 22-3216(3).

843. *Id.* § 22-3216(2), (4).

844. *Id.* § 22-3215(1).

845. *Id.* § 22-3215(2).

846. *Id.* § 22-3215(3).

847. *Id.* § 22-3215(4).

848. *Id.* § 22-3215(5).

849. *Id.* § 22-3215(6).

### 3. Pretrial Conference

The goal of section 22-3217 of the Kansas Statutes is to “consider such matters as will promote a fair and expeditious trial” through pretrial conferences.<sup>850</sup> Such conferences may take place at any time after charges are filed.<sup>851</sup> A pretrial conference may be held on the motion of any party or the court’s own motion.<sup>852</sup> The court subsequently files a memorandum on the matters agreed upon at the conference.<sup>853</sup> No admissions from pretrial conferences can be used against a defendant unless they are in writing and signed by the defendant and her attorney.<sup>854</sup>

## V. TRIAL RIGHTS

### A. *Fifth Amendment Issues*

The Fifth Amendment states, “[N]o 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>855</sup> These constitutional rights protect the defendant from double jeopardy, provide a safeguard against self-incrimination, and guarantee due process of law in criminal proceedings.<sup>856</sup> Section 10 of the Kansas Constitution’s Bill of Rights closely mirrors those rights found in the Fifth Amendment.<sup>857</sup> Within section 10 is the guarantee that “[n]o person shall be a witness against himself, or be twice put in jeopardy for the same offense.”<sup>858</sup> Additionally, the right against self-incrimination is codified at section 22-3102 of the Kansas Statutes.<sup>859</sup>

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850. *Id.* § 22-3217.

851. *Id.*

852. *Id.*

853. *Id.*

854. *Id.*

855. U.S. CONST. amend. V.

856. *Id.*

857. KAN. CONST. bill of rights § 10.

858. *Id.*

859. *See* KAN. STAT. ANN. § 22-3102(a) (2007 & Supp. 2012) (“No person called as a witness at an inquisition shall be required to make any statement which will incriminate such person.”).

## 1. Self-Incrimination

The Fifth Amendment protection against self-incrimination is broadly construed “to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.”<sup>860</sup> The Kansas Supreme Court recently found that the results from a court-ordered mental examination qualified as self-incriminating evidence and that a criminal defendant had not waived his Fifth Amendment rights and privileges in the results of that examination.<sup>861</sup>

In *State v. Cheever*, the defendant was accused of killing a police officer and shooting four others after ingesting methamphetamine.<sup>862</sup> The defendant asserted a voluntary intoxication defense, claiming the methamphetamine rendered him unable to premeditate the killings, as required to be guilty of murder and attempted murder.<sup>863</sup> The judge ordered a psychiatric examination of the defendant because the defendant might raise a mental condition defense.<sup>864</sup> Although the defendant never raised the defense or presented evidence of a mental disease or defect at trial, the State used the results from the examination to impeach the defendant’s testimony, based on prior inconsistent statements, and rebut the defendant’s expert witness, who testified about the effects of methamphetamine in support of the voluntary intoxication defense.<sup>865</sup> The Kansas Supreme Court found that, if a defendant files a notice of intent to assert a mental disease or defect defense, a court may order a psychiatric evaluation; however, consent to this examination does not waive Fifth Amendment self-incrimination rights, and the State is prohibited from using the examination unless the defendant in fact presents evidence of a mental disease or defect at trial.<sup>866</sup> Voluntary intoxication is not evidence of a mental defect or disease, as defined by section 22-3220, and therefore the court erred in allowing the State to use the mental examination to rebut the defendant’s expert witness.<sup>867</sup>

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860. *Maness v. Meyers*, 419 U.S. 449, 461 (1975) (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72–73 (1920)).

861. *State v. Cheever*, 284 P.3d 1007, 1022–23 (Kan. 2012), *cert. granted*, 133 S. Ct. 1460 (Feb. 25, 2013) (mem.).

862. *Id.* at 1013–14.

863. *Id.* at 1015.

864. *Id.*

865. *Id.* at 1015–17.

866. *Id.* at 1023.

867. *Id.* at 1023–24.

The Supreme Court has granted the State's petition for a writ of certiorari in this case.<sup>868</sup> The Court will address the alleged Fifth Amendment violation caused by using the mental examination to rebut the defendant's expert testimony regarding voluntary intoxication, but will not address whether a Fifth Amendment violation occurred when the exam was used to impeach the defendant's testimony.<sup>869</sup> *Cheever* is certainly a case practitioners should keep an eye on. The Supreme Court's decision will likely impact the scope of Fifth Amendment protections for defendants as well as influence evidentiary choices when presenting a defense.

The Kansas Supreme Court limited its *Cheever* ruling in *State v. Schaeffer*.<sup>870</sup> The court found the use of psychological examination results did not violate the defendant's Fifth Amendment self-incrimination right in this case because the examination was considered by a judge rather than a jury, and for sentencing purposes only, not to determine guilt.<sup>871</sup>

The Kansas Supreme Court also extended Fifth Amendment protections for criminal defendants in suppression hearings. In *State v. Boggness*, the defendant, convicted of first-degree murder, appealed the district court's ruling that he had waived his Fifth Amendment privilege when he voluntarily testified at a *Jackson v. Denno* hearing regarding the admissibility of his confession to police.<sup>872</sup> The defendant, who testified on direct examination in the suppression hearing about the voluntariness of his confession, was cross-examined by the State regarding the truth of the statements he made to police during custodial interrogation.<sup>873</sup> Defense counsel objected to the State's questioning as outside the scope of direct examination, and the trial court ruled the cross-examination was appropriate and admissible at trial should the defendant take the stand.<sup>874</sup> After defense counsel objected to the ruling, the defendant asserted his Fifth Amendment privilege and refused to testify further.<sup>875</sup> The trial court ruled that he had waived his Fifth Amendment privilege when he

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868. *Kansas v. Cheever*, 133 S. Ct. 1460 (Feb. 25, 2013) (mem.).

869. *Id.*; see also Petition for Writ of Certiorari, *Cheever*, 133 S. Ct. 1460 (Nov. 13, 2007) (No. 12-609), 2012 WL 5837599, at i.

870. *State v. Schaeffer*, 286 P.3d 889, 893 (Kan. 2012).

871. *Id.*

872. *State v. Boggness*, 268 P.3d 481, 487 (Kan. 2012).

873. *Id.* at 486–87.

874. *Id.* at 487.

875. *Id.*

voluntarily testified on direct examination, held him in contempt, and struck all of his testimony.<sup>876</sup>

The Kansas Supreme Court noted that they had not “weighed in directly” on the issue of whether a defendant waives his Fifth Amendment privileges by testifying at a *Jackson v. Denno* hearing.<sup>877</sup> The court noted that the purpose of a *Jackson v. Denno* hearing is to determine whether a defendant’s statement or confession was voluntary, and the truthfulness of the statement made is not at issue.<sup>878</sup> Therefore, the defendant may take the stand to address only whether his statement or confession was voluntarily made, and the defendant does not waive her privilege against self-incrimination by doing so.<sup>879</sup>

The right against self-incrimination also applies when an individual is called as a witness at trial. The Kansas Supreme Court recently found that potential witnesses may be advised of their Fifth Amendment rights without infringing on the criminal defendant’s trial rights. In *State v. Suter*,<sup>880</sup> the defendant was convicted of driving under the influence and driving while suspended.<sup>881</sup> During his trial he called his friend Bailey as a witness to testify that Bailey, rather than the defendant, was the driver.<sup>882</sup> After Bailey had been subpoenaed, the district judge noted that his testimony might be self-incriminating.<sup>883</sup> The judge then had a “lengthy colloquy” with Bailey about his Fifth Amendment rights, ultimately appointing counsel to represent him.<sup>884</sup> Against his counsel’s advice, Bailey decided to testify, prompting the judge to say, “If you choose to testify, I want to make a very clear record that this is a knowing, intelligent, free, and voluntary waiver of your right against self-incrimination,” and to further state that the district attorney could file charges against Bailey based on the transcript of the proceedings.<sup>885</sup> The following day at trial, Bailey invoked his Fifth Amendment privileges and refused to testify.<sup>886</sup>

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876. *Id.*

877. *Id.*

878. *Id.* at 488.

879. *Id.*

880. 290 P.3d 620 (Kan. 2012).

881. *Id.* at 622.

882. *Id.* at 623.

883. *Id.*

884. *Id.*

885. *Id.*

886. *Id.* at 624.

On appeal, the defendant alleged that the trial court violated his due process rights and his constitutional right to present a defense by advising Bailey of his rights against self-incrimination.<sup>887</sup> Relying on *Webb v. Texas*,<sup>888</sup> a case in which the United States Supreme Court found that a judge's comments to a witness regarding his Fifth Amendment rights were excessive and precluded the witness from making a voluntary choice whether to testify, the defendant argued that the district court judge's comments were analogous to those made by the judge in *Webb* and therefore infringed on his constitutional rights.<sup>889</sup> The Kansas Supreme Court found that the judge's comments to Bailey were distinguishable from the comments in *Webb* because Bailey reaffirmed that he intended to take the stand, even after the judge and counsel's advice.<sup>890</sup> The court found that although the judge's advice may have been excessive, it did not exert the requisite duress sufficient to "drive [Bailey] from the witness stand."<sup>891</sup>

The Tenth Circuit also held in *United States v. Pablo* in 2012 that potential witnesses retain rights against self-incrimination and may be advised of those rights.<sup>892</sup> In *Pablo*, a defendant appealed his conviction of rape and kidnapping on the basis that his right to present a defense was interfered with when the prosecution and district court dissuaded two of his potential witnesses from testifying.<sup>893</sup> The Tenth Circuit found that the right to present a defense may, in this situation, "bow to accommodate other legitimate interests in the criminal trial process," including a potential witness's rights against self-incrimination.<sup>894</sup> And while the prosecution or court cannot substantially interfere with a witness's decision to testify, each retains the right to advise the witness of the implications of self-incriminating testimony.<sup>895</sup> Relying on *United States v. Serrano*,<sup>896</sup> the court determined that interference is substantial when "the government actor *actively discourages* a witness from testifying through threats of prosecution, intimidation, or coercive

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887. *Id.* at 625.

888. 409 U.S. 95 (1972).

889. *Suter*, 290 P.3d at 625–26.

890. *Id.* at 627.

891. *Id.*

892. 696 F.3d 1280 (2012).

893. *Id.* at 1295.

894. *Id.*

895. *Id.* at 1296.

896. 406 F.3d 1208 (10th Cir. 2005).

badgering.”<sup>897</sup> The court concluded that the prosecution did not actively discourage the witnesses from testifying and instead merely raised the concern that the witnesses’ testimony could be self-incriminating.<sup>898</sup> Additionally, upon learning of the prosecution’s concerns, the district court simply informed the witnesses of their Fifth Amendment rights and appointed independent counsel for each.<sup>899</sup> The Tenth Circuit found no evidence of coercion or bad faith, and determined that neither the prosecution nor district court interfered with the defendant’s right to present a defense.<sup>900</sup>

## 2. Immunity

The privilege against self-incrimination, specifically regarding grants of immunity in the context of inquisitions in criminal cases, is codified in Kansas.<sup>901</sup> An individual providing inquisition testimony may receive a grant of transactional immunity or a grant of use and derivative use immunity.<sup>902</sup> Transactional immunity prohibits the State from prosecuting that individual, while use and derivative use immunity do not protect the individual from prosecution, but rather prevent the State from using the inquisition testimony against that individual at trial.<sup>903</sup> For the State to use any evidence related to inquisition testimony against the individual who has been granted immunity, it must prove “by clear and convincing evidence that the evidence was obtained independently and from a collateral source.”<sup>904</sup>

In *State v. Carapezza*, the Kansas Supreme Court affirmed a district court’s decision to order that prosecutors, certain law enforcement officers, and witnesses exposed to the defendant’s immunized statements be precluded from further participation in the case.<sup>905</sup> The defendant’s first trial for felony murder had been remanded for a new trial due to evidentiary issues regarding expert testimony.<sup>906</sup> Prior to the second trial, the defendant filed a motion to suppress evidence derived from

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897. *Pablo*, 696 F.3d at 1296 (quoting *Serrano*, 406 F.3d at 1216).

898. *Id.*

899. *Id.*

900. *Id.* at 1297.

901. KAN. STAT. ANN. § 22-3102 (2007 & Supp. 2012) (“No person called as a witness at an inquisition shall be required to make any statement which will incriminate such person.”).

902. *Id.*

903. *Id.* at § 22-3102(b).

904. *Id.* at § 22-3102(b)(2).

905. 272 P.3d 10, 12 (Kan. 2012).

906. *Id.* at 13.

defendant's immunized testimony.<sup>907</sup> The district court found that the State failed to meet its burden of proving by clear and convincing evidence that the excluded evidence was not derived from the defendant's immunized statements and therefore excluded numerous witnesses and participants.<sup>908</sup> Although the State argued that simply being exposed to immunized testimony does not violate the Fifth Amendment, the Kansas Supreme Court agreed with the district court's conclusion that "[t]he fact that other witnesses were exposed to immunized testimony may suffice to taint their testimony. . . . neither the State's attorney or the law enforcement officers who were exposed to the defendants' statements could rationally be expected to avoid utilizing the defendants' statements . . . ."<sup>909</sup>

### 3. Double Jeopardy and Multiplicity

The Double Jeopardy Clause in the Fifth Amendment protects criminal defendants from being tried twice for the same offense.<sup>910</sup> The clause prohibits repeated attempts at prosecution so that a defendant will not be subject to the "embarrassment, expense and ordeal," of multiple prosecutions and avoids "compelling [a defendant] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."<sup>911</sup> The clause also "unequivocally prohibits a second trial following an acquittal."<sup>912</sup>

In *Blueford v. Arkansas*, the United States Supreme Court reaffirmed that a criminal defendant can be re-tried after a jury becomes deadlocked on a verdict and the judge orders a mistrial.<sup>913</sup> The defendant in *Blueford* was charged with capital murder in the death of a one-year-old boy.<sup>914</sup> The jury was instructed to consider three lesser included offenses including first-degree murder, manslaughter, and negligent homicide.<sup>915</sup> The prosecution commented on the instructions, ensuring the jurors knew that before they could consider lesser offenses, they must find the

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907. *Id.*

908. *Id.* at 15.

909. *Id.* at 17.

910. *Blueford v. Arkansas*, 132 S. Ct. 2044, 2048 (2012).

911. *Id.* at 2050 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977)).

912. *Id.* at 2053 (Sotomayor, Ginsburg, & Kagan, JJ., dissenting) (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978)).

913. *Id.* at 2053.

914. *Id.* at 2048 (majority opinion) (the State had, however, waived the death penalty).

915. *Id.*

defendant not guilty of capital murder.<sup>916</sup> After a few hours of deliberation, the jury foreperson reported that the jury was “hopelessly deadlocked,” and the judge asked the foreperson to disclose the jury’s votes on each of the instructed offenses.<sup>917</sup> The foreperson revealed that the jury had voted unanimously that the defendant was not guilty of both capital murder and first-degree murder, but was deadlocked on the manslaughter charge.<sup>918</sup> After another thirty minutes of deliberation, the jury still had not reached a verdict and the court declared a mistrial.<sup>919</sup> The State then sought to retry the defendant on all counts, prompting the defendant to move to dismiss the capital and first-degree murder charges on double jeopardy grounds.<sup>920</sup> The Court found that the foreperson’s report of the vote count was not a final resolution and did not result in acquittals for capital murder and first-degree murder because the deliberations had not concluded.<sup>921</sup> The Court found that although the jurors had been instructed to consider the more severe charges before moving on to the lesser offenses, they were never told they could not revisit the charges they had voted on, and there was nothing preventing them from changing their minds about the capital or first-degree murder charges after the initial vote.<sup>922</sup> The Court distinguished this case from *Green v. United States*<sup>923</sup> and *Price v. Georgia*,<sup>924</sup> which held the Double Jeopardy Clause is violated when defendants were convicted of lesser offenses and later re-tried for the greater offenses.<sup>925</sup> Instead, the Court here found that the defendant had been neither convicted nor acquitted of any offense and therefore the State was not barred from retrying him on the same offenses.<sup>926</sup>

Section 10 of the Kansas Constitution’s Bill of Rights and section 21-5110 of the Kansas Statutes also provide protection against double jeopardy.<sup>927</sup> The double jeopardy protections codified in Kansas are essentially the same as those in the Fifth Amendment.<sup>928</sup> The Double

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916. *Id.*

917. *Id.* at 2049.

918. *Id.*

919. *Id.*

920. *Id.*

921. *Id.* at 2050.

922. *Id.* at 2051.

923. 335 U.S. 184 (1957).

924. 398 U.S. 323 (1970).

925. *Blueford*, 132 S. Ct. at 2051–52.

926. *Id.* at 2053.

927. KAN. CONST. bill of rights § 10; KAN. STAT. ANN. § 21-5110 (Supp. 2012).

928. *See State v. Schoonover*, 133 P.3d 48, 66 (Kan. 2006) (citing *State v. Cady*, 867 P.2d 270

Jeopardy Clause further protects a defendant from multiplicitous convictions.<sup>929</sup> Multiplicity is the “charging of a single offense in several counts of a complaint or information.”<sup>930</sup> To resolve a multiplicity claim, the court must look to (1) “whether the convictions arose from the same conduct,” and, if so, then (2) whether, by statutory definition, the conduct constitutes one offense or two.<sup>931</sup> Under the first prong of the analysis, the court must determine if conduct comprises a single, unitary act by looking at: “(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.”<sup>932</sup>

In *State v. Sprung*, the defendant sought reversal of one of his two convictions for aggravated indecent liberties with a child, claiming they were multiplicitous.<sup>933</sup> The defendant was convicted under a Kansas statute that prohibited lewd fondling or touching of a child.<sup>934</sup> The Kansas Supreme Court found that the statute only created a single unit of prosecution and the defendant’s act of touching the victim and the subsequent act of forcing her to touch him constituted only one act under the statute.<sup>935</sup> The court applied the unit-of-prosecution test from *Schoonover*,<sup>936</sup> which required it to interpret the “statutory definition of the crime to determine the allowable unit of prosecution intended by the legislature,” because “[o]nly one conviction can result from each allowable unit of prosecution.”<sup>937</sup> The court determined that if the legislature had intended to create more than one unit of prosecution under the statute, it would have separated the act of touching the child and the act of forcing the child to touch the offender into two subsections.<sup>938</sup> The Kansas Supreme Court relied on *Sprung* to make a

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(Kan. 1994)).

929. *State v. Coleman*, 277 P.3d 435, 443 (Kan. Ct. App. 2012), *review denied*, No. 10-105199-A, 2013 Kan. LEXIS 277 (Kan. Mar. 28, 2013).

930. *State v. Sprung*, 277 P.3d 1100, 1105 (Kan. 2012); *State v. Holman*, 284 P.3d 251, 273 (Kan. 2012).

931. *See State v. Sprung*, 277 P.3d at 1105 (citing *Schoonover*, 133 P.3d at 79).

932. *Holman*, 284 P.3d at 274 (quoting *Schoonover*, 133 P.3d at 79).

933. 277 P.3d at 1105.

934. *Id.* at 1106.

935. *Id.* at 1107.

936. *State v. Schoonover*, a landmark Kansas Supreme Court case, established the test for determining whether a conviction is multiplicitous. 133 P.3d 48 (Kan. 2006).

937. *Id.* at 1106 (citing *Schoonover*, 133 P.3d at 79–80).

938. *Id.* at 1107.

similar ruling about multiplicitous convictions in *State v. Holman*.<sup>939</sup> *Sprung* and *Holman* provide insight as to what constitutes one unit of prosecution. Going forward, courts may consider two convictions multiplicitous if a single statute includes two or more acts in one subsection with a phrase such as “any of the following acts,” rather than separating the acts into multiple subsections.

### B. Sixth Amendment Issues

The Sixth Amendment guarantees that in all criminal prosecutions, “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State.”<sup>940</sup> The Sixth Amendment also grants criminal defendants the right to confront witnesses against them and to present a defense.<sup>941</sup> The right to counsel derives from the Sixth Amendment as well.<sup>942</sup>

#### 1. Speedy and Public Trial

##### a. Speedy Trial

The federal Speedy Trial Act codified a criminal defendant’s right to a speedy trial.<sup>943</sup> The trial must begin by the later of 70 days of the filing of the information or indictment or 70 days of the defendant’s first appearance in court.<sup>944</sup> The Act contains numerous events that toll the time limit, including during the time between the filing and disposition of a pretrial motion,<sup>945</sup> and during any delay while the court considers a plea agreement.<sup>946</sup> The Tenth Circuit recently held that a notice of change of plea counts as a pretrial motion and therefore tolls the 70-day clock.<sup>947</sup> If a delay does not fit within an enumerated exclusion, the court may still toll the clock after an explicit finding that the justice served by doing so outweighs the interests of the defendant and the public in a speedy trial.<sup>948</sup> The burden is on the defendant to spot violations of the Act and

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939. 284 P.3d 251 (Kan. 2012).

940. U.S. CONST. amend. VI.

941. *Id.*

942. *Id.*

943. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2006).

944. *Id.* § 3161(c)(1).

945. *Id.* § 3161(h)(1)(D).

946. *Id.* § 3161(h)(1)(G).

947. *United States v. Loughrin*, No. 11-4158, 2013 WL 856577, at \*7 (10th Cir. Mar. 8, 2013).

948. U.S.C. § 3161(h)(7)(A).

explicitly raise them in a pretrial motion to dismiss.<sup>949</sup> An appellate court will only address specific violations raised in the lower court, not entirely different violations discovered after the fact.<sup>950</sup>

The right to a speedy trial is also codified in section 22-3402 of the Kansas Statutes, which states that if any person charged with a crime and held in jail is not brought to trial within 90 days after arraignment, that person shall be discharged from liability for the crime charged.<sup>951</sup> While this statutory right attaches at arraignment, the constitutional speedy trial right attaches when “one becomes accused and the criminal prosecution begins, usually by an indictment, an information, or an arrest, whichever first occurs.”<sup>952</sup>

In *State v. Gill* the Kansas Court of Appeals decided that, when the State dismisses a charge and later files another one, the constitutional speedy trial clock starts over for the second case if (1) the State dismissed the first case because of necessity, or (2) the charge in the second case is not identical to the charge in the first.<sup>953</sup> If neither of those conditions are met, “the dismissal of the first case will be construed as merely tolling the constitutional speedy trial clock.”<sup>954</sup> In other words, the time period before the dismissal of the first charge and the time period after the second identical charge was filed will count on the constitutional speedy trial clock if the first charge was not dismissed because of necessity.

#### b. Public Trial

The right to a public trial guaranteed under the Sixth Amendment is implicated when the court prohibits members of the public from the courtroom.<sup>955</sup> A courtroom can be closed to the public when the court has an “overriding interest” at stake, so long as the closure does not exceed the scope of that interest.<sup>956</sup> The court must consider reasonable alternatives to a closed trial, such as removing disruptive spectators.<sup>957</sup>

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949. *Loughrin*, at \*8.

950. *Id.*

951. KAN. STAT. ANN. § 22-3402(a) (2007 & Supp. 2012).

952. *State v. Taylor*, 594 P.2d 262, 266 (Kan. Ct. App. 1979).

953. 283 P.3d 236, 245–46 (Kan. Ct. App. 2012)

954. *Id.* at 246.

955. *State v. Barnes*, 251 P.3d 96, 98 (Kan. Ct. App. 2011).

956. *Id.* at 101.

957. *Id.*

In *United States v. Addison*, the Tenth Circuit considered an alleged Sixth Amendment violation based on the exclusion of a former codefendant from the courtroom.<sup>958</sup> Such “partial [courtroom] closure” is not a constitutional violation if there is a substantial reason for the closure.<sup>959</sup> Noting that the lower court provided several reasons for the partial closure, the Tenth Circuit singled out witness intimidation as sufficient on its own to substantiate the judge’s decision.<sup>960</sup> And, as the lower court limited the closure to the one person causing the intimidation, the scope was properly limited, and the defendant was not at risk of receiving an unfair trial.<sup>961</sup>

## 2. Trial by Jury

### a. Generally

A criminal defendant has the right to a unanimous jury verdict under section 22-3421 of the Kansas Statutes.<sup>962</sup> In cases where a single crime can be committed in more than one way, a jury must unanimously agree the defendant is guilty of the crime charged, but unanimity is not required as to the means of the commission so long as each option is supported by substantial evidence.<sup>963</sup> Failure to instruct a jury as to an element of a charged offense violates a defendant’s right to a jury trial.<sup>964</sup> This is rarely a harmless error, but it can be in the limited case where the element was “uncontested and supported by overwhelming evidence.”<sup>965</sup> Finally, the court is not required to prove the defendant’s prior convictions to the jury before using prior convictions to impose enhanced sentencing.<sup>966</sup>

All felony cases are to be tried by a jury, unless the defendant and the prosecutor waive this right and the court consents.<sup>967</sup> Generally, a jury must have twelve members.<sup>968</sup> Misdemeanor cases are bench trials by default unless the defendant requests a jury trial within seven days

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958. *United States v. Addison*, 708 F.3d 1181, (10th Cir. 2013).

959. *Id.* at 1187.

960. *Id.*

961. *Id.*

962. KAN. STAT. ANN. § 22-3421 (2007); *State v. Swindler*, 294 P.3d 308, 313 (Kan. 2013).

963. *Swindler*, 294 P.3d at 313 (citing *State v. Timley*, 875 P.2d 242, 246 (Kan. 1994)).

964. *State v. Hargrove*, 293 P.3d 787, 794 (Kan. Ct. App. 2013).

965. *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 17 (1999)).

966. *State v. Benson*, 287 P.3d 927, 932 (Kan. 2012).

967. KAN. STAT. ANN. § 22-3403(1).

968. *Id.* § 22-3403(2).

after the notice of trial assignment is received.<sup>969</sup> If so requested, the jury will have six members.<sup>970</sup>

In *United States v. Turrietta*, the Tenth Circuit, reviewing for plain error, decided a jury that had not been sworn in did not deprive the defendant of his right to a jury trial.<sup>971</sup> This was a matter of first impression in federal courts, as no binding authority stated whether a jury trial requires a sworn jury.<sup>972</sup> In *Turrietta*, the defense counsel consciously chose to remain silent regarding the court's failure to swear in the jurors until a verdict was reached and the jury released, claiming "a duty to his client to exploit the opportunity fortuitously presented."<sup>973</sup> Because the defendant failed to make a contemporaneous objection, the Tenth Circuit was limited to reviewing this issue for plain error.<sup>974</sup> Ultimately, the court affirmed the defendant's conviction because "any threat to the integrity of the proceedings was mitigated by an otherwise fair and procedurally rigorous trial;" the jury was sworn in during voir dire and was otherwise reminded of their duty to try the case in accordance with the law several times throughout the trial.<sup>975</sup>

#### b. Impartial Jury

The right to a jury trial guarantees that a criminal defendant receives a fair trial with a panel of impartial and indifferent jurors.<sup>976</sup> Any failure to provide a criminal defendant with a fair trial is a blatant violation of due process.<sup>977</sup> The jury must base their verdict on the evidence presented at trial rather than the "heinousness of the crime charged, the apparent guilt of the offender, or the station in life in which the offender occupies," but the Due Process Clause does not require that a juror be "totally ignorant of the facts and issues involved in the case."<sup>978</sup>

The district court has broad discretion to excuse a juror for possible bias.<sup>979</sup> The decision rests on whether the juror can remain impartial.<sup>980</sup>

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969. *Id.* § 22-3404(1).

970. *Id.* § 22-3404(2).

971. 696 F.3d 972, 985 (10th Cir. 2012).

972. *Id.* at 981.

973. *Id.* at 975–76.

974. *Id.* at 976.

975. *Id.* at 985.

976. *State v. Cady*, 811 P.2d 1130, 1139 (Kan. 1991).

977. *Id.*

978. *Id.*

979. *United States v. Gordon*, Nos. 10-5146, 11-5009, 2013 WL 1010540, at \*23 (10th Cir. Mar. 15, 2013).

Appellate courts are very deferential to the trial court judge's decision to dismiss or not dismiss a juror.<sup>981</sup> A conviction will not be reversed based on a trial court error in such a decision unless the error resulted in prejudice to the defendant.<sup>982</sup>

A conviction also will not be reversed, nor a new trial ordered, where bias develops within the jury due to the internal jury process itself.<sup>983</sup> By its nature, a jury will develop partiality as a case proceeds and the jury deliberates.<sup>984</sup> The purpose of voir dire is to minimize such like-mindedness.<sup>985</sup> Under the Federal Rules of Evidence, the court cannot inquire into such internal processes.<sup>986</sup> Thus, when a case and the subsequent jury deliberations result in jury bias—such as where jurors decide that gang-related crime is a “cancer” on our society—the court will leave the jury's verdict undisturbed, absent evidence of some external influence on the jury.<sup>987</sup>

The United States Supreme Court recently denied a petition for writ of certiorari in a case where a prosecutor made racially charged statements in front of the jury.<sup>988</sup> The Supreme Court refused to hear the matter because the petitioner waived his arguments by failing to raise them in the lower court, but Justice Sotomayor was so offended by the facts of this case she wrote a statement as part of the Court's denial.<sup>989</sup> In it, she states that racially biased arguments made by prosecutors violate both a defendant's right to equal protection of the laws and her right to an impartial jury.<sup>990</sup> At trial, the prosecutor mentioned the presence of African-Americans—including the defendant—Hispanics, and a bag of money, and then said, “[A] light bulb doesn't go off in your head and say, This is a drug deal?”<sup>991</sup> Sotomayor notes that such statements are calculated to arouse the deepest prejudices of jurors and have a dangerous potential to turn a jury against a potentially innocent

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980. *Id.* at \*22 (citing *United States v. Brothers*, 438 F.3d 1068, 1071 (10th Cir. 2006)).

981. *Id.* at \*23.

982. *Id.*

983. *United States v. Cornelius*, 696 F.3d 1307, 1325–26 (10th Cir. 2012).

984. *Id.* at 1326.

985. *Id.*

986. *Id.* at 1325 (citing FED. R. EVID. 606(b)).

987. *Id.*

988. *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013).

989. *Id.* at 1136–37.

990. *Id.* at 1137.

991. *Id.* at 1136.

defendant.<sup>992</sup> While this statement is not precedential, it serves as a valuable reminder that racial prejudice in the courtroom is intolerable and never serves as a tool of justice.

c. Waiver of Right to Trial by Jury

Upon agreement of the court and the State, a defendant can waive her right to a jury trial.<sup>993</sup> Analyzing whether the right to a trial by jury was validly waived is a case-by-case inquiry that asks if the waiver “was voluntarily made by a defendant who knew and understood what he or she was doing.”<sup>994</sup> A silent record cannot be grounds for assuming a defendant waived this right.<sup>995</sup>

Kansas follows the American Bar Association’s standard for accepting waiver of a jury trial, requiring (1) the court first instruct the defendant of the right to a jury trial, and then (2) the defendant must “personally waive this right in writing or in open court for the record.”<sup>996</sup> In instructing the defendant of the right to a jury, courts are not required to “inform the defendant of his right to a unanimous verdict.”<sup>997</sup> Thus, waiver can be made knowingly and voluntarily when the court does not expressly state the defendant’s right to a unanimous verdict.<sup>998</sup>

In *State v. Johnson*, the Kansas Court of Appeals decided that, when waiving his right to a jury trial in writing, the defendant’s written waiver was ineffective because it did not indicate that the court advised the defendant of his right to a jury trial.<sup>999</sup> Here, the parties submitted a stipulation of facts, which included “[B]eing duly advised of those rights by counsel, Defendant freely, voluntarily, and intelligently agrees to waive said rights and to enter into this stipulation of fact for the Court to determine Defendant’s guilt or innocence by a bench trial.”<sup>1000</sup> The court noted that the waiver contained no mention of the court’s apprising the defendant of his right.<sup>1001</sup> Also, the court denied the State’s assertion that

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992. *Id.* at 1137 (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946)).

993. KAN. STAT. ANN. § 22-3403(1) (2007).

994. *State v. Beaman*, 286 P.3d 876, 882 (Kan. 2012).

995. *State v. Duncan*, 242 P.3d 1271, 1278 (Kan. Ct. App. 2010).

996. *Beaman*, 286 P.3d at 882 (quoting *State v. Irving*, 533 P.2d 1225, 1228 (Kan. 1975)).

997. *Id.* at 884 (citing *Irving*, 533 P.3d at 1228).

998. *Id.*

999. 264 P.3d 1018, 1026–27 (Kan. Ct. App. 2011), *review denied*, 2012 Kan. LEXIS 193 (Kan. Mar. 9, 2012).

1000. *Id.* at 1026.

1001. *Id.* at 1027.

the defendant should be procedurally barred from appealing his right to a jury trial even though his written waiver very nearly invited the error of the court.<sup>1002</sup> Because “there [was] no indication in the record that the district court advised Johnson of his jury trial rights,” Johnson’s waiver was not effective and constituted a reversible error.<sup>1003</sup>

Likewise, in *State v. Frye*, the Kansas Supreme Court reversed and remanded a bench trial’s verdict because the defendant’s written waiver was invalid.<sup>1004</sup> In *Frye*, the alleged waiver was undated.<sup>1005</sup> This was important because Frye was initially charged with a misdemeanor, but the complaint was later amended to charge a felony.<sup>1006</sup> Had the waiver been filed when Frye was charged only with the misdemeanor—when no constitutional right to a jury trial existed—the waiver would be ineffective.<sup>1007</sup> The court also took issue with the fact that the author of the handwritten waiver was uncertain and that the waiver did not include a statement that the court had advised the defendant of his right to a jury trial.<sup>1008</sup> The court ultimately ruled the alleged waiver to be ineffective because it did not clear the “*Irving* hurdle,” which requires the court to advise the defendant of her right to a jury trial.<sup>1009</sup>

#### d. Jury Selection

##### i. Generally

In Kansas, procedures for criminal trial jury selections are codified by statute.<sup>1010</sup> Prospective jurors are examined by the defense and prosecution, and the court may conduct its own examination or, if necessary, limit the parties’ examinations.<sup>1011</sup> Grounds for challenging a prospective juror for cause, listed in subsection (2) of section 22-3410 of the Kansas Statutes, are tried by the court, and “each party may challenge

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1002. *Id.*

1003. *Id.*

1004. 277 P.3d 1091, 1098 (Kan. 2012).

1005. *Id.* at 1097.

1006. *Id.* at 1094.

1007. *Id.* at 1097.

1008. *Id.* at 1097–98.

1009. *Id.* at 1098.

1010. KAN. STAT. ANN. §§ 22-3407 to -3413 (2007 & Supp. 2012).

1011. *Id.* § 22-3408(3).

any prospective juror for cause.”<sup>1012</sup> Parties may challenge for cause until the jury is sworn to try the case.<sup>1013</sup>

In a capital case, a venire member may not be excused for cause simply because she has a general objection to the death penalty, because doing so would ultimately impanel a “jury uncommonly willing to condemn a man to die.”<sup>1014</sup> In capital cases, the standard of dismissal for cause is “whether the juror’s views would prevent or substantially impair the performance of his duties as a juror.”<sup>1015</sup> The Tenth Circuit refused to extend this rule to a juror dismissed in a capital case because she disagreed with the legal definition of mental retardation when compared to the clinical definition.<sup>1016</sup> The court found her dismissal was not in error because her views on capital punishment were not the cause of her dismissal.<sup>1017</sup> So long as the jury that is ultimately impaneled is impartial, an improper dismissal for cause is not a constitutional error.<sup>1018</sup>

## ii. Peremptory Challenges

Peremptory challenges are used by both sides of a case to exclude jurors without statutory cause to reduce “extremes of partiality” and to find a jury fit to objectively hear the case.<sup>1019</sup> Each defendant is allowed a certain number of peremptory challenges based on the severity of the charge.<sup>1020</sup> The prosecution is allowed the “same number of peremptory challenges as all defendants.”<sup>1021</sup> Once all challenges have been made or waived, the jury is sworn in to try the case.<sup>1022</sup>

A peremptory challenge may be opposed by a *Batson* challenge if the defendant believes a potential juror was stricken on account of her race.<sup>1023</sup> This rule has been extended to “other groups receiving heightened protection under the Fourteenth Amendment,” including

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1012. *Id.* § 22-3410(1).

1013. *Id.* § 22-3410(3).

1014. *Hooks v. Workman*, 689 F.3d 1148, 1175 (10th Cir. 2012) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521–22 (1968)).

1015. *Id.* (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

1016. *Id.* at 1174–76.

1017. *Id.* at 1176.

1018. *Id.*

1019. *United States v. Prince*, 647 F.3d 1257, 1263 (10th Cir.), *cert. denied*, 132 S. Ct. 860 (Dec. 12, 2011).

1020. KAN. STAT. ANN. § 22-3412(a)(2)(A)–(D) (2007 & Supp. 2012).

1021. *Id.* § 22-3412(a)(2)(F).

1022. *Id.* § 22-3412(b).

1023. *Prince*, 647 F.3d at 1261.

where discrimination is based on sex and religious affiliation.<sup>1024</sup> *Batson* challenges involve a three-step inquiry: (1) the defendant must make a prima facie showing that the peremptory strike was based on race; (2) the striking party may then state a facially valid, race-neutral reason for the strike; and (3) the court decides whether the defendant proved discrimination.<sup>1025</sup> In the third step, the court can consider many factors, including whether the striking party removed nonminority potential jurors for the same reasons as the stricken minority ones, or if other members of the stricken minority are present on the jury.<sup>1026</sup>

In *State v. McCullough*, the Kansas Supreme Court upheld the district court's denial of a *Batson* challenge because the State acted consistently with its race-neutral explanation.<sup>1027</sup> Here, the defendant raised a *Batson* challenge because the only African-American male potential juror was struck by the prosecution despite the fact that his answers during examination were similar to other jurors.<sup>1028</sup> The State said that the potential juror was struck because he was tardy during voir dire and had a family member that was a victim of a violent crime.<sup>1029</sup> The State specified that it had struck another white juror for tardiness and had been prepared to strike another white juror for involvement in violent crime, but the defense had already done so.<sup>1030</sup> The trial court denied the *Batson* challenge but did not expressly state whether the defendant had carried the burden of "establishing purposeful discrimination in the third step."<sup>1031</sup> The Kansas Supreme Court upheld the denial, ruling that step three of a *Batson* challenge—the court deciding whether the defendant met her burden—can be "implied from [the court's] consideration of the prosecutor's reasons and the defendant's rebuttal of them before overruling the *Batson* challenge."<sup>1032</sup>

#### e. Jury Misconduct

A new trial may be granted for jury misconduct if the defendant can show misconduct occurred and that it "substantially prejudiced the

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1024. *Id.* at 1262.

1025. *State v. McCullough*, 270 P.3d 1142, 1160 (Kan. 2012).

1026. *Id.* at 1162 (citing *State v. Angelo*, 197 P.3d 337, 347 (Kan. 2008)).

1027. *Id.*

1028. *Id.* at 1160.

1029. *Id.* at 1161.

1030. *Id.*

1031. *Id.*

1032. *Id.*

defendant's right to a fair trial."<sup>1033</sup> In *State v. Miller*, the Kansas Court of Appeals decided that a juror's failure to disclose a family relation to a law enforcement officer during voir dire did not warrant a new trial.<sup>1034</sup> The court noted that neither party asked the potential juror about relatives serving as law enforcement officers, and "[p]otential jurors are not required to be mind readers."<sup>1035</sup> Therefore, the court ruled that the defendant's motion for a new trial was properly denied.<sup>1036</sup>

Further, a defendant waives her ability to request a new trial due to juror misconduct if, prior to the rendering of the verdict, the defendant knew of the misconduct but failed to raise an objection.<sup>1037</sup> This rule allows the court to remedy the problem or declare a mistrial and keep the defendant from gambling on a favorable verdict, only to raise the issue when the verdict goes against her.<sup>1038</sup> The Kansas Supreme Court recently held a claim of juror misconduct to be precluded when raised only after the verdict.<sup>1039</sup> The defendant had had an altercation with one of the jurors at the pharmacy where the juror worked at some point before trial.<sup>1040</sup> Given the juror's presence throughout the trial and personal information disclosed by the juror during voir dire, the court found the defendant had "multiple opportunities to recognize and alert the court" to his previous adverse experience with the juror.<sup>1041</sup>

### 3. Right to Confront Witnesses—Cross-Examination

A criminal defendant's right to confront witnesses is protected by the Sixth Amendment Confrontation Clause of the Constitution, which states, "[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."<sup>1042</sup> In Kansas, this right is also guaranteed by similar language in the Kansas Constitution's Bill of Rights.<sup>1043</sup>

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1033. *Bell v. State*, 263 P.3d 840, 843 (Kan. Ct. App. 2011), *review denied*, No. 10-104429-A, 2012 Kan. LEXIS 471 (Kan. Sept. 14, 2012).

1034. *State v. Miller*, No. 107,286, 2012 WL 6762006, at \*3–4 (Kan. Ct. App. Dec. 28, 2012) (unpublished table decision).

1035. *Id.* at \*3 (quoting *State v. Hopkins*, 896 P.2d 373, 375 (Kan. 1995)).

1036. *Id.* at \*4.

1037. *State v. Astorga*, 284 P.3d 279, 288 (Kan. 2012) (citing *State v. Saleem*, 977 P.2d 921, 929 (Kan. 1999); *State v. Buggs*, 547 P.2d 720, 725 (Kan. 1976)).

1038. *Id.* (citing *Buggs*, 547 P.2d at 725).

1039. *Id.*

1040. *Id.*

1041. *Id.*

1042. U.S. CONST. amend. VI.

1043. KAN. CONST. bill of rights § 10 (stating that "the accused shall be allowed . . . to meet the witness face to face.").

Additionally, section 22-3405(1) of the Kansas Statutes states that a felony defendant “shall be present . . . at every stage of the trial.”<sup>1044</sup> Kansas courts have interpreted this statute as the functional and analytical twin of the Sixth Amendment Confrontation Clause.<sup>1045</sup> A defendant’s right to confront witnesses against her is primarily a procedural tool to ensure the reliability of evidence.<sup>1046</sup> However, in *Crawford v. Washington*, the United States Supreme Court decided that the Confrontation Clause applies only to “testimonial” evidence, as nontestimonial evidence is governed by hearsay rules of evidence.<sup>1047</sup> Thus, testimonial statements of an unavailable witness are inadmissible against a defendant if the defense has not been afforded the opportunity to cross-examine the witness.<sup>1048</sup>

The Court has largely declined to explicitly define “testimonial,” but instead has relied on its colloquial meaning, to be determined on a case-by-case basis.<sup>1049</sup> In *Michigan v. Bryant*, the Court further refined its approach by using an objective inquiry into the primary purpose of an interrogation for the purpose of categorizing the testimonial nature of statements.<sup>1050</sup> Simply put, an encounter is testimonial if a reasonable participant would consider the primary purpose of the parties’ statements and actions was to produce a record for trial.<sup>1051</sup>

In *State v. Jones*, the Kansas Supreme Court decided a sexual assault nurse examiner’s (SANE) testimony discussing lab reports of a minor rape victim was nontestimonial and therefore not subject to the Confrontation Clause.<sup>1052</sup> The SANE’s testimony regarded the presence of alcohol and marijuana in the victim’s tests and was admitted under the business records exception to the hearsay rule.<sup>1053</sup> The court noted that medical records made for treatment are generally nontestimonial and that the laboratory results at issue “were generated primarily for medical

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1044. KAN. STAT. ANN. § 22-3405(1) (2007).

1045. *State v. Wells*, 290 P.3d 590, 608 (Kan. 2012) (citing *State v. Engelhardt*, 119 P.3d 1148, 1158 (Kan. 2005)).

1046. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (explaining that the Confrontation Clause’s purpose is to ensure that evidence is reliable).

1047. *Id.* at 68.

1048. *See id.* at 68–69.

1049. *See Davis v. Washington*, 547 U.S. 813, 822 (2006) (discussing how to categorize statements as either testimonial or nontestimonial).

1050. 131 S. Ct. 1143, 1156 (2011).

1051. *See id.* at 1155 (describing statements that do not have the primary purpose of creating a record for trial as “non-testimonial,” and therefore “not within the scope of the [Confrontation] Clause.”).

1052. *State v. Jones*, 288 P.3d 140, 145 (Kan. 2012).

1053. *Id.* at 143.

treatment purposes.”<sup>1054</sup> In determining the primary purpose of the lab reports, the court found the medical tests had dual purposes—medical treatment and law enforcement—because the SANE was probing for evidence of sexual assault as well as evidence of overall health.<sup>1055</sup> Ultimately, the court was “handcuffed” to the Court of Appeals’ ruling because the lower court did not make additional findings about the SANE’s inquiries and purposes, and the tests were thus ruled nontestimonial.<sup>1056</sup>

The Tenth Circuit recently addressed the Confrontation Clause in the context of a defendant’s right to cross-examine a witness. In *United States v. Woodard*, the Tenth Circuit analyzed whether by precluding a part of the defendant’s cross-examination of a witness the trial court violated the defendant’s right to confrontation.<sup>1057</sup> The test is whether “a reasonable jury might have received a significantly different impression of [the witness’s] credibility had [the defendant] been permitted to pursue his proposed line of cross-examination.”<sup>1058</sup> Whether the precluded testimony would have changed the verdict is not determinative of whether there has been a Confrontation Clause violation.<sup>1059</sup> Here, the court agreed with the defendant that a violation had occurred.<sup>1060</sup> Upon such a finding, the court must reverse the lower court’s verdict unless the State can show, beyond a reasonable doubt, that the error was harmless.<sup>1061</sup>

There is one exception to the Confrontation Clause: “a defendant who obtains the absence of a witness by his or her own wrongdoing forfeits his or her constitutional right to confrontation.”<sup>1062</sup> The defendant must not only have caused the witness’s unavailability, but must have done so with the intent of preventing the witness’s testimony.<sup>1063</sup> The State must show this by a preponderance of the evidence.<sup>1064</sup>

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1054. *Id.* at 145.

1055. *Id.*

1056. *Id.*

1057. *United States v. Woodard*, 699 F.3d 1188, 1192 (10th Cir. 2012).

1058. *Id.* at 1197 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

1059. *Id.*

1060. *Id.* at 1198.

1061. *Id.* (citing *Van Arsdall*, 475 U.S. at 681).

1062. *State v. Belone*, 285 P.3d 378, 382 (Kan. 2012) (citing *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

1063. *Id.*

1064. *Id.*

Although there is a presumption against waiver of constitutional rights, a defendant may waive her confrontation rights if there is an “intentional relinquishment or abandonment of a known right or privilege.”<sup>1065</sup> Additionally, the decision to waive must be a “legitimate . . . or . . . prudent trial strategy,” and the accused must not oppose the decision.<sup>1066</sup>

#### 4. Right to Testify and Present a Defense

A criminal defendant has the “right to testify on his own behalf under the United States Constitution’s Fourteenth Amendment Due Process Clause, the Six Amendment Compulsory Process Clause, and the Fifth Amendment’s guarantee against compelled testimony.”<sup>1067</sup> Additionally, a defendant may remain silent at trial,<sup>1068</sup> and the court has no duty to inform the defendant of her right to testify.<sup>1069</sup> Therefore, a defendant may waive the right to testify without affirmatively stating her intention to do so.<sup>1070</sup>

As a fundamental constitutional right, a criminal defendant must be “afforded a ‘meaningful opportunity to present a complete defense.’”<sup>1071</sup> In *State v. Jones*, the defendant asserted a violation of this right because defense counsel claimed the court forbade him from stating in closing arguments that the defendant did not know the violated statute—prohibiting the sale of pirated DVDs—existed in Kansas.<sup>1072</sup> The prosecution countered that the defendant’s knowledge of the law was irrelevant and the court agreed; however, the court did not expressly restrict defense counsel’s substantive arguments in any way.<sup>1073</sup> The Kansas Court of Appeals found that the defendant’s rights were not violated because it appeared that defense counsel was not expressly

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1065. *United States v. Lopez-Medina*, 596 F.3d 716, 731 (10th Cir. 2010) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

1066. *United States v. Aplt*, 354 F.3d 1269, 1282 (10th Cir. 2004) (quoting *United States v. Stephens*, 609 F.2d 230, 232–33 (5th Cir. 1980)) (internal quotation marks omitted).

1067. *State v. Anderson*, 276 P.3d 200, 211 (Kan. 2012) (citing *Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987)).

1068. *See* U.S. CONST. amend. V (stating that a criminal defendant cannot be compelled to be a witness against herself).

1069. *See Anderson*, 276 P.3d at 212 (holding that the defendant’s right to testify was “not violated when the trial court did not ask Anderson whether he understood his right to testify”).

1070. *Id.*

1071. *State v. Jones*, 276 P.3d 804, 810 (Kan. Ct. App. 2012) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

1072. *Id.* at 809.

1073. *Id.*

limited in closing arguments, and, even if such limitations were imposed, any error was harmless.<sup>1074</sup>

## 5. Right to Counsel

### a. Invocation of the Right to Counsel

Criminal defendants have a constitutional right to counsel under the Sixth Amendment.<sup>1075</sup> The Sixth Amendment right to counsel vests at the “critical stages of the proceedings.”<sup>1076</sup> Critical stages are defined as those amounting to “trial-like confrontations” during which counsel would help the accused in meeting her adversary.<sup>1077</sup> In Kansas, a defendant charged with a felony has a statutory right to counsel “at every stage of the proceedings,”<sup>1078</sup> and counsel will be appointed for a defendant who is financially unable to obtain counsel.<sup>1079</sup> It is the duty of the court to inform the defendant of the right to counsel.<sup>1080</sup>

A person charged with a misdemeanor also has the right to counsel “if the sentence to be imposed upon conviction includes a term of imprisonment, even if the jail time is suspended or conditioned upon a term of probation.”<sup>1081</sup> Previously, the right to counsel did not attach to a defendant charged with a misdemeanor until “actual imprisonment.”<sup>1082</sup>

### b. Personal Choice

Defendants have the opportunity to obtain counsel of their “own choosing.”<sup>1083</sup> The defendant also must be given a reasonable opportunity to consult with counsel of her own choosing upon asking to

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1074. *Id.* at 810–11.

1075. U.S. CONST. amend. VI.

1076. *State v. Hamon*, 262 P.3d 1061, 1069 (Kan. Ct. App. 2011) (citing *State v. Andrews*, 614 P.2d 447, 455 (Kan. 1980)), *review denied*, No. 09-101954, 2012 Kan. LEXIS 363 (Kan. May 21, 2012).

1077. *Id.*; *see also* *United States v. Ash*, 413 U.S. 300, 312 (1973) (discussing circumstances where counsel benefits the accused most, including in pleading intelligently, “shelter[ing] him from the overreaching of the prosecution,” and examining witnesses).

1078. KAN. STAT. ANN. § 22-4503(a) (2007).

1079. *Id.* § 22-4503(b).

1080. *Id.*

1081. *State v. Neal*, 258 P.3d 365, 371 (Kan. 2011) (quoting *State v. Youngblood*, 206 P.3d 518, 519 (Kan. 2009)).

1082. *See id.* at 370–71 (discussing the elimination of the “*Delacruz* bright-line ‘actual imprisonment’ rule”).

1083. KAN. STAT. ANN. § 22-4503(b).

do so.<sup>1084</sup> If a defendant is found to be indigent and unable to employ counsel under section 22-4504 of the Kansas Statutes, then an attorney will be appointed to the defendant.<sup>1085</sup>

A defendant has the right to request that the court appoint substitute counsel, but the trial court must first investigate the defendant's complaints.<sup>1086</sup> Specifically, the defendant must show "justifiable dissatisfaction with appointed counsel," which includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant."<sup>1087</sup> If the court reasonably believes the "attorney-client relation has not deteriorated" to a degree where the defendant can no longer receive "effective aid," then the court may refuse to appoint new counsel.<sup>1088</sup> A court's duty to inquire into a potential conflict between client and attorney<sup>1089</sup> is triggered by a defendant's "articulated statement of attorney dissatisfaction."<sup>1090</sup> Speculative remarks are insufficient to trigger this duty.<sup>1091</sup>

In *State v. Thompson*, the Kansas Court of Appeals decided the trial court did not abuse its discretion by refusing to appoint new counsel although the defendant was unhappy with his counsel's infrequent visits to discuss his case.<sup>1092</sup> Although counsel visited his client just four times in nine months, the court of appeals noted that counsel filed several pretrial motions and appeared prepared for trial, indicating counsel's diligence.<sup>1093</sup> Also, when discussing with the court the communication issues the defendant had with his counsel, the defendant expressed a willingness to continue working with his counsel.<sup>1094</sup> The court of appeals ultimately found that the trial court had a reasonable basis for

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1084. *Id.*

1085. *Id.* § 22-4503(c).

1086. *State v. Boggness*, 268 P.3d 481, 489 (Kan. 2012).

1087. *Id.* (quoting *State v. Sappington*, 169 P.3d 1096, 1098 (Kan. 2007)).

1088. *Id.*

1089. *See id.* ("In Kansas, [b]efore determining whether to appoint new counsel, the trial court must make some inquiry into the defendant's complaints.")

1090. *State v. Rand*, No. 106,774, 2012 WL 6634397, at \*5 (Kan. Ct. App. Dec. 14, 2012) (unpublished table decision) (citing *State v. Hulett*, 263 P.3d 153, 158–59 (Kan. 2011); *State v. Williams*, 236 P.3d 512, 516–17 (Kan. 2010)).

1091. *Id.* at \*5–6.

1092. *State v. Thompson*, No. 106,522, 2013 WL 310349, at \*2–7 (Kan. Ct. App. Jan. 18, 2013) (unpublished table decision).

1093. *Id.* at \*3, \*6.

1094. *Id.* at \*6.

refusing to appoint new counsel because the attorney–client communication issues could be repaired.<sup>1095</sup>

c. Right to Counsel in Probation Hearings

The right to counsel extends to probation hearings in Kansas under section 22-3716(b) of the Kansas Statutes.<sup>1096</sup> Additionally, the court must tell the defendant that counsel will be appointed if the defendant cannot afford a private attorney.<sup>1097</sup>

d. Waiver of the Right to Counsel

A defendant may waive her right to counsel and proceed pro se if she “voluntarily and intelligently” chooses to do so.<sup>1098</sup> In Kansas, deciding whether a defendant has made a valid waiver is a three-part inquiry:

First, a defendant should be advised of both the right to counsel and the right to appointment of counsel in cases of indigency. Second, the defendant must possess the intelligence and capacity to appreciate the consequences of the waiver. Third, the defendant must comprehend the nature of the charges and proceedings, the range of punishment, and all facts necessary to a broad understanding of the case.<sup>1099</sup>

The Sixth Amendment ensures the right to self-representation for criminal defendants who properly waive their right to counsel.<sup>1100</sup> Courts note that this right is not explicit in the amendment, but is an implied right of the accused, “for it is he who suffers the consequences if the defense fails.”<sup>1101</sup> However, a trial court may deny the defendant’s request to proceed pro se “if self-representation will abuse the dignity of the judicial proceedings.”<sup>1102</sup> Reasons for denying a request to litigate pro se include untimeliness of the motion and incompetence of the

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1095. *Id.*

1096. KAN. STAT. ANN. § 22-3716(b) (2007 & Supp. 2012).

1097. *Id.*

1098. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (stating it is unconstitutional to “force a lawyer upon” a defendant who voluntarily and intelligently wishes to proceed pro se).

1099. *State v. Miller*, 237 P.3d 1254, 1257 (Kan. Ct. App. 2010) (citing *State v. Buckland*, 777 P.2d 745, 749 (Kan. 1989)).

1100. *State v. Vann*, 127 P.3d 307, 315 (Kan. 2006) (citing *Faretta*, 422 U.S. at 807).

1101. *Faretta*, 422 U.S. at 819–20.

1102. *State v. Brown*, No. 103,425, 2011 WL 3658364, at \*3 (Kan. Ct. App. Aug. 19, 2011) (unpublished table decision) (citing *Faretta*, 422 U.S. at 834 n.46 (1975)), *review granted*, (Kan. Oct. 13, 2011).

defendant.<sup>1103</sup> Also, as a cautionary measure, a court may appoint standby counsel to assist a pro se defendant even if the defendant objects.<sup>1104</sup>

e. Effective Assistance of Counsel

i. Generally

The right to counsel under the Sixth Amendment also requires that counsel be reasonably effective.<sup>1105</sup> An ineffective assistance of counsel claim requires the defendant to show that “counsel’s performance was constitutionally deficient,” and “but for counsel’s deficiency, there is a reasonable probability” the defendant would have received a better outcome.<sup>1106</sup> The first prong requires the court to apply a strong presumption that counsel’s performance complied with the “broad range of reasonable professional assistance,” and thus “[a] strategic choice made after a thorough investigation of law and facts . . . is virtually unchallengeable.”<sup>1107</sup> Courts apply a highly deferential standard of scrutiny to the first prong.<sup>1108</sup> The second prong requires the defendant show the outcome would have been different by a “probability sufficient to undermine confidence in the outcome.”<sup>1109</sup>

In *State v. Uwadia*, the Kansas Court of Appeals affirmed the district court’s denial of a motion for a new trial based on ineffective assistance of counsel because counsel acted within reasonable professional standards and the outcome would not have been altered if counsel would have acted in accordance with the defendant’s suggestions regarding witnesses.<sup>1110</sup> The defendant claimed that counsel should have objected to the admission of a “procedurally flawed deposition” and should have investigated using witnesses suggested by the defendant.<sup>1111</sup> The defendant’s argument failed the first prong of the analysis because counsel made reasonable strategic decisions for trial—including which witnesses to call—that fell within the reasonable range of professional

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1103. *Id.*

1104. *Vann*, 127 P.3d at 315 (citing *Faretta*, 422 U.S. at 834).

1105. *Chaidez v. United States*, 133 S. Ct. 1103, 1109 (2013).

1106. *State v. Uwadia*, 279 P.3d 731, 737 (Kan. Ct. App. 2012) (citing *Rowland v. State*, 219 P.3d 1212, 1218 (Kan. 2009)).

1107. *Id.*

1108. *Id.* at 738.

1109. *Harris v. State*, 204 P.3d 557, 560 (Kan. 2009).

1110. *Uwadia*, 279 P.3d at 737–38.

1111. *Id.* at 737.

assistance.<sup>1112</sup> Additionally, the court found the outcome would have remained the same even if the deposition at issue would have been excluded because other witness testimony revealed the same evidence.<sup>1113</sup>

An ineffective assistance claim based on a conflict of interest requires that the defendant show a conflict of interest was present and that this conflict “affected the adequacy of the attorney’s representation.”<sup>1114</sup> Notably, a defendant in this scenario need not show counsel’s representation had any effect on the outcome.<sup>1115</sup>

## ii. Appellate Counsel

Section 22-4503(a) of the Kansas Statutes entitles defendants to assistance of counsel “at every stage of the proceedings,” including on appeal.<sup>1116</sup> The test applied in determining ineffective assistance of appellate counsel is largely the same as that used at the trial level, but the second prong is slightly altered.<sup>1117</sup> Instead of showing that the defendant would have received a more favorable outcome,<sup>1118</sup> the defendant must show that “but for counsel’s inadequate work there was a reasonable probability that the appeal would have been successful.”<sup>1119</sup> The considerations of an appellate ineffectiveness claim predominantly mirror those of a trial-court-level ineffectiveness claim.<sup>1120</sup>

## iii. Standard for Review

Regardless of whether an ineffective assistance of counsel claim is based on counsel performance or a conflict of interest, the claim “involve[s] mixed questions of fact and law.”<sup>1121</sup> Therefore, appellate

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1112. *See id.* at 737–38 (stating that objecting to the admission of the deposition would only have “force[d] the prosecutor to file an *unnecessary* motion” that would have been quickly granted, and that counsel acted within objective standards of reasonableness).

1113. *Id.* at 738.

1114. *State v. Cheatham*, 292 P.3d 318, 338 (Kan. 2013) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348–49 (1980); *Mickens v. Taylor*, 535 U.S. 162, 168 (2002)).

1115. *Boldridge v. State*, 215 P.3d 585, 591 (Kan. 2009) (citing *Mickens*, 535 U.S. at 591).

1116. KAN. STAT. ANN. § 22-4503(a) (2007).

1117. *Mattox v. State*, 267 P.3d 746, 748 (Kan. 2011).

1118. *Uwadia*, 279 P.3d at 737.

1119. *Mattox*, 267 P.3d at 748–49 (citing *Baker v. State*, 755 P.2d 493, 498 (Kan. 1988)).

1120. *See Baker*, 755 P.2d at 498 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)) (discussing how appellate counsel’s challenged act or omission must be outside the broad parameters of reasonably competent assistance for an ineffectiveness claim to be successful).

1121. *State v. Cheatham*, 292 P.3d 318, 328 (Kan. 2013).

courts review the factual findings of the lower court to ensure that they are supported by substantial competent evidence and apply de novo review to the legal conclusions of the lower court.<sup>1122</sup>

### C. Evidentiary Issues

#### 1. Prior Actions by the Defendant

In Kansas, the admission of evidence of prior actions by the defendant is governed by section 60-455 of the Kansas Statutes and *State v. Gunby*.<sup>1123</sup> Section 60-455 prohibits the admission of evidence of a defendant's past crimes for the purpose of showing that she committed another crime or is predisposed to criminal activity.<sup>1124</sup> The statute provides that evidence of prior crimes may be admitted for other purposes; including establishing motive, plan, preparation, or identity.<sup>1125</sup> Certain past actions are excluded from the statute's blanket inadmissibility, including where a criminal defendant is charged with a sex offense.<sup>1126</sup>

After *Gunby*, the Kansas Supreme Court set forth three findings the appellate court must make to determine if evidence was properly admitted under section 60-455.<sup>1127</sup> First, the evidence in question must be relevant to prove a material fact that has a "legitimate and effective bearing" on the case's outcome.<sup>1128</sup> Second, the evidence in question must relate to a material fact that is in dispute.<sup>1129</sup> Finally, the evidence in question's probative value must outweigh its potential to prejudice the jury.<sup>1130</sup> If evidence is found to be admissible under section 60-455, the trial court must issue a limiting jury instruction to make sure the jury is considering the evidence only for the reason it was admitted.<sup>1131</sup> It should be noted that successful challenges to the admission of evidence under section 60-455 generally require a contemporaneous objection to

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1122. *Id.*

1123. 144 P.3d 647 (Kan. 2006); KAN. STAT. ANN. § 60-455 (2005 & Supp. 2012).

1124. KAN. STAT. ANN. § 60-455(a).

1125. *Id.* § 60-455(b).

1126. *Id.* § 60-455(d).

1127. *See, e.g.*, *State v. Torres*, 273 P.3d 729, 734–35 (Kan. 2012); *State v. Smith*, 293 P.3d 669, 678–79 (Kan. 2012).

1128. *State v. Weis*, 280 P.3d 805, 811–12 (Kan. Ct. App. 2012) (quoting *State v. Hollingsworth*, 221 P.3d 1122 (Kan. 2009)).

1129. *Id.*

1130. *Id.*

1131. *Smith*, 293 P.3d at 679.

the evidence at trial.<sup>1132</sup> If the appellate court determines the evidence was admitted in error, it must then determine whether or not the error was harmless.<sup>1133</sup>

Motive, plan, preparation, and identity are among the nonexclusive list of purposes for which the statute allows evidence of past crimes to be admitted.<sup>1134</sup> Evidence tending to prove the defendant's plan and preparation can be admitted either because of a direct or causal connection between the two incidents or where a similar modus operandi supports the logical conclusion that both incidents involved the same individual.<sup>1135</sup> To employ the modus operandi theory, the method must be so similar that it serves as the perpetrator's signature.<sup>1136</sup> To be sufficiently similar, the cases must be uniquely connected—for example, more similar than what all sexual abuse cases have in common.<sup>1137</sup> To offer evidence of past crimes to prove the identity of the defendant as the perpetrator, there must be sufficient unique similarities between the past and current charges to tie this defendant to the charged crime and rule out other possible perpetrators.<sup>1138</sup> In some cases, even one unique similarity is enough.<sup>1139</sup>

In addition to the purpose exceptions, there are several categories of past actions to which section 60-455 protection does not extend. Evidence of gang membership is not evidence of a crime or civil offense

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1132. *State v. Gaona*, 270 P.3d 1165, 1181 (Kan. 2012) (refusing to examine the merits of the admission of prior acts where counsel had not objected at trial).

1133. *State v. Torres*, 273 P.3d 729, 736–37 (Kan. 2012) (citing *State v. Prine*, 200 P.3d 1, 10 (Kan. 2009)) (finding that even where evidence was wrongfully admitted, there still must be a harmful error to set aside the verdict).

1134. *Id.* at 734.

1135. *Id.* at 735 (citing *State v. Jones*, 85 P.3d 1226, Syl. ¶ 2, 1227 (Kan. 2004)).

1136. *Id.* (citing *Prine*, 200 P.3d at 14–15).

1137. *See, e.g., id.* at 735–36 (holding that between two sexual abuse cases, the fact that the girls were both fourteen or under, that the defendant had sexual relations with both, and that he was providing financial support to their mothers at the time of the relationship was not sufficiently unique and similar to qualify as plan evidence).

1138. *State v. Smith*, 293 P.3d 669, 679 (Kan. 2012) (finding that similar burglaries, with similar targets, that all occurred in a short span of time, with checks and credit cards stolen in all four incidents, was admissible for the purpose of identifying the defendant); *State v. Wilson*, 289 P.3d 1082, 1092–93 (Kan. 2012) (finding sufficient similarity in the isolated nature of multiple burglary targets based on the fact that all were situated near the highway in a limited geographic area, the fact that they were unoccupied, and the presence of evidence of smoking, including cigarette butts with the defendant's DNA in nonsmoking homes was sufficient to make the admission of evidence of uncharged burglaries relevant to the question of the defendant's identity).

1139. *Smith*, 293 P.3d at 679–80 (finding that the unique shared feature of stolen checks and credit cards was sufficient to identify the defendant even though the other similarities between the crimes were general enough to apply to a broad category of burglaries).

and is therefore generally admissible at trial.<sup>1140</sup> As section 60-455 is not applicable to gang-affiliation evidence, district courts are not required to give a limiting jury instruction even though gang evidence is often prejudicial.<sup>1141</sup> To be admissible, gang-affiliation evidence must be relevant to the alleged charges.<sup>1142</sup> Relevant purposes are similar to the exceptions for past offenses under section 60-455 and include establishing motive,<sup>1143</sup> the events surrounding the charged crime,<sup>1144</sup> and witness bias.<sup>1145</sup>

Additionally, evidence of past drug possession offenses is admissible where the defendant has acknowledged and does not dispute her possession of the drugs and the purpose is to show her intent to possess.<sup>1146</sup> Such evidence is also admissible where drug use was contemporaneous with the current charges or where it is being offered as circumstantial evidence to show possession and control over the drugs, as section 60-455 blocks only evidence stemming from other specified occasions and protects against proving propensity.<sup>1147</sup> Where possession is disputed, however, evidence of past drug offenses is not admissible.<sup>1148</sup>

## 2. Silence from the Defendant

As established in *Doyle v. Ohio*, the prosecution cannot offer evidence at trial of a defendant's post-arrest silence.<sup>1149</sup> The Kansas Supreme Court has explained that this protection is based on the *Miranda* requirement to notify defendants that they have a right to remain silent and that anything they say can be used against them.<sup>1150</sup> It follows from this right that if an arrested individual chooses to remain

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1140. See, e.g., *State v. Jones*, 286 P.3d 562, 567 (Kan. 2012); *State v. Peppers*, 276 P.3d 148, 156-59 (Kan. 2012).

1141. *Jones*, 286 P.3d at 567 (citing *State v. Conway*, 159 P.3d 917, 927 (Kan. 2007)); *Peppers*, 276 P.3d at 159 (citing *Conway*, 159 P.3d at 927).

1142. *Peppers*, 276 P.3d at 148 (citing *State v. Brown*, 173 P.3d 612, 637 (Kan. 2007)).

1143. *Id.* at 158-59.

1144. *Id.* at 159.

1145. E.g., *State v. Jones*, 286 P.3d 562, 567 (Kan. 2012) (citing numerous permissible reasons for admitting evidence of gang affiliation, including witness bias, as in *State v. Ross*, 127 P.3d 249, 255 (Kan. 2006)).

1146. *State v. Preston*, 272 P.3d 1275, 1280 (Kan. 2012).

1147. *State v. Adams*, 273 P.3d 718, 726-27 (Kan. 2012); *State v. Blizzard*, No. 107, 656, WL 6217335, at \*3 (Kan. Ct. App. Dec. 7, 2012) (unpublished table decision).

1148. *Preston*, 272 P.3d at 1278, 1280.

1149. 426 U.S. 610, 611 (1976).

1150. *State v. Kemble*, 238 P.3d 251, 261 (Kan. 2010).

silent, that silence cannot be used as evidence against her.<sup>1151</sup> However, a defendant's refusal to memorialize statements previously made does not receive the same treatment as a complete refusal to speak, and testimony about refusals has been admitted into evidence.<sup>1152</sup>

Typically *Doyle's* protection only extends to individuals who have been arrested and *Mirandized*, thus affording them an opportunity to invoke their right to remain silent.<sup>1153</sup> As a result, evidence of silence prior to arrest has been held admissible.<sup>1154</sup>

### 3. Evidence Implicating Third Parties

When a defendant wishes to present evidence at trial implicating a third party in the crimes for which the defendant is charged, such evidence will only be allowed where, under the totality of the circumstances, it effectively connects the third party to the crime.<sup>1155</sup> Speculative and conjectural evidence are not enough to establish that connection.<sup>1156</sup>

Further, Kansas scrutinizes eyewitness identifications using a two-step process to determine their admissibility due to their inherently unreliable nature. In the preliminary step, the court examines whether the identification procedure was "impermissibly or unnecessarily suggestive."<sup>1157</sup> The identification procedure is impermissibly suggestive if law enforcement highlights one specific suspect or otherwise attempts to steer the witness towards identifying a specific individual.<sup>1158</sup> After determining the identification procedure was in fact proper, the court next examines the likelihood of misidentification.<sup>1159</sup> Among eight factors established by the Kansas Supreme Court in *State v. Corbett*,

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1151. *Id.*

1152. *See State v. Parks*, 280 P.3d 766, 774, (Kan. 2012) (upholding the admission of defendant's refusal to make a videotape memorializing his statements made during an earlier interview with police).

1153. *See State v. Gould*, No. 105,637, 2012 WL 2620553, at \*4 (Kan. Ct. App. June 12, 2012) (per curiam) (unpublished table opinion) (allowing reference to defendant's pre-arrest silence into evidence).

1154. *Id.*

1155. *State v. Tahah*, 262 P.3d 1045, 1050 (Kan. 2011) (citing *State v. Marsh*, 102 P.3d 445, 456 (Kan. 2004)).

1156. *Krider v. Conover*, No. 11-3010-SAC, 2012 WL 1207278, at \*5 (D. Kan. Apr. 12), *aff'd*, 497 F. App'x 818 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 1469 (2013).

1157. *State v. Mitchell*, 275 P.3d 905, 910 (Kan. 2012) (citing *State v. Corbett*, 130 P.3d 1179, 1190 (Kan. 2006)).

1158. *Corbett*, 130 P.3d at 1190.

1159. *Mitchell*, 275 P.3d at 910 (citing *Corbett*, 130 P.3d at 1190).

courts should consider how certain the witness was in her identification.<sup>1160</sup> Since the Kansas Supreme Court's decision in *State v. Hunt*,<sup>1161</sup> Kansas's application of the certainty prong has been disputed because the court omitted this factor in its analysis without clarifying whether it was rejecting the factor or whether there simply had not been any evidence of certainty available.<sup>1162</sup> *State v. Mitchell*, however, establishes that the certainty factor is still a valid factor, at least for admitting eyewitness testimony.<sup>1163</sup> However, *Mitchell* and two other 2012 cases have rejected including the certainty factor in jury instructions regarding the evaluation of eyewitness identification because it infers that juries should give more weight to confident witnesses despite no proof that confidence correlates with accuracy.<sup>1164</sup>

In certain circumstances, defendants can have witnesses psychologically examined. To compel a witness to undergo a psychological examination for evidentiary purposes, a defendant must meet rigorous standards, particularly in cases involving sex crimes.<sup>1165</sup> In granting a request for an examination, a court should consider the witness's mental stability, veracity, ability to understand what truthfulness entails, history of making false allegations in similar cases, the presence of evidence corroborating the accusations, and the likelihood that the examination is only a "fishing expedition."<sup>1166</sup> A low IQ alone is not sufficient to satisfy the mental-instability factor.<sup>1167</sup> Witness statements and conduct that support the fact that the witness lacks veracity must be related to the witness's relationship or contact with the defendant.<sup>1168</sup> Lack of veracity cannot be established by the witness's delay in sharing information about the defendant or

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1160. *Id.*

1161. *State v. Hunt*, 69 P.3d 571 (Kan. 2003).

1162. *Mitchell*, 275 P.3d at 910.

1163. *Id.* at 911.

1164. *See id.* at 911–13; *State v. Marshall*, 281 P.3d 1112, 1122–24 (Kan. 2012); *State v. Anderson*, 276 P.3d 200, 207–09 (Kan. 2012). *Cf.* *State v. Finch*, 277 P.3d 1193 at \*8–10 (Kan. Ct. App. June 8, 2012) (unpublished table decision) (finding that the inclusion of the certainty factor was insufficient to set aside the jury's verdict where the only expression of certainty came from law enforcement testifying about the witness's identification and there were no serious concerns about reliability because the witness had seen the defendant before), *review denied*, No. 11-105750-A, 2013 Kan. LEXIS 377 (Kan. Mar. 26, 2013).

1165. *State v. Rojas-Marceleno*, 285 P.3d 361, 368 (Kan. 2012) (citing *State v. Berriozabal*, 243 P.3d 352 (Kan. 2010)).

1166. *Id.*

1167. *State v. Simpson*, 260 P.3d 1248, at \*8 (Kan. Ct. App. Sept. 30, 2011) (unpublished table decision), *review granted*, 2012 Kan. LEXIS 203 (Kan. Mar. 9, 2012).

1168. *Rojas-Marceleno*, 285 P.3d at 369 (citing *State v. Price*, 61 P.3d 676, 684 (Kan. 2003)).

inconsistent stories about the incident involving the defendant.<sup>1169</sup> Courts have also taken into account the age and maturity of the witness; where the witness is a child or teenager, dishonesty related to juvenile mischief has not been considered.<sup>1170</sup>

#### 4. Cross-Examination

Where there is no infringement of the defendant's or witness's constitutional rights, the court has the discretion to set the scope of cross-examination.<sup>1171</sup> However, the court's discretion must qualify as reasonable control.<sup>1172</sup> Courts are free to limit cross-examination to guard against harassment, prejudice, confusion of the issues, endangerment of witnesses, and cumulative or irrelevant testimony, even when questioning a witness regarding her bias or motivation for testifying.<sup>1173</sup> So long as the limits are reasonable, the defendant's Sixth Amendment right to confront witnesses is not violated.<sup>1174</sup> If the defense chooses to limit its own cross-examination, it has no Sixth Amendment grounds for appeal.<sup>1175</sup>

Testimonial hearsay statements infringe on a defendant's Sixth Amendment right to confront her accusers unless the witness is unavailable at the trial and the defendant had a prior opportunity to cross-examine the witness.<sup>1176</sup> *Crawford v. Washington* loosely identified testimonial hearsay statements as "ex parte in-court testimony"<sup>1177</sup> and "extrajudicial statements."<sup>1178</sup> Subsequent cases established a series of

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1169. *State v. McIntosh*, 58 P.3d 716, 721–22 (Kan. 2002).

1170. *Rojas-Marceleno*, at 368–69 (rejecting past lies told by a teenager when being confronted by adults about misbehavior as evidence of lack of veracity); *State v. Sprung*, 277 P.3d 1100, 1110–11 (Kan. 2012) (rejecting minor misbehavior and lies by a young person to avoid homework, getting in trouble, and finishing meals as supporting lack of veracity).

1171. *State v. Tully*, 262 P.3d 314, 324 (Kan. 2011) (citing *State v. Sharp*, 210 P.3d 590, 607 (Kan. 2009)).

1172. *State v. Holman*, 284 P.3d 251, 270 (Kan. 2012) (citing *State v. Corbett*, 130 P.3d 1179 (Kan. 2006)); see also *State v. Noah*, 162 P.3d 799, 804 (Kan. 2007).

1173. *Noah*, 162 P.3d at 804 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986)).

1174. *Id.*

1175. *State v. Parks*, 280 P.3d 766, 775 (Kan. 2012) (citing *State v. Hebert*, 82 P.3d 470, 486 (Kan. 2004)).

1176. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

1177. *Id.* at 51–52. Affidavits, custodial examinations, and prior testimony that had not been subject to cross-examination are included as functional equivalents of in-court ex parte testimony. *Id.*

1178. *Id.* Affidavits, depositions, prior testimony, confessions, and statements made under circumstances that clearly suggested they would be made available for use at trial are examples of extrajudicial statements. *Id.*

factors to be used to determine whether specific statements qualified as testimonial hearsay: whether (1) an objective witness would reasonably believe that the statement would be available for criminal prosecution, (2) the statement was made to law enforcement, (3) the main purpose of the interview was to prove facts that might be relevant to criminal prosecution as viewed under the totality of the circumstances, and (4) the statement had the formality of testimony.<sup>1179</sup> In applying *Crawford* and its successors to documents—such as statements made by medical professionals in medical reports and equipment calibration certificates—courts have found that these documents are only testimonial when they are compiled for the purpose of proving an element of a crime at trial.<sup>1180</sup>

## 5. Proof Beyond a Reasonable Doubt

In a criminal case, due process assigns the prosecution the burden of proving each element of the crime charged beyond a reasonable doubt.<sup>1181</sup> The court determines whether this burden has been met by evaluating the evidence in a light most favorable to the State and then determining whether a rational fact finder could have convicted the defendant beyond a reasonable doubt.<sup>1182</sup> Courts have traditionally held that the term “reasonable doubt” is sufficiently clear that it need not be defined, but giving a jury instruction that includes a definition is not a reversible error.<sup>1183</sup> The definition cannot suggest a higher level of doubt than the traditional standard, such as tends to be the case with phrases like “grave uncertainty” or “substantial doubt.”<sup>1184</sup> The Tenth Circuit has stated that its preferred definition of reasonable doubt is “couched in

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1179. *State v. Benson*, 287 P.3d 927, 929–30 (Kan. 2012) (citing *State v. Brown*, 173 P.3d 613 (Kan. 2007)).

1180. *State v. Jones*, 288 P.3d 140, 145 (Kan. 2012) (citing *State v. Miller*, 264 P.3d 461, 483–86 (Kan. 2011)) (declining to categorize medical records as testimonial hearsay if they are compiled for the purpose of treatment and not criminal prosecution, unless specifically sought for prosecutorial goals); *State v. Benson*, 287 P.3d 927, 930–32 (Kan. 2012) (citing *State v. Johnson*, 233 P.3d 290, 299 (Kan. Ct. App. 2010); *State v. Dukes*, 174 P.3d 914, 917 (Kan. Ct. App. 2008)) (stating breathalyzer certificates of calibration are not testimonial because regardless of whether they are used at trial, they are primarily produced to comply with state regulations).

1181. *State v. Douglas*, 640 P.2d 1259, 1260 (Kan. 1982) (citing *In re Winship*, 397 U.S. 358, 361 (1970)).

1182. *Id.* at 1260–61.

1183. *State v. Holloway*, 547 P.2d 741, 747 (Kan. 1976), *rev'd on other grounds sub nom.* *State v. Foster* 233 P.3d 265 (Kan. 2010) (citing *State v. Woods*, 542 P.2d 319, 323 (Kan. 1975); *State v. Ritson*, 529 P.2d 90, 94 (Kan. 1974); *State v. Winston*, 520 P.2d 1204, 1209 (Kan. 1974)).

1184. *United States v. Kieffer*, 681 F.3d 1143, 1157–58 (10th Cir. 2012) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277, 281 (1993)), *cert. denied*, 133 S. Ct. 996 (2013).

terms of the *kind of doubt* that would make a [reasonable] person hesitate to act.”<sup>1185</sup>

*D. Actions by Different Players During a Trial*

1. Prosecutors

a. Prosecutorial Discretion and Selective Prosecution

Prosecutors can charge and try any offense once they have established probable cause and believe they can meet the required burden of proof.<sup>1186</sup> Prosecutors also have discretion regarding the level of criminal charges to bring against a defendant and may ignore facts that support a more serious offense to pursue a lesser charge.<sup>1187</sup> This includes the freedom to choose to divert charges<sup>1188</sup> and to charge several crimes in a single complaint.<sup>1189</sup> However, prosecutors may not exercise their discretion selectively. To prove selective prosecution, a defendant must show that the prosecutor’s exercise of discretion has resulted in similarly situated persons not being prosecuted and that this discretion was motivated by discriminatory purposes.<sup>1190</sup>

b. Prosecutorial Misconduct

To show prosecutorial misconduct, a defendant must demonstrate that the prosecutor’s comments during discussion of the evidence a trial went beyond the leeway generally allowed,<sup>1191</sup> and then the court must decide whether those comments prejudiced the jury against the defendant, making a fair trial impossible.<sup>1192</sup> Courts will consider three factors: (1) whether the prosecutor’s misconduct was “gross and

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1185. *Id.* at 1159 (quoting *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1271 (10th Cir. 1992)).

1186. *United States v. Bradshaw*, 580 F.3d 1129, 1135 (10th Cir. 2009) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

1187. *State v. Jenkins* 284 P.3d 1037, 1041 (Kan. 2012) (citing *State v. Portillo*, 274 P.3d 640, 647 (Kan. 2012); *State v. Sandberg*, 235 P.3d 476, 481–82 (Kan. 2010)).

1188. *State v. Greenlee*, 620 P.2d 1132, 1139–40 (Kan. 1980)).

1189. *See* KAN. STAT. ANN. § 22-3202(1) (2007) (allowing the prosecutor to charge more than one crime in the same charging document if the crimes are similar, occurred together, or were part of a common scheme).

1190. *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

1191. *State v. Rivera*, 291 P.3d 512, 527–28 (Kan. Ct. App. 2012) (citing *State v. Bennington*, 264 P.3d 440, 458 (Kan. 2011)).

1192. *Id.* at 528.

flagrant,” (2) whether her conduct was “motivated by ill will,” and (3) whether the evidence was so “direct and overwhelming” that the prosecutor’s misconduct likely did not affect the minds of the jurors.<sup>1193</sup> The defendant is not required to make a contemporaneous objection to preserve a misconduct claim for appeal when the improper statements are made by the prosecutor during voir dire or opening or closing arguments.<sup>1194</sup> The prosecutor bears the burden of proving beyond a reasonable doubt that her misconduct did not impact the verdict.<sup>1195</sup> Additionally, prosecutors must be careful not to refer to facts that are not in evidence or opine about the credibility of evidence, the guilt of the defendant, or fairness of a cause.<sup>1196</sup> Failure to disclose expert evidence to the court or the defense can also count as misconduct.<sup>1197</sup>

### c. Undue Influence

It is inappropriate for the State to use undue influence to dissuade a witness from testifying at trial.<sup>1198</sup> Yet, when a prosecutor badgers, intimidates, or exploits a witness’s fear of prosecution, such undue influence may be ameliorated if the witness consults independent counsel and then chooses not to testify.<sup>1199</sup>

## 2. Trial Judges

Kansas statutes grant broad discretion to judges regarding their decisions in a proceeding. Section 60-261, the harmless error rule, allows judges to ignore “all errors and defects [in all judicial proceedings] that do not affect any party’s substantial rights.”<sup>1200</sup> Similarly, appellate courts must disregard these errors and defects on review so long as they do not “appear to have prejudicially affected the substantial rights of the party complaining.”<sup>1201</sup> The Kansas Supreme

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1193. *State v. Stafford*, 290 P.3d 562, 587 (Kan. 2012) (citing *State v. Marshall*, 281 P.3d 1112, Syl. ¶ 3, 1114 (Kan. 2012)).

1194. *Rivera*, 291 P.3d at 528.

1195. *Stafford*, 290 P.3d at 587 (citing *State v. Inkelaar*, 264 P.3d 81, 94 (Kan. 2011)).

1196. *State v. Hall*, 257 P.3d 272, 279, 282 (Kan. 2011) (citations omitted).

1197. *State v. Grey*, 268 P.3d 1218, 1225–26 (Kan. Ct. App. 2012) (finding that failure to disclose corrections to a report entered into evidence constituted prosecutorial misconduct).

1198. *United States v. Pablo*, 696 F.3d 1280, 1295–96 (10th Cir. 2012) (citing *United States v. Serrano*, 406 F.3d 1208, 1215–16 (10th Cir. 2005)).

1199. *See id.* at 1296–97 (explaining that seeking advice from independent counsel “significantly diminished” the risk of coercion).

1200. KAN. STAT. ANN. § 60-261 (2005 & Supp. 2012).

1201. *Id.* § 60-2105 (2005).

Court has held that substantial rights are violated when the error prejudiced the outcome of the proceeding.<sup>1202</sup> Appellate courts will make a substantial rights determination where they find that the lower court abused its discretion by taking legal action that was arbitrary or unreasonable, based on legal error or factual error.<sup>1203</sup> Where a federal constitutional error is reviewed, appellate courts apply a tougher standard: the error must be found harmless beyond a reasonable doubt.<sup>1204</sup> The party that benefitted from the error has the burden of showing beyond a reasonable doubt that the error did not affect the verdict.<sup>1205</sup>

a. Admissibility of Evidence

Depending on the applicable evidentiary rule, admission or exclusion of evidence is subject to the trial judge's discretion.<sup>1206</sup> In determining whether to admit evidence, a judge should first decide whether it is relevant, then determine which evidentiary rules apply, and finally apply the appropriate rules.<sup>1207</sup> Judges should take care not to implicate constitutional rights when admitting or excluding evidence.<sup>1208</sup> However, if the error was harmless and did not impact the outcome of the trial, such implications will not overturn a conviction.<sup>1209</sup>

b. Authority to Issue *Allen* Instructions

To avoid the likelihood of a mistrial, judges may issue *Allen* instructions—jury instructions encouraging jurors to “agree on a verdict,” especially when the jury is deadlocked—as long as the

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1202. *State v. Ward*, 256 P.3d 801, 811–12 (Kan. 2011) (citing *Kotteakos v. United States*, 328 U.S. 750, 766 (1946)).

1203. *State v. Tague*, 298 P.3d 273, 282–83 (Kan. 2013) (citing *Ward*, 256 P.3d at Syl. ¶ 3).

1204. *Ward*, 256 P.3d at 813 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

1205. *Id.*

1206. *State v. Cline* 283 P.3d 194, 199 (Kan. 2012) (stating that the rule of evidence applied determines whether the evidence is admitted or excluded as a matter of law or by the judge's discretion) (citations omitted).

1207. *Id.*; *State v. Tully*, 262 P.3d 314, 323–24 (Kan. 2011) (citing *State v. Shadden*, 235 P.3d 436 (Kan. 2010)).

1208. *See id.* (indicating that violations of constitutional rights are subject to de novo review, whereas nonconstitutional questions are only reviewed by an abuse of discretion standard).

1209. *See, e.g., id.* at 327–28 (reversing defendant's conviction because admission of evidence regarding defendant's post-arrest silence violated his *Miranda* and *Doyle* rights). The court found that admission of such evidence impacted the defendant's credibility—upon which the jury may have based its verdict—and therefore was not harmless. *Id.* at 329.

instruction does not pressure the jury to shirk its responsibility or forfeit the accuracy of the verdict.<sup>1210</sup> To determine whether a trial court's specific *Allen* instruction was appropriate, appellate courts analyze the instruction's language and timing as well as the length of subsequent jury deliberations.<sup>1211</sup> While *Allen* instructions are traditionally given to encourage jurors to cooperate, judges are not required to give such instructions, even if it comes to their attention that jurors are bullying one another, as long as there is no indication of impropriety.<sup>1212</sup> A defendant may only challenge an *Allen* instruction if her counsel voiced disagreement with the language used in the instruction.<sup>1213</sup> If the defense fails to timely and specifically object, courts will apply the clear error standard on appeal.<sup>1214</sup>

### c. Recusal and Instructing the Jury

Of a judge's many duties during a trial, perhaps the two most important are the duty to recuse herself in any case where "impartiality might reasonably be questioned"<sup>1215</sup> and the duty to inform the jury of the applicable law.<sup>1216</sup> A judge must recuse herself whenever a personal bias, interest, or prejudice exists that would reasonably place the judge's ability to be fair and impartial into question.<sup>1217</sup>

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1210. *United States v. Cornelius*, 696 F.3d 1307, 1313 n.1, 1321 (10th Cir. 2012) (citing *United States v. LaVallee*, 439 F.3d 670, 689 (10th Cir. 2006)).

1211. *See Cornelius*, 696 F.3d at 1321–23 (citing *LaVallee*, 439 F.3d at 689–91) (explaining that (1) language encouraging reconsideration that is directed at both factions and coupled with a reminder not to surrender their convictions is permissible; (2) the *Allen* instruction should accompany the other jury instructions but does not have to; and (3) longer deliberations tend negate any coerciveness from the instruction).

1212. *White v. Medina*, 464 F. App'x 715, 720 (10th Cir.), *cert. denied*, 133 S. Ct. 124 (2012).

1213. *State v. Peppers*, 276 P.3d 148, 160 (Kan. 2012).

1214. *State v. Burnett*, 270 P.3d 1115, 1126 (Kan. 2012) (citing KAN. STAT. ANN. § 22-3414(3) (2012)); *State v. Duong* 257 P.3d 309, 319 (Kan. 2011). The *Burnett* court explained that "an instruction is clearly erroneous only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict" had the instruction not been given. *Burnett*, 270 P.3d at 1126 (quoting *State v. Martinez*, 204 P.3d 601, 608 (Kan. 2009)) (internal quotation marks omitted).

1215. *State v. Robinson*, 270 P.3d 1183, 1203–04 (Kan. 2012) (finding no personal bias or prejudicing sentiment and therefore no duty to recuse where the judge expressed empathy for the victims' families regarding their frustration with the delay resulting from his granting a motion for new counsel). *But see State v. Dean*, No. 105,682, 2012 WL 1450441, at \*8–9 (Kan. Ct. App. Apr. 20, 2012) (unpublished table decision) (finding that the judge had a duty to recuse himself because his admission that he distrusted counsel and preferred not to have that attorney appear in his courtroom would have given a reasonable person cause to question the judge's partiality).

1216. *State v. Hargrove*, 293 P.3d 787, 797 (Kan. Ct. App. 2013).

1217. 689 P.2d 778, 784 (Kan. 1984)).

When instructing jurors on the applicable law, judges are expected to “inform the jury of every essential element of a . . . charge[]”<sup>1218</sup> and are not bound by the jury instructions proposed by the parties.<sup>1219</sup> Failure to properly instruct the jury regarding the elements of the offense at issue implicates a defendant’s right to a fair trial under the Sixth Amendment.<sup>1220</sup> On appeal, instruction errors regarding elements of the crime are subject to harmless error review.<sup>1221</sup> Where the omitted element was conceded by the defendant and supported by substantial evidence, the resulting error is harmless and the conviction should not necessarily be reversed.<sup>1222</sup> An error invited by the defense’s tactical decisions may also save the conviction from reversal as long as the omission was not accidental.<sup>1223</sup>

### *E. Potential Trial Actions*

#### 1. Motion for Acquittal

Either the court or the defendant may bring a motion for acquittal when, at the end of either party’s presentation of evidence, there is insufficient proof to support a conviction.<sup>1224</sup> In determining whether the evidence was insufficient, the appellate court must view it in “the light most favorable to the prosecution” and find that no “rational fact finder [could have found] the defendant guilty beyond a reasonable doubt.”<sup>1225</sup> As long as the judgment of acquittal resolves a factual element and jeopardy attaches, the prosecution may not appeal it.<sup>1226</sup>

#### 2. Mistrial

The court may declare a mistrial for many reasons defined by statute, including if it becomes impossible to continue the trial and conform to

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1218. *State v. Montes*, 268 P.3d 12, at \*2 (Kan. Ct. App. Jan. 27, 2012) (unpublished table decision) (citing *State v. Richardson*, 224 P.3d 553, 558 (Kan. 2010)).

1219. *Hargrove*, 293 P.3d at 797.

1220. *Id.* at 794 (citing *Neder v. United States*, 527 U.S. 1, 18 (1999)); *State v. Linn*, 840 P.2d 1133 (Kan. 1992).

1221. *Neder*, 527 U.S. at 12–13.

1222. *State v. Inkelaar*, 264 P.3d 81, 97–98 (Kan. 2011); *State v. Race*, 259 P.3d 707, 718 (Kan. 2011) (referring to the omission of the age element in Jessica’s Law prosecutions).

1223. *Hargrove*, 293 P.3d at 805.

1224. KAN. STAT. ANN. § 22-3419(1) (2007).

1225. *State v. Finch*, 244 P.3d 673, 678 (Kan. 2011) (quoting *State v. Cavaness*, 101 P.3d 717, 724 (Kan. 2004)).

1226. *See State v. Roberts*, 259 P.3d 691, 695–99 (Kan. 2011).

the law, a legal defect in the proceedings makes reversal inevitable, and injustice to either side cannot be avoided.<sup>1227</sup> The court may declare a mistrial sua sponte.<sup>1228</sup> Mistrial does not implicate a defendant's right to a speedy trial,<sup>1229</sup> and double jeopardy only applies in cases where the mistrial was intentionally caused by harassing and overreaching prosecutorial conduct.<sup>1230</sup>

## VI. SENTENCING

### A. *Federal Sentencing*

The United States Sentencing Commission developed the U.S. Sentencing Guidelines Manual to create a sentencing system that can achieve the basic purposes of criminal punishment—"deterrence, incapacitation, just punishment, and rehabilitation"—with greater honesty, uniformity, and proportionality.<sup>1231</sup> A defendant's criminal history is "directly relevant" to the purposes of criminal punishment.<sup>1232</sup> Pursuant to the Guidelines, federal courts must consider (1) the nature and circumstances of the offense and (2) the history and characteristics of the offender when sentencing felons.<sup>1233</sup> The defendant's offense level and criminal history coordinate to produce a recommended sentencing range.<sup>1234</sup>

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1227. KAN. STAT. ANN. § 22-3423(1)(a)–(c) (2007).

1228. Gleason v. McKune, No. 11-3110-SAC, 2012 WL 2952242, at \*19 (D. Kan. Jul. 19, 2012) (citing KAN. STAT. ANN. § 22-3423; State v. Wimbley, 26 P.3d 657, 664 (Kan. 2001)), *appeal dismissed*, No. 12-3212, 2013 WL 163787 (10th Cir. Apr. 5, 2013).

1229. KAN. STAT. ANN. § 22-3402(f) (2007 & Supp. 2012); see State v. Holder, No. 106,479, 2013 WL 310341, at \*4 (Kan. Ct. App. Jan. 18, 2013) (unpublished table decision) (explaining that a mistrial does not force defendant to choose between the rights to an impartial jury and a speedy trial because the speedy trial clock resets following the mistrial).

1230. State v. Miller, 264 P.3d 461, 470 (Kan. 2011) (citing Oregon v. Kennedy, 456 U.S. 667, 675–76 (1982)).

1231. U.S. SENTENCING GUIDELINES MANUAL §§ 1A1.2–1A1.3 (2012).

1232. *Id.* § 4A1 introductory cmt. ("A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.")

1233. *Id.* § 1A2; 18 U.S.C. § 3553(a)(1) (2006).

1234. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a), *limited on constitutional grounds by* United States v. Booker, 543 U.S. 220 (2005).

Guideline departure is appropriate where the defendant's circumstances are sufficiently idiosyncratic to deviate from the "heartland" of cases.<sup>1235</sup> A court may impose a sentence outside the prescribed range where it finds aggravating or mitigating circumstances that were disregarded by the Sentencing Commission in preparing the Guidelines.<sup>1236</sup>

## B. *Kansas Sentencing*

### 1. Sentencing Determination

Similar to federal courts, Kansas courts determine most criminal sentences in accordance with guidelines that offer a presumptive sentence based on consideration of (1) the offender's crime of conviction and (2) criminal history.<sup>1237</sup> The Revised Kansas Sentencing Guidelines Act categorizes felonies into grid offenses and off-grid offenses.<sup>1238</sup> Grid offenses are further divided into non-drug-related and drug-related felonies and each category has its own grid.<sup>1239</sup> A grid functions as a two-dimensional classification tool.<sup>1240</sup> The grid's horizontal axis is a criminal history scale that classifies the offender's history from most serious to least serious relative to prior convictions or juvenile adjudications.<sup>1241</sup> The grid's vertical axis reflects the severity of the current criminal charge.<sup>1242</sup> By locating the grid block corresponding to the intersection of an offender's criminal history classification and crime severity ranking, a court identifies the presumptive punishment for any particular offender of a grid felony.<sup>1243</sup>

Not all felonies, however, are sentenced through the grid approach. Certain felonies are *per se* "off-grid crimes for the purpose of

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1235. *Id.* § 1A1.4(b) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.").

1236. *Id.* § 1A1.2.

1237. *See* KAN. STAT. ANN. §§ 21-6804 to -6806 (Supp. 2012) (providing sentencing guidelines for nondrug, drug, and off-grid crimes that necessitate review of crime severity and criminal history).

1238. *Id.*

1239. *Id.* §§ 21-6804, -6805.

1240. *Id.* § 21-6804(c).

1241. *Id.* §§ 21-6804(c), -6805(a), -6809.

1242. *Id.* §§ 21-6804(c), -6805(a), -6807, -6808.

1243. *Id.* §§ 21-6803(l), -6804(f), -6805(d).

sentencing.”<sup>1244</sup> Off-grid crimes include capital murder,<sup>1245</sup> murder in the first degree,<sup>1246</sup> terrorism,<sup>1247</sup> illegal use of weapons of mass destruction,<sup>1248</sup> and treason.<sup>1249</sup> Subject to limited exceptions, a felon convicted of an off-grid crime receives a mandatory sentence of life imprisonment.<sup>1250</sup>

a. Criminal History

In conjunction with crime severity, sentencing courts generally must consider an offender’s criminal history.<sup>1251</sup> Criminal history includes an offender’s verified convictions of “adult felony, class A misdemeanor, class B person misdemeanor or select misdemeanor convictions and comparable juvenile adjudications at the time such offender is sentenced.”<sup>1252</sup> The criminal history scale is identical for both non-drug- and drug-related sentencing grids.<sup>1253</sup> Each criminal history category is represented alphabetically, ranging from the most serious (A)—three or more adult convictions or juvenile adjudications for person felonies—to the least serious (I)—no prior record, or merely one adult conviction or juvenile adjudication for a misdemeanor.<sup>1254</sup> Prior to sentencing, the criminal history of a defendant must either be admitted by the defendant or proved by the State by a preponderance of the evidence.<sup>1255</sup> The summation of an offender’s prior convictions is scored to determine her criminal history category.<sup>1256</sup> Sections 21-6810 and 21-6811 of the Kansas Statutes enumerate the applicable rules for determining the value

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1244. *Id.* § 21-6806(c).

1245. *Id.* § 21-5401(c).

1246. *Id.* § 21-5402(b).

1247. *Id.* § 21-5421(b).

1248. *Id.* § 21-5422(b).

1249. *Id.* § 21-5901(b).

1250. *Id.* § 21-6806(c). Off-grid crimes accompanying a mandatory sentence of life imprisonment also include any of the following felonies committed by an offender eighteen years of age or older against a victim under fourteen years old: aggravated human trafficking, statutory rape, aggravated criminal sodomy, aggravated indecent liberties with a child, sexual exploitation of a child, and promoting prostitution. *Id.* §§ 21-6806(d), -5426, -5503, -5504, -5506, -5510, -6240.

1251. *Id.* §§ 21-6804, -6805, -6809.

1252. *Id.* §§ 21-6803(c), -6810(a), (d)(1).

1253. *Id.* §§ 21-6804(a), -6805(a), -6809.

1254. *Id.* §§ 21-6809.

1255. *Id.* § 21-6814(a).

1256. *Id.* § 21-6803(d).

of prior convictions.<sup>1257</sup> Effective July 1, 2012, the Kansas Legislature amended section 21-6811 to provide:

[Where] the current crime of conviction is for a violation of subsections (b)(2) through (b)(4) of K.S.A. 8-1602 . . . each of the following prior convictions committed on or after July 1, 2011 shall count as a person felony for criminal history purposes: K.S.A. 8-235, 8-262, 8-287, 8-291, 8-1566, 8-1567, 8-1568, 8-1602, 8-1605 and 40-3104, and amendments thereto, and subsection (a)(3) of K.S.A. 21-5405 and 21-5406, and amendments thereto, or a violation of a city ordinance or law of another state which would also constitute a violation of such sections.<sup>1258</sup>

Ordinarily, diversion agreements are not included in an offender's criminal history when determining a sentence.<sup>1259</sup> The legislature has provided a limited exception, however, where the current crime of conviction is for involuntary manslaughter resulting from the commission of, attempt to commit, or flight from driving under the influence committed on or after July 1, 1996.<sup>1260</sup> Under such circumstances, the sentencing court may consider any previous diversion instead of criminal prosecution or juvenile adjudication for driving under the influence as one person felony.<sup>1261</sup>

#### b. Crime Severity Levels

An offender's crime severity level is measured in accordance with the crime severity scale appropriate to the offense category—non-drug or drug—of her most severe criminal conviction.<sup>1262</sup> Regardless of the applicable grid, crimes listed within each level are “considered to be relatively equal in severity.”<sup>1263</sup> The crime severity level for each

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1257. *Id.* §§ 21-6810, -6811.

1258. *Id.* § 21-6811(i). The offenses now considered person felonies for criminal-history purposes are, in the order listed by statute, driving without a license, driving on a suspended or revoked license, habitual violation of driving on a revoked license, operating a motor vehicle in violation of restrictions on a license, reckless driving, driving under the influence, fleeing or attempting to elude a police officer, leaving the scene of an accident involving injury or death, leaving the scene of an accident involving property damage, driving without liability insurance, involuntary manslaughter related to driving under the influence, and vehicular homicide.

1259. *State v. Chamberlain*, 120 P.3d 319, 323 (Kan. 2005) (citing *State v. Macias*, 39 P.3d 85, 87 (Kan. Ct. App. 2002)).

1260. KAN. STAT. ANN. § 21-6811(c)(2).

1261. *Id.*

1262. *Id.* §§ 21-6807(a), -6808(a).

1263. *Id.* §§ 21-6807(a), -6808(a).

offense is listed in the offense's criminalizing statute.<sup>1264</sup> A court measuring the crime severity of an offender convicted of a nondrug offense will use a crime severity scale that consists of ten levels of crimes.<sup>1265</sup> Each level is represented by a roman numeral (I–X) on the nondrug sentencing grid, ranging from most severe (level I) to least severe (level X).<sup>1266</sup> Effective July 1, 2012, a court measuring the crime severity of an offender convicted of a drug-related offense will use a crime severity scale that consists of five levels, expanded from four.<sup>1267</sup> Each level is represented by a roman numeral (I–V) on the drug-related sentencing grid, ranging from most severe (level I) to least severe (level V).<sup>1268</sup> Although the crime severity level of most drug offenses will continue to be determined by quantity,<sup>1269</sup> all “mere possession” offenses are now level V felonies.<sup>1270</sup>

c. Hard 40/50 Sentences

Certain felonies require a sentencing court to impose a mandatory sentence of imprisonment for life without eligibility for probation, suspension, modification, or reduction of the sentence.<sup>1271</sup> An offender serving a “hard” sentence will not become eligible for parole prior to serving a mandatory forty or fifty years of imprisonment.<sup>1272</sup> Where the conviction is for first-degree, premeditated murder, and the sentencing court identifies one or more aggravating factors that are not outweighed by any mitigating factors, the offender is ineligible for parole until completing either forty years of imprisonment for a crime committed before July 1, 1999, or fifty years of imprisonment for a crime committed on or after July 1, 1999—regardless of good time credits otherwise applicable.<sup>1273</sup> Similarly, a sentencing court is required to impose a minimum forty-year sentence for any offender who has a previous

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1264. *See, e.g., id.* § 21-5408(c)(1), (2) (defining kidnapping as a “severity level 3, person felony” and aggravated kidnapping as a “severity level 1, person felony”).

1265. *Id.* § 21-6807(a).

1266. *Id.* §§ 21-6804(a), -6807(a).

1267. *Id.* §§ 21-6805(a), -6808(a).

1268. *Id.* §§ 21-6805(a), -6808(a).

1269. *See, e.g., id.* § 21-5705(d)(1) (classifying the crime severity level of unlawful cultivation or distribution of controlled substances with respect to quantity of material).

1270. *See, e.g., id.* § 21-5706(c) (defining the unlawful possession of controlled substances as a drug severity level 5 felony).

1271. *Id.* § 21-6623.

1272. *Id.*

1273. *Id.* §§ 21-6620(b), (d), -6623.

conviction for any crime listed or substantially similar to those listed in section 21-6627(a)(1), and who, after July 1, 2006, has committed any one of the same or similar listed offenses.<sup>1274</sup>

d. Aggravating Circumstances

A sentencing court may consider aggravating circumstances<sup>1275</sup> and mitigating circumstances<sup>1276</sup> to determine whether to impose a “hard 50” sentence on an offender convicted of murder in the first degree.<sup>1277</sup> Similarly, a jury may evaluate aggravating and mitigating circumstances to impose a sentence of death on an offender convicted of capital murder.<sup>1278</sup> Current legislation, however, proposes to abolish the death penalty and replace the offense of capital murder with a new crime of aggravated murder.<sup>1279</sup> Under the proposed legislation, a court sentencing an offender convicted of aggravated murder retains the discretion to evaluate aggravating and mitigating circumstances surrounding the offense.<sup>1280</sup>

e. Consecutive and Concurrent Sentences

Unless otherwise provided by sections 21-6606 or 21-6819, separate sentences of imprisonment for multiple convictions imposed on a single defendant will run concurrently.<sup>1281</sup> Regarding all other multiple conviction cases, the sentencing judge retains discretion to impose either concurrent or consecutive sentences.<sup>1282</sup> In exercising this discretion, the sentencing judge “may consider the need to impose an overall sentence that is proportionate to the [crime’s] harm and [defendant’s] culpability.”<sup>1283</sup>

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1274. *Id.* § 21-6627(b)(1). The crimes listed in subsection (a)(1) include aggravated human trafficking where the victim is younger than fourteen, rape, aggravated indecent liberties with a child, aggravated criminal sodomy, promoting prostitution of a prostitute under the age of fourteen, and sexual exploitation of a child under fourteen. *Id.* § 21-6627(a)(1)(A)–(F). It also includes attempt, conspiracy, or criminal solicitation of any of the above crimes. *Id.* § 21-6627(a)(1)(G).

1275. *Id.* § 21-6624.

1276. *Id.* § 21-6625.

1277. *Id.* § 21-6620(c).

1278. *Id.* § 21-6617(e).

1279. S.B. 126, 85th Leg., Reg. Sess. (Kan. 2013).

1280. *Id.*

1281. KAN. STAT. ANN. §§ 21-6606(a), -6819.

1282. *Id.* § 21-6819(b).

1283. *Id.*

## 2. Sentence Modification

With limited exception, a sentencing judge is required to impose the presumptive sentence provided by the sentencing guidelines.<sup>1284</sup> A sentencing judge may depart from the guidelines if the judge finds “substantial and compelling reasons” to abandon the presumptive sentence.<sup>1285</sup> Although nonexclusive,<sup>1286</sup> sections 21-6815 and 21-6816 enumerate several mitigating and aggravating factors which may influence a sentencing court’s departure determination.<sup>1287</sup> Current legislation proposes to expand the list of aggravating circumstances to incorporate certain aggravated human trafficking and commercial sexual exploitation of a child offenses as crimes that may merit departure.<sup>1288</sup> Upon a determination by the sentencing judge that departure is appropriate, departure must comply with particular statutory limitations.<sup>1289</sup>

Appellate review of a departure sentence is limited to ascertaining whether the record sufficiently demonstrates substantial and compelling reasons for departure.<sup>1290</sup> Recently, the Kansas Supreme Court took action to correct sentencing courts that “fail[] to consider proper statutory limitations or legal standards.”<sup>1291</sup> In *State v. Ardry*, the lower court reimposed the full, original sentence on a defendant after he violated the terms of his probation.<sup>1292</sup> The judge stated that he could not modify the original sentence absent a substantial and compelling reason.<sup>1293</sup> The

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1284. *Id.* § 21-6815(a).

1285. *Id.*

1286. The Kansas Court of Appeals recently explained that the racist nature of an offense may be a “substantial and compelling” ground for departure. *State v. Stawski*, 271 P.3d 1282, 1288 (Kan. Ct. App. 2012) (defining substantial as “something real and of substance and not imagined or ephemeral,” and compelling as “imply[ing] that the court is forced by the facts of a case to go beyond what is ordinary or to leave the status quo”), *review denied*, No. 10-104349-A, 2013 Kan. LEXIS 322 (Kan. Apr. 1, 2013).

1287. KAN. STAT. ANN. §§ 21-6815(c), -6816.

1288. S.B. 61, 85th Leg., Reg. Sess. (Kan. 2013).

1289. KAN. STAT. ANN. § 21-6818(a) (describing general limitations on all departure sentences); *id.* § 21-6819(c) (discussing duration maximums for departure sentences imposed in multiple-conviction cases).

1290. *Id.* § 21-6820(d). The appellate court may not, however, review a sentence that falls within the presumptive range or any court approved sentence agreement between the state and the defendant. *Id.* § 21-6820(c).

1291. *State v. Ardry*, 286 P.3d 207, 209 (Kan. 2012) (citing *State v. Shopteese*, 153 P.3d 1208, Syl. ¶ 2, 1209 (Kan. 2007)) (finding that the district court abused its discretion in sentencing where court misstated the statutory requirements for imposing a lesser sentence at probation revocation hearing).

1292. *Id.* at 208–09.

1293. *Id.*

Kansas Supreme Court found that the judge relied on an incorrect legal standard<sup>1294</sup> and thereby abused his discretion.<sup>1295</sup> Under these circumstances, substantial and compelling reasons for departure are simply not statutorily required.<sup>1296</sup>

In *State v. Gilliland*, the Kansas Supreme Court recently confronted the “unusual situation” in which the sentencing court, although it denied the defendant’s motion for departure, imposed a sentence that departed from the life sentence statutorily required under Jessica’s Law and further departed from the sentencing grid that applies when the court departs from Jessica’s Law guidelines.<sup>1297</sup> In *Gilliland*, the record was clear that the judge denied the defendant’s motion for departure, but the sentence imposed was, in fact, a dual departure.<sup>1298</sup> A judge may depart from the required sentence under Jessica’s Law, but then must apply the applicable sentencing guideline grid.<sup>1299</sup> The judge may then depart from the grid if she so chooses.<sup>1300</sup> However, for each departure, the judge must state substantial and compelling reasons for doing so.<sup>1301</sup> The sentencing court simply failed to follow proper procedures.<sup>1302</sup> In remanding the action for resentencing, the court clarified that a sentence—even one determined in accordance with the proper guideline recommendation—will be held illegal if it is “contrary to the law and to the explicit findings of the sentencing court.”<sup>1303</sup>

### 3. Constitutional Challenges

Both the United States Constitution and the Kansas Constitution forbid cruel and unusual punishment.<sup>1304</sup> Even where the method of a punishment is constitutional, a particular sentence may run afoul of the constitution where “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of

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1294. *Id.* at 209. In fact, where probation is revoked, the judge has complete discretion to order the defendant to serve the original sentence “or any lesser sentence.” *Id.* (citing KAN. STAT. ANN. § 22-3716(b)).

1295. *Id.*

1296. *Id.* (citing *Abasolo v. State*, 160 P.3d 471, 476 (Kan. 2007)).

1297. 276 P.3d 165, 187 (Kan. 2012).

1298. *Id.*

1299. *Id.* (citing *State v. Jolly*, 249 P.3d 421, 424 (Kan. 2011)).

1300. *Id.*

1301. *Id.*

1302. *Id.*

1303. *Id.* at 187.

1304. U.S. CONST. amend. VIII; KAN. CONST. bill of rights § 9.

human dignity.”<sup>1305</sup> Courts consider disproportionality using a three-part test that examines (1) the nature of the offense and character of the offender (2) the punishments imposed in the state for more serious offenses as compared to the sentence at issue, (3) and punishments imposed in other jurisdictions as compared to the sentence at issue.<sup>1306</sup> The Kansas Supreme Court used this analysis twice this year to uphold the proportionality of “hard 25” life sentences under Jessica’s Law for rape and aggravated indecent liberties charges.<sup>1307</sup>

## VII. POST-TRIAL ISSUES

### A. Appeals

A criminal defendant has a nearly unlimited right to appeal, unlike the State.<sup>1308</sup> Generally, however, an appellate court cannot review the admissibility of evidence or testimony on appeal unless the defendant’s counsel made a specific, contemporaneous objection to the admission of that evidence or testimony at trial.<sup>1309</sup> While the Kansas Supreme Court has reaffirmed its commitment to the contemporaneous objection requirement,<sup>1310</sup> exceptions exist.<sup>1311</sup> Recently, in *State v. Boggness*, the court relaxed the objection requirement and permitted an appeal on a motion to suppress in the absence of a contemporaneous objection where “a bench trial consist[ed] solely of stipulated facts, [a]nd there [was] no

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1305. *State v. Seward*, 297 P.3d 272, 275 (Kan. 2013) (citing *State v. Gomez*, 235 P.3d 1203, Syl. ¶ 9, 1206 (Kan. 2010)); *State v. Newcomb*, 298 P.3d 285, 290 (Kan. 2013) (citing *Gomez*, 235 P.3d at 1206).

1306. *Seward*, 297 P.3d at 275 (citing *State v. Freeman*, 574 P.2d 950, 956 (Kan. 1978); *Newcomb*, 298 P.3d at 290 (citing *Freeman*, 574 P.2d at 956)).

1307. *Seward*, 297 P.3d at Syl. ¶ 1, 274; *Newcomb*, 298 P.3d at Syl. ¶ 3, 288.

1308. *State v. Berreth*, 273 P.3d 752, 760 (Kan. 2012).

1309. *State v. Spagnola*, 289 P.3d 68, 72 (Kan. 2012) (citing KAN. STAT. ANN. § 60-404).

1310. *Id.* (internal citation omitted) (“The court noted that the purpose of the requirement is to give the trial court the opportunity to conduct the trial without exposure to tainted evidence, thus avoiding possible reversal, and the rule is also necessary to ensure that litigation may be brought to a conclusion.”).

1311. Recognized exceptions to the requirement for contemporaneous objection include review for “clear error” and for error affecting a defendant’s constitutional rights. *See, e.g., State v. Anderson*, 276 P.3d 200, 211 (Kan.) (citing *State v. Perez*, 261 P.3d 532, 535 (Kan. 2012)) (recognizing general exception that an appellate court “may consider a constitutional issue raised for the first time on appeal if it falls within three recognized exceptions.”), *cert. denied*, 133 S. Ct. 529 (2012); *State v. Race*, 259 P.3d 707, 718 (Kan. 2011) (applying the “clearly erroneous” standard of review where defendant failed to object to elements of jury instructions at trial and declining to find clear error where not “convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred”).

opportunity for the defendant to make a contemporaneous objection at trial to the admission of evidence.”<sup>1312</sup>

Even if an appellate court finds that an objection was properly raised and the trial court was in error, the court must find the error harmless and confirm the lower court’s decision if the error appears to be consistent with substantial justice and did not prejudice the substantial rights of the complaining party.<sup>1313</sup> Thus, harmless errors will not result in post-conviction relief.<sup>1314</sup> While individual errors may be harmless in isolation, a court may base a finding of reversible error on a determination that the aggregate of multiple trial errors substantially prejudiced the defendant.<sup>1315</sup>

### 1. New Trial

A defendant can move for a new trial, and the court can grant one if justice so requires.<sup>1316</sup> A motion for new trial must be made within fourteen days of the verdict or within two years of the verdict when the motion is requested for the consideration of newly discovered evidence.<sup>1317</sup> The court has forty-five days after filing to decide the motion.<sup>1318</sup>

### 2. Sufficiency of Evidence

Appellate courts review an appeal based on a claim of insufficient evidence to support a conviction by examining all of the evidence in a light most favorable to the prosecution.<sup>1319</sup> The court will uphold the conviction if it finds that “a rational factfinder could have found the defendant guilty beyond a reasonable doubt.”<sup>1320</sup> Where the crime charged is one that can be committed by alternative means, the evidence

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1312. 268 P.3d 481, 486 (Kan. 2012); *see also* State v. Kelly, 285 P.3d 1026, 1028 (Kan. 2012).

1313. *See* KAN. STAT. ANN. §§ 60-261, -2105 (2005 & Supp. 2012).

1314. *Id.* § 60-261.

1315. *See, e.g.,* State v. Burns, 287 P.3d 261, 271 (Kan. 2012); State v. Tully, 262 P.3d 314, 334 (Kan. 2011).

1316. KAN. STAT. ANN. § 22-3501(1) (2007 & Supp. 2012).

1317. *Id.*

1318. *Id.* § 22-3501(2).

1319. State v. Wright, 224 P.3d 1159, 1164 (Kan. 2010) (citing State v. Gutierrez, 172 P.3d 18, 22 (Kan. 2007)).

1320. *Id.*

must sufficiently support each possible alternative beyond a reasonable doubt.<sup>1321</sup>

### 3. Judgment of Acquittal

Whether on defendant's motion or by the court sua sponte, a court must order entry of judgment of acquittal if, after either parties' case is closed, the evidence fails to support a conviction of the offense charged.<sup>1322</sup> While a trial judge should never substitute her judgment for that of the jury, the Kansas Supreme Court recently confirmed that the entry of judgment of acquittal is mandatory if a rational factfinder could not have found sufficient evidence of each element of the crime charged beyond a reasonable doubt.<sup>1323</sup>

#### *B. Post-Conviction Remedies*

##### 1. Habeas Corpus

As a general rule, a defendant must seek to correct trial errors through direct appeal and not by motion to vacate or modify a sentence pursuant to habeas relief afforded by section 60-1507 of the Kansas Statutes.<sup>1324</sup> A section 60-1507 motion, therefore, cannot assert an issue that should have been previously adjudicated on direct appeal.<sup>1325</sup> A court, however, may correct trial errors on a motion to vacate if the errors substantially affected the defendant's constitutional rights or the defendant is able to demonstrate exceptional circumstances—"unusual events or intervening changes in law"—excusing the prior failure to raise the issue on appeal.<sup>1326</sup> Otherwise, a 60-1507 motion attacking a sentence for habeas relief must allege that the defendant's sentence was imposed (1) in violation of state or federal constitution or laws, (2) by a court lacking proper jurisdiction, (3) in excess of the lawfully authorized sentence, or in a manner "otherwise subject to collateral attack."<sup>1327</sup>

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1321. *State v. Newcomb*, 298 P.3d 285, 288–89 (Kan. 2013) (citing *State v. Timley*, 875 P.2d 242, 246 (Kan. 1994)).

1322. KAN. STAT. ANN. § 22-3419(1) (2007).

1323. *State v. Dinh Loc Ta*, 290 P.3d 652, 657 (Kan. 2012).

1324. *Soto v. State*, 927 P.2d 954, 957 (Kan. Ct. App. 1996) (citing *Dunlap v. State*, 559 P.2d 788, 789 (Kan. 1977)); *see also* KAN. STAT. ANN. § 60-1507 (2005); KAN. SUP. CT. R. 183(c) (defining when habeas relief can be granted).

1325. *Rowland v. State*, 219 P.3d 1212, 1220 (Kan. 2009).

1326. *Id.*

1327. KAN. STAT. ANN. § 60-1507(a).

In *Thompson v. State*, the Kansas Supreme Court confirmed the important procedural characteristics of section 60-1507 motions.<sup>1328</sup> While the court has previously recognized that a request for habeas relief under section 60-1507 is an independent civil action governed by the rules of civil procedure,<sup>1329</sup> the court in *Thompson* clarified the importance of proper procedure by refusing to allow an untimely amendment to a movant's section 60-1507 motion where the new claims did not adequately relate back to those alleged in the original motion.<sup>1330</sup>

Federal statute grants a right to habeas relief based on evidence that the defendant is in state custody in violation of either the Constitution or the laws of the United States.<sup>1331</sup> Federal habeas relief is not available to state inmates unless and until the applicant has exhausted all state-level remedies, or where there is a lack of process or only ineffective process available to the applicant at the state level.<sup>1332</sup> Federal prisoners have a similar remedy for improper imprisonment under 28 U.S.C. § 2255.<sup>1333</sup>

Courts do not have to review multiple, consecutive habeas motions brought by the same prisoner.<sup>1334</sup> The prisoner must list all grounds for relief in her first application.<sup>1335</sup> A subsequent application will not be entertained absent sufficient justification for failing to raise the claim in the original motion.<sup>1336</sup>

## 2. Post-Conviction DNA Testing

Any person convicted for murder or rape under Kansas law may petition the court that entered judgment for an original or newer and more accurate forensic DNA test of any biological material in the State's possession that is relevant to the investigation or prosecution that resulted in that person's conviction.<sup>1337</sup> The Kansas Supreme Court recently emphasized that, in demanding that the request be made regarding material "not previously subjected to DNA testing, or . . . subject to retesting with new DNA techniques that provide a reasonable

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1328. 270 P.3d 1089 (Kan. 2011).

1329. *Albright v. State*, 251 P.3d 52, 56 (Kan. 2011).

1330. *Thompson*, 270 P.3d at 1097.

1331. 28 U.S.C. § 2254(a) (2006).

1332. *Id.* § 2254(b).

1333. *Id.* § 2255.

1334. KAN. STAT. ANN. § 60-1507(c) (2005).

1335. *State v. Trotter*, 295 P.3d 1039, 1044 (Kan. 2013) (quoting *Walker v. State*, 530 P.2d 1235, Syl. ¶ 2, 1236 (Kan. 1975)).

1336. *Id.*

1337. KAN. STAT. ANN. § 21-2512(a) (2007).

likelihood of more accurate and probative results,”<sup>1338</sup> the statute does not seek “to redo the old [DNA] tests for impeachment purposes.”<sup>1339</sup> Furthermore, in determining whether material is “related to the investigation or prosecution that resulted in conviction,” a court is to interpret the statutory language broadly to include material that may not have been introduced at trial.<sup>1340</sup>

Once a defendant has established the requisite criteria to petition the court for the testing of biological material, a court must grant the order requesting DNA testing if the court determines that testing may produce “noncumulative, exculpatory evidence” probative of petitioner’s claim of wrongful conviction or sentencing.<sup>1341</sup> The Kansas Supreme Court has declined to define exculpatory evidence under section 21-2512(c) “as being a function of weighing evidence, i.e., tending to exonerate the petitioner when weighed against the evidence used against the petitioner at trial.”<sup>1342</sup> Rather, exculpatory evidence encompasses any evidence “*tending* to establish a criminal defendant’s innocence.”<sup>1343</sup> Thus, the court recently acknowledged that evidence may be exculpatory without being exonerating.<sup>1344</sup>

After post-conviction testing has occurred, section 21-2512 provides that a court should dismiss a petition for DNA testing where the results are unfavorable to petitioner or, conversely, order a hearing to vacate, modify, or retry petitioner’s conviction where the results are favorable to petitioner.<sup>1345</sup> Exculpatory evidence is sufficiently favorable to warrant a new trial.<sup>1346</sup> A proposed legislative amendment, however, seeks to replace the “favorable or unfavorable” language of the statute with a stricter standard based on whether the results of the DNA test “exonerate” petitioner.<sup>1347</sup> Thus, the proposed amendment would elevate the required finding for granting a new trial to only those cases in which the results of the post-conviction DNA test “conclusively establish that

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1338. *Id.* § 21-2512(a)(3).

1339. *State v. Lackey*, 286 P.3d 859, 864 (Kan. 2012).

1340. *Id.*

1341. KAN. STAT. ANN. § 21-2512(c).

1342. *Lackey*, 286 P.3d at 865.

1343. *Id.* (quoting BLACK’S LAW DICTIONARY 637 (9th ed. 2009)).

1344. *Haddock v. State*, 286 P.3d 837, 850 (Kan. 2012).

1345. KAN. STAT. ANN. § 21-2512(f).

1346. *Haddock*, 286 P.3d at 850.

1347. S.B. 40, 85th Leg., Reg. Sess. (Kan. 2013).

the petitioner did not engage in the conduct that is the subject of petitioner's conviction."<sup>1348</sup>

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1348. *Id.*